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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
DR G. JOHNS, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON THURSDAY, 4 DECEMBER 2003, AT 9.01 AM

Continued from 1/12/03 in Melbourne

PROF WOODS: Good morning. Welcome to the Sydney public hearings for the Productivity Commission inquiry into national workers compensation and occupational health and safety frameworks. I'm Mike Woods; I'm the presiding commissioner for this inquiry. I am 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 are 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 200 submissions from interested parties as part of the process of the inquiry. We 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 and there is an opportunity to submit any final submissions by Friday, 30 January. The final report is to be signed by 13 March next year. We'd 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 today I will provide an opportunity for any persons present to make an unscheduled oral presentation, should they wish to do so.

I'd like to welcome to the hearings our first participants, the Australian Industry Group. For the record, could you please state your name, title and organisation you are representing.

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

MR GOODSELL: Mark Goodsell, director, New South Wales, Australian Industry Group.

PROF WOODS: Gentlemen, thank you very much. We had the benefit of an earlier submission from you back in June. We have a draft of a proposed submission from you. Is that yet able to be put on the record, or is it subject to - - -

MR RUSSELL: It's subject to approval by our national executive and state councils at this stage, which will happen obviously before 30 January 2004.

PROF WOODS: That would be - yes. But we'll draw on this for discussion

purposes, but so as to keep a transparent and open record, if you could submit that as a final submission as soon as possible.

MR RUSSELL: Certainly.

PROF WOODS: That would be helpful. Do you have an opening statement you wish to make?

MR RUSSELL: I essentially want to break up this morning into three parts, I guess, in terms of what we want to put. Firstly, a little bit about the OH and S side in the interim report; secondly, the workers compensation side and then I suppose what I would call the other issues that are covered and basically that would be the structure of what we put today. We are generally supportive of some of the recommendations but I guess one of the questions we have about some of them, and the reservations we have about some of the recommendations is exactly what these things would look like in practice, and obviously it's very early in the piece to be deciding these things, but that is, I suppose, our submission - it's tempered with that flavour throughout.

PROF WOODS: The devil in the detail.

MR RUSSELL: That's correct. Perhaps if I start on the occupational health and safety side - we support a movement to a single, national regime on occupational health and safety and we will probably support it as soon as practicably it can happen. We see real benefits, particularly for our nationally based companies for a single regime on that. We recognise the constitutional hurdles in achieving this and so we actually strongly support the development of an intergovernmental agreement that's recommended in the commission's interim report, and we'll certainly be putting that position to the states and the Commonwealth in submissions that we put on these issues.

In the interim, the move to opening up the Commonwealth OH and S regime to employers who might qualify for the self-insurance things or the Comcare arrangements in the two recommendations - the first two parts of the recommendations in the workers comp sections - certainly provides a positive step in moving some companies towards that national regime, so we welcome it. One of the things we have sort of tempered in our comments and the comments about workers compensation recommendations is that we are doubtful about who many of your actual members are going to take up stage 1 of the workers comp recommendations, just simply because many of them will not meet - - -

MR .....: The nature of your constituency.

MR RUSSELL: They will not meet the competition test. But the other thing is, I

guess, in terms of the second step, we think there is an attraction for some companies but it would be a question of what the scheme would look like, and we've expressed some of our issues in our draft submission and I'll talk to that in a moment. So, as I said, generally we support the occupational health and safety recommendations. I guess we also support some of the structural reform that's being proposed to the national occupational health and safety commission. We expressed reservations in our initial submission about how quickly that body has been able to achieve reform and we think the idea of picking up an intergovernmental agreement that requires the states to pick up uniform legislation, codes and regulations is a good thing in that environment.

If I can move on to workers compensation, as I said, much of this is discussed clearly in our draft submission. Workers compensation, I suppose, as I said, on the first step that has been proposed we do not have any objection to it, but we do not think that many of our members will take it up. The second point is that on the second step we think that there is going to be some attraction for our national based companies for it. But one of the issues that has been highlighted to us already by those members is the structure of the Comcare scheme and whether that would be used as a base for the second step. There seems to be clear reservations from our members about that, if that were to occur. I don't think the recommendation necessarily prescribes that outcome, but certainly - - -

PROF WOODS: We can discuss that, though, and also whether you've got any feedback from your members on priority areas within the Comcare benefit structure that they're particularly concerned about or we can - - -

MR RUSSELL: The two priorities I would say that have been identified on that is the benefit structure scheme, the 45 weeks at full pay and 45 weeks at half-pay. Our group has been fairly clear and explicit about what we see as appropriate benefit structures, that encourage return to work and rehabilitation around the 12 to 13-week mark, and where stepdown should occur, and we've made those clear in our initial submission.

PROF WOODS: That's one.

MR RUSSELL: Sorry?

PROF WOODS: You said there were two.

MR RUSSELL: Sorry, yes, the second one is the question of dispute resolution. There is some concern that the Administrative Appeals Tribunal is not a specialist workers compensation tribunal and one of the experiences that we've had, certainly through the New South Wales reform process in recent times, is that we think so far

that the steps that have been made in the workers compensation tribunal area and the replacement of the Compensation Court with the Workers Compensation Commission seem to be on the right track and seem to be assisting in containing legal costs and things like that.

PROF WOODS: We have been having discussions with the honourable justice - - -

MR RUSSELL: Yes.

PROF WOODS: - - - for nearly all of the New South Wales reforms.

MR RUSSELL: We are certainly - we see value in having a specialist workers compensation tribunal to handle dispute resolution - - -

PROF WOODS: So does he.

MR RUSSELL: - - - in any new system that might be developed. They are the main two.

PROF WOODS: Okay. That's helpful.

MR RUSSELL: There is also some concern that Comcare from heavy industry's point of view may not have the appropriate level of skills and expertise in some of the industries that we represent principally.

PROF WOODS: Interestingly on that, though, is the question of what function are we talking about when we talk Comcare. Are we talking about the function of insurance which Comcare does for Commonwealth entities - the white collars which aren't your main industry sector? Or are we talking about the regulatory function which belongs more to the SRCC and whether, if there was a split, that had the regulatory function separate from Comcare, then they'd be relating to that entity, so that may resolve some of the concerns. I mean, at the moment, Comcare is sort of the title used to describe both functions.

MR GOODSELL: In what's called an insurance stream, you can further disaggregate that into funds management and claims management - - -

PROF WOODS: Yes.

MR GOODSELL: - - - which, in some jurisdictions, is further being split out, and we'd favour a good examination of where the strengths lie at that level of examination of the functions of the insurer, so that it may be in relation to claims management that the model is relevant to - - -

DR JOHNS: Do you have a model in mind? Is that what you're saying?

MR GOODSELL: Not particularly, but certainly the idea that claims management process should not necessarily be a monopoly held by insurers is attractive to us. That's I think the case in Victoria and being explored in New South Wales.

PROF WOODS: In fact, in our interim report, we say that the claims management function should be done by relevant expert bodies. To date they have primarily come from the insurance market, but that need not always be the case.

MR RUSSELL: The third step that's identified, I guess, the devil is in the detail, too - that's the way I would characterise our submission. I guess the principal question is about what would happen if you are moving from a monopoly (indistinct) state, from effectively monopoly markets in the relevant states to a competing system, and how you would balance those particular issues, and where that probably comes to the critical point is issues like cross-subsidisation. I think it would be difficult to deal with competing systems if you have one that's cross-subsidised in certain sections of industries and one that isn't.

Effectively you could end up with a two-tiered approach where all of those companies who are going the benefit of the cross-subsidisation stay in whatever system is offering that level of cross-subsidisation and those who aren't move out into the other one which means therefore that you can't cross-subsidise any more. That might be the micro-economic reform that maybe this is designed to achieve, but given the fact that certainly in some of our states, some of our medium to high risk industries probably do benefit from some degree of cross-subsidisation, we would be reserved about that.

PROF WOODS: At some point can I explore with you the difference between risk pooling within a common risk class and cross-subsidisation, because we may be able to find a bit more common ground if we separate out those two concepts. I've got that noted here as something to raise with you.

MR RUSSELL: On cross-subsidisation it's not just that we have industries that benefit out of it, we believe that it is an appropriate thing to do, given certain risks in terms of fraudulent claims by claims behaviour and employer behaviour and we think cross-subsidisation has spread some of that risk across the scheme. I guess the nature of workers compensation, we say, means that that is appropriate, because if you look at - if it's close to a no-fault scheme and it requires compulsory insurance - and one of the issues we also have is, I guess, this private model of medicine that occurs in workers compensation when effectively it's a public scheme that is providing the funding for it.

Some of those issues means that there is a degree of fraudulent behaviour, both in claims that genuinely should not be accepted and those that are exaggerated and things like that. We think that cross-subsidisation to some extent allows for those risks to be spread across the scheme. We have deliberately - - -

DR JOHNS: Yes, I just don't understand the connection between fraudulent behaviour or trying to mollify its effect and cross-subsidisation. Are you saying the large firms should subsidise small firms because there is fraudulent behaviour taking place in where?

MR GOODSELL: It's more cross-subsidisation between industry groups and those that have more claims, are more exposed to this - the margin which you can put a figure on, if you want, but if you just said there is a margin of claims that probably shouldn't be accepted, but are because of scheme design, then industries that have more claims are more exposed to the dollar effect of that and the cross-subsidisation helps do two things: spread, I suppose, the cost of that across every industry, but it also deals with the perception of some employers who are in those high-risk industries to see the results of these claims that they don't think should be accepted. If you have some level of cross-subsidisation, then they feel a bit more comfortable buying into the scheme, in a sense, because they know that there's some mechanism in place so they're not being totally left out to dry by the perceived injustices from an employer's perspective.

Workers compensation is close to no fault. Employers think that it is meant to be purely work-related and on a daily basis they see claims that, in their view, aren't. The schemes accept them, and the more claims you have and the higher risk you are, the more likely you are to see a volume of those types of claims.

DR JOHNS: I guess it's sort of a classic means of not trying to sort out the actual problems. You try and socialise some of your losses. You say, "Let's spread the damage here," but in fact you want to minimise inappropriate claims or you want a debate about the nature of the benefits, neither of which has anything to do with whether or not some group should be subsidised at the expense of another. I don't know. I'd prefer to separate out the elements into their constituent parts and say, "Which can we solve and which can't we?"

MR GOODSELL: That's a valid way to do it. If you could provide a scheme that had 100 per cent confidence that the first two elements were being dealt with properly, then cross-subsidisation wouldn't be an issue.

DR JOHNS: I guess the other thing too is that employers don't opt into a scheme. It's a monopoly.

MR GOODSELL: No, but its not a matter of - - -

DR JOHNS: That's it.

MR GOODSELL: I didn't use the word "buy in" in the sense of having a choice, but their level of confidence that the scheme is run properly and is fair does affect their behaviour as employers and as claims managers, et cetera. The last thing you want is them thinking that the scheme is biased against them, because that may have an effect. In fact, it may have an effect on the way they manage safety, because there is a link between the two issues. If there's a sense that the workers compensation system is somehow corrupted to some degree, that does flow on into the issue of dealing with workplace safety.

PROF WOODS: I don't think we particularly want to head down that track too far, because we'll be exposing some employer behaviour that may not be all that robust, but in terms of an actuarial magnitude that we're dealing with here - I mean, it's dependent in part on what's the quantum of claims that aren't appropriate to the scheme benefits, in the first instance, and then it's the distribution of those marginal inappropriate claims between different industry groups or sizes of employers or whatever the form of the cross-subsidisation is.

We're talking about a margin on a margin, so I'm not really sure that we're talking - the perception, I suspect, is a lot greater than what the quantum underlying it might actually be. I don't know if you've had any actuarial assistance in coming to some understanding of the magnitude of the issue or not.

MR GOODSELL: No, we haven't. It's just based on decades of experience and perceptions, as you say.

PROF WOODS: Yes.

MR GOODSELL: Perceptions can be quite strong.

PROF WOODS: Perceptions drive the behaviour.

MR GOODSELL: Yes.

PROF WOODS: I'm just wondering what's the actual degree of - - -

MR GOODSELL: I suppose the strongest empirical evidence lies in the changes in financial and return-to-work outcomes and things like that that occur when you have changes in schemes. For example, in the New South Wales scheme between 1992

and about 1998, the proportion of claimants who were off for more than a week - who were still off after six months - doubled. There's no evidence that people were twice as ill or twice as injured. The major structural change in that time was the reintroduction of common law and subsequent court decisions that modified that. When you see that kind of thing, you realise that there's more at play here than just purely injury rates and things like that.

PROF WOODS: Just on that point, in your judgment, is the AI Group saying that the introduction of common law, in itself, was a contributing factor to delaying return to work?

MR GOODSELL: I think that's the case. I think that the dispute resolution process represented by common law was inappropriate for early return to work, and that showed up in those structures. Even if all those people were injured, employers paid twice as much, in a sense, for the same injuries. These are the kinds of perceptions, looking at the scheme as a whole, that you get as an employer.

DR JOHNS: I'm just saying it's important that we get the perceptions sourced accurately back to the cause and, if the introduction of access to common law was the cause of increased premiums, why go for a solution that says, "Can we subsidise our members to overcome the cost of this increase?" That's all. We'd prefer to distinguish - - -

MR GOODSELL: No, I understand that. We would be remiss if we didn't bring to your attention that the issue of cross-subsidisation - which is a financial issue for companies - is not unrelated to their perception of the fairness of the scheme, which is publicly put forward as work-related injuries and, "That's all he gets compensated for." To the degree that that's blurred around the edges, employers think the financial purist arguments ought to be blurred around the edges as well.

PROF WOODS: Yes. Just looking for help wherever they can find it.

MR GOODSELL: Yes, that's right.

PROF WOODS: Okay. That's helpful.

MR RUSSELL: The second sort of issue I guess we'd have if we were to move into a competitive arrangement on that third step would be the question of benefit levels. In a monopoly market, we have pretty clear views about what the benefit levels should be. It's a fairly simple question. It gets a lot more complicated when you've got competing schemes. We do still, unfortunately, have some enterprises within our membership where potentially that could become an industrial relations issue on the side if there was a choice between schemes and there was a perception

that one scheme was somehow more beneficial to employees or not.

I wouldn't say that it's a majority of our members these days, but there is still a group of them where that could open up, so I guess the question of benefit levels needs to be looked at very very carefully. We don't say, "Don't go there." We don't say no to step three. What we sort of say is that we'd have to have a very very careful look at the scheme design and look at the benefit levels that are, obviously, an integral part of that. I suppose the concentration on some of these issues in any sort of design of a step three type scheme is critical on those issues.

On the point of private underwriting, we're not in principle opposed to private underwriting. We resisted it in some state schemes, because we felt that - because of the chronic underfunding that was going on - it was not in the best interests of our members to be hit with huge and unsustainable premium price hikes until such time as the funding problems of the schemes had been met. Again, it would be a question of scheme design for that step three type approach.

PROF WOODS: Yes. I noticed you were carefully non-committal on that question.

MR RUSSELL: I appreciate your point on that. As I said, private underwriting has come from particular problems we've faced with some of the existing state schemes. As I said, we haven't always supported a move to it. I think our position in the New South Wales reform process has always been we'd look at private underwriting, but after the scheme's financial problems have been fixed. It's not an in principle opposition. It's one that's tempered by pragmatic concerns at the time about the other parts of the structure of the scheme.

MR GOODSELL: Could I just add to that point? I think McKinseys carried out a review of the underwriting arrangements in New South Wales and came to the conclusion that, if you look at schemes here and elsewhere in the world, there doesn't seem to be any great line-up between underwriting arrangements and the operation of the scheme. It's really about the scheme design, and our fear about private underwriting is that, where it has come up, it has often come up as some sort of magic bullet. We just wanted to get that argument off the table, that privately underwriting a flawed scheme would fix it.

PROF WOODS: Yes.

MR GOODSELL: It wouldn't. It would just make the prices go up.

PROF WOODS: We've looked ourselves at the relative performance of private and public underwriting, and have also concluded that there are good and bad examples

of both, but we do have some in-principle reasons for supporting private underwriting, including risk to taxpayers' capital, competition and those arguments we've spelt out in the document.

MR RUSSELL: In terms of the parallel recommendation to continue some sort of cooperative framework between the Commonwealth and states and territories to try and develop a more consistent and uniform system, yes, we're generally supportive of it. I guess there are some comments about the structure that that would take, and we don't say very much about that in our draft submission. It's a question of, if you can achieve it, we're prepared to look at anything on that, but I guess what we would say on that is the agenda that that sort of a body - whether it's the Heads of Workers Compensation Authority or whether it's another body, the agenda that they look at probably should prioritise some of the issues.

PROF WOODS: Yes. You actually have an interesting little priority list that you suggest, which I found quite helpful, thank you.

MR RUSSELL: Yes. I think you asked us last time to prioritise.

PROF WOODS: We did.

MR RUSSELL: We probably could have done that before now, but we thought we'd take this opportunity. As I said, basically, some of the mechanical issues, I guess, and some of the issues that cause the most problems for employers who operate beyond one state - we've concentrated on things like definitions of "employer", "employee", "performance", "injury", "work-relatedness", "attribution" and probably a national approach to the notifications of injuries and incidents. There is probably an added point that I haven't made on that, but something that did occur to me this morning as I was reading it - some sort of data set that's nationally consistent.

PROF WOODS: Yes.

MR RUSSELL: I think the House of Representatives inquiry picked up on that point. That's something, certainly, we would support.

PROF WOODS: If you could build that into your final - - -

MR RUSSELL: Certainly.

PROF WOODS: We're very conscious of the paucity and incompatibility of data in this area, so that would be helpful.

MR RUSSELL: Yes. I think the issues of benefit levels and things like that are probably a longer term issue, given the issues we've just expressed, and also dispute resolution. The questions of underwriting and premium setting for a cooperative model, I think, are things that probably could form the lowest priority, in our particular view on that.

The rest of, I suppose, our submission talks about some of the more mechanical issues - probably what a more consistent set of state based arrangements would look like and/or a competing national scheme would look like in terms of the issues that it addresses - starts drilling into some of those issues. In terms of access and carriage, we made submissions on that in our initial submission, but we've picked up on a couple of things that the Productivity Commission picked up in its interim report.

PROF WOODS: Like major significance - - -

MR RUSSELL: Yes, major - - -

PROF WOODS: Major contributing factor rather than significant - - -

MR RUSSELL: - - - contributing factor. We'd probably prefer that. We see benefits in nationally - - -

PROF WOODS: There is debate on that.

MR RUSSELL: Yes, I understand that. We would like to see a nationally uniform approach to that issue, first and foremost, but we have a particular view about what that should constitute. Obviously, this will all be subject to stakeholder debate and the usual process.

PROF WOODS: Yes.

MR RUSSELL: I probably won't go through most of the rest of that. It's fairly similar to what we put in our initial submission. One issue that did come up in the issue of injury management that we wanted to raise was the issue of mobile workers and return to work.

PROF WOODS: Yes, that was interesting.

MR RUSSELL: One of the things that probably brought this to our attention is that there's currently an application before the New South Wales Industrial Relations Commission for a test case by the New South Wales Labour Council. It's on the general issues of contracting out, labour hire work and things like that. They wish to put in place a particular provision that requires the host employer, in the case of a

labour hire employee, to actually have to provide the alternate duties and assist in the rehabilitation program.

Our members have expressed extreme opposition to this process and I guess we would like to see in the recommendations, I suppose, clarity about exactly what's meant by workplace based rehabilitation where possible at the pre-injury workplace. When you've got a situation where you've got different employees working the same sites, that issue needs careful consideration. I'm not sure it was an issue that was deliberately put there, but it's one that - in light of recent events - we're particularly concerned about.

PROF WOODS: You mention it in here, but it would be helpful to us if you could devote a bit more thought and detail in your final - because it is very relevant, particularly as we have a sort of parallel models, one of which keeps the state schemes operating - but the question of rehabilitation for mobile workers, return to work and the like does warrant some serious thought.

MR RUSSELL: Yes. We would break it up into two questions: one is the sort of labour hire example, where it's another employer who is working at the work site. But the second issue is the issue of mobile workers. You know, we would have a lot of employers these days who would have a service division for the products that they manufacture and, at the end of the day, these people spend most of their life working in all sorts of places other than what we would regard as a standard workplace. That issue needs some thought.

The other thing we wished to raise in this was the question of small business. Generally speaking performance based - sorry, in terms of injury management we have noticed a trend that small business struggles sometimes with that. One item, I guess, where we think that many new national bodies should look at is how small business can be assisted and what research can be done to assist them in the injury management process. It's not one where we've come up with a lot of great answers. I think we identified in our initial submission, in our initial oral submission to the public hearing, that it's an area that's fairly vexed for us.

We've tried a number of approaches that largely haven't been acceptable and haven't been taken up by small businesses, so it's one of those areas that probably needs a bit further attention, because obviously the holy grail of workers compensation is the early return to work and the earliest rehabilitation possible, and the best way of doing that is integrating people back into the workforce as quickly as possible, and suitable duties are absolutely a key part of that. Small businesses, particularly in our industry, still seem to struggle with those issues. It's a priority in achieving the best outcomes for both employers and employees in our industries.

PROF WOODS: I'll come back to SMEs in a minute. Would you like to give your colleague a glass of water before he expires?

MR RUSSELL: Yes.

PROF WOODS: Otherwise we'll have a workers comp claim.

MR GOODSELL: I'll try to expire off the record, if it would help.

PROF WOODS: Yes, if you could.

MR RUSSELL: The other issue we raised in regard to injury management was the role of medical and rehabilitation providers. This goes to the heart of a point we made before about the differences between a private model of medicine and what is essentially a public model of medicine. At the end of the day we find that the employer who funds workers compensation - often his voice is marginalised in this issue and we've given some thought to this. We've put these recommendations before to the House of Representatives inquiry, and also to this one, that treating doctors should have to initiate and maintain contact through with the workplace following the report of the workplace injury.

The other question - and I think it's been picked up in the recommendations - is that return-to-work plans should be structured to emphasise return-to-work outcomes rather than more general patient welfare outcomes. I probably won't deal any further with common law. I think we've been through that topic fairly clearly.

PROF WOODS: It would be an appropriate time to raise common law - some of our colleagues - I'm sure we'll have that debate later.

MR RUSSELL: Our position on common law is fairly clear and - - -

PROF WOODS: Yes.

MR RUSSELL: - - - quite well exposed.

PROF WOODS: You don't want to summarise it in a sentence or two.

MR RUSSELL: We oppose it. In terms of statutory benefit structures I've pretty much talked about that. Probably the other issue that we really want to talk about before we finish today is the issue of premium setting. I think the question of full funding is obviously desirable - we accept that point - but again it's a question of what the scheme will look like, so we would have to see the scheme design before we comment on the value of the scheme, in particular.

Cross-subsidisation we've pretty much been through. One of the things about experience rating that we just wanted to raise is that there is a perception from employers - employers generally believe the notion that the bigger you are, you are rated by your experience factor and that is a fair way of doing it, that provides suitable protection for small employers from single, isolated, expensive claims. So there's a general acceptance of the principle, but one of the cynicisms that creeps in from our members is the levels at which things are set, and the other question about how often that is adjusted with rising wages and things like that.

So I would describe it in a way that's not unlike bracket creep. As your wages level rise from time to time with wage rises, inflation and those effects, then slowly more and more employers become more and more prone to the experience rating portion of the thing. I guess what we would say is in any national scheme to be developed, or in any attempts to get more consistent arrangements amongst the state, there needs to be care and attention put on to that issue so that those levels are open and transparently set and employers can understand how it works. That's pretty much all I really wished to say in terms of the submission. We've covered most of the other points elsewhere. Do you have any further things you want to add?

PROF WOODS: Do you want to head in a particular direction?

DR JOHNS: Let's just talk about the SMEs, I think.

PROF WOODS: Yes. A large part of your constituency is in the small and medium enterprise area, so it's very helpful to us to talk to you on those matters. You've identified a couple of things. One is the question of cross-subsidisation. If I can, for the purpose of the discussion, distinguish between risk pooling, which is where entities in a common industry - and particularly it applies to SMEs - only one of them every 10 years may have a significant claim, but it would be of such substance that it would send them broke, if it's a significant issue. The difference between saving and insurance is that the cost would be too high for the individual to bear, but there is considerable uncertainty as to whether the event would occur, as distinct from savings which you foresee that you can ultimately afford the cost and there is considerable confidence that the event will take place - so if we can make that distinction.

Risk pooling has to happen for SMEs because of their very nature. They couldn't individually cope with a big hit, but that's different from cross-subsidisation which is saying that either different industry groups support this industry group because somebody judges that they shouldn't be penalised collectively with the total cost of their claims, or that there is cross-subsidisation from large to small because somehow large are more able to afford it, or more worthy of being penalised to a

greater extent. I can understand the risk pooling, but I still don't have a clear conception of why cross-subsidisation is important in this area and why you are supporting that, but maybe you are only part supporting it and part supporting risk pooling.

MR RUSSELL: I think our first point on cross-subsidisation was the competitive question, if you moved into a competitive market and, as I said, the effects that that might have. As I said, that might be the desired effect, but the reality is that could leave some employers in a very difficult position.

PROF WOODS: Competitive insurance market, you mean, as in a private underwriting?

MR RUSSELL: Yes, as I said, in competing state system versus a - - -

PROF WOODS: Or - yes, competing state versus a national, yes.

MR RUSSELL: Versus a national system. If you've got one system that's offering cross-subsidisation to a certain group and one that isn't, then you're going to have issues there.

PROF WOODS: Yes.

MR RUSSELL: I think that's where we sort of started from on our cross-subsidisation point.

PROF WOODS: Okay.

MR RUSSELL: But what we also said - we're not sure about the two-tiered sort of approach that that could generate. The second question was the broader question about cross-subsidisation. You sort of indicated your question about what the level is, so how much of a problem really is it? I got the feeling there was a understanding of what we were saying, but you were questioning the magnitude of the problem.

PROF WOODS: And whether cross-subsidisation is the right response to it - - -

MR RUSSELL: Yes.

PROF WOODS: Dr Johns' line of questioning was: do you try and solve a particular question by some other response?

MR RUSSELL: I think you can certainly look at that, but I suppose the issues that we've found particularly related to fraudulent claims is that - and this is one thing that

we went through in the House of Representative inquiries - it's extremely difficult to quantify the level of fraudulent behaviour. All attempts that seem to have occurred have been extremely difficult to quantify.

At the end of the day we have probably a file close to about that thick from our members over the last five years that talks about the claims they believed to be possibly fraudulent. It's very difficult to quantify because, at the end of the day, they're not recognised by a scheme as fraudulent. I guess this magnitude question has been sort of vexed for some time. You know, if you ask employers, they'll probably tell you up to 20 per cent of claims they think are fraudulent. If you look at the actual data, I think it's below 3 per cent or something like that; it's absolutely negligible. The truth is probably somewhere in between, but how you assess that is very difficult. So I guess that - - -

PROF WOODS: But in addition to that margin - whatever it be, between 3 and 20 - there is also then the question of what the distortion is between different groups or different industries. If that, in itself, is only 5 per cent distortion then you're talking about 5 per cent of something between 3 and 20 per cent. We really are getting to small numbers.

MR RUSSELL: Yes. We get this sort of notion - or one of the things that we notice in our claims or in our industries is that we do get a tendency for copycat claims to emerge. Where there is one potentially dubious claim, often the workplace soon becomes infected with a number of similar claims. So there seems to be patterns in that area, very hard patterns to put down quantitatively and come up with firm data on, but certainly it seems to be an issue that comes out.

MR GOODSELL: If you're looking at magnitude issues, it's really a question of the difference between where we are now and where we go to and if there's going to be a new structure for schemes set up, we were just wary of the principle of no cross-subsidisation, leaving it open to that resulting in substantial premium increases for our sectors.

We've actually tolerated, or supported perhaps in some ways, but we have - our membership or the structure of our membership in the medium to high-risk industries, has been exposed to less cross-subsidisation in most state schemes over the last couple of years, through two effects. Broadly, in most cases, every time there is a reassessment of premium setting of how individual sectors are classified, generally cross-subsidisation tends to be washed out rather than reapplied. The second effect has been to the extent that most of the state governments, or their WorkCover authorities, measure the success or the competitiveness of their schemes by quoting the average premium rate.

Given the changes in demographics in the economy, in very, very broad terms towards - from higher-risk industries towards lower-risk service office-type, but if you're maintaining a constant, average premium rate this probably means our members are paying more. Because if the demographics are shifting, and there are more people in lower-risk industries, but the average premium is staying the same, then there must be some shift going on underneath that in terms of the premiums paid by actual individual industries.

Those two effects mean a cross-subsidisation to the extent it has existed in the past is being washed out all the time. What we are really worried about is a big hit shift under the principle that if there is a new national scheme and there is no cross-subsidisation, we just don't want our members to be exposed to a massive financial burden as a result of that principle.

PROF WOODS: So it's in the transitional phase?

MR GOODSELL: These things are often transitional issues, but I wouldn't underestimate the comment I made earlier about perceptions of fairness and things like that and we do play a game with workers comp. Around the margins it is a quasi-social welfare system, because of all the relationships a person has in their life the only relationship they're likely to have, where the other person has no-fault insurance, is in their employment. So of all things that can happen to them - some of those bad things will gravitate towards being hung off the employment relationship, even if maybe it's marginal whether they should have. So employers suffer from that reality, they wear it and, in a sense, they're comfortable that we as a society have that system, but from time to time they want to make sure that they're not being over-exposed to the financial risks of that scheme running.

DR JOHNS: Very briefly: I'm conscious that we've set a path towards a national competitive model, if you like, and it doesn't so much leave out small to medium size enterprises. It's apparent that there are savings amongst multistate employers in going to a single model, and if there are employers who can't read the benefit of the savings of going to a single one, then in a sense it's not our problem. Nevertheless, if you see there being a two-tier system that is at a disadvantage to small and medium, then please tell us some more when you finalise your submission. As I say, I don't think it's an issue because some don't opt in because it's not a benefit to them. It's up to them, it's their choice, but if you see some issues there and can quantify some specific disadvantages or whatever, please do so.

MR RUSSELL: I guess there are two questions it raises for us. The first is with SMEs. If the system is to develop, then it's got to be something that's competitive and attractive to employers, otherwise it's not going to get up. The second question: SMEs in our industry are a little bit different, we probably regard small employers as

slightly - they are probably regarded by other organisations as a bit larger than small. Particularly when you've got a constituency concentrated in the manufacturing industry, you need a certain critical mass in order to produce the goods that you're producing. So that means a lot of our SMEs are actually operating interstate. I've been trying to put a number on that, and hopefully by 30 January we'll be able to get a better idea of that question, but we certainly know that there's a lot of them who do operate beyond one state, usually in a sales distribution capacity, but certainly it's not just our large members that would be looking at the advantages of a national scheme in that circumstance, so we should be able to provide a bit more detail.

PROF WOODS: Yes. Thank you. In terms of SME agendas, we have the cross-subsidisation issue. Two others I've drawn from your submission: one is the whole vexed injury management/return-to-work type areas; the capacity you have, what are the options; whether you do pooling or whatever to try and deal with that. That's one part of it. The other, interestingly, is you take the view that many of your members prefer prescriptive rather than performance based occ health and safety - whether you want to tease that out for us a little further at some stage.

MR RUSSELL: I can probably clarify that, but I wouldn't say any of them have a clearly defined preference for one over the other. If I went and spoke to most of them about performance based legislation versus prescription based legislation, they'd give me a blank look. The introduction of the risk management principles in New South Wales - the 2001 regulation has caused a level of angst that employers express usually in this way: they sort of say, "Once upon a time, WorkCover told us what to do" - even to the level of making sure that the name of the local WorkCover inspector being posted somewhere in the factory. "Now we're told to manage the risk. We don't quite know what that means."

There's been some good work done in New South Wales by WorkCover. We can probably provide some examples of that to you in terms of basic manual handling, fact sheets and use of chemicals and things like that - the standard things that many small businesses have to operate in. The National Occupational Health and Safety Commission has put out a number of codes of practice on a number of issues, and our larger members find those very very helpful in clarifying what the standards are, in conjunction with Australian standards and things like that, and they find that very useful in developing their risk management systems. Small employers sometimes look at those documents and think - - -

PROF WOODS: "That's good, but what do I actually have to do?"

MR RUSSELL: Yes, "What do I actually have to do?" So I guess what we were just trying to highlight is that issue, and there are some good examples of what things can be done, and in the development of any OH and S framework, then we think that

those things should be given appropriate regard.

PROF WOODS: I think that's a very valuable point, and we hear it from the employee representative bodies, who obviously also like prescription because of that clarity, but I think there is a constituency in the SMEs who are also saying, "I don't have a lot of infrastructure and overhead to translate this for me on my shop floor, but if somebody tells me that that's got to be the height of the rail, I'll make sure that's the height of the rail and this is the guard on the machine."

MR RUSSELL: Yes.

PROF WOODS: That clarity and certainty I can understand being quite valuable. The other area - I don't want to go into it this morning, but put you on notice and ask if you could give consideration to - is whether there is any perceived benefit amongst your members and maybe in sort of subindustry groups of some collective purchasing of workers comp cover. There are certain examples of that in the pharmaceutical industry, in local government and the like, where they collectively operate a sort of subscheme, in effect - whether there's been any interest in your membership, in particular subindustry groups or not, where there are any advantages of it.

MR GOODSELL: There's different models, I think, within that. There's specialised insurers, there's captive insurers, there's collective buying. It's not something, to be honest, that we have really examined in great detail. The nature of our membership now is quite broad, so at a macro level it's not something that we could achieve.

PROF WOODS: But if there are particular subindustry groups who have explored this a little further, if you could give us the benefit of that thinking: where there are any benefits, what are the problems associated with it. Clearly there are the opt-outs and all the other issues that need to be thought through, but a couple of pages in that in your final submission would be most welcome.

MR GOODSELL: Yes.

PROF WOODS: One other that I'd just briefly like to raise: when we propose going to step two, you talk of the value of extensive consultation. My only concern there is if that means let's start with a blank sheet of paper and draw up the perfect scheme, we can all sit round here in 10 years' time and have an anniversary and no progress will have been made. If you want progress by any offer of advice, don't do that. Consultation, yes, but be pragmatic in terms of the trade-off between time and outcome. That's as blunt as I need be on that one, I think.

DR JOHNS: That's clear, I think.

PROF WOODS: Anything else you want to raise?

MR RUSSELL: No, thank you.

PROF WOODS: I think, one way or another, we've covered most of it. We look forward to getting a final submission from you within a timely manner that we can put on the public record. But, as always, we thank the AI Group for participating in our many and varied hearings. We probably won't be having too many tariff ones again, so we won't be talking to you over that table, but I'm sure there will be other occasions when we'll get together - if you could pass back through the group the commission's thanks for your ongoing support of our various inquiries, and this one in particular.

MR RUSSELL: Certainly.

MR GOODSELL: Thank you. Thank you for the opportunity.

PROF WOODS: Gentlemen, a pleasure to have you with us again. Could you please for the record state your names, titles and organisation that you are representing.

MR MURPHY: Gerald Anthony Murphy, I'm the chairman of the accident compensation committee of the Queensland Law Society.

MR CARTER: Scott Carter, I'm a member of that committee.

PROF WOODS: Thank you very much for making available to us a draft of your proposed submission and for coming today. Will you be putting this forward as a final for the public record at some stage, or in fact can we treat this as a final?

MR MURPHY: I thought that the final report, signed by the president, would have already been received.

PROF WOODS: Okay. We'll draw on this, but it will hit the public record as soon as we have established - - -

MR MURPHY: Yes. I apologise for that.

PROF WOODS: No.

MR MURPHY: My understanding was that it should have been there. That was sent in a response to a direct request from you.

PROF WOODS: Yes.

MR MURPHY: The final submission differs from that virtually not at all, Mr Woods.

PROF WOODS: Thank you very much. Do you have an opening statement you wish to make?

MR MURPHY: I do.

PROF WOODS: Thanks.

MR MURPHY: First of all could I thank the commission for inviting us to address you again, and particularly thank you for arranging the venue in Sydney. Apparently it's pouring rain in Brisbane.

PROF WOODS: We even bring our associate commissioner down when it's up

there.

MR MURPHY: If I just might address the two major concerns of the - the particular concerns of the Queensland Law Society. We've addressed those in the submission. Could I, in doing that, commissioner, put aside what I'd call threshold questions - that is, accept for the purposes of our submission that there is to be a national scheme.

There's two issues which are of particular concern to the Queensland Law Society. The first of those is the issue of self-insurance or the model of self-insurance. We appreciate that the commission accepts that the existing arrangements under the Comcare licensing system are not adequate if the scheme is to be extended to self-insurance for private sector employers.

What we say in relation to that, with respect, is that we don't believe the commission has paid due regard to the warnings, if I could call it that, in the Australian government actuary's report, where they go into some detail in listing the financial and what you might call the moral hazards of that and the consequences of that, and we say that if proper regard is paid to both the actuarial reports, that the commission was not justified in accepting - and I think I'm using the commission's words - that there's little - or there's minimal, if any, risk attaching to the Commonwealth. We don't accept that that's a conclusion that can be drawn from those reports.

If we could then just move on to benefits, and again, as we read the commission's report - and please correct us if we're wrong - the commission acknowledges that the present Comcare benefits are not necessarily the most appropriate for a national scheme - thank you for that - and then the commission says, and we completely agree with it, that the benefit regime should be reasonable and appropriate by prevailing community standards, and we'd support that entirely.

It will be no surprise to the commission that our principal concern is the commission's recommendations against common law. In your overview you've put a number of grounds for that, but the two main grounds - the first is the cost, and the anti-rehabilitation, to use a phrase - but I think you know what I'm speaking about.

PROF WOODS: Yes, we understand.

MR MURPHY: We would say that both of those are myths. We again with respect submit that the commission has been dismissive of the common law position, and in fact ignored the reality of the Queensland scheme. I know I'm starting to sound like a broken record, and I know you've heard me on this before, but the situation in our view has strengthened since I last addressed the commission in that

we now have the Comcare annual report and the Queensland WorkCover annual report, and we'd say that both of those underline what I think was then our principal submission, and is now our principal concern or principal submission - that is, that the Queensland scheme, put simply, in a nutshell, has the most common law of any Australian scheme, but it's also, on any criteria, the best performed scheme. The latest annual report supports that.

If I could just mention some of those inquiries. We referred you to graphs in the Comcare annual report, but the Queensland scheme is of course fully funded and that's really an understatement. I can elaborate on that if the commission would like me to. It has the lowest legal cost, has the highest percentage of expenditure going to the claimant, the lowest disputation rate and the lowest premiums. We say, against that background, that it is dismissive for anyone - the commission or anyone else - to say that a national scheme should not have common law, and we'd say that looking at the Queensland scheme, the inclusion of common law is reasonable and appropriate by prevailing community standards.

Could I just mention one other issue, and again the commission has heard me on this before, but once you do away with common law of course you then move towards periodic benefit payments, and we say that - quite apart from the rehabilitation issue, and you know our position on that, and again I can elaborate on that if you wish us to - but once you move to periodic benefits, you're eventually building a scheme that will ultimately collapse. The Australian government actuary, for example, says - and we mention this in our submission - that eventually 50 per cent of the employers' payroll will be needed to fund those periodic benefits.

Again you don't have to go any further - you've referred to a comprehensive no-fault scheme in New Zealand, and I mean, it is just totally periodic benefits and it got to the stage, after 14 years, 15 years - sorry, I'll get it right - 13 years as at 30 June 1987, where the unfunded liability for the scheme was nearly nine billion.

Could I just mention that you have said in your overview that the actuary has suggested it takes five years for the sign of a scheme. We'd say, if you look at the New Zealand scheme, it was 13 years before the New Zealand scheme addressed the question of periodic benefits, and they reduced the unfunded liability simply by going towards lump sums. They had over 30,000 long-term claimants in the scheme, and they reduced that over two or three years by paying people lump sums, and reduced that below 15,000, and that's how they brought the deficit down.

Once you do away with common law, that's the reality, that's what will happen. As compared to the Queensland scheme with the full common law, the other schemes that have done away with common law and moved to periodic benefits, all have large unfunded liabilities. I mean, it's simply not a situation that can be

countenanced. There was one other point that I wished to make in relation to that. I'm sorry, it leaves me for the moment.

PROF WOODS: That's all right. You can come back to that.

MR MURPHY: Yes. That was all as far as opening statement was concerned.

PROF WOODS: Thank you. We do appreciate the time and the effort you have put into your submissions and addressing us. Perhaps if we can deal with the self-insurance issue first, and probably somewhat briefly. We were conscious of the potential risk to the Commonwealth of expanding those who would obtain self-insurance licenses under an expanded Comcare scheme, if we can paraphrase it as such, which is why we went to the Commonwealth government actuary. We also then wanted to see what effect it would have on the state schemes, which is why we asked for that other actuarial work.

It is a matter of judgment and balance. You can set hurdles so high and so tight that no-one can jump over them, in which case there's little actually achieved. You can set hurdles at a pragmatic level that minimises risk to an extent acceptable - and "acceptable" is a judgmental word - or you can open it up and not control the risk in any manner. We've had discussions with the actuary obviously in the preparation of that advice, and sought guidance on what would be a high but practicable level of prudential regulation, and I agree, it's a matter of judgment.

In your view that judgment is such that there is still a risk to the Commonwealth - "Yes, I'm certainly not going to mortgage my house on the assumption that there would never be an event occurring, but in my responsibility to the taxpayer of Australia I'm going to recommend a scheme that I consider has risks that are negligible and acceptable for the benefit of achieving self-insurance for those who can meet those standards." I don't know that much more can be usefully pursued through that debate, because it does ultimately fall into one of judgment.

I think the issues have been sufficiently explored and I think you're telling us that your review of the actuarial report found it generally to be sound in itself. It's then a matter of what inference one draws from it. Gary, do you have anything to add?

DR JOHNS: Yes. I guess it's important to say that I don't think we prejudge whether a government or a private organisation is more competent at managing risk. It's just that sometimes when a government manages it, it can hide it by increasing other taxes, or taxing taxpayers after. We'd prefer, I think, in all of these matters to sheet home the cost to the players in some way, to make the costs obvious and able to be understood. So there's not a prejudgment about who is good and who is bad,

but rather that a scheme can be looked into and that the costs can be seen clearly and fall where they should.

MR MURPHY: The only further comment I'd make in relation to that is that we're aware of your responsibility to the taxpayer. Our concern is if some of the risks that the Australian government actuary identifies, the Commonwealth is in a position where it just has to pick up the tab, as it has, and that's our concern as far as the taxpayer is concerned.

PROF WOODS: We share a common interest on behalf of the taxpayer in that respect, but ultimately it becomes a matter of judgment.

MR CARTER: Gentlemen, it is to a degree a double-headed concern and that's why we've touched briefly on some of the most recent interventions of the Commonwealth - Ansett, HIH, UMP. In round figures they're not much over 1 billion but 1 billion is a fair bit of money. If you look at some areas of it - HIH, for example - the Commonwealth dealt in that bailout with total disregard for any equitable principles. They left stranded groups of insurers which they must have seen as electorally insignificant. I don't know how the judgment was made but certainly some were left with no assistance at all, while others received 100 cents in the dollar that they should have got from HIH if it had not been so corruptly managed.

That type of decision-making by the Commonwealth is a risk not only to the taxpayers' pockets, whether it's by a subsequent tax on air tickets or whatever it may be; it's a risk to the claimants, and that is an element that seems not to be developed in the interim report as is before us today. In other words, the claimants may find themselves with an unpopular employer or an employer that, for whatever reason, the Commonwealth decides not to bail 100 cents in the dollar, or bail only part of the claimants' interests. There seems to be no reason in declining to pay anything for a number of FAI or HIH bona fide liabilities. Some were just ignored, and it wasn't anything you could do about it. They weren't ignored by legislation; they were ignored by press statement: "We will not be paying the following." That left classes somewhat borderless.

PROF WOODS: We do understand the consequences of when a government steps in - that how it steps in is a matter of its own judgment and its criteria aren't always totally transparent, but that's not at heart the issue here. Sure, it can be a consequence if there is some event that causes the Commonwealth to resort to the taxpayer as a last resort. We do understand that.

MR MURPHY: I don't want to labour the point but could I just make one further issue on that, and I think it's made in our paper. Quite putting aside the events that

Mr Carter referred to, the moral pressure, if you'd like to say, the political pressure on the Commonwealth would be even greater of course in a scheme like this where the Commonwealth licenses somebody to do self-insurance and then it goes up.

PROF WOODS: The government actuary sort of draws on that point. We were entirely happy to have that put into the public arena because we agree.

MR MURPHY: Thank you.

PROF WOODS: Common law: you raise a number of issues which we should explore but you also surround it with what I might unkindly describe as a little bit of rhetoric. For instance, at the front end of this draft of your submission you talk about the shortcomings in the interim report - "registers its concern that the arguments and evidence previously submitted find no recognition in the report". I think that's a little unkind. In fact, I draw your attention - that we have quoted you twice in the 26 pages that we have on common law.

MR CARTER: I did give you a final copy, if it may assist you, because I have written on my draft and I'm not sure if it's found its way into the file - and this is one of the elements that have come from dealing with a draft - no adequate - - -

PROF WOODS: I accept your qualification.

MR CARTER: You can then see from the examples that come - the flavour of that, Mr Commissioner, is that we don't see it as adequate, particularly in the examples from - - -

PROF WOODS: "Adequate" is a matter of judgment, but "no recognition" I did bridle at.

MR MURPHY: We accept that you have quoted from our submission twice.

PROF WOODS: We started this chapter with an 80-page document which we now have down to 26. I consider it a reasonably balanced exploration of the issues. What you I think object to is the conclusions that we draw from that, but we have made every endeavour in a document, as I say, that's finally come down to something that's manageable, without being a report itself on common law, to at least expose the various arguments. Adequacy we can address. If there are some areas where we haven't sufficiently expanded on those, I'm happy to reconsider that.

MR CARTER: If I could just point to the fact that we follow that by saying if you have concluded that the persuasive weight lies with the view that common law remedies are not a compatible part of a national self-insurance workers compensation

scheme, then we're suggesting that it's incumbent upon the commission, before it can say that to government by way of guidance as to what government may do in the future, to examine the raw data that we have drawn attention to there in relation to lowest premiums, highest cents in the dollar reaching claimants, lowest disputation rate, the types that are in Queensland because they are a glaring example of something which is entirely contrary to your conclusions.

PROF WOODS: Let's deal with those in a minute but I'd also, just while we're on the broader level, point out that although we come to a recommendation which is not the one that you were hoping to read, we also do note that if common law is to be included in a national framework, then we - so we have an element of pragmatism in our conclusions. I trust you have noted that.

MR MURPHY: We're aware of that, except you then say that it should be limited to non-economic loss.

PROF WOODS: That leads to further argument.

MR MURPHY: Yes.

PROF WOODS: We agree. Now, you point out a number of statistics which in themselves are factually correct to the extent they go, but to attribute all of those to the fact that Queensland has common law I think is where we wouldn't be equally convinced. Yes, you do have a very low premium rate but to what extent is that attributable to cutting off all benefit payments after five years and moving them across to the Australian taxpayers as distinct from having common law? You may well argue that one goes hand in hand with the other, but of course that only deals with those who are able to prove negligence in a legal process, whether it's pre-court or at that - whatever the - so it's only a subset of those who benefit from that particular stream. But for all others, at the end of five years it's the Australian taxpayer who picks up the bill and if your premiums are lower, well, that comes as no surprise.

MR CARTER: That's an area that we've addressed historically. For many years we respondent to your fellow commissioner's 1993 paper - I think it was - written under another hat then, saying that it is difficult conceptually to contemplate an employer of a young person with a dicky back who through no fault of the employer becomes utterly disabled on the first day of the job, and the employer is faced with a lifetime pension because one of two employees is now unable to work for the rest of their life. We find no difficulty in suggesting that that might properly be a problem for the taxpayer, rather than the person who put the full-time - - -

PROF WOODS: Okay, but it may also impact on the level of premiums that the

scheme ends up with.

MR MURPHY: Well, except could I say this, Mr Woods: very, very few of Queensland claimants go the five years.

PROF WOODS: Few in numbers, but as a proportion of costs they're higher than their numbers would suggest.

MR MURPHY: We'll try and get some figures on that but I don't know that that one factor alone sort of explains the lower premium.

PROF WOODS: No, but I'm not suggesting that the one factor of common law either explains the lower premium.

MR MURPHY: But the common law does impact on that.

PROF WOODS: Both do.

MR CARTER: Would you propose, Mr Commissioner, that the final report will address those matters that we've raised and indicate that you're satisfied as to why any one of those statistics should be so favourable to the only jurisdiction that has unencumbered common law.

PROF WOODS: I'll respond to that by saying I will take seriously into consideration the matters that you have raised in your submission.

MR CARTER: Thank you.

MR MURPHY: Sorry, can I just say that when I was talking about common law, one of the two reasons that you gave was the cost of it.

PROF WOODS: Yes.

MR MURPHY: We think that the Queensland scheme demonstrates that if you've got a common law that the cost isn't a necessarily - - -

PROF WOODS: There's a coincidence. It's the causality that's the question there and how - you know, you can recognise some of the causality but I'm just suggesting that there may be other factors.

DR JOHNS: If we need to tease that out in some more detail, we could afford a couple more pages.

MR MURPHY: Thank you.

DR JOHNS: Many more pages. We should let them through. It is important we distinguish the coincidence and prove or disprove it - the coincidence of access to common law in the Queensland situation, which is bubbling along nicely, it appears.

MR CARTER: Well, the recurring one, if I could just mention again - that legal costs are a significant element. I know that legal costs mean different things in different jurisdictions but there are adjustments notes to those graphs and when you look at the Queensland legal costs, they're not only a moiety of legal costs in other jurisdictions where there aren't any common law remedies but they are indeed identical to the Comcare costs. Most of the critics say if you open a common law remedy path, the legal costs will triple the scheme. Now, that is one that with great respect it's very hard to jump over - the recent publication by Comcare.

MR MURPHY: Just in relation to your comment, Mr Johns, that the Queensland scheme is bubbling along nicely, I did mention the latest annual report, and the latest annual report confirms low premiums and fully funded and that. The number of common law claims is going up but the legal cost as a percentage of the payments is coming down quite significantly, if you look at the latest report.

PROF WOODS: The ACT private also has unrestricted common law access but its ratio of legal fees to claims is something like 26 per cent compared to the national average of 10 per cent. Should I include from that that it's unrestricted common law that's causing the failure in that area, and that therefore the high ratio of legal fees to claims costings is indicative of common law - - -

MR MURPHY: It's just a question of how the scheme is run - no, not necessarily.

PROF WOODS: I agree. This is where the common ground is. It is in part how the scheme is run, what the culture is, and all the rest of it. But here we have ACT at completely the other end of the spectrum and it has totally unrestricted common law as distinct even from Queensland, which has some limitations. Its legal fees are way out of kilter with the national average.

MR MURPHY: It's a much smaller scheme of course - private insurers.

PROF WOODS: I understand.

MR MURPHY: We say that's not typical. The Queensland scheme is big enough.

DR JOHNS: No, I don't mean with respect to the ACT. Our job is to see where access to common law, which is really a whole set of things, adds value and clearly

the law, through the common law, has helped define most of the major factors here - the whole sense of duty of care and negligence and so on. But whether or not it's any good at handling disputes or settling matters or getting workers back to work, each of those has to work through, I think. Our job is to sort of disaggregate this notion of the common law and to see what bits work and what don't, and what appears to drive other costs, et cetera. We've got to work that through and debate each.

PROF WOODS: You mention disputes. Tasmania, which is a common law jurisdiction, has the highest level of disputes, being 32 per cent of new claims. Do I draw from that that common law is the contributing factor from that particular - - -

MR CARTER: Mr Commissioner, we don't suggest that. We suggest that you have to look further than you have now, because - - -

PROF WOODS: True, but it's just that the weight of your prose attributes all of these to common law. My staff have very kindly identified other jurisdictions.

MR CARTER: I'm not sure whether we've been flattered or castigated, but I know what you're saying.

PROF WOODS: Yes, all right. So we're happy to look through them, explore them and identify to what extent common law may or may not be a contributing factor.

DR JOHNS: That's an important area.

MR MURPHY: Okay, and we will endeavour to address that in our submissions by 30 January. I have just thought of one further point to make. I might make it now. It's again the question of people going on long-term benefits. I drew on the New Zealand experience. The same thing, we would submit, is now occurring in New South Wales. I heard a manager of the workers comp scheme in New South Wales saying - and this was sometime last year at an actuaries' conference in Adelaide - that the long-term claimants in the New South Wales scheme have doubled over the last 10 years, and he said that's the only problem they've got.

What's happened since then, of course, is they've now virtually taken away common law altogether. It's not worthwhile pursuing a common law claim and done away with commutations. So the number of long-term claimants in the New South Wales scheme will sort of explode and that, I would submit, is one of the reasons for the extraordinarily unfunded deficit in the New South Wales scheme, and it will become worse.

PROF WOODS: Of course, commutations is sort of a parallel issue, and again it's

a little difficult at this stage to just see what's the relevant contribution of those two to that outcome. But commutation is a whole issue in itself. Have you, in taking that view, meant that I can't report other figures like the Victorian solvency ratio deteriorated from 96 to 86 per cent once common law was reintroduced?

DR JOHNS: You just heard.

PROF WOODS: Did I? I'll stop at that point. But, yes, we will go through all that. On this broader issue of rehabilitation, it would be useful, and maybe as supplementary to this submission, if you had any further material on it, because we do have a body of opinion that's coming from the Australasian occupational medicine group, the rehab providers and the like, who are all taking one particular view, which isn't the view you share. But if you can put substantial evidence to us on that issue, it would help us because, as I say, at the moment we're - we've quoted you deliberately because you're one of the few who stand up and say that, but I don't have a lot of evidence to draw on in terms of the conditions that you - - -

MR CARTER: We could try and expand on that. Some of the stuff goes back 10 years: Naomi Wing, Leo - - -

MR MURPHY: Well, there's a lot of that in our 94 submission which was - - -

PROF WOODS: Yes, we have access to that.

MR MURPHY: Well, it was annexed to our preliminary submission. We will try and update that.

PROF WOODS: Okay, we'll go back to that, but if you could then see if there's anything more by way of update.

MR MURPHY: Yes, we accept that position.

PROF WOODS: As practitioners in the field - and your membership would be getting case-load in through the door - are you getting any sense, however, that the Queensland scheme - that the number of common law claims is starting to accelerate?

MR MURPHY: The figures in the Queensland scheme show that, yes, that the number of common law claims are expanding, yes.

PROF WOODS: And by quite a margin.

MR MURPHY: Significant.

PROF WOODS: We're not talking about a 5 or 10 per cent increase. So what's happening there in that and what does that mean if we were to be sitting here in three years' time looking at it in terms of the costs and things? What's the dynamic?

MR MURPHY: I'd be lucky to condense that in 25 pages but there are a number of factors involved in that, and it's against a background where, while the number of claims is increasing the average size of the claim is coming down each year, and the percentage of legal costs is also diminishing each year. And at the starting point, traditionally in the Queensland scheme, the number of statutory claims that materialised in the common law claims was always very small - it was less than 2 per cent - whereas in other schemes, like New South Wales, it was massive, even though they did have more generous benefits than we had. There are a number of factors involved in that, and we will endeavour to address those in our final submission, but it's an interesting - - -

PROF WOODS: Because when I saw that statistic, I thought, well, we can sit here and say Queensland at the moment is looking terrific, but what do those figures mean? Is this becoming an entrenched trend when you take that out three, five years, and you've always got to look at least five years out in any of these to start to see some trends.

MR MURPHY: Yes, a minimum of five years.

MR CARTER: But it is correct that it comes off an inexplicably small base, and the last time - it was 1.6 at one stage of live workers comp matters that ever grew into any sort of common law claim. It never did make sense.

MR MURPHY: Could I make just one other point, and I'm not certain that it surfaces in the annual report, but a lot of those common law claims finish up not being proceeded with. There's a large percentage - and that's increasing - of nil finalisations in the scheme, and that's a factor - - -

DR JOHNS: So is advertising by lawyers generating - I'm not necessarily for or against. I'm just - - -

MR MURPHY: No. Well, I'm sort of against. I don't think advertising is a large factor in that. No, I don't think advertising is a large factor - - -

MR CARTER: And, in any event, from an abundance of caution, that also has been wound back now.

DR JOHNS: And I wonder if it contributed to it.

MR MURPHY: I doubt that. That's my own personal gut feeling. I can't put it any stronger than that. That's not one that's necessarily shared by other people in the thing, but I wouldn't have thought so. I would have thought there are basically social factors involved, myself.

PROF WOODS: Yes. I mean, it's the social, the cultural, et cetera, that are interesting. We're going to be hearing evidence later today from somebody who says that it seems that the legal profession in Queensland is the very antithesis of the New South Wales profession, and goes on in some detail. Is that the view of Queensland - -

MR CARTER: I think most states would agree with that, yes.

PROF WOODS: I'll be asking the Australian Law Council whether they have a view on that as well.

MR MURPHY: In what respect is that - - -

PROF WOODS: This then goes on to talk about - "in Queensland the profession works very closely with WorkCover, ensuring that litigation is the last resort."

MR MURPHY: I see. I understand that.

PROF WOODS: This is not the case in the more adverse area of the jurisdiction; Queensland again in stark contrast to New South Wales - - -

MR MURPHY: Yes, that's certainly true of the 40 years I've been in practice. It's interesting, actually - if I can just digress for a little bit, if you go back to the Woodhouse commission, which is now 30 years old, he produced some figures from what he said were closed insurance files, and it was acknowledged by everyone that the data wasn't sufficient, but at that stage - and I can remember when I gave evidence before the Senate committee of inquiry into it - they specifically asked me that. The percentage of claims in Queensland where process was issued at that stage was 98 per cent, as opposed to New South Wales, where it was less than 50 per cent. I've never understood the reason for that, but that's been completely reversed now, in any event, and that does get down to cultural issues.

PROF WOODS: But it also goes back to that issue of how the schemes are managed, how you construct them, how you put in your rules and regs versus how they're actually managed on a day-to-day basis by the various stakeholders. You can create the perfect scheme on paper but watch it disintegrate.

MR CARTER: There's an interesting example, if you like, on the one that we can't resolve because of the evidence on both sides, the rehabilitation issue, and whether or not lawyers can be seen to be an impediment there. I don't know how many meetings I've been involved in, quite successfully, I think, in smoothing the path - and this is not workers compensation so much; it happens to be motor vehicle and a concern of the Insurance Commission - but smoothing the path for the insurer to get in touch with the lawyer's client directly on issues of rehabilitation, and the profession accepts that this is not the end of the world, providing we are dealing truly with rehabilitation issues, and the professional society is facilitating that and it's facilitating it in education programs and it's meeting with insurers to see how - and it's working. So the problems are really - best practice comes out of probably lots of practices and seeing which ones work, and we think we have achieved something there. It would be equally true of a self-insuring workers comp arrangement. In fact, it would be easier to insure there, to insure - - -

PROF WOODS: We are very keen that our dealing with common law is a document that can be of long standing and not just be seen to take a particular position without the evidence, so we will be going through it in the light of yours and other contributions to make sure it's as balanced and comprehensive within some practical limit that the report allows.

MR MURPHY: Are there any other areas that you'd like us to address?

PROF WOODS: No. They're probably the main ones.

MR MURPHY: I suppose, trying to sum it up, what we really say is the fact that you have common law - what the Queensland scheme demonstrates, except what you say about - the facts in ACT and Tasmania can be distinguished, but the fact that common law is the major element of a scheme doesn't necessarily lead to unfunded deficits and high premiums and high legal costs.

PROF WOODS: I think that construction is useful as distinct from - that common law is a necessary component of a successful scheme. I think the construction you were just heading to is one that we could look more closely at. Anything else?

MR MURPHY: No, that's a good discussion.

PROF WOODS: Anything else that you want to raise with us?

MR MURPHY: No.

PROF WOODS: I think that's been very helpful.

MR MURPHY: Thanks very much.

PROF WOODS: We'll take a short break for morning tea which is available outside this room.

PROF WOODS: If you could please give your name, title and organisation you are representing, if any, for the purpose of the record.

DR NIALL: I'm Paul Niall. I'm an audiological and occupational physician. I am also the chief medical officer of the Compensation Court of New South Wales, but I don't appear here representing that court or any part of the executive government in the state of New South Wales. I'm basically giving my own opinions and I've prepared a set of notes really on what I might have to say, if I can just make that clear. So you're talking to me - - -

PROF WOODS: Yes, as Dr Paul Niall?

DR NIALL: That's right.

PROF WOODS: Indeed. Thank you very much. We do have the benefit of those notes and they have been incorporated as a submission to this inquiry. Do you have an opening statement you wish to make?

DR NIALL: Yes. I'll just talk briefly to the notes. That's just what they are. It's not a full submission in detail as to any particular set of opinions, but it's probably best if I say how I got involved. When I read the interim report, I noticed the recommendation about the use of independent medical panels and nothing more. So I thought that it might be useful to the commission to have somebody like me, who's been involved in medical panels in this state for over 20 years, to put a bit of meat on the bones of this area.

What I've done in my notes is just to identify some of the things that may be of interest, may be issues for the commission and make myself available to take questions, because it's not entirely clear to me what areas - what I put down here, for example - the commission may be interested in. It seems to me that some of the things I have to say may be quite germane to the commission's concerns and other things may not.

What I've tended to do in this little paper is to just raise certain types of issues that will come up anywhere where you are thinking of having an independent medical system and setting out, in respect of some of those issues, some of the choices that may be available or which you will have to make. In some cases, I've done in italics what we do in New South Wales, not because I think that everything we do is wonderful, but it gives a context and it gives a point of departure for discussion. Indeed, some of the things I think that we do or have done in New South Wales are very good and some perhaps are not so good.

I might also point out that, in our state, the government has decided not to have

medical panels. We've had medical panels in the workers compensation jurisdiction since 1926 and from the end of this year, with some exceptions, there won't be any more. I might say just historically that, as most of the earlier workers compensation laws were modelled on each other, the idea of independent medical panels was in most state laws long ago, but they fell into disuse, except in New South Wales and Queensland where they continued in a somewhat different way for many years until about the early 90s when there was renewed interest in independent medical panels. That led to medical panels restarting - let's call it - or being founded in, I think, Victoria and Western Australia and discussion of having them in other states. I'm not sure about the Northern Territory, but it's a mixed picture really of interest and disinterest in medical panels. Having said that, I might just let others open those sorts of issues on what I've said that anyone wishes to.

PROF WOODS: Thank you. I found it quite a helpful perspective on this issue. Could I start with where you talk about a definition of a medical panel, not because it relates to that specifically, but it raised a question in my mind. You talk about giving a medical opinion in respect of medical questions - and I understand that - but some of the questions that are asked are questions such as, "What is the relatedness of the injury?" and, "What is the work readiness in terms of return to work?" To what extent is a medical practitioner or a medical panel competent to fully answer that, as distinct from giving an opinion as to the condition of the worker?

DR NIALL: I think I'll start the answer to that by just referring to the bottom of page 3, where I've a little title Jurisdiction and a subtitle Dispute Type.

PROF WOODS: Yes.

DR NIALL: You're quite right, of course, there are many different types of things which medical panels might be asked to opine on. I think one has to be quite careful about what types of opinions you should seek and, indeed, if you do seek those opinions, what status they should have. The list I've got there is disputes about permanent loss and fitness for work. I haven't mentioned some of the things that you've mentioned. There are other things: treatment disputes and causation disputes. There are a number of things and, for each of them really I think the key principle is, in my view, that you really ought not to ask doctors other than what you might call pure medical questions. If you do - you want a medical slant on some issues which may not be entirely medical - then you should be cautious about making the doctor's opinion in those circumstances conclusive.

In New South Wales, to give you an example, most permanent loss disputes are given the status of conclusivity. Fitness for work disputes were conclusive until 1979 and not since. Most other disputes are not conclusive. In other words, people who are able to refer those questions to us then - if they don't like the answer they

get, they can argue it further in the court. What we have to say is, as the status of - well, various evidentiary statuses in court, so courts are persuaded by those opinions of medical panels, but they do have to endorse them.

PROF WOODS: Yes. Is it that the wrong question is being asked of a medical expert or is it that the question needs to be answered and the medical expert is seen as the only one who has some competence to answer it? I'm thinking of work-relatedness and fitness for work, not permanent loss. Is it inexperience on the part of medical practitioners to venture beyond their competence and offer an opinion that may not fully understand the nature of the duties, the event at the time, the circumstances of training or competence of the worker?

DR NIALL: Yes. Some of those things - - -

PROF WOODS: How do you work your way through this?

DR NIALL: In my experience - I mean, I am in part an occupational physician and part of our expertise is that we really are expected to know about duties. It may be that other specialists - other groups - may know less about duties and are not so familiar with workplaces, et cetera. If you're thinking of legislative arrangements, you have to take that into account. The medical profession is not amorphous. It has different sorts of experiences. If, for example, you're interested in saying that doctors can give conclusive answers to questions about fitness, you might say, "Well, you ought to have occupational physicians involved in that," and the law might specify that.

PROF WOODS: Mind you, it doesn't tend - - -

DR NIALL: No, it tends not to. In our law, in New South Wales, there's only one type of specialist that's specifically mentioned and they will sit on a certain type of case. I'm just making the point that what you've raised can be quite controversial, with legal people saying the doctors really aren't across all the issues. I mean, that leads into an argument that the independent medical panels are essentially an inquisitorial type of operation, which is quite different from the legal, adversarial character. That's got advantages and disadvantages.

PROF WOODS: All right. I think it still remains a vexed issue, but the occupational physician is becoming more an important part of this process and I guess there are more trained in that area and, therefore, can be called upon more often.

DR NIALL: I think the answer is yes.

PROF WOODS: Impartiality? An appointment criteria for medical referees? It just sparked in my - this is on page 2 - - -

DR NIALL: Yes.

PROF WOODS: Some of the evidence brought before the commission is from a party who will say, "Yes, but those doctors were acting on behalf of," and I could either insert the words "the worker" or I could insert the words "the employer" with equal passion.

DR NIALL: Yes.

PROF WOODS: Why is this so?

DR NIALL: In this respect, it's not very different, say, from judges in workers compensation jurisdictions, is it? Judges in workers compensation jurisdictions have had to get experience as advocates, and so they've acted for adversaries. When they're appointed to the bench, they're expected to wear a different hat and put that behind them. With doctors, it's really the same thing. When you're on a medical panel, you're expected to be unbiased. One of the things I would say in support of medical panels is that inside a medical panel you have to justify your opinions to another person. You have to argue it out, not only with one person but over a period of time with various persons.

If you are a person that's in a particular speciality on - I'm basically an ear doctor. We're arguing all the time about our opinions, not just with the person we're sitting with today but with a group of people we sit with over a certain amount of time, and I think this function is, in certain ways, a natural counter to bias. Of course bias is a ubiquitous sort of thing. Allegations of bias can be ubiquitous.

PROF WOODS: I notice that hearing loss is an area of your particular speciality. Again, in this inquiry we've come across many instances where hearing loss has accumulated through a range of experiences over a lifetime of work, and whether you attribute to the last employer in one jurisdiction, whereas it may have commenced and been particularly exacerbated during an apprenticeship, 20 years ago, with another employer or maybe they just enjoyed loud music. What's the way through the situation, where it's the last employer who has the worker, who then goes over the threshold, who has that land on their premium, in effect? Is there any solution or is this just the way it falls out?

DR NIALL: I think that might be the simplest way to do it. I think the theory behind that idea is that, sure, it may be that the last noisy employer is not the noisiest employer; earlier employment may have been noisier. Often that's the case, not that

the workplaces are getting quieter.

PROF WOODS: Yes. Indeed.

DR NIALL: I think the convenience of that is that the insurance risk - well, it's thought, I suppose, that the insurance risk is spread between various insurers and there's a knock-for-knock character about that situation.

PROF WOODS: Except for the individual employer, who says, "Hello, my premium has just gone up."

DR NIALL: Yes.

PROF WOODS: I understand that at the macro level the distribution is fine - - -

DR NIALL: That's right. Okay, so the micro level - you are quite right. So what could you do? What could you do? Well, if you wanted to do something, if it was worthwhile to do something on that basis then you would have to ask the doctors to do something which is a bit more difficult, which is to try and apportion the hearing loss between different periods of employment with different noise doses. This could only be respectably accurate enough where the data is available, such as noise surveys over different periods. I can tell you that mostly that data is - mostly, but not always - not available.

A typical situation though is a noisy employer, or said to be a noisy employer, and the employer may argue he is not really noisy, but that type of argument, in our jurisdiction, is settled by courts. Once he is deemed to be a noisy employer he gets to pick up at least five years - well, if the employee has been with him for five years in the system he gets to pick up the loss. I wouldn't be easily advocating that we do what I just said we could. I just don't think there is, on average, enough data around to reliably base such apportionments.

PROF WOODS: No, short of all new employees being subject to some audiological assessment before being employed by each new employer, which would at least be able to therefore attribute some past contribution.

DR NIALL: I think there is some merit in the idea that if an incoming employer settles somebody's existing hearing loss, that that is supported by the system. Let me illustrate. In New South Wales it has often been the case that incoming employers have done hearing tests, but those hearing tests later on, five years down the track, are not supported, as it were, by the system, as defining what somebody's hearing loss was at the time. So that I do think there is some merit in the laws being able to support an employer who goes through an approved process with incoming

employees, so that he will get relative if not absolute protection from later deteriorations.

What can happen with older workers is, like the rest of us in the community, that they can suffer from other causes of hearing loss and hearing loss is common. It's about 10 per cent of the community that has a hearing loss and by no means are all of those caused by noise or caused wholly by it.

DR JOHNS: In New South Wales they got over this by saying if you are with an employer who is deemed to be noisy for five years then you cop the liability.

DR NIALL: Yes.

DR JOHNS: So it stops any question about apportioning blame and so on, by the sound of it.

DR NIALL: That's how it works. It's rough and ready. There are lots of things in workers compensation schemes that are.

PROF WOODS: Now, hearing loss is similar, in a sense, to some musculoskeletal type injuries and the deterioration of backs. If we are looking at an ageing population and if we are looking at encouraging workers to stay on longer and later, to contribute to the workforce, is the workers compensation scheme, as currently constructed, sufficiently robust to cope with pressures of attributing to employers things, that - as you say, hearing loss can in part be related to ageing as such as distinct from employment? And again back deterioration is another good example, I would have thought.

DR NIALL: I think there are several limbs to an answer to that. One is that it's important to understand that over time the workplace is getting quieter. So if you are talking about people, say, now aged 50, who may be in the industrial workforce, classically, in recent years, those people are quite close to the end of their career. What you are saying is that maybe in the future - - -

PROF WOODS: There is another 10 years.

DR NIALL: - - - 60 might be an age.

PROF WOODS: Yes.

DR NIALL: And what might the impact of that be? Well, it will be ameliorated by the fact that workplaces are, on average, getting quieter. Nevertheless, the point remains that people who are subject to hearing loss with age - presbycusis - in other

more frank pathologies, as they age. As to presbycusis it's eventually universal. The thing about it though is that for the last 20 years we have had very good data on the average rate at least at which people's hearing loss deteriorates.

Since 1988 we've had that in the National Acoustic Laboratories standard, so that if somebody has a hearing loss - in pretty well all states now; New South Wales being the last to come on - there's a presbycusis deduction from any occupational hearing loss, which takes off the average age rate. So it's a little bit of a lottery but you nevertheless make some adjustment. It does carry a disadvantage for workers, which is that everybody is assumed to have this amount of presbycusis and that's - - -

PROF WOODS: That's the average?

DR NIALL: Yes, it is the average. There are marginal issues too, there. Like if you got your hearing loss in your 20s - and that's probably the time you are most likely to have got it because it's noisier - and also when you start getting a hearing loss it advances fastest, then if you make a claim in your 50s you have gone without your hearing for 30 years, say, it then starts to be presumed that a certain proportion of the hearing is due to age when indeed you have endured 30 years of hearing loss due to noise which is now being attributed to age. That's possibly a marginal thing. I don't know.

PROF WOODS: An interesting point, that if the current 20-year-old is in a less noisy environment then not only will their curve start from a lower step but it will go at a shallower rate because they won't have had the noise-induced loss which, as you say, accelerates; therefore the deterioration over time.

DR NIALL: Classically, of course, a noise-induced loss proceeds to limit; it can only go a certain distance, whereas presbycusis, as it cuts in, will just keep going. It doesn't stop. It's accelerating.

DR JOHNS: I was just interested. You mentioned before that some earlier hearing tests were not acceptable as a baseline measure or meter.

DR NIALL: A classic problem in New South Wales at least has been that sometimes new employers have got audiograms, if you like, at the start of employment. When a claim is made some years later these audiograms have not been given the status that would protect the employer from the claim.

PROF WOODS: Because?

DR NIALL: Because they haven't got any official status.

DR JOHNS: So there has been a legal case somewhere to disprove the worth of some particular audiogram?

DR NIALL: Some of those audiograms might be done quite poorly. The employers don't necessarily appreciate that things should be done well. On the legal side informed employers now, if they want to go down that track, will insist that an incoming employee who has been exposed to noise make a claim against the previous employer. Then if he is compensated for an existing loss he can't be recompensated for that again. So that is a way around it. It's probably only in recent years that employers have begun to do that.

DR JOHNS: There is a wider issue that you raise about workers remaining in the workforce or even returning to the workforce at an older age, and employers trying to, I guess, defend the possibility that this worker will carry injuries or have injuries at a later year.

PROF WOODS: The bad back or whatever.

DR JOHNS: What level of medical evidence is going to be good enough? What tests are going to suffice for an employer to say, "Well, here is the true health of this person, and five years down the track I will present this evidence in my defence."

DR NIALL: I'm sorry, I don't quite understand.

DR JOHNS: Are we going to get into the problem of the audiology tests that were not adequate, that were not professionally done? Are we really saying to employers, "If you are going to use this means of hiring older workers, test them well and it has to be done professionally and well," et cetera, et cetera?

DR NIALL: It would. I suppose the real question is, are the current arrangements by which an employer can protect itself from previous hearing loss, when it takes on any new employer, are they sufficient indeed to protect the employer? If not, what mechanism should be legislated for so that they are? Is that what you mean?

DR JOHNS: Yes, because ultimately you say, "Well, is there a defence in taking down good data now?" Then an employer will want a legal opinion to say, "Well, only in these circumstances. Only with this quality of measurement," et cetera, et cetera.

DR NIALL: If you were to do that you need to have a fairly high quality of professional and medical work behind it, but if that's there I would support that being legally solid, being made legally solid by legislation, say.

DR JOHNS: There would be not much purpose if it weren't.

DR NIALL: No.

PROF WOODS: No, but if it is then employers may choose against an older employee purely to protect their workers comp premium.

DR NIALL: Yes. Although often they are under pressure to accept somebody's hearing damage because in certain industries hearing damage goes with experience.

DR JOHNS: Yes.

PROF WOODS: I totally agree, yes. You propose joint medical consultations, which seems to be an alternative medical disputes resolution system, if I can define it that way.

DR NIALL: Yes. I think it is.

PROF WOODS: I found that quite interesting. What's the level of interest amongst your colleagues in this particular model?

DR NIALL: The reason I talked about it here is because I do think it's an interesting thing to do and it has been done, mostly in the past, on an informal basis; by definition it's informal. When I've asked my colleagues about why - I've not been involved in many of these, I don't think - it has fallen into disuse, I don't really get a straight answer except that it is offered that it doesn't survive well when there's a lot of adversarial flavour to the workers compensation scheme. If solicitors for parties think that they can get parties a better deal in formal mechanisms and can convince them of that then they are not going to use an informal mechanism.

The definition, the idea of a joint medical consultation, as I have set it out, is that parties can make their own arrangements outside formal legislative arrangements. I guess what I'm saying is that it has worked in the past, it has been useful and I think the commission might profitably look at having it as an arm of things to be available, and in particular to think about recommending the support of such arrangements by means of things such as legislation, which enables parties, for example - they can do anything - to agree that they will accept the outcome of joint medical consultation with certain questions referred to it and to make that enforceable. Other than that, of course, by definition you don't really require much legislation for this sort of thing, and indeed you might even argue that because our systems are quite adversarial, it may not be very successful and mightn't be taken up a lot. Even if that's true, I don't think it matters, because it's there and available and if some small numbers of companies, self-insurers, whatever, use it, and they're

happy with it, it's something which would be a cost saver. So I think that's the basis for making that point.

PROF WOODS: Just the noise of its disturbance.

DR NIALL: Yes.

PROF WOODS: Okay. No, I was just sort of attracted to the idea, and we'll certainly go through it as to how we - - -

DR NIALL: Yes. I think it needs a bit more policy development about the thing, but it really needs a light hand, I think.

PROF WOODS: Yes. I think that was your concluding phrase.

DR JOHNS: So what has New South Wales opted for in the new scheme of things in terms of medical disputes?

DR NIALL: Okay. Now in New South Wales, injured workers who may in the old system have gone to a medical panel, will go to a single doctor, who will give a conclusive opinion. In other words, the medical panel has basically been replaced by a single doctor.

DR JOHNS: And then that opinion is carried on into a tribunal.

DR NIALL: Well, that opinion is basically a conclusive opinion. The conclusivity provisions have been really extended to cover most types of matters, so the conclusivity in the new system is a bit wider than it was in the old.

DR JOHNS: But is there a panel of medical practitioners to whom a person can be referred, or can you go to anyone for an opinion?

DR NIALL: Well, if you have a potential dispute coming on and you can't resolve it, you can apply to the commission and the commission will send that dispute to an approved medical specialist, an AMS, who is that - and what that medical specialist says is conclusive evidence of what has been asked.

So, for example, in my field, I act as an AMS in hearing loss disputes, so instead of seeing people, as I have for many years, in a panel of two or three doctors - usually two - I'll see them by myself. So I lose the ability to use different types of specialties or different people to sit with to argue about the difficult cases.

DR JOHNS: So in some ways that systems relies on your having had the earlier

experience of sitting down with other people in the field.

DR NIALL: The medical panel system was a wonderful system of medical education, because you could take people who had never done that sort of work and ease them into it by sitting them with different people over time, so there was a lot of learning on the job. Often in public policy discussions medical panels are sort of black boxed - you know, they're just seen as something which you have there and there's input and output, but the process is not clear. This is understandable because there's not a lot of medical involvement in the policy-making, the doctors are left to do it themselves, and medical panels are in a sense necessarily - they're conducted in a room, not like a public court open to anyone to sit in the back of the room. But it's really important in public policy-making I think to look inside that black box and see what goes on, see if there's things there that you want to have or don't want to have.

DR JOHNS: I agree. That's good. Thank you.

PROF WOODS: Any other matters that you want to draw to our attention?

DR NIALL: Let me just look through and see if there's anything I should raise. I think generally what I've set out is general answers to some of these questions, with what we've done in New South Wales. I think I would say, probably just to finalise it, that if you're to go ahead with the idea of independent medical panels, you've got to pay appropriate attention to the structure of how you do it, how you set it up, what powers you give, what powers you don't give, what limitations and how you administer it - the whole structure of the thing has to be done carefully.

But it is also important, as elsewhere in life, to get the right culture, get the right people - you need to get the right people. So to get it right you have to get the right combination of structure and practice, and probably I would finally say that there's a quite different situation between where you have an existing medical tribunal which you wish to either continue with or to modify on the one hand, as distinct from the situation where you are starting a medical tribunal where there hasn't been one before - for example, as they did in Victoria in the 1990s. That's, I think, quite a more difficult exercise. It would be more controversial, because there's less traditional acceptance. But you need to be doubly careful about how you do it in those cases.

PROF WOODS: All right. Thank you very much. I appreciate the time of putting the submission together and coming along today.

DR NIALL: Okay. Thank you.

PROF WOODS: If we could call forward the next participants, the Law Council of Australia. Thank you, gentlemen. If you could for the record please state your name, position and organisation you are representing.

MR STACK: Commissioner, Maurie Stack. I'm the vice chairman of the common law rights committee of the Law Council of Australia.

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

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

PROF WOODS: Thank you very much, and thank you for your very detailed earlier submission of 12 June which we had the benefit of when we were preparing our interim report, and your subsequent submission to us in a very measured tone, for which we're very grateful. Do you have an opening statement you wish to make?

MR STACK: Yes. Thanks, commissioner. I should say that we would propose to put in a final submission before your closing date, commissioner.

PROF WOODS: I noted that, and thank you.

MR STACK: I suppose you'd be entitled to ask why you should listen to the Law Council. We're not a player in the sense that employers might be regarded as players, or in the sense that employees are regarded as players. My experience of being on council of the Law Society, local government council, is that when you put the same information and knowledge and experience - if you get a group of people together and they've got the same knowledge, information and experience, you will generally get consensus on the outcome. So we would see our role as perhaps providing the commission with the benefit of our knowledge and experience.

In my own case, I've been president of the New South Wales Law Society. I was for 20 years, until this year, a member and for many years president of the personal injury committee of the Law Society of New South Wales. I chaired for many years the committee of which I am now vice-chairman of the Law Council. More importantly I've spent virtually the whole of my adult life acting for accident victims. In our submissions we draw upon of course not just my experience but the experience of thousands of lawyers, who throughout Australia have spent large parts of their lives acting on a day-to-day basis for accident victims, and for insurers.

PROF WOODS: And employers.

MR STACK: And employers, yes. We don't put these submissions on the basis that the commission should be trying to find a way to provide employment for the legal profession. We would, however, make the point that in any scheme that ultimately is developed, it is important to remember that the poor, the marginalised, the people for whom English is a second language, will always need legal representation when they deal with employers who can afford to employ insurance clerks and for insurance companies who of course have people who are professionals in the area.

PROF WOODS: So is this a balance of power issue?

MR STACK: Yes, quite so, commissioner. The first matter we wanted to address is not surprisingly the common law. The first thing I say about that is, it's what accident victims want. I mean, I've spent my whole life dealing with accident victims and I see report after report from actuaries. I think probably I've read in my lifetime more actuarial reports than some people have had hot breakfasts, and I can see all the arguments that are put against the common law.

But one thing that ought to be borne in mind is, if you ask the accident victim what they want, they will tell you - as they have told me on countless occasions, as they've told the other lawyers on countless occasions - what they want is some finality. If they have a major accident, they do not want to be in a situation where they are depending upon handouts for the rest of their life. They don't want to be in a situation where they're being required to turn up for medical examinations throughout the balance of their life. They don't want to be wondering from one day to another whether the benefits will continue or whether they'll be cut off.

They would like to take a lump sum, provided it is a lump sum calculated on some realistic basis to represent the lifetime losses that they will suffer. That is a strong preference of accident victims. There are a lot of myths put forward about the rehabilitation benefits of one scheme or another, but our long-held view has been that it is a myth to believe that putting people on the drip-feed for the whole of their lives is an effective form of rehabilitation.

I know in the commission's report it is said that common law schemes interfere with early rehabilitation. We don't see why, in a properly designed scheme, that is necessarily so. Workers who receive common law benefits also receive weekly compensation. I mean, they receive weekly compensation, if they're entitled to it, up until the time their common law is dealt with. There is every opportunity for them to be involved in rehabilitation schemes and to be rehabilitated back to work.

PROF WOODS: I've let you pursue the flow of your opening statements, but can I just flag that when we get to discussion, if we could differentiate between lump sum

and certainty, because maybe certainty is what some of them are looking for rather than that it must necessarily be in the form of a common law process lump sum. So if we can explore that, and also whether we're talking about the significant injuries or whether we're talking about - I mean, most claims are not at that end of the spectrum. So if we can tease all that out later.

MR STACK: Certainly.

PROF WOODS: But I don't want to interrupt your flow.

MR STACK: No, that's fine, and of course those comments I've made are of course directed to people with serious injury.

PROF WOODS: Yes.

MR STACK: There's another element that is - it's obvious, but it's often overlooked in dealing with common law schemes. Common law is the principle that has been developed over the centuries by the judges and it's based on a simple idea, and that is that if you injure somebody you place the accident victim financially back in the position they were in had it not been for the accident. It's a notion which appeals to the ordinary sense of justice of most Australians. In some areas, of course, you can't do that. In relation to general damages, how do you put a value on the loss of a leg of course, and it's always going to be artificial, under whatever scheme. But in terms of compensation for - - -

DR JOHNS: Sorry - the leg or the damages?

PROF WOODS: Don't go there.

MR STACK: It is suggested, or it's questioned in your report whether serious accident victims might in fact be better off on compensation. Can I just say that my firm is the defendant in proceedings at the moment where one of our staff failed to obtain - to seek common law benefits on behalf of a worker and only pursued workers compensation rights. If I thought there was the slightest prospect of running a defence that they were financially better off with the workers compensation rights, we'd be running that. But it would be an absolute dead letter to seek to run that in the New South Wales situation as it was - I mean, it's a different situation in the last two years. But to say that somebody who might, under the compensation scheme, be getting $320 a week for the next 30 years would be better off than receiving the $400,000 they might have got by way of a common law settlement. It's chalk and cheese.

PROF WOODS: Except for all those who end up on a pension who have blown the

dollars.

MR STACK: Yes, except for those who have blown the dollars. Again, there are a lot of myths about that. I mean, one can only deal with personal experience. Our personal experience is that that's the rare event. If you go into the RSL club in Taree where I live on the day after dole day, it's very busy at the poker machines. I mean, there are some people who are going to put money through poker machines whether you give it to them weekly or in a lump sum, but the vast bulk of people do not do that. The vast bulk of people that I've acted for who get a lump sum - they will either pay off their house mortgage or they will buy a house. They will do something they would have put their wages towards, if they'd been able to continue to work.

There are many mechanisms to reduce costs. In your report, you've said the cost of an unrestricted common law scheme is prohibitive. That's a value judgment, but we'd simply make the point that there are many mechanisms available to reduce costs in small claims and they've been explored in different schemes throughout Australia. We'd also just make the obvious point that, when you deal with justice, why should motorists have full common law rights, or have common law rights in any event, and those who are injured at work not have them? Where is the justice in that?

The next thing I wanted to refer to, Mr Commissioner, are the occupational health and safety schemes. Our initial submission, on page 26, says that we consider national legislation is not necessary, but at the same time we support the move to commonality in that area. We do support a move to commonality in the occupational health and safety area, whilst it is necessary to recognise there is a different individual mix and different stage of development, say, between New South Wales and the Northern Territory - even allowing for that. We'd also make the point that I think the commission itself recognised, and that is commonality in occupational health and safety is not dependent on having commonality in workers compensation. Workers occupational health and safety, of course, deals with workers' safety. It is obviously a priority matter, and we'd support that notion.

The problems we'd see with the commission's proposal concerning workers comp are these: Comcare is largely restricted to the Australian Capital Territory. In downtown Taree where I live the people who come within the ambit of Comcare are those who've gone and served some time in the armed services and those who work for Australia Post. There's only a small segment of the community that fall into that category. Under your draft report, in due course one may expect that the employees of Woolworths, Coles, Bi-Lo, Goninan's and Mitre 10 - a whole raft of employers in a community such as ours - will find themselves under a national scheme.

When you deal with people with serious injuries - sometimes they have a

single injury, but quite often, by the time people finally go off work, they've had multiple injuries with different employers. Your proposal creates a real problem there. I mean, it's just common for us to see workers compensation applications where there are multiple respondents - multiple employers. It's not an unusual thing. It's a very common thing.

If 25 per cent of the employees in downtown Taree end up under a national scheme and 75 per cent under a state based scheme, workers with damaged backs will have an initial injury stacking shelves at Coles under a national scheme. They will aggravate it working at Godwin's Retravision under a state scheme. They will have a final incident at Goninan's under a Comcare scheme or a national scheme and what do we do then? How do we deal with that? What we have to do is we have to run two actions, one in the AAT to pursue the rights under the national scheme and one in the New South Wales commission to deal with the injuries for the state employers.

Firstly, there's a huge duplication of legal costs in doing that. Secondly, it's an intolerable situation to get into, because you can come between the cracks. The AAT can conclude that the problems really arose - because the respondents will be arguing this fiercely - from the employment with the state based employer. Then you go to the state commission and, of course, the respondents are fiercely arguing that the problems come from the other employer - from the national one. The worker can end up losing in both places or, even more bizarrely, the worker can end up winning in both places - in both courts, they find that the problems are the result of that one, so they get double compensation.

The first time, Mr Commissioner, that that happens and it's reported on Alan Jones, Prime Minister Latham will be on the phone to his treasurer and be saying, "Who put us in this situation?" If he were to find out your home addresses, there would be dive tackles. You could imagine!

PROF WOODS: I'm relaxed!

MR STACK: It is a serious practical problem that we see. I understand the thought that has gone into it from the commission's point of view, but we do see that as a real problem.

PROF WOODS: Can I flag there that we should talk about employees who work in different states being faced with that?

MR STACK: Yes, that is a problem.

PROF WOODS: It's not a new problem.

MR STACK: It's not a new problem. The problem exists also in downtown Taree, because somebody can be injured whilst working for Australia Post and also be injured - but my point is that it's an occasional problem at the moment. It's a problem we rarely strike. It does happen, but very rarely.

PROF WOODS: If it was in Albury-Wodonga or in Tweed Heads-Coolangatta - - -

MR STACK: Yes, in those places it's more of a problem. Generally speaking, it's not. Under this proposal, it will become a common problem and a real problem when it occurs. The second point we'd make is that we'd urge the commission not to underestimate the cost to the legal profession of tooling up, if you like, for a second scheme which is operating side by side with the existing scheme.

You may think that personal injury lawyers throughout Australia are or should be familiar with Comcare. The fact is that most personal injury lawyers don't have occasion to deal with it. There aren't enough claims outside of the ACT to warrant it. Within my office, for example, we have nine offices. One of them is in the ACT. Any Comcare claims that come in are quickly flicked down to the ACT office. Many personal injury lawyers wouldn't touch it.

PROF WOODS: It's the same with rehab providers, it's the same with medical practitioners and claims managers - - -

MR STACK: Yes.

PROF WOODS: We recognise that issue. It applies to you, but it applies to a number of professions.

MR STACK: Yes. The scheme that you flagged or that you put forward in this draft report, commissioner, addresses the problems of the employers who represent in number less than 1 per cent of total employers, but it will create on the other side of the coin a large cost to thousands of lawyers throughout Australia, not only getting themselves up to speed as to how Comcare - or whatever the national scheme is - operates, but also in physically tooling up. There were a number of reports of the cost to employers. The cost to IAG, in particular, was flagged of setting up an IT program. Law firms have that too. I mean, we have to set up IT - and there are lots of lawyers, unfortunately. They all set up their own individual IT programs that deal with - they have to set up precedents, document management, warning systems - all of that is part of that.

PROF WOODS: There could be a niche there!

MR STACK: Yes. I'll just do it for my firm, thanks, commissioner. There's a significant cost associated with that. If that were done in relation to, for example, a Comcare-type scheme initially and then in due course it was decided that really Comcare isn't the one - and I know that the commission has flagged there are problems with Comcare - we would have lawyers jumping from the top floor of buildings if they had to do it once and then had to do it again. The insurers might say that's a good thing, but we're a bit more sensitive about that idea.

PROF WOODS: In the case of law firms who have a national presence - as you say, when you have one that's currently Comcare, to get to that part of your national presence that deals with and is the expert in that scheme - - -

MR STACK: Yes. In reality, commissioner, the national law firms don't touch this sort of work. I mean, this sort of work is done by your local law firm, not by Mallesons. The third point we'd make is our criticism of Comcare as a national model. We recognise, in making those comments, that the commission has flagged itself that it recognises there are some problems with it. We'd just like to emphasise that.

PROF WOODS: Yes, thanks.

MR STACK: Pension schemes anyway depend on low long-term benefits and, in practice, cutting off people. I mean, I notice your report - one of your tables lists various schemes and it lists Queensland and says, "People stay on benefits in Queensland for five years." In practice, I can tell you there are very few people - I don't practise much in Queensland, although we've got an office at Tweed, but I can tell you - and I'm sure Gerry Murphy would agree - that very few workers in Queensland ever get beyond two years. Don't worry about five years.

PROF WOODS: Those that do are a fairly high cost - - -

MR STACK: Yes. Even the ones of high cost - they tend to just pay them out inside two years. They will just give them a lump sum and they're off. I take your point about it being picked up by the Commonwealth but, so far as the scheme is concerned, they're out of there in less than two years.

PROF WOODS: Yes.

MR STACK: Anyone can, with great respect to Comcare, run a compensation scheme for officer workers where the biggest risk is a cut finger from an envelope. Comcare works fine - - -

PROF WOODS: Actually stress is - - -

MR STACK: I understand the stress thing is a problem. Comcare works fine for the Department of Administrative Services. That doesn't mean it would work in a factory in Taree. At table 8.1 of the report, you conveniently set out how benefits are paid under comparative schemes. It's not unusual these days for tradesmen to earn $1000 a week. If you take a single tradesman under the New South Wales scheme, at 26 weeks in New South Wales he'd be receiving compensation of $317.20 per week. Under Comcare he would, at that point in time, be receiving $850. At 45 weeks in New South Wales he's still receiving $317.20 and under Comcare he's dropped back to 750.

It's an enormous difference. If you can stay off work long term on $750, save your travel costs and a few dollars on the side, fishing becomes a pretty attractive hobby. When a common law system is compared to a system like that and it is said to us that common law is a disincentive to rehabilitation, we say, "Well, we've got our own views about what's a disincentive to rehabilitation, and it's that ongoing Comcare benefit that's the real disincentive."

PROF WOODS: I've extended an invitation to the Queensland Law Society and I'm happy to extend the same invitation to the Australian Law Council to elaborate further for us on this rehabilitation issue, because we do have various professional bodies giving us one view and we're serious about wanting this to be a balanced examination of the issues and so look forward - - -

MR STACK: Can I just give you one example, commissioner, that brought it home to me? I had a worker sitting in my office one day and he was on benefits. I think, in fact, it was Centrelink benefits whilst he was waiting for his case to be heard. He was, with his children - he had quite a tribe of children - receiving total benefits of something like $450 a week. He was offered a job which paid $450 a week and he said to me, "What should I do?" and I said, "Well, you take the job, of course. If you've been offered a job - I mean, I'm a taxpayer. Take the job." He said, "You don't understand." He said, "We live from week to week. I don't have any reserves." He said, "I pay the rent each week out of the money that comes in." He said, "If I take that job - and I don't know whether I'm going to be able to handle it - and it doesn't work out for me, it will take weeks before I get back onto benefits again. That may not seem much to you, but during those weeks I can't pay my rent." He said, "We're liable to be out in the street. My landlord isn't interested in saying, 'Pay the week after next.'" That weekly benefit thing can create a real problem for people to get out of. It becomes a real trap.

PROF WOODS: If you could sort of move beyond anecdote to some material for us, we'd be very happy to receive it.

MR STACK: Commissioner, our position is we would support model D, as we've said in the written submission - a national workers compensation body developing standards for implementation by the states. We would strongly suggest that the Law Council should be represented on that body. You were asking earlier about differences between New South Wales and Queensland.

PROF WOODS: Yes.

MR STACK: Can I just sort of flag an initial comment on that. I know that one of the things that I noted years ago - that in Queensland lawyers would commonly resolve litigation before commencement of proceedings; in New South Wales, after commencement of proceedings. Cultures develop in different places and those cultures are associated with attitudes of insurers that can change; they're associated with the way rules work. There's all sorts of fine-tuning matters that can really impact on the culture and that's where an involvement of the legal profession on anybody can be of assistance, in trying to address those matters.

We would remind the commission that there are checks and balances in individual systems which need to be preserved or at least considered. In New South Wales, before the latest changes, we had a stronger workers compensation scheme in Queensland but a restricted common law scheme. They, on the other hand, had the reverse. They had weaker workers comp rights but stronger common law.

PROF WOODS: Do you feel that our submission hasn't adequately acknowledged that these schemes are complex and that you can't change one element without it having an effect on the other?

MR STACK: No. I think that your report addresses those matters, commissioner. We recognise that the - well, I guess the final thing I would say is we recognise that a lot of time and thought has gone into the recommendations that you put and we're reluctant to say, at the end of that process, that between doing a draft report and a final report that we suggest you should change tack. It is our strong view that the final recommendation you put forward is not ultimately the best one and that the better recommendation is, of course, the slower way of achieving change but it is the one in the end that will get the best result.

Having said that, we agree that there are some obvious things that do need to be addressed and should be quickly addressed. I mean, why should there be a different definition of "worker" throughout Australia. There's lots of things that could and should be immediately addressed. Thank you, for your time.

PROF WOODS: All right. Thank you for that opening address. If we can explore a couple of these things. We, like you, can see a difference between the desire to

achieve a common occ health and safety scheme compared to the various state commitments - and I don't mean state government under the stakeholder commitments to their individual workers compensation schemes. You use the word "commonality" and we have tried to carefully differentiate. In the case of occ health and safety we're talking about a uniform one, single scheme where it just rolls out and applies uniformly across the countryside.

In workers compensation we've talked about moving to greater consistency and we, like you, would like to think that people can sit down and come up with definitions of work-relatedness and who is an employee and all of those multitude of areas where there seems to be goodwill but very little - - -

MR STACK: It hasn't happened.

PROF WOODS: It hasn't happened for a very long time. So we seriously seek progress under model D but your prospect that it should be given time to assess its success, I guess we are less confident than you seem to be through that view that we will make a lot of progress in a short space of time. I would like to think that model D will drive greater consistency for workers comp and we put great faith in some progress being made but it's a judgment issue as to whether, in itself, that is enough.

We have come to the view that we can also, as of now, solve the problems from the employer perspective and for their employees - because I think there is benefit in having a common company culture of occ health and safety and injury management and all of those issues, so I think the employee will benefit as well - through A and, to some extent, B. Model C we have sort of said is somewhere down the track and maybe if D can achieve what it needs to with, to some extent, the parallel pressures of A through B, we may not ever need C. Who knows? All we're trying to do is create pathways for reform.

So we agree with you in the surmising about where occ health and safety and workers comp are at, but we differ from you in judgment as to whether D is the only solution at this point in time or warrants giving it a period of time.

MR STACK: I suppose what we are really saying is that the problems you will solve with C are less than the problems that potentially might be created.

PROF WOODS: Yes. I'm very conscious of your point that having a more widespread membership into whatever the national self-insurer scheme looks like will create - - -

MR STACK: You see, commissioner, even when Woolworths, for example, puts their hand up and says, "We're into the national scheme," the day they do it you've

got an immediate problem because you've got all the employees that they have who were injured under the old scheme and who will have to pursue a claim with one insurance - - -

PROF WOODS: Yes, they're looking at - - -

MR STACK: Yes, but they're going to have multiple injuries. They're going to have a injury under the old thing; an injury under the new one; and then how do you address that? Where do we go to get that dealt with? The injury under the old scheme, the employer says and the insurer says, "Well, that's got to be dealt with in the state scheme. That's the scheme that deals with it."

PROF WOODS: There would have to be exit arrangements negotiated. But also, I mean, we're not forcing Woolworths to do it. Woolworths will come to a view that if all of this has to be achieved - and they will obviously take into account the views of their staff - how they take them into account is entirely their matter. They will make judgments about what is involved in the process and what are the consequences to them and then if they, on balance, consider that this is a step they want to take, then this commission and no-one else is forcing them into it. That's a judgment that they make.

MR STACK: Save, commissioner, that - you know, speaking as an old advocate for workers rather than for employers - my experience tells me that when the employer makes the call, the employer will be making the best call for the employer, not necessarily the best call for the employees. They may be different things.

PROF WOODS: I did say taking into account the views but how they take them into account is their matter, yes.

MR STACK: It may be an unfortunate outcome for the employee. The other thing about that is when the employers leave the scheme - I know that your actuaries have looked at it - but if you leave a scheme such as New South Wales which is seriously in deficit, how in real terms are you going to have those employers contribute to their share of the deficit? I mean, for starters, in New South Wales the size of the deficit seems to change every time you pick up a newspaper. How does one realistically get Coles in New South Wales to cover their share of the New South Wales deficit as a condition of their moving out, because if they don't, somebody else is picking it up.

PROF WOODS: There are different models of how you take your tail or how you buy out your exit. We haven't explored the detail of that but there are models and, in fact, as people move to self-insurers under the current scheme, those matters are negotiated and resolved. In South Australia, for instance, they have moved to become self-insurers over the last couple of years and have different exit

arrangements negotiated but it depended on what the perceived state of the scheme was at the time. So it's not the exact size but it's a negotiated outcome.

MR SCARLETT: There was an endeavour - and it might be helpful to you to talk to New South Wales WorkCover. They sought, about two years ago, interest in taking over the tail as they changed and that came to nothing, despite some of the mega-financiers of the world, in the shape of reinsurers, et cetera, having a look at buying out tails. There are a number of issues, when Mr Stack has finished, that I might be able to help you on, sir.

PROF WOODS: Perhaps we can get onto those in a moment, but can I just flag that, when we talk through common law, you've - in the course of your introductory comments - identified a number of criteria that might be worth pursuing for their own sake and then to conclude whether common law is or isn't the right solution. I mean, some of it's that we're talking serious injury, some of it's that we're talking only in the case of where fault can be proved - and, where fault can't be proved, then common law doesn't resolve - whether certainty is at the core of it, rather than common law as such, in terms of the incentive. I mean, even your anecdotal one of the person on government benefits versus employment - again, it seemed to me that certainty was at the heart of what he was wanting. He wanted to know what the income was, so that he could pay the rent.

MR STACK: Yes, and delay. I mean, just the delay associated with a change.

PROF WOODS: Yes, and also you've got to go through your pre-qualifying periods and all of those - - -

MR STACK: Yes.

PROF WOODS: So certainty was, again, at the heart of his interest and then also commutation versus common law. I'm not sure that all of those point you automatically to common law, but they are all criteria that are worthy of taking into consideration in how a scheme should operate.

MR SCARLETT: Sir, there's something which has not been touched on in relation to common law, which I feel - and I'm an insurance lawyer. I act for the defendants. We are all in the broad church of law council, of course.

PROF WOODS: Absolutely.

MR SCARLETT: It is that I think there is a tendency to overlook the moral dimension of the feeling of vindication that, "Someone has hurt me. You've run me down in your motor car as a walked across a pedestrian crossing and, as a result, I

look to you and I say to you, 'Hey, you've hurt me; you fix me.'" To say the criterion should be the severity of the injury flies in the face of the approach of the courts and the results that you report.

For example, in the Sydney Morning Herald yesterday there was a report of some chap who was swinging on a rope over, I think, the Murray River and somersaulted into the water, who unfortunately became a paraplegic or a quadriplegic. He failed in his action for damages, and that is right, but what happens if the same fall had been occasioned by a tour operator providing some adventure thing and decides not to renew the ropes on the basis of the normal maintenance standards and causes that? I think that in the debate we're dealing not solely with money. There is a very human element of a feeling of catharsis of a worker being able to have his or her day in court and say, "You have done this to me. You've done this wrong to me, and I am now looking to you to put it right to the extent that money can." There is mention in your interim report, sir, of moral hazards. I just feel, in relation to common law, that this aspect does not seem to be touched upon.

In relation to the current review of medical indemnity law, there is talk about pressure for a national scheme for those catastrophically injured. What seems to be overlooked in a lot of these things where fault is a factor is that this is a community with a conscience, where there is a safety net. Not that you or I, sir, or anyone here would probably like to be on Medicare benefits and an invalid pension, but we are not in the sort of situation, as some countries are, where you either prove negligence or fall through the safety net because there isn't a safety net or the safety net is exiguous. As a country with a conscience that cares for people, even if they have become catastrophically injured through their own fault, to - - -

PROF WOODS: We do understand that question of people wanting justice - - -

DR JOHNS: The argument runs the other way, though. If you have a system based entirely on having to prove negligence, then some will fail to prove it, but most of our systems are based on no fault. You get the money if you're out of work. The common law and the judges have told us that the person in control of the workplace is the employer and that they have to make conditions safe, and we have 100 years of experience of that, so by and large the schemes revolve around - the only proof required is that you were there when the accident happened. It has nothing to do with revenge of the employer - or the employee on the employer. So the moral hazard argument that economists use is very different from the morality question that lawyers use - - -

MR SCARLETT: Yes, I appreciate moral hazard is a term of art.

DR JOHNS: But nevertheless I think we should take the "moral" bit out. The fact

is that these state schemes are designed to compensate workers for injury at work, almost regardless of cause. We've gone - this is post-morality - we already have systems that do that. The only question is whether there is value added in having a particular dispute mechanism where particularly qualified people should be able to get particular workers, with usually extreme injuries, a particular sort of payout. So it's only one part of the question, by and large if we talk in terms of - - -

MR STACK: But in terms of expectation, of what David says, if I act for an accident victim and he just has an accident at work and it's just one of those things, then they're happy - I mean, they're pleased that there is in place a compulsory scheme that gets them some benefits. But it's a different thing if they have an accident in circumstances where they've told their employer 100 times that the machine is dangerous and the employer does nothing about it and they are injured. They have a different expectation. They have an expectation there that their full loss should be met.

DR JOHNS: Yes, I know. I am saying there is a class of injury and a class of accident and so on, where someone wants to have the thing heard and gone through, but by and large the system now is picked up in an administrative sense.

MR SCARLETT: Commissioner, could I urge that you perhaps consider the system of workers compensation, no-fault workers compensation, which was designed by Count Otto von Bismarck, as mandatory noblesse oblige in an industrial revolution sense, in that there was no longer a lord of a manor with peasant tenants there. They were in a factory and so he mandated the scheme that he knew as a nobleman and the obligations inherent in him to his tenantry.

That seems awfully odd in the 21st century and, in particular, if I could point to you one of the flaws that seems to me to be fundamental which is at page 29 of the commission's draft report. It very rightly says that:

> A source of market failure for workers compensation is that the beneficiary of the insurance product - the worker - is not the one facing the cost; while the party facing the cost, the employer, is not the one receiving the benefit. Thus no party faces the correct set of incentives to arrive at an appropriate mix of cost and benefit.

That seems to me, acting for insurance companies, to be a terribly fundamental element because this is something that evolved from the late 1800s - 1894, I think, if my memory serves me right - and it's still limping around now and there have been numerous attempts to fix it, a number of which, as you point out in commenting on the actuarial submission, the working out of a change of (indistinct) takes about five years before you discover, no, it's not as good as it seems to have been.

DR JOHNS: Look, nearly all the systems are mixed. The only question is where you place the fence around access to common law and what sort of cases. So there's no pure moral question about it; I'm simply saying, "Where does the legal process add benefit?" if you like. That's something we reflect on, but we also try to disaggregate those elements of what we broadly call common law and whether they contribute positively or negatively. I think it will take a little bit more time in our final report in teasing out whether it benefits and disbenefits. But I wanted to ask you - - -

PROF WOODS: Sorry, just on that - which is why I'm interested in developing this list of criteria as it's emerging.

DR JOHNS: Yes.

PROF WOODS: This can guide us in how we take that work on.

DR JOHNS: Okay. This returns us to the start because I think you have - for instance, if we were to say, "Okay, in a national scheme there should be access to common law under the following circumstances" - how keen would you then be not for the model D - which is sit down for the next 50 years and talk about uniformity - but for the steps 1, 2 and 3 that would take us towards a competitive model, states and the Commonwealth, which gives access to national employers to a single system?

MR STACK: Could I answer it this way: when I started law, we had in Australia a universal system. It was the common law. If you were injured in New South Wales or injured in Victoria or injured in Queensland, it was all the same. The judges applied the same principles. The result might be different because it reflected different economic circumstances and the amount you would get in Queensland would be different to the amount in New South Wales, because there was a different economic situation, but the principles were the same. So it would hardly be the case that the Law Council would say that there was something fundamentally wrong with that. Of course, we would applaud that.

The difficulty the Law Council will always have is that it represents law societies throughout Australia and they, of course, have differing views as to what they would like. In Queensland there is a full common law scheme. The Queenslanders would say, "Well, that works well and that is what it should be." I guess the most the Law Council could do is say, "Well, there is a range of options here. These are the sort of things that have been tested." There was a scheme in New South Wales until two years ago which in fact gave common law rights to people who had serious injury but didn't give it to anyone who didn't have quite

serious injuries.

DR JOHNS: The point I'm making is that you straddle the same number of fences that we do. The Law Council of Australia couldn't design a national scheme, because you couldn't agree on a national scheme. We've come to the same conclusion: there is no one model.

PROF WOODS: Nor should there be somebody to stand up and say, "This is the perfect model that will apply for the next 50 years."

DR JOHNS: However, to provide some relief or add some value to the system, for those who can take the benefits of it, it's reasonably sensible to have another player - the Commonwealth - offer a scheme. Now, it starts at point A, it's Comcare and where it goes will be up to the players many years down the track. For those employers who can derive a benefit - in a sense it's no more complex than that - we're really not designing for the national scheme.

MR STACK: I don't think the Law Council could ever support a proposal that we have two schemes running side by side in the way that's proposed, for the very reasons that we just know in practice it's going to cause a- - -

DR JOHNS: But they are run side by side now. I mean, there are some Commonwealth employers in Taree and so on and so forth. These are not unknown.

MR STACK: Yes, that's true, but it's a very occasional problem.

DR JOHNS: But it's a very good point you make.

MR STACK: And, as the commissioner said, there are interstate injuries. But they are, for the most part, very much out there and the exception. If you bring those into the mainstream - and that's what we've got to confront every day of the week - then it really will cause some serious problems. I couldn't see the Law Council ever supporting that straddle idea.

DR JOHNS: But do you agree that you couldn't design a national scheme and it's most unlikely that in a model D all the states would sit down and come to agreement on one, or a sufficient degree of uniformity that we could call virtually a national - - -

MR STACK: What tends to happen, of course, with national schemes, is that it tends to be lowest common denominator. The driver always is premium: what is it going to cost? What will the economics afford? Unfortunately the people who are in a position or who are able to make the strongest submission, to push the strongest case, are those who are organised - that's employers, large employers, insurers - it's

the poor old accident victim who cops the consequence of a national scheme which ultimately is a lowest common denominator which everyone thinks is terrific.

PROF WOODS: Actually we've had evidence from various parties and there is absolute agreement between employer bodies and employee bodies that a national scheme has the (indistinct) for the lowest common denominator, but both of them fundamentally disagree on whether that's the lowest common benefits or the highest common benefits, and the consequent impact on premiums. So both of them agree that that is the danger, but fundamentally disagree on what the likely outcome is.

MR STACK: Yes. We tend to look across the Tasman at what's happened in New Zealand over a period of years and we look at what has happened there and we do not like what we see. We certainly wouldn't be keen to - - -

PROF WOODS: We understand the New Zealand scheme and we have been monitoring it.

MR STACK: Yes.

MR SCARLETT: Commissioner, could I perhaps assist with a couple of comments.

PROF WOODS: Yes, please.

MR SCARLETT: Which may guide you as you move towards the final report. Firstly, sir, with great respect to the company IAG, you've - Mr Lever is gone, which means he won't beat me up when he sees me next.

PROF WOODS: You'll be on record.

MR SCARLETT: IAG is the largest general insurer in Australia; however, its expertise in workers compensation is comparatively recent and the commission may well be assisted by seeking wider input from insurers with longer or specialist expertise.

PROF WOODS: We have been actively encouraging them and the Insurance Council of Australia who is appearing tomorrow.

MR SCARLETT: Yes, sir. The other one is that looking at page 18, sir - the fears on compliance at pages 18 and 19. CSR is talking about the extra cost of reporting to five different regulators of $60,000; whereas Optus throws up a figure of $2 million. It's not for the Law Council to criticise these figures or the people producing them, but on a reading there seems to be a real risk of what are perhaps best described as

rubbery figures. With respect, sir, we'd like to draw that to your attention.

The other thing that is, I think, perhaps more substantial is there is in a number of the schemes and also in the interim reports, a great acceptance of injury management and rehabilitation as a given, as a good thing. Could I draw to the commission's attention, please, that at page 140 and at page 3 - at page 140 at about 6.1, sir, you will see that it says there:

> Aside from the obvious lifestyle benefits to the injured worker from recovering as soon as possible, associated personal costs can be reduced, financial benefits can accrue to the employer through lower workers compensation premiums, avoidance of retraining costs and reduction of other expenses. Indirect benefits may arise through improved productivity and workplace morale. To the extent that there is cost shifting, early recovery can reduce the burden on the general community.

If you look at page 3, you will see that you've expressed the view there that the duration of rehabilitation has tended to increase in recent years and the average number of days of paid compensation has risen from 52 in 1998-1999 to 57 in 2002-2003. Associated with this has been the increase in the average nominal cost of claims from 7532. Can I comment that we have seen the first rehabilitation in New South Wales, first rehabilitation in injury management come in as the thing that was going to turn the duration and cost of claims around, but in fact it doesn't seem to have.

If I can put a personal view, it's very much akin to the old saw about leading a horse to water. An injured worker who wants to get back to work, will seek out all the services that worker can find to get back on the job. Someone who, for whatever reason, is not so keen - and this often happens with persons who are in the workplace when they have English as a second language and their background is of life in the home, and no matter how much rehabilitation or injury management is thrown at that person, they will never admit to any improvement. So I just as a comment said it to warn against what seems to be a good thing in the sense of, "Oh, yes, it's wonderful and it helps people." Those two comments of the commission seem to me to be in conflict.

PROF WOODS: No, page 140 is a statement of principles which, as I read them, I remain happy to sign up to. Page 3 is a statement of facts as they are, but there are a whole range of reasons for that, some of which is the injury management system; some is the type of claims that are currently occurring - like those who are on stress, rehabilitation is longer and more expensive than those who had a slip, trip or fall. The change in the nature and proportion of claims is in part underlying the longer rehab. We also have to look at incentives. If there is an incentive to a rehab provider

to be paid on a per episode base, then maybe they want to have as many episodes as is appropriately warranted in the circumstances.

MR SCARLETT: All I was saying was the two - - -

PROF WOODS: I think they conflict in the sense that what you would like to see is not happening, but they don't conflict in the sense that what's on page 140 is a statement of principles we'd all like to get to, and page 3 is the stark reality of where we are.

MR SCARLETT: We would like to help, obviously. We're here to help the commission produce as good a report as it can, and that's the reason for making those comments.

PROF WOODS: Thank you. I'm quite happy to have that drawn to our attention. I'm enjoying the debate but I'm also conscious that others are - - -

MR STACK: No, that's fine. Yes, we appreciate the time, commissioner.

PROF WOODS: So nothing else that you want to raise?

MR STACK: We will provide our final report and we'll try and flesh out some of the matters you've requested.

PROF WOODS: Yes, if you could.

MR STACK: When I say "we" I mean - - -

PROF WOODS: I understand the royal "we". When I say "we" I do mean the good staff who have - but there's nothing like the royal "we" occasionally. So thank you for your time and for the work that has gone into it. I think it can all help produce a more focused and more thorough report, so thank you. We will take a minor break.

PROF WOODS: Our next participant is the Australian Plaintiff Lawyers Association. Can you, please, for the record state your name, position and organisation that you're representing.

MR MORRISON: My name is Simon Morrison. I represent the Australian Plaintiff Lawyers Association. In that organisation I hold the position of national chair of the workers compensation special interest group. I am a plaintiff lawyer working in a private practice in Queensland. I've been a workers compensation practitioner for 15 years.

PROF WOODS: Thank you very much and thank you for coming. We have a set of discussion points but we have the benefit of your earlier submission of 13 June, which we drew on as we prepared our report, and thank you for the work that you put into that. We look forward to you submitting a further submission following our discussion today.

MR MORRISON: Yes, commissioner.

PROF WOODS: Have you got an opening statement?

MR MORRISON: I have, commissioner.

PROF WOODS: Thank you.

MR MORRISON: For today's purposes I'll limit any discussions to chapter 7 of the interim report. As you saw, commissioner, the main focus of our primary submission concentrates on the common law. I'll leave it to others to concentrate on some other areas. Our case predominantly, commissioner, is that common law and a statutory no-fault scheme can happily coexist and should happily coexist, and we believe there is ample evidence to support that contention. I was interested in some of the debate in the earlier submission today about the reasons why the common law should be in this scheme. For our part, as an organisation, we start from the premise that the common law is a right that exists on the part of workers. The argument is not why it should exist; the argument is if the funding abilities of schemes impede that existence, then what changes, if any, are necessary to maintain that right? So that's the angle we've drawn from.

Commissioner, if I can take you to page 159 of the interim report, in the third-last paragraph there is some commentary in relation to the restriction of access to common law and why that has occurred over the past two decades, and it's noted that it was thought that the common law undermined scheme affordability, was inimical to early intervention and rehabilitation and return to work. I've not ever sighted data from two decades ago. CPM has been operating now for five years but I

would have to say, commissioner, that if the judgment was made today on the CPM data, that statement, in my respectful submission, cannot be supported.

PROF WOODS: We're actually quoting from the Northern Territory government.

MR MORRISON: I understand that, commissioner.

PROF WOODS: Thank you.

MR MORRISON: I understand that. The other point I should make, commissioner, is I've relied solely on CPM 4 for the purpose of this submission, on the assumption that that's the data that was used. I'm aware that 5 has now been released. I want to refer to some new statistics in 5 in a moment. So that's the first submission I would make: that if you look at the performance data you will see the common law schemes. I only have the benefit of a photocopy. You have a scheme like Queensland, for example, which on a performance basis is right at the top. I'll also add, commissioner, that the flavour of my submission has a Queensland overtone, predominantly because I'm a Queensland lawyer but more so because I believe that the fundamentals and the formula of that scheme operate very effectively.

The second comment that is made as a reason for getting rid of common law is that it is inimical to early intervention, rehab and return to work. I'm not certain what data the Northern Territory government relied upon to make that statement but I would make this observation: that in a scheme like Queensland where an election provision operates at the back end of a statutory scheme, that's not a statement that can be supported, for the simple reason that the rehabilitation provisions have occurred well before the election is made. Indeed, 2001 amendments to our legislation continued rehabilitation provisions of common law. The percentage of people who elect remains pretty steady at about 3 per cent, so I would submit that that statement just isn't supported by evidence.

PROF WOODS: Just on that, you have obviously read our interim report and, therefore, you'd be aware that we've drawn on and quoted from the Australasian Faculty of Occupational Medicine and various rehabilitation provider and peak groups of those, all of whom hold that as a very firmly based professional opinion on their part. Where you may be drawing a distinction, though, is between common law as it relates to the Queensland scheme as distinct from common law in a more generic form. If that's the distinction you're making, then that's worth pursuing. Are there features of the Queensland version of common law that hold that professional opinion on the part of organisations that I would have thought would be well qualified to speak on it are less relevant?

MR MORRISON: Indeed, that is a distinction I make, commissioner. I make the point that if you look at a scheme like Queensland pre-1996, you had concurrent access to common law structures and statutory benefits, and I do make the concession, commissioner, that Australia-wide that structure is an impediment in relation to the rehab issue, but I would submit that since the amendments to at least the Queensland scheme, there has been a market turnaround. Of course we don't have the same structure in other states but I'll come to that in a moment.

PROF WOODS: That is an interesting distinction. As you say, pre-96 Queensland, where they were concurrent rather than sequential, the results were different.

MR MORRISON: Yes. If I can then go to the actual quote you've put into the submission from the NT government in relation to it, it's justification for why common law was inappropriate when indeed its amendments were made - this is a statement back in 1994 from the NT government and I simply make the observation, commissioner, that if we look at the data available to us today and run through the performance of the NT scheme, which has been a no-fault scheme for some time, against a scheme like Queensland, on the statistics the story, in my submission, is quite telling.

The premium rate as existed in CPM 4 for the NT was 2.42; for Queensland it was 1.55. The funding ratio for NT was 72 per cent against 132 per cent for Queensland. Compensation paid as a percentage of total expenses in the scheme in the NT was 52.1; Queensland was 63.7. Compensation paid to a worker as a percentage of total income in the scheme in the NT was 36.6; Queensland 56.2. Legal costs paid as a percentage of total claims cost in the NT, 11 per cent; Queensland, 9 per cent. Legal costs per dispute - NT, $19.6 thousand; Queensland $10.8 thousand. Further disputation rate, which of course is the appeal rate after a first knock-back, NT 37 per cent; Queensland 11 per cent. The permanent impairment payments, as I read them on the tables, are less in the NT than Queensland. On a raw analysis, commissioner, that would suggest to me that the no-fault scheme in the Northern Territory isn't quite as attractive as the 1994 prediction.

PROF WOODS: It also, though, needs to be drawn out of a wider body of data about all of the schemes. I'm not quite sure whether you're saying - and I had this discussion with your colleagues from the Queensland Law Society - I assume they're your colleagues.

MR MORRISON: They are indeed.

PROF WOODS: About the use of statistics. Yes, they are factual statistics in

CPM 4, and I have the benefit of CPM 5 and can update them for you.

MR MORRISON: Yes.

PROF WOODS: But to then draw a conclusion that it is common law that is the saviour of the Queensland scheme is not one that I am necessarily immediately attracted to. If I can just point out a couple of reasons for that: ACT, unrestricted common law access, ratio of legal fees to claims costs of 26 per cent compared to the national average of 10 per cent, so clearly the presence of unrestricted common law there isn't solving their legal fees to claims ratio. Solvency ratio in Victoria pre common law, pre last common law - given it goes in cycles - 96 per cent; post common law down to 86 per cent.

Disputation: Tasmania, common law jurisdiction, highest level of dispute 32 per cent of new claims. Now maybe in Queensland the fact that you don't have long tails means that disputes to new claims may be distorting some of that data. Statistics are interesting but from the commission's point of view we don't want to draw one set of statistics and then infer what may be a correlation but have to try and work out the extent of causation.

MR MORRISON: Commissioner, if I could clarify, I don't pretend for a moment that adopting or using statistics from one common law scheme is evidence that it works everywhere. Indeed, both in CPM4 and my recent glance in the aeroplane today on CPM5 suggests to me that there is an obvious imbalance in schemes that do have common law. They don't perform so well in some areas and perform better in others. What it does suggest to me - and this is the nub of the submission - is that a well thought out formula for the inclusion of a common law scheme can operate to the benefit of all stakeholders.

PROF WOODS: The exclusion of common law is not necessarily sufficient to create a perfect scheme.

MR MORRISON: I don't believe so, no.

PROF WOODS: I think that's worth pursuing.

MR MORRISON: Yes.

PROF WOODS: What does interest me though - and you would have heard some of this in the previous discussion - is by what criteria do we evaluate the role of common law, so that to the extent it may have relevance it is well targeted and well constructed?

MR MORRISON: I'd be interested to be a player in that equation.

PROF WOODS: Please give us submissions - - -

DR JOHNS: That's the key - - -

PROF WOODS: Yes. Please, as you go back tonight, reflect and if you can help us - as I said earlier, I'm starting to develop some criteria where the seriousness of the injury, the extent of fault, the importance of certainty; these are the sorts of issues that we want to get to the heart of. Then if common law falls out of that, so be it.

MR MORRISON: Yes.

PROF WOODS: If it doesn't, so be it also. We are neutral in this respect.

MR MORRISON: I think one of the disadvantages is that there isn't a lot of data available, from the worker's perspective - accurate data. You referred to the Neave and Howell material back in 1992, and the PWC material in 2001. I'm not aware of any national data source. I can tell you, certainly in Queensland, that the WorkCover authority has embarked upon its own survey and I would be confident that it wouldn't be that difficult to get that important information from Workers National. If I can take you then to page 162? It's paragraph 7.2. It's footnote 3 from that paragraph that says:

> There are also concerns over the increasing proportion of scheme payments, which were for legal fees rather than compensation to ill or injured workers and concerns over the impact of common law on early intervention.

I'm not going to pretend to support the argument that legal fees are an important part of the process, given that I am a beneficiary of that process. I do make this observation, that looking statistically, if you look at the average legal fees paid across the schemes, comparing common law and non-common law schemes, one would expect that the tenor of that statement would suggest that in the non-common law schemes your legal costs are very low and in the common law schemes your costs are very high.

I do draw on CPM5 for this purpose, commissioner, because it's current data. The Australian average is $10,363. Queensland came in at $6470, and - - -

PROF WOODS: Can you remind me of what the ACT figure was?

MR MORRISON: I can get it for you very quickly.

PROF WOODS: That's all right. I will look it up.

MR MORRISON: I have adopted the NT only because they opened in the submission, and they came in at 14,000. The figure for ACT is 23,656.

PROF WOODS: Compared to the national average of?

MR MORRISON: Of 10,363. I'm not here to support the ACT's practices at common law. That in itself suggests to me that the prediction that legal costs were going to ruin the scheme is not an accurate one. I am certainly cognisant of the fact that in the attaching notes to both 4 and 5, reports in CPM, there is a reference to a potential distortion of the data in Queensland, in that the average statutory dispute cost was about $400-odd against, in CPM4, a common law cost of around 20, I think, dropping down to 13 in 5.

What has been overlooked in the collation of that data is that costs indemnity of course was abolished in 1996 and the payments you see are payments on old claims. As you are probably aware the WorkCover authority makes no payment on legal costs, at least to the plaintiff's side, since that date. If I can then go to page 163, you do make reference to the Queensland scheme, where you say:

> There are no caps on damages in Queensland and Tasmania, but access is subject to a minimum injury threshold.

I wasn't certain what you meant by that in respect to Queensland, but our interpretation is that we don't have an injury threshold per se. We have an election access point, meaning that the worker makes the choice but isn't subject to reading any impairment threshold to actually get access to the common law. The consequences are the right to legal costs.

PROF WOODS: Interestingly, a fact that I was unaware of is that in Queensland the scheme started in 1886, merely two years after it sort of had its world initiation.

MR MORRISON: If I can then turn to page 165, and there are the dot points outlined. These are the arguments put forward by stakeholders against common law, and starting at the second dot point.

> This scheme is slow and denies the victim access to timely compensation.

I certainly make the concession that in bygone years the respective schemes were very slow. Pre the significant changes in our state we averaged 4.7 years from

date of injury to date of completion. Since the advent of the pre-court processes in our scheme, which commenced in 97 but really didn't kick in, in a practical sense, till about 99, you are now looking at, I understand, an average of about nine months post-election, which means post-end of the statutory process for a 70 per cent conversion of claims.

What I mean by that is that before claims can be litigated they go through a statutory pre-court. WorkCover informs us, as of last week, that they run at 70 per cent success rate converting, so that has narrowed significantly in those time frames and I would submit puts paid to the arguments that were submitted some years ago. I don't pretend that's the picture in every other state because not all states have a pre-court process.

In relation to the third dot point, of high transaction costs undermining affordability, I again bring back reference to CPM4. As I interpret that data the transaction costs across an entire scheme do not suggest that common law schemes are the ones that are the most expensive. Indeed, in some states it's quite the opposite. I would suggest, cheekily, that the difference between the two might be the quality of management of the scheme state by state.

PROF WOODS: As we have discussed with other participants, you can construct on paper the best scheme but a lot depends on how it is managed.

MR MORRISON: Yes indeed. I have already made the point about rehab and return to work, as it appears in dot point 4, so I won't revisit that, and similarly dot point 5. If I can turn to the dot point referring to the provision of lump sums, which can be dissipated by the victim?

PROF WOODS: Yes.

MR MORRISON: My first submission is that that simply isn't a valid argument to eliminate access to common law. There is certainly some data upon which that statement has been made. The Neave and Howell study, which of course were motor accident victims and not workers comp victims, made reference to that issue, as did the PWC. I would submit two things in relation to that. The first is that since the advent of structured settlements at common law that will go a long way to solving any apprehensions about that. Secondly, it certainly is the choice of the worker as to how they allocate the funds but I would respectfully suggest, on an anecdotal basis, that a good majority of workers use those funds quite positively, and those involve occupational change within an environment that they can control.

PROF WOODS: Yes, you do talk about the rights of the worker to use the funds as they wish, but the cost - - -

MR MORRISON: Consequent costs I understand is an issue - - -

PROF WOODS: - - - of the scheme is being borne either by the employer or the taxpayer.

MR MORRISON: Yes.

PROF WOODS: So their interests must also be recognised.

DR JOHNS: Yes, we tend to talk lump sum and common law as an example of - - -

PROF WOODS: Yes, whereas structured settlements, commutations, common law - - -

DR JOHNS: Yes. We should flesh that out.

MR MORRISON: If I could turn to - this is still on page 166 - the submission of the Minerals Council of Australia, their concern is that the common law acts as a disincentive to return to work and directly conflicts with focus on injury management. The first statement I make is a statement I made earlier, that in a scheme like ours, where your election postdates your statutory intervention, I would submit that's not supported on that basis and indeed there is ongoing availability of rehab, which is used in the common law process. There is a reference by the council to:

> The adversarial court system is not always in the best interests of the injured worker. Third parties may be the beneficiary of such action.

I wasn't certain who they were referring to. I was a little concerned they were referring to lawyers. I would reiterate the submissions of Mr Stack, earlier, about the importance of lawyers in the process.

DR JOHNS: How does it work? If someone in the Queensland scheme has to go through some process before they elect to go to common law they still nevertheless know that they have access to the common law.

MR MORRISON: Some do and some don't.

DR JOHNS: And that there wouldn't be much point in doing it if they were rehabilitated and back to work. There is a bit of gaming that goes on and we have to make that part of the picture.

MR MORRISON: Certainly. Some do and some don't. WorkCover has a statutory obligation to advise a worker of the common law rights, which accompanies a notice of assessment, which is the end part of the scheme. Others are more streetwise and consult lawyers earlier in the process. I can't - - -

DR JOHNS: What I'm saying is that even if the lawyers are the back end they are known to be in - I should say the law is a tort, but there is access to some other form of benefit. It's there and it does affect the thinking of someone who might otherwise be persuaded to be more readily rehabilitated or return to work or whatever, however fanciful. I'm just saying - - -

MR MORRISON: In theory I agree. In practice what has served as a pretty good deterrent, at least in Queensland, is what we call the money or the box in the election; pre-money or the box. The advice is probably clear from the lawyer about where you should go. Once the money is dangling it becomes a different equation. As I say, the conversion stands at 3 per cent, so it seems to be a very effective tool.

PROF WOODS: Just on page 167, are you similarly going to point out the difficulties with the dot points that we have there?

MR MORRISON: I hadn't proposed to. I thought I had made all my points in my primary submission. If you want me to go through them I'm content to.

PROF WOODS: Carry on.

MR MORRISON: If I could turn then to page 171, about three-quarters of the way down: it's a reference to a publication by Dewees, Duff and Trebilcock. They talk about empirical studies not supporting the conclusion that common law provides greater incentives to reduce workplace risk than does a no fault scheme. The final statement they make, in circumstances where they obviously believe that the workers compensation appears to have a greater deterrent effect - I'm not certain what they rely upon to reach that conclusion. I am certainly cognisant of the fact that, depending on the way premium is structured - and there have been movements from class-rated systems to experience-rated systems - there is an impact or not an impact.

From a purely common law perspective, in my own experience as a practitioner dealing with employers in the litigation process, I couldn't believe that an employer would think a statutory process operates as a greater deterrent than what happens in the common law arena. Again this is a difficult one because I don't expect there is any statistical data available to you.

PROF WOODS: I'm happy to revisit that study and come to a view on its worthiness for inclusion.

MR MORRISON: Yes. The one potential source of information which may assist, and I'm happy to assist you to follow it up, again is from our WorkCover authority who conducted a survey of employers as well.

PROF WOODS: Yes.

MR MORRISON: Without having sighted the survey I would expect that there would have been some reference to that issue.

PROF WOODS: If you could help us access that that would be good.

MR MORRISON: Certainly. At page 172 - and this is a reference to the Australasian Faculty of Occupational Medicine's submission. They talk about:

> The use of common law as an incentive to prevention is too slow and indirect and its case-by-case processes do not make for orderly setting of priorities in prevention.

The example they raise - I'm not certain it's their example or whether it's an example you've put in, commissioner - it's the example listed below that quote - - -

PROF WOODS: Yes.

MR MORRISON: - - - of a mesothelioma sufferer. I would submit that that example is not in the main representative of the true picture that appears in workers compensation. Most of the claims, at least in our jurisdiction, are body-stressing claims, and the time frames within which you have a turnaround are significantly greater than the latency periods of 40 years alluded to in the case of the meso claim. Particularly with the advent of pre-court processes, the impact of that becomes very severe very quickly, and my submission, commissioner, would be it has a profound effect in relation to employers.

PROF WOODS: We do talk about "a greater problem" - I mean, we're pointing that out as at the end of the spectrum, not as being necessarily typical of the spectrum.

MR MORRISON: Certainly. If I can then move further down in the submission from the same body, where they talk about:

> Common law is potentially available for injury where the source of energy comes from within the body, ie, over-exertion injury.

They go on to talk about how the implementation of manual handling practices over the last two decades have had a modest effect on the severity, the conclusion being that employers are right to question how they can reasonably be held negligent for these types of claims.

I'm a little confused by the statement as a lawyer, I must confess, because there are over-exertion injuries and there are over-exertion injuries that attach negligence. The example I give, commissioner, is a meatworker on a process line. If a meatworker is on a line and the processes are in accordance with the requirements, well, he could still potentially suffer an over-exertion injury. On the other hand, if a practice is employed to speed up a chain or to cut out rest breaks or indeed to cease rotation on the chain, you have the added element of negligence that attaches, and there's a very clear distinction between the two. So I was concerned that the result that that body sought to derive was that, "You've got this whole body of injuries that occur for which we can't possibly be negligent."

PROF WOODS: Yes.

MR MORRISON: At page 173 under the heading of Compensation for Workplace Harm - it's about three-quarters of the way down - it refers to:

> The advantage of common law is likely to be greatest in the case of non-economic loss -

the discussion being that you've got your greatest variable in your general damages for pain and suffering.

I would submit, with respect, that economic loss is a significant variable in the common law arena, and the example I give you is the blue-collar worker who's a brickies labourer, sustaining an injury to L4-5, and I sustain the same injury, in the common law arena we will both, if we go through a statutory process, will both be assessed, presumably under AMA, will both have the same range of movement testing, we will both probably have the same impairment rating, but clearly that man's needs will be significantly greater than mine because I'll sit in a comfy ergonomic chair and push my pen. So economic loss is a critical component to variables in the schemes.

If we then move to the bottom of that page - and this is the start of the Neave and Howell study in 1992. The only observations I make about that - I've not seen the study, commissioner, I must confess. I'm referring only to the material in the interim report - the study is about motor accident cases and not workers comp cases, and the data is 11 years old.

PROF WOODS: Yes.

MR MORRISON: The submission I would make, commissioner, is that the world has changed significantly.

PROF WOODS: We'd like some more up-to-date data ourselves.

MR MORRISON: If I could then move to - again on page 174, about halfway down - Neave and Howell go into some of their statistics. The comments I make are these: in my submission, commissioner, the data only serves to highlight that common law will never put the plaintiff back in the position. I mean, it's certainly philosophically designed to do that, but in practice the reality is it never will, and this is evidence of it.

PROF WOODS: "But is there an alternate system which is more capable of so doing?" is a relevant question.

MR MORRISON: We would submit no, on the basis that you simply can't have a one size fits all.

PROF WOODS: Yes.

MR MORRISON: And much of the data, I would submit, becomes obsolete when you look at things like structured settlements, which clearly weren't around in 1992. I have not seen any data that talks about the successes of structured settlement programs. They're only a new concept in our state. I believe in New South Wales, Victoria, they've been around for a bit longer, but I've not seen any data. I could only assume, commissioner, that they'd serve to help that problem.

PROF WOODS: That was certainly what they were addressing.

MR MORRISON: At page 175 - we're still on the Neave and Howell study, where they are talking about dissipation of lump sums - they make the statement that it was not possible for them to determine the number of people who had mismanaged their lump sum, nor was there any statistically significant relationship between the use of a lump sum and any current poverty or insecurity. However, they concluded that undoubtedly some people mismanage their lump sums.

I can only add, in the absence of any other statistics, that anecdotally my submission is that the majority of common law claimants use those lump sums effectively and for the betterment of their occupational position. It's not uncommon, commissioner, for example, for a process worker who can no longer work on a chain, to receive a lump sum and set up a small business where he can control the pace at

which he works.

PROF WOODS: If you could - based on considered judgment - offer an opinion on that in your final submission, that would be helpful. Rather than draw on an anecdote which may present a particular picture, if you would, based on experience across a range of cases, draw a view.

MR MORRISON: Yes. Commissioner, we had proposed, at least in our association, to conduct a national survey.

PROF WOODS: Yes. I remember that early discussion, many months ago.

MR MORRISON: It was many months ago - to address many of those issues, and we intend to have that completed by the closing date.

DR JOHNS: That would be helpful, if you do that.

MR MORRISON: Yes.

PROF WOODS: So that's still happening?

MR MORRISON: It's still happening, commissioner.

PROF WOODS: Excellent. I was a little worried by the size, but I'm pleased by what you tell me.

MR MORRISON: Yes. I was going to make the point at the close of my submission that you'll also recall we issued an invitation to work on a draft for this perfect scheme.

PROF WOODS: I know, yes. Is that still - - -

MR MORRISON: Well, it's not off the agenda. We recanted when we saw the position of some of the states on some of the constitutional issues.

PROF WOODS: But if you can do some survey work - well, I mean, if you can bring together that survey work you've been doing and put it in the submission, that would be good.

MR MORRISON: Yes, commissioner.

PROF WOODS: The perfect scheme, I think we can put to one side.

MR MORRISON: For the moment, yes. At page 176, I now turn to the PricewaterhouseCoopers data of 2001. The first observation I make is, they refer to the New South Wales scheme, which I presume was the only scheme addressed in that survey. My colleague Mr Stack spoke about the successes of the New South Wales scheme until recently. I would simply make the point that in well run common law schemes that have responsible pre-court processes, figures like 4.7 years are ancient figures.

PROF WOODS: Yes. You drew our attention to the more recent Queensland experience.

MR MORRISON: Yes. If I can then move to the bottom of that page, this is the submission of the Insurance Council of Australia, and the comment is made - and I think Commissioner Johns may have been alluding to the potential of this issue - that:

> Where access to common law exists, it has been suggested that workers may even be encouraged to act in a manner that would maximise any lump sum payment. There is an equity case for common law access to catastrophic -

et cetera. I'm certainly alive to the criticisms of legal professionals, noting in particular a well-known cartoon where an injured man with a cast on his leg says, "My doctor told me I could return to work, but my lawyer told me I can't." The comment I'd make, commissioner, is that with the introduction of an election system, it has all but eliminated any references to those sorts of behaviours, for the simple reason that the odds are markedly different now. The worker has to make an informed choice between the taking of a lump sum and proceeding to common law damages, and if all of this behaviour existed in a scheme like Queensland, for example, you would expect the conversion rates to common law to go through the roof, and that simply hasn't been supported by the evidence.

PROF WOODS: Is there a change in the rate of election of common law in Queensland starting to become evident through the statistics though?

MR MORRISON: Not a marked change. It has hovered around the 3 per cent, commissioner.

PROF WOODS: But in terms of new claims that are coming in on common law?

MR MORRISON: I'm certainly aware that WorkCover reported an increase, I think in the year 2001, largely centred, we believe, around some changes to legislation. Whenever there is a change to legislation, there is a rush to file claims

where there's a sunset provision. But my understanding, commissioner, is, taking out that one variable, there is no such increase.

PROF WOODS: We're pursuing it.

MR MORRISON: Yes. WorkCover can help you. I'm just trying to run through some quickly. The Law Society submitted to you, on page 178, Queensland Law Society - talking about the disincentives - - -

PROF WOODS: One of several areas where we quoted them - they now acknowledge that we so did.

MR MORRISON: Yes. The only submission I'd make in relation to that issue, commissioner, is that if one looks to, as a comparison, a statutory long-tail scheme, which effectively we call a pension scheme, against a lump sum common law scheme, our concern is that a statutory long-tail scheme invites what I would refer to as "pension syndrome", and I think an earlier speaker referred to that. I think there was no greater example of that than in the New Zealand scheme implemented after the Woodhouse reforms, and we would have significant worries that any moves to implement a long-tail statutory scheme will invite that sort of behaviour.

PROF WOODS: Mind you, we do have evidence of such a scheme, being Comcare.

MR MORRISON: I'll come to Comcare in a moment, when we get to your recommendations, commissioner. Just excuse me for a moment, commissioner. If I could turn over to page 181. It's a discussion on legal costs in each of the schemes, and I simply want to highlight a point I made to you earlier in relation to the legal costs attaching to a scheme like Queensland.

The notation you make there, commissioner, is the appending notes I was referring to in CPM4. The contrast in CPM5 is quite marked; you've had a drop of $12,000 per claim. But moreover, as I indicated earlier, the data, in my respectful submission, is not accurate because - referring to long-tail payments on old claims - it's not representative of the legislation moving forward.

PROF WOODS: Yes. We'll go back through that data.

MR MORRISON: Thank you. Further down on that page there is a reference to common law legal action having a significant effect on the size of medical costs, and the suggestion is made that:

The medical service provider is placed in the position of not only treating

the injury or illness, but also providing medical evidence on the extent of the harm for legal purposes.

I would again respectfully submit that modern practice in common law litigation has moved on since the days when a lawyer, for the sake of getting a report, got a report from every treating practitioner in a scheme.

PROF WOODS: Yes. I mean, it's still a difficult area though as to the questions asked of the medical practitioner and the competence of the medical practitioner to comment on things like work-relatedness or fitness to return to a particular occupational situation.

MR MORRISON: In a statutory environment, certainly, commissioner. In a common law environment, I would submit that the world has moved on markedly, to the point where many jurisdictions are now not only encouraging the use of joint experts, but indeed seeking to legislate. In practice, the use of experts has been isolated to those who are well regarded in that practice.

PROF WOODS: If you could draw that out a little further in your submission.

MR MORRISON: Certainly. Over to page 182 under 7.4, you comment, commissioner, that the commission regards the common law as a flawed mechanism for providing workers compensation in most circumstances. We are certainly cognisant of the arguments that were put forward against coexistence, and we make the concession, commissioner, that in schemes as they existed five or six years ago there's merit to that argument.

PROF WOODS: That they were concurrent.

MR MORRISON: That's right. We would submit that since those changes, the two very happily coexist and, indeed, statistics bear that out. Before I get to your final recommendations, commissioner, at page 183, the final paragraph, the comment is made that evaluation of whether common law should be included within a national scheme, should consider its impact on the welfare of the most seriously injured, rehab and return to work and scheme affordability.

If I can simply go through them one by one. Our submission is that the common law shouldn't discriminate in relation to severity of injury. The rider we put on that, commissioner, is that it has to be within the constraints of scheme affordability and we believe there is ample evidence to show that that can be so. The second point about rehab and return to work I've mentioned twice now, but the imposition of elections, I believe, solves that concern. In relation to scheme affordability, I make the simple submission that I think the CPM 4 data speaks for

itself. Five doesn't change my views on that, commissioner.

So finishing then on the recommendations put forward in chapter 7, the first recommendation is that common law should not be included in the framework on the grounds that firstly, it doesn't offer a stronger incentive for accident reduction than a no-fault scheme. You've heard my submissions on that, commissioner.

PROF WOODS: Yes.

MR MORRISON: I will provide you with data if I can access it from WorkCover, but would invite you to do the same.

PROF WOODS: Yes, thank you.

MR MORRISON: I reiterate our submission that our belief is that it's not so in the common law environment. Secondly, that it does not compensate seriously injured workers to a greater extent than statutory schemes. I refer, commissioner, to example 7 in CMP 4 on page 101, which gives us a hypothetical example of a seriously injured person and the applicable payments and the jurisdictional differences.

The submission I would make, commissioner - and you've no doubt seen the material - that you have some common law schemes that offer greater, some no-fault that offer greater, but as a general submission if you look at the variables between the lowest and the highest, my submission is that it would be marginal at best in terms of its argument. Although I haven't had a close analysis - - -

PROF WOODS: We say, "Does not compensate to a greater extent than" - I mean, we're not there promoting one or the other; we're saying that there is - - -

DR JOHNS: The biggest margin - - -

PROF WOODS: Yes, that whatever difference is, is marginal. Isn't that what you're agreeing with?

MR MORRISON: Which is my submission, yes. It is marginal.

PROF WOODS: So I can tick it as an agreed - - -

MR MORRISON: Yes.

PROF WOODS: That's good.

MR MORRISON: But the second arm to that, commissioner, is that that is not an argument then to delete one of them. As I said, I haven't had a close look at five, but I understand the figures aren't markedly different. Dot point 3, that it may overcompensate the less seriously injured, who in the normal course of events could be expected to be rehabilitated and returned to work - I'd make the bold submission, commissioner, that I'm not aware of any evidence that supports that contention. I would certainly submit that since changes in schemes like Queensland, that has eradicated any beliefs that previously existed about - you file your writ in the registry and you pull the lever. There are significant hurdles both in relation to elections and cost indemnity which serve as great deterrents to that belief. I won't touch on - - -

PROF WOODS: Rehab we've been through.

MR MORRISON: We've covered, commissioner.

PROF WOODS: Yes.

MR MORRISON: There's a more expensive compensation mechanism - again, I - - -

PROF WOODS: That's the transaction cost issue.

MR MORRISON: I refer you to the CPM 4 data.

PROF WOODS: Yes.

MR MORRISON: Finally, if common law is to be included in a national framework then access should be restricted to the most seriously, or non-economic loss. I've covered both, but I'll repeat them. Philosophically our view is that the common law should not discriminate on severity, the rider being scheme affordability.

PROF WOODS: Yes, there are some pragmatics.

MR MORRISON: Secondly, that if there is access it's non-economic loss only and I refer you back to the examples I gave about the critical importance of economic loss in that equation. Those are my submissions, commissioner.

PROF WOODS: That's, I must say, not only thorough but very helpful. It's nice to see somebody who has pondered each para as they go through.

MR MORRISON: My wife hasn't been forgiving me for analysing CPM 4 data for the last six months.

PROF WOODS: They are good reading, though, aren't they?

DR JOHNS: Simon, thank you for those. I think they're very good. To the extent that you prove each point, you also remind me, though, that the experience of the last decade or so has been how to fence off or fence in common law. In other words, it's all an experience of saying, "Okay, well, we don't want to deny people access to common law nevertheless" - and there have been a lot of "neverthelesses".

MR MORRISON: Yes.

DR JOHNS: Now, X years down the track we've got to a point where we're not talking common law any more; we're talking to the specific contribution by the legal profession to some aspects of workers compensation.

MR MORRISON: Yes.

DR JOHNS: If that requires a better explanation and teasing out all the elements, your check list that you started to build up, I think that's very useful. Okay.

MR MORRISON: Yes, I make the comment, commissioner, that in my capacity in APLA as a national chair, there are divergence of views even within our organisation.

DR JOHNS: Yes.

MR MORRISON: You were alluding to the Law Council earlier and the different stakeholders - - -

PROF WOODS: No, we understand that.

DR JOHNS: I think we will get to a very good discussion about - - -

MR MORRISON: Yes. The second arm of that - sorry, commissioner - is that at a practical level the cooperation between the profession and the insurers in the management of schemes is critical to the equation. Now, I would be confident that when you speak to our majority insurer in Queensland, they will tell you that there has been a significant mind change in relation to that relationship, and the parties have worked very well together to minimise unnecessary cost in the scheme. I do believe that can be achieved nationally but the difficulty will be breaking away from the insecurities, if I can call them that, in each of the states. I wonder whether (indistinct) is a vehicle that could be used a bit more to do that. I know they've commissioned reports over the years, but I question whether all the stakeholders

were really involved in that process.

PROF WOODS: Yes, all right. You certainly, as you went through, exhausted all of my other questions.

DR JOHNS: Very good.

MR MORRISON: Thank you.

PROF WOODS: Thank you very much.

PROF WOODS: I'm going to be calling a break for lunch and resumption at 2 o'clock, but there is a participant who has asked to make an unscheduled presentation - Mr Sandilands, if you could come forward. For the remainder, we will be resuming at 2 o'clock.

May I remind you that this is an inquiry about national frameworks for workers compensation, so if you could address your remarks to the purposes of this inquiry, that this is not an inquiry into workers comp as such, it's a national framework. Also, you are protected under our legislation where you make comments in good faith, but if they exceed that limitation, then our act provides you no protection.

MR SANDILANDS: I understand.

PROF WOODS: If you could, for the record, please, state your name and any position that you may beholding as you come before the commission.

MR SANDILANDS: My name is Peter Sandilands. I'm a student at UWS on leave of absence. I used to be a career auditor who worked in the public sector of the UK as well as the private sector. In my position I was required not to just get an experience in all different types of organisations, I was required as a public servant to do an awful lot of reading on many different issues. Most of that - - -

PROF WOODS: I have the benefit of a submission, or in fact I think three now we're up to submissions from you, but if you could briefly state for the record - - -

MR SANDILANDS: I will be making a final submission, but (indistinct) until January and I'll briefly summarise now what I'm going to say.

PROF WOODS: Thank you. Please.

MR SANDILANDS: I looked at workers compensation 20 years ago, for a particular reason. In looking at that, I looked at it strictly from an audit point of view, not from any academic knowledge or what have you, just strictly from an audit aspect. In that report I identified all the facts relating to the situation and all the issues. I presented all the issues in plain English and in diagramatic formulation so that everybody could understand what was involved.

What I found out was that workers compensation was a social issue and was not related to accidents as such. This is because in the mid-seventies the ratio of workers compensation to (indistinct) 1.7 per cent and then it grew, I think, to about - when I looked at it - I'm not quite sure but I think it was about just over 2 per cent - but I know the accidents in any organisation, particularly in a large organisation statistically won't vary from one year to another. The larger the organisation, the

more certain that will be statistically. So I then commented on the issues which were required to improve that aspect, without knowing the full implications of all this, because this was mammoth - it was beyond any one person understanding, to comment on what should or shouldn't be done.

Anyway, since that date I have been researching into workers compensation and safety for a particular reason, in that I knew with an absolute certainty I was correct in what I said, but I had no academic qualifications or research experience to substantiate what I said. Consequently that is one of the reasons why I'm at UWS, to research into that particular area, which I have done. Its conclusion can be this: workers compensation is the result of social change, resulting from higher employment, resulting in increased anxiety, resulting in increased financial insecurity, resulting in people maximising the benefits to which they are perfectly entitled to under the law.

The question then becomes: how do we correct that? One way is to correct the law in terms of simplification of the law and rules and regulations. That is the obvious way. The next thing - when we say, "This is people committing fraud." But is it? The insurance company have just submitted a report to, I think, one of the Senate committees to the effect that 1 per cent of all workers compensation claims are fraudulent but they know 10 per cent are fraudulent. That's a pretty sweeping statement to make. I know for a fact, as does this commission, what applies in any environment - economic environment is Plato's principle, or sometimes known as the 20 to 80 rule. Does 1 per cent applied to the 20 per cent or does it apply to the rest? Certainly does the 10 per cent apply to the 20 per cent which relates to 80 per cent of cost, or does it apply to the balance?

The point I'm trying to make is that it is in the interests of every organisation to buttress their own particular position. That's been my experience as an auditor in many organisations. That does not mean to say they are behaving dishonestly; they're behaving quite naturally and normally according to their profession, but as an auditor I question everything, so I question - are people really committing fraud? Or is it just quite normal and natural human behaviour? I think I submitted to the Productivity Commission some data from Japan to the effect that in 1985 some insurance experts ascertained the ratio as 1.1 per cent, but I also know in Japan they had full employment at the time and I also know that experts came up with the fact that it was due to high (indistinct) density, automation, et cetera. I think I also submitted that in one textbook - some research I'd done on FMS - they had come to the same conclusion - Japan's high productivity was due to high (indistinct) automation, et cetera - and not all connected.

I know perfectly well the Productivity Commission in their report into the mining industry - I think it was 1998, I'm not quite sure - - -

PROF WOODS: Yes, black coal industry.

MR SANDILANDS: Yes, at about that date, they ascertained a report by the Tasman Pacific and I made precautions to get a copy of that report, which I did do. Now, that report made it perfectly clear - I thought anyway - that safety is really - was relative and was related to productivity. So that evidence of it is quite clear - safety is related to productivity. Workers compensation, workers - it is a social cost. It seems to me that it has to be dealt with from a social basis and to confuse it with economics you're going to land yourself in a whole heap of problems. Social costs are social.

Coming on to safety. Commonsense should tell anybody that a business leader has only got two factors: equipment and people, and he has got to make a profit. Now, if he's a good businessman he'll likely have up-to-date equipment, good quality staff, good industrial relations and a good safety record, and the (indistinct) therefore apply if he's a poor businessman, it then follows and it confirms what the productivity have found, that the safety record of an organisation is relative. I say commonsense tells us that anyway. I say productivity has found that out. It then falls from that, that the correct way to treat accidents, is to treat accidents as an economic activity, and a normal factor of economic activity.

Now, what does that mean? It then means you then have to look at the cost of an accident, because any business man will only make any decision if he is required to do so for economic reasons, and you can have all the laws in the world, that's not going to affect that businessman's decision; that's why there (indistinct) for a legislation (indistinct) just will not work, and it will never work. It is the board of directors who make the business decision of how to invest money, not the man on the shop floor. If the board of directors is not convinced to invest money in making a bigger investment then nothing will happen, and that's the end of it.

It should not be too easy to ask - well, 20 years ago one could not evaluate the cost of an accident because the technology just wasn't there, but with the Internet and technology now, it should be a relatively easy process to evaluate the cost of an accident, and I know perfectly well it is. But a cost of an accident is not just a workers compensation cost. If you have an accident in an manufacturing environment you're going to lose productivity as well, you're going to produce less widgets, so you also have to add on to that what is the loss in productivity. It seems to me, as long as there's such a system whereby one emphasises and forces the businessman to work at the economic costs and he is made aware of what these economic costs are, then he's going to make the appropriate business decision. That to me is going to be the best and quickest way of correcting Australia's safety record.

I would emphasise again Australia's safety record is no worse than anybody else's. It's just our workers compensation record which is bad, but that comes back - even unemployment. Unemployment say is 5 per cent or 6 per cent but that is only the headline figure. There's a huge amount of people on disability support pension, people who can't find jobs, discard workers - so the anxiety is still there in the community. It's still a social cost. I don't know the answer to these questions. My job in the UK was to do an audit and just, "These are the issues. Let somebody else deal with the problems," and just hand it over to the experts. Well, that's just exactly what my submission would be. I will just, to the best of my ability, define what the issues are and let those responsible who have the knowledge do whatever is necessary.

I am trying to ascertain a legal case to emphasise this point, because I've looked at the workers compensation report in 1994, I think it was, and I've been listening to some of the evidence, and I don't think that you've got a chance of getting a voluntary agreement to the states. There are just too many divergences, too many differences, too many jobs at stake, and nobody is looking at the picture. We've got an ageing population and a profession - medical, legal and what have you, and all the implications which flow from these bare things. But somebody has got to, and the politicians won't but a law court will if they're presented with the right sort of evidence. They will say, "Right, this is the law," based on evidence substantiated legally. Then a court will make a decision: accidents are normal function of economic activity.

That will then force the politicians to start reviewing the situation, get them to the party, so to speak, and get people talking. I don't think it would be that difficult, quite frankly. A cause of an accident is easily ascertained and there can always be agreement on that if it's explained properly. Accidents - I don't think the way to act is that difficult. There was this case in the construction industry about rigging. Now, to my way of thinking, if a construction company had not supplied rigging, then you bring the full weight of the law down on them, but that is in minor cases. Most cases are borderline cases, in my experience as an auditor - borderline cases where it's not so cut and dried.

Therefore, you have another system for borderline cases and, based on my experience, it's just normal training of the workers when they first join the workforce. Nothing sophisticated, nothing fancy, just normal everyday training as to why a young worker should do things the right way. As that person gets more experience he will do things in a safer way, as far as the worker is concerned, but if a young employee is not given training - proper training - then the chances are he is going to have an accident. There's no point in the training people saying, "Oh, we've got to train the managers." There's nothing wrong with Australia's managers. Everybody is as competent as any of them - that's not the problem.

Australia's managers have another problem. It's related to the information needs of the managers, or at least that was the problem 20 years ago. I don't know what the problem is now. Another example of that is in both Email and AMIL. There was nothing wrong with the managers. They were just the same as the managers in the UK - no different. The only differences, they were all managing by the seat of their pants. They did not have what I call an information system by which they managed the business. That was the same in Ampol and it was the same in Email. The managers - no different. Nothing wrong with the managers; they just did not have the information system.

In the business course we have had to do some case studies, and you had the Ansett case study. One looks at that - it's the same thing. Eddington, the manager, used to say Ansett was a great company, lousy business. What did he mean though? The managers who insisted on looking at the case study did not have the means to make commercial decisions. They didn't have yield information and what have you to make commercial decisions. What happened there was Ansett was the old school, a self-made man and he ruled Ansett with the rule of thumb, and he was what's called - he was a good manager but he knew the business. He did not build up a management team. He did not build up a management information system. Consequently, when he left and somebody else came in, they were lost.

PROF WOODS: I think, Mr SandilandS, we're sort of straying a bit.

MR SANDILANDS: I know what you're saying, but I'm saying a general problem. That's the same problem in workers compensation. The systems were not available 20 years ago but on all the odds, the systems are available now to define the cause of accidents - the technology - but I don't know, but all the odds are. I think that would be the quickest and most effective way for Australia to improve; in other words, preventative. I'll just say I am trying to arrange a court case. I've got all the evidence I need, I've got all the legal opinions I need. All I've got to do is get a lawyer and arrange finance. I've got that in hand and I'll do so. I'm doing it in my own interests but I'm also doing it because I do know it's in this country's interests because I say you'll never get voluntary agreement; not with all the states - that's impossible.

PROF WOODS: Okay, and that will be the subject of your submission.

MR SANDILANDS: That will be the subject of my submission - in broad detail.

PROF WOODS: Okay. Thank you very much, Mr Sandilands. We will adjourn until 2 o'clock.

(Luncheon adjournment)

PROF WOODS: Thank you for your tolerance and patience in waiting. My apologies for the late start. Could you, for the record, please state your name and any organisation you're representing?

MR SPLATT: Kerry Michael Splatt. I'm a solicitor, and I'm not representing any organisation.

PROF WOODS: Very good. We have the benefit of a submission from you. Do you have an opening statement you wish to make?

MR SPLATT: I represent injured workers. A small part of my practice is representation of injured workers in Queensland, and I'm concerned about the recommendations to interfere with a good profitable scheme that operates in Queensland.

PROF WOODS: Do you want to elaborate on that or shall we do it through questioning?

MR SPLATT: I can take you through my submission. Should I do that?

PROF WOODS: We've had the benefit of reading it, but if there are some particular points you wish to draw our attention to in it, that would be helpful.

MR SPLATT: I think I just want to emphasise that I would like the commission to - when it makes the recommendations in relation to common law, that it have regard to the jurisdictional differences in the states. There are some common law jurisdictions which are very successful with their common law and other states which are disastrous. In Queensland we've worked cooperatively together for the last seven years to ensure that litigation is a last resort and that a profitable and good scheme is operating, which is unlike other states. In Queensland we think there should be no interference in such a good scheme. I'm not aware of any major lobbying force for it.

PROF WOODS: Could you define for me what are the particular characteristics of the Queensland scheme that, in your view, make it successful? What are the defining features that focus on this outcome?

MR SPLATT: The mandatory pre-litigation procedures which we've had in place for some time. If other states had used us as a model, we don't think we would have even had the so-called insurance crisis - if people had followed the Queensland model. Also we have the situation where injured workers have to go through the statutory process first. An offer is made, based on a medical assessment, and the injured worker has to elect whether to proceed to common law. That's a very small

percentage. I think it's only about 3 per cent of such people that proceed on to common law.

PROF WOODS: Even then, not that percentage then end up in court.

MR SPLATT: That's right. A very small percentage end up in court, because in the mandatory pre-litigation procedures the legislation makes it mandatory to have conferences and there are great consequences of each party going to court, and the injured worker and WorkCover are forced to come to a very quick conclusion to their claim. We also have a very open book process in relation to discovery.

DR JOHNS: Could I just go back to that point? We had this debate about what is alternative dispute resolution, and it seems to me that the Queensland system using lawyers, in effect, has an alternative dispute resolution system. It is a system of negotiation.

MR SPLATT: It is, but it's based on common law.

DR JOHNS: I think that's something we might just - - -

PROF WOODS: Whether you need common law as an end point of it - - -

DR JOHNS: I'm saying just because the lawyers are involved doesn't mean that it's not an ADR, do you know what I mean? That's been my observation.

MR SPLATT: It's effectively an ADR, but it's based on common law. Everyone looks at what a court would do. Everyone is in a position to go to court straightaway, before you go to the settlement conference, and it's entirely based on the common law as to what a court would do with the claim. The beauty of the common law is that it's based on the individual's circumstances and not one shoe fits all.

DR JOHNS: But it's a negotiation.

MR SPLATT: It's a negotiation, but based on - - -

PROF WOODS: But are you saying you need the gun at their head to produce the result?

MR SPLATT: No. You need the process of discovery and all the process that you need beforehand, which you do without having to issue proceedings.

PROF WOODS: But if you didn't have common law as the ultimate threat, would you still get the same beneficial result from the pre-litigation process?

MR SPLATT: I doubt it. I think you need the common law as - - -

DR JOHNS: You need some threat under any system, don't you?

PROF WOODS: Yes.

DR JOHNS: You need someone to say, "You have to settle this." Well, there are consequences for not - - -

PROF WOODS: Or else we - - -

DR JOHNS: Yes, or you take the benefits - - -

PROF WOODS: Yes.

MR SPLATT: Although we agree that the adversarial system is not a wonderful thing, I think that there has to be some need for an adversarial system in the event of - you could have a fraudulent worker or - - -

PROF WOODS: The claim needs to be tested.

MR SPLATT: It needs to be tested.

PROF WOODS: You need a testing of the process. How adversarial that is depends on the different models.

MR SPLATT: But the mandatory pre-litigation procedures are not adversarial. They're open book with discovery and everyone knows the issues and they know what a court is likely to do without the need to go to court.

PROF WOODS: Okay. Mandatory pre-litigation, the statutory processes, the election - are there any other sort of crucial elements that make the Queensland system more successful than others?

MR SPLATT: I think it's the fact that in Queensland we have a very unique system, where the major stakeholders have worked very cooperatively for the last seven years to ensure - - -

PROF WOODS: That's an interesting sort of almost cultural issue, though, isn't it?

MR SPLATT: Yes.

PROF WOODS: How does one create culture of that sort or do you just give up and say there are different systems that operate in different cultures?

MR SPLATT: I don't know why it's not the case in New South Wales, but in Queensland we just got together and we work together very hard to make sure that we have a fair system.

PROF WOODS: You have interesting views on your colleagues south of the border in your submission, indeed.

MR SPLATT: Well, New South Wales is a very litigious state and that could have all been avoided.

PROF WOODS: If we knew how!

MR SPLATT: We have the perfect model.

PROF WOODS: Is there any trend happening in common law claims in Queensland?

MR SPLATT: I've left the figures and statistics to the Queensland Law Society and APLA.

PROF WOODS: Okay.

MR SPLATT: I can only speak in generalised terms.

PROF WOODS: No, that's all right. I know the answer. You talk about, "Queensland does not have long-tailed schemes, unlike other schemes." That's true, to the extent that, in fact, it represents a cost shift to the general Australian taxpayer, presumably?

MR SPLATT: No. A lump sum payment would be - when a claim is concluded, there are large remissions back to the federal government in the form of statutory payments; Health Insurance Commission, Centrelink payments, WorkCover - - -

PROF WOODS: What about for somebody who would otherwise be on statutory benefits for more than five years? Their benefits cease, as I understand it. Correct?

MR SPLATT: They do cease.

PROF WOODS: That person then has to resort to, presumably, social security - - -

MR SPLATT: Social security, yes.

PROF WOODS: - - - which is the general taxpayer.

MR SPLATT: True.

PROF WOODS: Okay. You come at your submission with a concept that somehow we want to impose a different scheme on Queensland whereas, in fact, what we're aiming to do here is not to impose anything on any state, but to do two things. One is to create an alternate scheme, starting with the large self-insurers so that they can deal with their fundamental problem of dealing with a number of jurisdictions, and at the same time, in parallel, have the states working cooperatively, to the extent they see benefit in it, starting with things like common definitions of what constitutes an employer, an employee, work-relatedness and the like. We're not actually saying, "Let's do away with the Queensland scheme." The Queensland scheme can continue to exist cooperatively in parallel - - -

MR SPLATT: The concern is the second phase of the recommendations, that the Corporations Law be invoked to allow businesses to incorporate. The fear is that people - while we don't think they'd leave the Queensland scheme, they'd go to the Comcare - - -

PROF WOODS: If it's so good, I'm sure they wouldn't.

MR SPLATT: That's right, but there's the potential there. If too many people leave the scheme, it can jeopardise the scheme.

PROF WOODS: Stage 1 really says, if you're competing with a current or former Commonwealth authority and you meet the prudentials and others, that you too can apply to self-insure. That picks up some of whom have self-declared, like Optus or others.

MR SPLATT: There's no problem with the first recommendation. That's understood.

PROF WOODS: Step 2 then says, well, perhaps that then creates a class of self-insurers who can get the benefit of a national scheme, ie the current Comcare scheme and those who are required to then continue to operate within the various state schemes. In fact, in Queensland you've got to have 2000 employees, so there aren't too many who fit into that category.

MR SPLATT: No.

PROF WOODS: In both of those cases, if they're the types of organisations that have been experience rated in the Queensland scheme, them moving out of that really shouldn't do anything about the viability of the Queensland scheme anyway, presumably, other than some contribution to overheads or something. It really isn't until you get to the third step of a generally available privately underwritten national alternative that those fears really bubble up, I would have thought. At that point in time, of course, it becomes a question of which is the more desirable from the point of view of the individual employer. If the Queensland scheme is so robust and well-constructed, then maybe it's not a problem.

MR SPLATT: That's looking at it from the perspective of the employer, but what about the perspective of the injured worker?

PROF WOODS: Presumably, before an employer makes an election, they would take into account the views and concerns of their employees.

MR SPLATT: Not all businesses are that benevolent.

PROF WOODS: I said "take into account". I didn't say what conclusion they'd reach. Certainly, we're not seeking to do anything directly in the sense of replacing or altering the Queensland scheme. I mean, it's a matter for that state and its stakeholders to negotiate, as it has done for decades.

MR SPLATT: The concern was just in relation to the use of the Corporations Law to overcome any constitutional - there was a fear in Queensland that there would be an abuse of the Corporations Law to overcome constitutional - - -

PROF WOODS: Our recommendation is to draw on constitutional powers to enable the Commonwealth to offer an alternate scheme, as distinct from replacing current state schemes. What the government of the day actually chooses to do is a separate question. We have a body of professional judgment from medical practitioners, rehab providers and the like who generally are advising us that common law can provide an impediment to early return to work, rehabilitation, et cetera. Is that body of law failing to recognise what's actually happening in Queensland specifically or in fact is that body of professional evidence just wrong, in that you've got some material to put into it?

MR SPLATT: I think it's not relevant to Queensland, and we have addressed that some time ago. Lawyers can't be involved in the statutory process. The statutory process, which entails the rehabilitation, must take place first, and then the common law can come into play once the worker elects what to do; whether to accept the lump sum under the statutory scheme or to try for a lump sum under the common law scheme.

Only yesterday I had a client who went through the statutory scheme, and this is the problem. The doctors there gave zero per cent. He hasn't access to his own doctors. Then he elected to proceed to common law because he was being offered a nil lump sum. When he went to common law we could get other doctors involved; we had our doctors and WorkCover, in the common law stage, had their doctors, who then said there was something wrong with our client. Our client then got a lump sum of $90,000 under the common law system, which was done a few months after the election. So it was done in a timely, efficient manner, without the need to go to court.

The costs aren't great. There are refunds back to the government, in the form of Health Insurance Commission and so forth. That worker needs that lump sum and is extremely grateful that he has that lump sum, where he can provide for his family. The great concern that I have is that there's this patronising recommendation that injured workers can't be trusted to look after their lump sum simply because some have dissipated their funds unwisely.

In Queensland we have to inform - it's mandatory for us to inform - about structured settlements. If there is any concern by any party about the ability of someone to look after their funds then we can apply to get a sanctioning order from the court, or the public trustee can get a sanctioning order.

DR JOHNS: Which is an acknowledgment that someone might blow their lump sum.

MR SPLATT: Yes, but I think it's wrong for any government to say to an injured worker - all injured workers that have come to me say, "Can you give us some money? I can't cope on this statutory" - they are only getting three-quarters of their award wage. They are in great financial distress. They are concerned about their future, with their future economic loss, the fact that they are at great risk in the open labour marketplace. The common question all the time asked by future employers is, "Have you ever been involved in an injury?" They need that lump sum to help them with their commitments, and I think it's an extremely bad recommendation to say they should not have a lump sum.

I have been a bit flippant I suppose, but you might use the case of a senator in Queensland. A senator, some time ago - in the last couple of years - had his lump sum and wasted it on fast cars and couldn't pay his debts and so on that basis should we take away a lump sum from senators as well? It's very patronising to - - -

PROF WOODS: What about structured settlements? Are you finding that that is offering a solution to particular situations?

MR SPLATT: Well, we have to advise the client what to do, if they want to it's there and it's - - -

PROF WOODS: But a view from your own structured settlements: do you have a view on them?

MR SPLATT: They are good in the - - -

PROF WOODS: In what particular circumstances?

MR SPLATT: In the appropriate circumstances.

PROF WOODS: So that's a positive move forward for some?

MR SPLATT: Yes.

DR JOHNS: Sorry, who gets to decide when there should be a structured settlement?

MR SPLATT: The injured person. If the lawyer is of the opinion that there is some sort of incapacity, or likely to be an incapacity, then you get the appropriate medical opinion and it could be referred to the court.

DR JOHNS: So only - the authority at no point says, "We are worried about the use to which the lump sum might be put"?

MR SPLATT: If the plaintiff's lawyer or the defendant's lawyer may think there is some sort of incapacity there to look after it - in terms of ability to look after the funds - then - - -

DR JOHNS: So it's just the plaintiff's lawyer who has, if you like, the decision making?

MR SPLATT: I think that the - - -

PROF WOODS: A recommending role, because they can't decide that either.

DR JOHNS: No, sorry.

PROF WOODS: But they can channel - - -

MR SPLATT: There is a process where you go - - -

DR JOHNS: WorkCover itself or the Queensland authority can't at any stage - - -

PROF WOODS: No. It's up to the court to sanction it, if there's some sort of incapacity there.

DR JOHNS: Yes.

MR SPLATT: But there has to be, I would imagine, some medical incapacity for it. I haven't had to use it yet.

PROF WOODS: Now, your other issue - where were we? No, I will pass on that one for the moment.

DR JOHNS: Just to go back Where are we? You mentioned that a worker would have to rely solely upon the doctors, comprising the WorkCover panel, to make an assessment about injury. You say:

> These doctors have a vested interest in ensuring an injured worker has received very low impairment percentages.

What is their vested interest? Why would you - I mean, that might be the outcome in some of your clients' cases but why do they have a vested interest in keeping the assessments low?

MR SPLATT: They are appointed by WorkCover, although they are supposed to be independent. The WorkCover doctors, although very good doctors - as a lot of doctors do - have a very cynical view of the lump sum payments that injured people should get. They think they should just get on with their life. My father was one of these doctors that - he was a very good doctor but his colleagues and he were of the view that people should get on with their lives, but they don't understand what an injured worker goes through.

DR JOHNS: One alternative to that is just to have a lawyer go to seek medical advice wherever, for an assessment that is reasonable. The middle alternative, or another alternative, is to have a medical panel, as we heard earlier in the day, of doctors appointed, however independently. Any bright side to that alternative?

MR SPLATT: If a statutory system was to function fairly the injured worker should be allowed to have his own doctor giving an opinion.

PROF WOODS: In addition to or instead of?

MR SPLATT: In addition - well, I'd say instead of, but that would not be fair.

DR JOHNS: You don't see a role for any sort of panel of doctors, whoever appoints them?

MR SPLATT: In Queensland we have a new scale, a new system of working out damages. The AMA 5 guide is going to be the new way of making sure there is very little difference between medical opinion, but that's only in relation to general damages and not in relation to other heads of damages. It's a very draconian system and - - -

PROF WOODS: Draconian in the sense of unfair or draconian in the sense of "this is the conclusion that you are reaching in this particular instance?"

MR SPLATT: It's based on disability, not impairment. It's regarded by the doctors I've spoken to as a very harsh way of determining impairment for an injured worker, but that scheme hasn't come into WorkCover yet. The proposal in Queensland is to have one system for everyone.

PROF WOODS: The point I was going to raise, and I may as well, in light of the more recent conversation, is the difference in opinions that the medical practitioners do give - I mean, you just quoted the example of somebody who got a zero impairment rating from one, and yet two other doctors, one that you found and one that WorkCover found, came to a different and reasonably common view on that occasion.

MR SPLATT: Yes. The percentage of impairment wasn't great, I think it was about 10 per cent, and very little difference between the two sides. However, what the common law did - and this is where the fairness comes into it - is that the claim was resolved on a common law basis, taking into account the individual circumstances. Now, another worker would have got $20,000. Another worker may have got $200,000. But it looked at how it affected that worker.

If I cut my finger off I should get nothing. It doesn't affect me as a solicitor. To a manual worker it's disastrous. They are at risk in the open marketplace forever, especially if that injured worker has no training in anything else, he is just a manual worker. That injured worker should get a lot because his livelihood is at risk forever. Getting a lump sum is of benefit to that injured worker and to the taxpayer because - - -

PROF WOODS: And that's an economic loss argument?

MR SPLATT: It's an economic loss argument, which is tailor-made to the

individual. That's why the common law is fair, provided we believe in a fair common law system and not an abused common law system. We think that mandatory pre-litigation procedures make sure that it's not adversarial and it's only adversarial in a small percentage of cases, where it's appropriate.

PROF WOODS: Would such a model though, if adopted in a more litigious state, come up with the same results? Is it the model or is it the culture or is it some combination of the two, hypothetically?

MR SPLATT: I think it's the model. I think the model will then ensure that the culture changes.

PROF WOODS: Change the behaviour. Why do doctors have such differing opinions? We are constantly coming up against this uncertainty of medical opinion and obviously you are finding exactly the same thing.

MR SPLATT: I don't know why doctors - I come from a medical family and they are of the opinion, and their friends and their colleagues are all of the opinion, that if you injure yourself you get on with life. That's the approach they have. They don't understand the financial distress that someone is in. Common law is the appropriate way to deal with it. They have a cynical view; it's like winning the lottery. It just isn't. Unfortunately that's the view in Australian society, that compo claims, in common law, are like winning the lottery. It's the unfortunate cynical view that people have of these things. If they had worked with some of these injured workers they would see that they need it.

DR JOHNS: I've just been interested. You say:

> In Queensland the common law has acted to make negligence claims for RSI exceptionally difficult.

Was that a particular case or was there a government direction - ie, not common law - that cut down on RSI claims? Just to fill me in - I don't know why they are so difficult to succeed in Queensland.

MR SPLATT: At common law it's just difficult to establish negligence for an RSI claim. So there are very few - - -

PROF WOODS: The employer might have the right ergonomic chairs and have set up the screen and - - -

MR SPLATT: Yes. It's just repetitive and they have - - -

PROF WOODS: And maybe it's not negligence.

MR SPLATT: A lot of it is - - -

PROF WOODS: Maybe that's the failing of the common law system, that you have to demonstrate negligence.

MR SPLATT: Also that that's the cause of the injury. A lot of RSI is degenerative. It's pre-existing. It's not the cause of any negligent act.

PROF WOODS: Yes.

MR SPLATT: So causation is another reason why the common law is important to contain, to make sure that the claims are legitimate. So the element of causation is a very important aspect of - - -

PROF WOODS: But one defining characteristic, therefore, of common law, is that it's only relevant where there is negligence that can be demonstrated. So for a large number of people who have injuries that significantly affect their future earning capacity that they don't have recourse to the lump sum that common law offers for those who can demonstrate negligence.

MR SPLATT: They have recourse to the statutory lump sum.

PROF WOODS: Yes, indeed.

MR SPLATT: I'm not saying that RSI claims are not - - -

PROF WOODS: I didn't think - - -

MR SPLATT: And I'm aware - - -

PROF WOODS: - - - if somebody sat on a stool with an old computer and bad lighting and was told to work all day.

MR SPLATT: I think the judiciary in Queensland have a very robust approach to the issue of negligence.

PROF WOODS: Are there particular other areas that you want to draw our attention to?

MR SPLATT: No, I think we've covered it.

PROF WOODS: I found it, as did Gary, a very useful submission to sort of give your particular perspective so I'm very grateful for that and for the time that you've obviously put into preparing it and coming down today, so thank you very much.

MR SPLATT: Thank you.

PROF WOODS: Does that complete the Queensland contingent? Not yet

PROF WOODS: Could you please, for the record, state your name and any organisation that you may be representing.

MR McDONALD: Geoffrey Lloyd McDonald and I'm really just an individual representing my company, Geoff McDonald and Associates.

PROF WOODS: Thank you very much. You've provided us with a substantial submission with a lot of attached material, thank you. You've helpfully also summarised your key points into, from memory, 39 points at the front of that. Do you have an opening statement you wish to make?

MR McDONALD: Perhaps, for the benefit of the audience, just that I entered the field of safety in 1964 when I started research into tractor fatalities and permanent disabilities with the University of Queensland. I was a tutor and researcher for the university for 11 years, when I then responded to pressures to go into consulting, particularly to the Utah Coal Mining Co and other industries. My main interest has always been to research and to find out and understand law and working at the university you would spend half the year trying to find someone who was prepared to put some funding forward and the other half of the year trying to do a year's work.

So I thought that I would be better funding my own research by doing the consulting and doing the research in that, and I found it a very useful activity because it put me hard in contact with the problems in the field. So that's roughly 40 years I've been doing that and I guess it's fair to say I feel a fair degree of frustration at the lack of progress and the lack of development of a profession of safety. Things are still done very much by the seat of the pants and not the way I would like to see them done.

PROF WOODS: You were involved in the Industry Commission's previous - - -

MR McDONALD: Yes. They asked me to do a research project there and I tried to avoid doing it, as a matter of interest, and they kept at me and I sort of put in and said, "I can't do this and I can't do this and I can't do that but I can do those." They said, "That's the best submission we've had." I said, "Look, I really don't know what you want from me. What is it you want?" Their comment was something along the lines of, "We've never seen such a mess as we've seen since we looked at work health and safety. You make more sense than anyone else. Just tell us what you know." So that was the basis on which I did the previous submission which, of course, was the same as this one, as you know, done under severe time constraints and - as the world works.

PROF WOODS: Are there any particular - before we sort of wander through your submission in some detail - matters in that that you wish to draw to our attention?

MR McDONALD: I believe that industry is grossly misdirected in spending its time and effort and money in safety and I believe it's misdirected because the information on how people became killed and permanently disabled - and you will know, of course, that the Industry Commission previous report identified 80.5 per cent of the total cost as coming from permanent disability; a finding which, as far as I can see, has been virtually ignored throughout Australia. It's one that I identified in 1980, that that was the case.

I believe that until we know how people are killed or permanently disabled in fairly good detail, we're not going to make progress, because at the moment in Queensland, and I believe it's the same in the other states, the main thrust is that people have to do risk assessments. They have no knowledge or no experience of how people are killed or permanently disabled and I believe in the major proportion of the prosecutions the person didn't even realise there was a risk in the activity that has led to the death or impairment of the person and really has no idea what to do. These I found to be honest, conscientious people - - -

PROF WOODS: So where is the failure in the system?

MR McDONALD: I believe - I don't know if you got how the female version of the management chain came, but you have a hard copy of it. I think, first of all, the field lacks goods concepts, good terminology that requires the thinking function to be used. Secondly, I believe that the management chain is a very important concept and, for the benefit of the audience, the management chain - you have the community, you have the government that manages on behalf of the community and it has the political section and the bureaucratic or executive system - then that goes to industry associations and unions and then down through the company structure until you come to the manager of the task activity.

Each level of that management chain is better able to do things than can any other level of the chain. So if you're going to get the most efficient action, each level of the management chain should be doing what it can do best and if it doesn't do it then some other level of the management chain has to put in a much larger effort to get the same result. I believe that the weakest link in the chain is at the government level, on the basis that I see them as the only level of the chain that can organise to get the information together on how people are permanently disabled.

They've done some good starting work on the "`killed" business but, as far as I can see, there's virtually nothing being done on the permanent disability or - not in anything like the depth and quality that's required.

DR JOHNS: When you say "they", is this a NOHSC report that you're referring to

or research that they have done or is there a particular - - -

MR SPLATT: NOHSC, I believe, disqualified themselves when they set their national targets. They nominated a 40 per cent reduction in all injuries and a 20 per cent reduction in fatalities over a 10-year period. They did not mention permanent disability. Now, I've given you in there the figures from New South Wales and, as far as I can establish, they're the only state that reports the number of permanent disabilities. In the 92-93 figures, which the Industry Commission used for their report, the incidence in New South Wales of permanent disabilities was 1.7 per thousand employees. The last year that I've been able to get the figures for was 2000-2001, at which stage it's 3.89. So that's a factor of 2.3.

So if you take what was 80.5 per cent of the problem in 1992-93 and multiply it by a factor of 2.3, you have to say, "Well, this is a whole lot worse situation." I'm taking the figures as they're presented. I've talked to the people in New South Wales. They said no. Any changes would take it in the other direction so I'm assuming those figures are sound and reliable. That says that over that time, and I think everyone would agree, there's a much greater effort been put into safety and it has gone backwards. A friend of mine who came out to lecture and help introduce the first tertiary course at a university in Australia, and helped introduce risk assessment, is now of the opinion that risk assessment doesn't work and he made the comment that the bureaucrats have made it impossible to do anything effective in safety. Companies approach me - - -

PROF WOODS: That doesn't lead us anywhere though, does it?

MR McDONALD: I was just going to go on.

PROF WOODS: Please.

MR McDONALD: Companies approach me and they're interested in safety. I said, "Are you interested in ensuring that your people are not killed and permanently disabled?" or "Are you wanting to comply with the government requirements?" They'll all say they want to comply with the government requirements. They see that as needing to be done. I don't see them as the same things. You know, we can explain to them and give them some understanding of why there's a difference. So that then makes it hard. They can go and comply with the government requirements which requires an entirely different sort of approach.

If I were to go in to audit an organisation, my first questions to them would be, "How are you most likely to kill and permanently disable your people?" Then the next question would be, "Right, how have you worked that out so that you can get some idea of whether it's a quality judgment or not, and then what have you done

about it?" Just as a simple example, at seminar after seminar where people are discussing risk assessments, I would say, "Have you done a risk assessment on your stairs?" and they would say, "No." They'd say, "Why would we do that?" I said, "Well, there are five people in" - in 1973 or thereabouts the United States Safety Group identified stairs as the second most dangerous consumer product after motor vehicles. Cigarettes hadn't come into it at that stage. Then in Queensland there are five people admitted to hospital every day from falls on stairs; certainly a lot of them outside work. Our own experience is that stairs come up fairly commonly in the permanent disability area.

PROF WOODS: If you're an employer and you've got stairs, what do you then do?

MR SPLATT: There are a number of design criteria: that you need a certain rising and going; and you need uniformity in there; and you need - - -

PROF WOODS: And platforms and - - -

MR SPLATT: For example, I was taken down to Victoria to look at a place down there where they were under instruction from the government that they had to clean these stairs regularly. It was a margarine plant. When you looked at the boots of everyone walking around, the boots were covered in margarine. They'd put on stairs with a grip nosing but when you looked closely at the stairs, the very edge of the stairs was curved around and smooth and that's the critical part for the grip. So the products and things don't fit the requirements and that's because - and this is typical of what goes right through.

There's not sufficient detailed knowledge of what is required to make it work. This is an aluminium thing and with some grip strips in it looks good and it's the same as the example I have quoted in the thing of the steps, getting up onto the truck. Over the major part of the surface here it has gripping sort of things but on this critical curved edge it's polished.

DR JOHNS: Well, stick with the margarine factory. You recommend sharper edges or whatever.

MR McDONALD: To get something where - measure the grip between the boots and - - -

DR JOHNS: Sure. Why did they bring you in?

MR McDONALD: Because they believed that cleaning these steps regularly was nonsense. They - - -

DR JOHNS: Yes, sorry, I'm just trying to get the chain of command. It was because the authority told them to clean the plant?

MR McDONALD: I'll go back to the beginning. It was a new plant. Someone was injured shortly after the plant - slipped on the stairs.

DR JOHNS: Yes.

MR McDONALD: They then modified the stairs and put in these wood grips, and sometime later a government inspector came along and I gather wasn't really all that keen on having a look at the stairs until the chap there said, "Do you want to come and look at them?" and then she saw some grease on the stairs and said, "Well, you have to clean these" - and I don't know what the regime was, but a number of times a day. Then the safety chap there, he said they'd previously always been happy to go along with any compliance notice he'd been given, but he saw this one as absurd because cleaning it wasn't going to change anything.

DR JOHNS: Yes. But the company called you in, and in a sense you created a defence for them by saying, "It's not the cleaning of the stairs, it's the sharpness of the edge" or whatever?

MR McDONALD: Yes.

DR JOHNS: And were you then able to go back to the authority and say - - -

MR McDONALD: I've no idea what happened after that.

DR JOHNS: I see. Yes. The system may be working. Surely you're not suggesting there could never be a no-accident workplace.

MR McDONALD: No.

DR JOHNS: So I guess what we're interested in is how do you learn, how much does it cost to learn, and does it rely on one or two officers who move on and someone else in the company has to learn again?

MR McDONALD: No. Well, I've learnt by looking at other staff - about six and a half thousand case histories of people killed or permanently disabled.

DR JOHNS: Okay. But look, on a broad X hundred thousand workplaces around the country, and we can't multiply you that many times, so each of those companies has to learn as best they can - some of them very small - they have the help of an authority - - -

MR McDONALD: - - - they have to be told. I don't believe they can, though. I believe - you know, you've got a company of five or six people, and they're not going to be able to work out what it is. But if the knowledge of how - you know, since the Industry Commission did their report, there was about 400,000 people been permanently disabled. If we knew in good detail what had happened to those people, somebody who was familiar with that information would be able to look at it and say, "Right, you've got this plant, you're using this equipment, people of these skill levels" et cetera "these are the most likely ways you are to kill or permanently disable someone".

PROF WOODS: Why aren't NOHSC doing that?

MR McDONALD: I don't know.

DR JOHNS: Or each authority, each day.

PROF WOODS: Yes.

DR JOHNS: I'd presume that's what they do every day.

PROF WOODS: I would have thought so.

DR JOHNS: We'll receive feedback, even if they don't have the - - -

MR McDONALD: Yes. I was on the board of workplace health and safety in Queensland for two years. I consider the time I spent on it wasted.

PROF WOODS: Why?

MR McDONALD: Because I just simply couldn't get a response or a shift to do - they had fixed in their minds where they were going, and that board was dominated by an employer-employee representative thing. They weren't interested in the technicalities. I have seen a copy of the accident investigation course or incident investigation course that the division uses. It is not one which would teach one to understand or to discover the phenomena involved in the occurrence.

I also do cases of dangerous driving, things like that, where you look at the police investigations, and I believe they're taught by the police where the aim of the investigation is to get a conviction for a violation, not to understand the phenomena and give advice that helps the thing to be understood.

I should make it clear that there's a lot of things that these people do that I think

is good, but an example of it yesterday is a crowd not far from where your office is, that makes salads. They've got a machine there for cutting potatoes into cubes. They rang me yesterday and said, "Look, the division bloke has been out and done an inspection and he said we've got to guard this, and he said he can't find anything, could I give him advice on how to guard it." I said, "Well, is it a new machine or an old machine?" and he said, "It's an old machine, but new machines are exactly the same, the parts are interchangeable," and I said, "Well, have you approached the distributor, looking for guards?" He said, "Yes. They don't have any." I said, "Well, look, it'd be a lot more sense if they were producing a guard so that all people having those machines can put the guard on." But this is the way it's done. It's the small unit that's put under pressure, and so you'll have a number of individuals developing guards; some of the guards will be good, some of them won't be.

DR JOHNS: Is there no mechanism to approach the distributor?

MR McDONALD: I believe there should be, but it doesn't seem to work. I've quoted an example in there concerning ropes, where the manufacturer puts out a thing saying what the breaking strain of ropes is, and so the bloke's handling limbs weighing 140, 150 kilograms, so he buys a rope with a breaking strain - I think it was about 2.8 tonnes. Now, you'd think a 2.8 tonne on a 140, 150 kilogram branch is pretty powerful, but then you see, if you loop the rope back on itself and put a knot in it, that cuts its strength down by close to a factor two - it's actually 60 per cent, and then for arduous work you take a safety factor of nine, so to all intents and purposes you say you're coming down a factor of 20. So he sees "2.87 tonne" up here, when he should read "140 kilograms".

He was prosecuted, and I don't believe the rope people have been made aware of it. They could easily have put in the requirements from the Australian standard about the safety factors and the knots and things. I don't believe that the division in Queensland would have people competent to investigate and understand the phenomenon of it there, and that's not their aim and their objective. They had one engineer within the organisation, who was grossly overloaded, and their inspectors - some of them I think have got a fair idea, but the feedback on a lot of them is that they really don't understand what's - - -

DR JOHNS: Now the hard question: what's your solution?

MR McDONALD: What's my solution? Well, my solution would be first of all to get NOHSC to understand clearly what it is they need to be trying to do, to accept that this is fundamentally a class 1 problem. "Class 1" is a terminology I've developed years ago, and class 1 damage permanently alters a person's life; class 2 temporarily alters it; class 3 simply inconveniences it. 82 per cent of the total cost of damage to people at work, according to the Industry Commission report, is class 1

damage, so the safety problem is fundamentally a class 1 problem, and it has to be confronted.

I think it's also necessary to confront the general stereotype. The term "accident" is still widely used. The British Medical Association won't publish an article with the term "accident" in it because the key components of the term "accident" is "unforeseen, unexpected, capricious chance" et cetera - fortuitous things, and then it gets up with cause and blame and fault, and so basically the majority of people see these things as being the result of somebody doing something wrong, and usually it's the person who's injured is the stupid fool who has done something wrong, and that demotivates the whole goal.

Now, coupled with that you've had a concerted campaign by the media and the insurance companies to denigrate and disrespect the permanently disabled, to where quite a number of people won't take legal action because they're not the sort of people that you talked about that are the bludging whingers, et cetera. So the terminology and the concepts have to be got around to where it's basically a matter of energy management, because the thing that distinguishes the phenomenon we're interested in is that there's an exchange of energy that goes outside tolerable limits, and results in damaged tissue and function.

As you would imagine, I've seen thousands of medical reports over the years, some too ludicrous to comment on. But one of the problems there is that the medical people don't understand the mechanism of injury, and very often they don't ask the person what it was they were doing that led to the onset of pain or dysfunction. So I believe that the national targets that were set by NOHSC should be withdrawn straightaway. As a matter of interest, New South Wales has shown a good reduction from about 19 down into the 15s in all injury rates widely; permanent disability has been going up - the figures are in the report there - and that they need to immediately start focusing attention on the permanent disability.

Now, it's not an easy problem to confront, but I don't think that's a reason for not confronting it. It's a massively expensive one in whatever terms you want to measure the damage, and then you want a group of people initially trained or educated or developed so that they understand the phenomena involved, understand what it is they're dealing with, and then start to develop out strategies from there. I've got a large amount of concepts and terminology and so forth that I've developed. It's been used by various people in the industry, and I know it works, and it's based very strongly on looking for change for the future, not blame for the past.

DR JOHNS: Thank you. I don't have any other questions.

PROF WOODS: Are there other matters that we haven't covered that you'd like to

draw to our attention?

MR McDONALD: Does that give you a clear enough picture?

PROF WOODS: Yes.

MR McDONALD: I could say a few words about the compensation side of things, just from where I've seen it.

PROF WOODS: Please.

MR McDONALD: I believe a lot of permanently disabled people are treated very badly. Now, one example a barrister told me of - and he said I was never ever to mention his name in association with this - but he was appearing defending an action, and - my figures will be a bit rough, but he had assessed it as about $230,000 worth of damages. The plaintiff's people had assessed it at 260,000. He was instructed by the insurers to offer something like 150,000 or 130,000. He said, "I felt sick to my stomach that I had to make this offer" and he said when the offer was made the woman took it; that they're in such a desperate financial situation - against the advice of the lawyers - they're in such a desperate situation, with bills mounting up, and that amount of money is seen as a monstrous amount.

Then I have had experience with a self-insurer which I found to be absolutely wretched. I can't tell you any details of the case because the terms of the settlement are confidential and nothing can be said about it, but I can say with certainty the woman was physically abused severely at work with the amount of musculoskeletal effort and load lifting and pushing and things, and she worked at a pace - when she left they had to put two men on to replace her - and I believe she was treated in the same way in court, and finished up with nothing.

I've heard anecdotal information about other self-insurers, so there's some merit in having some distance between the insurance function and the business function. The argument I've heard people put forward is that they're going to make sure that no-one else takes legal action; will discourage them strongly. Now, I don't know to what extent that occurs and what exists. I believe that there are those that operate perfectly ethically and appropriately, but I'm afraid I believe in that case that it definitely wasn't.

PROF WOODS: Thank you very much.

MR McDONALD: I perhaps should say, I've forwarded a copy of this to the Victorian inquiry into their workplace health and safety, and New South Wales are juSt starting one, so I'll be forwarding the same.

PROF WOODS: A very good idea. Thank you. We appreciate your time.

MR McDONALD: Thank you.

PROF WOODS: Could you please for the record state your names, positions and organisations you are representing.

MR TUCKER: Thank you, commissioner. My name is John Tucker. I'm the executive director of the New South Wales Minerals Council.

MR TURNER: Kieren Turner, assistant director employee services, New South Wales Minerals Council.

PROF WOODS: Good to see you again.

MR TUCKER: Thank you, commissioner.

PROF WOODS: We have a draft of some matters that you wish to raise with us. Will they be turned into a formal submission at some stage?

MR TUCKER: We would be very pleased to do that.

PROF WOODS: Thank you. If you could particularly do it before 30 January so that we can take it into account.

MR TUCKER: Yes.

PROF WOODS: At the moment I'll treat this as the draft material. We await a formal submission from you. Do you have an opening statement you wish to make?

MR TUCKER: Yes.

PROF WOODS: Thank you.

MR TUCKER: I have indicated in that draft material that I'd like to focus our comments today fairly specifically on the New South Wales coal workers compensation scheme. It's an industry-based scheme which receives some attention in your draft report. I understand that the Minerals Council of Australia, I think, will be appearing before the commission next week, so we will seek to - with your agreement - confine our comments to those issues and broader comments relating to occupational health and safety and workers compensation national frameworks in the broader mining context are to be matters taken up at that time.

We welcome your report. I have a broad background in workers compensation. I have worked for nearly all the parties. I have worked for private insurers in the form of MMI. I've worked for Comcare as a general manager. I've worked for ministers responsible for workers compensation. I've been a workers

comp adviser to unions. I've been a workers comp adviser to employers.

As such, I have had nearly 20 years focusing very carefully on occupational health and safety and workers compensation frameworks. I was also a member of the National Occupational Health and Safety Commission and an inaugural director of the WorkCover Board in New South Wales. It's no light comment, if I can say, that I find this a very comprehensive report, a very thoughtful one and, I think, extremely useful for those of us who are involved in the day-to-day management of workers compensation, amongst other things.

PROF WOODS: Thank you very much.

MR TUCKER: It's just a very good coverage of the issues and, I think, extremely well balanced.

PROF WOODS: Much appreciated. I'll pass that on to the staff.

MR TUCKER: Thank you. The points we wanted to make, I suppose, were that there are difficulties in relation to industry schemes and we appreciate earlier opportunities to meet with the commission and to make submissions and just make that plea not to forget about those who - not only are there issues related to national frameworks and state frameworks, but those who are then captured, in our case, in a statutory mandatory monopoly for one sector in a state.

It's experiencing extreme difficulties in terms of cost, premium blow-outs and erosion of solvency. The reality is it is the state's largest export industry. It's part of the nation's largest commodity export and we're extremely concerned about this cost impost and what that will mean for the industry and for the state, given that ultimately we must compete for capital. Whilst we might not be able to do much about the Australian dollar and other factors that influence ultimately the attractiveness of the profitability of the sector, we must do all we can to focus on the control of the cost, productivity issues broadly and, in this instance, the issue of workers compensation.

We've previously made submissions that the CMI scheme in New South Wales is out of kilter with all other workers compensation and tort law schemes in New South Wales and Australia. I suppose, if I reflect on the recommendations in the report - I've made the comment here that this scheme fails all of those core objectives that you have defined in your report. You make the comment in page 28, "The underlying objectives of a workers comp scheme are adequate composition, appropriate injury management continuing and a fully funded scheme that's affordable." As I say, it's a bold statement, but we fail each of those.

The scheme is, in fact, vastly more generous in terms of benefits than any other. The existence of a rampant common law culture is a barrier to injury management and return to work, which is a finding you make elsewhere in the report about recommendations against the inclusion of common law in a framework scheme.

PROF WOODS: That's been disputed by various participants - in fact, a long list of participants - here today, but we look forward to hearing both sides on that issue.

MR TUCKER: Yes. I think it is fair to say that, in this scheme, it is widely debated as well. I noticed that some of the CFMEU submissions about this scheme say that one of the problems is lack of commitment to return to work. I adopt the position of perhaps an independent director that sits on the board of the coalminers insurance scheme. They sit there and they hear both sides of the story. That is difficult. We've identified - and, in fact, are committed to doing a lot more work to be able to get down and, I suppose, get beyond the statements and establish that.

The coal sector - not only do you have this access to strong common law, but you have people living in tight catchments and so you get the potential for numbers of people understanding and hearing about levels of claims and the benefits that are available. One of the most significant concerns for me is that a recent Ernst and Young review found that the workers in the scheme have an average 10 to 15 claims banked up for the future, so these aren't acted upon, but it means upon retrenchment or retirement they're then acted upon.

The end result of that is an extremely strong common law culture. It's not in any way to say that there aren't real injuries and issues, but that they make for very great difficulties. Our members will talk about how this scheme also has 78 weeks accident pay, so they will talk about efforts they will make for very long periods of time to invest in rehabilitation, return to work and vocational retraining, then to find - hit the 78 weeks, the common law, the matter is processed through and off we go and all of that comes to nothing. It's very hard when you take a sort of statutory snapshot of a scheme to say this industry is not committed to return to work. You have to sort of follow the barriers and the failures and where some of those difficulties come up.

If I put that in a positive balanced sense, our scheme is coming up for a two-year review. That's a commitment that was made with the creation of this scheme and one of the issues we will look at is - and I must say that is with the agreement of the CFMEU directors, so we've all agreed that we will look in that regard at barriers to rehabilitation and return to work in a legislative sense. We will look at practices that are going on and do all we can to move forward. It's one of the areas where we are in strong agreement. If you step over the barriers and the problems, issues of vocational retraining and so on are very important.

Once again, just to stay with the practical issue, when you have workers who are, by community standards, very very highly paid, you have to look at your drivers and why is it attractive for an injured miner, who's got full access to partial then total, to retrain as a computer operator with the prospect of getting a third of the income? We have very fundamental drivers and difficulties that come down for this sector of the workforce.

We have gone on in the notes to note that the safety performance in the Australian coal industry has improved very substantially, and I quote some figures there that are really ABS source data, reported here through Wilkins of the Melbourne Institute of Applied Economics, but we've seen across the 1990s that the most substantial improvement in claims frequency was in, firstly, the mining industry and, as a subset of that, the coalmining industry. There was, in fact, a 78 per cent reduction in claims frequency between 1991 and the year 2000. I suppose, putting that very bluntly, we have said if there was ever a basis for special benefits on the basis of risk that situation no longer applies.

We've made some points there, which I think are compatible with the recommendations here, that we need to see a scheme that has positive drivers, picks up what we've said about injury management and attempts to refocus compensation dollars onto injured workers and not to legal and medical providers. We need to have a secure, stable and affordable scheme. Ernst and Young found that the coalminers insurance scheme has a superimposed inflation rate of 10 to 14 per cent, and they say quite unambiguously that no scheme with that level of superimposed inflation has recovered or survived. They make the statement that legislative reform of this scheme is inevitable. It's just a question of when, and they say that the scheme has two to five years in which to make those changes.

DR JOHNS: John, you mentioned there's a review of the scheme, saying it's just a two-yearly review. There was no specific lobby or issue or figure that said, "We have to review this - - -"

MR TUCKER: Yes. This scheme, which goes back to the 1940s, was previously administered by the Joint Coal Board. When the Commonwealth withdrew from the Joint Coal Board, this quite unusual quango, or whatever you might call it, was formed called Coal Services. We have fifty-fifty ownership between the CFMEU and the New South Wales Minerals Council, but directors are appointed by the minister and the minister has an oversight role.

We agreed to participate and to participate in the scheme on the basis that there would be fundamental reform to bring it back and make it affordable. I suppose this is a long and painful process for all parties to face up to and address those reforms.

In introducing the Coal Industry Act at the time the bill entered parliament, the minister made a commitment to a one-year review and to a two-year review. Those were sourced from a previous review by Richard Grellman, who did a report for the New South Wales premier in the year 2000.

To the credit of Minister Della Bosca, he has overseen those one and two-year reviews. They've been undertaken and commissioned by the board of Coal Services, of which CMI is a subsidiary. In effect, therefore, the policy holders - the member companies that belong to our council - have funded that exercise. Ernst and Young did the one-year review and, I think, the board made available to the commission on a private basis the Ernst and Young report as a commercial-in-confidence document. The two-year review has not yet been commissioned. I can't say who will be conducting that, but it will commence next year and the terms of reference include, but are not restricted to, whether the monopoly mechanism is the most appropriate vehicle for the administration of that scheme in New South Wales.

In the notes here I have made the point that those terms of reference - and I congratulate the CFMEU for being willing to - we've been about to take to the minister a broad and strong set of terms of reference. It will include costings of, in effect, "What if we do nothing? Where will we land?" right through to, "What if you got into the scheme and it was mainstream and a part of WorkCover?" through to, "What if we picked up some of the key features of WorkCover?" For example, we're excluded from the Workers Comp Commission. We have no access to objective medical assessment under the AMA guidelines, the only industry in New South Wales not to have access to that sort of regime.

What if you looked at things like modified common law, objective medical assessment, Workers Comp Commission and so on? It's picked up in several points in the terms of reference - the fact that there is this report. What if the four-step model - and, particularly, step 2 - were to come into play and the likes of a BHP Billiton or a Rio Tinto or a Strata - those global companies - took up self-insurance? What would that mean for the scheme? What does it mean in terms of exit provisions? What does it mean for small policy holders who - - -

DR JOHNS: That's where we should dig in, shouldn't we? Excuse the pun.

PROF WOODS: I'll excuse the pun, yes.

DR JOHNS: Let's head down this track. I mean, how many of your members might jump into a national scheme?

MR TUCKER: It's very difficult for me to say. If I can qualify my comments by saying I'm not authorised to speak specifically on behalf of BHP - - -

PROF WOODS: No.

DR JOHNS: But let's have the consideration. What are they going to think about? What are they going to measure?

MR TUCKER: Having made that qualification, let me make some frank comments - and I will talk about BHP Billiton. They have, as I understand it, a global position of seeking to self-insure in any jurisdiction they're in, and for the cynics who say, "People only self-insure to get out of expensive schemes," the Queensland Coal Scheme is - you made your own comments about Queensland - very attractive. They self-insure in Queensland, and it is extremely frustrating for those companies. They self-insure all their businesses - I need to be careful when I say "all over the world", but they self-insure wherever they can, but they can't self-insure their coal business in New South Wales. It's a great frustration to them. Then they see premiums of an order of magnitude higher than they pay in comparable businesses in another state.

Again, let me step back from using any company name and say there are definitely global operators for whom self-insurance is the way they do business. I'm sure there are others where it's not. They say, "It's not a core business and we don't want to go down that path," and for them, they just want affordable premiums and are relaxed about how that is done.

PROF WOODS: Is there - - -

MR TUCKER: If I might just make one more comment.

PROF WOODS: Sure.

MR TUCKER: There are other companies raising with me to say that perhaps a modified form of - and I'll just leave your models out of the way for a moment, but for example out of the CMI review, what if we were to set up something a little bit like, say, the Treasury managed fund in New South Wales where we could continue to have a CMI scheme. We could continue to have boundaries around it. We could continue to allow the management of the issues that are in the history of this scheme, but do we really need to have all the infrastructure? All of our time and effort goes in to take a dinosaur insurer and fix it up, when we believe all our focus should be on the scheme drivers and the delivery.

There are other models out there which my members in their own minds think of as self-insurance where they would pay their liabilities, they would meet their obligations but do it in a sort of almost like a group self-insurance scheme model that could still be called CMI.

PROF WOODS: Let's explore a bit of that. Start with those who might want to self-insure under options available to them. Under step 1, it's just saying Comcare as is and it's also a limited group, but step 2 says maybe it's Comcare but maybe it's Comcare with a couple of modifications; that some people have identified the long tail. Some people have identified a dispute resolution process. Various organisations have identified one or two features of Comcare, but would it require a wholesale change to Comcare to adapt it to this industry? Comcare grew up in an environment that is primarily service sector. Is that a problem or not a problem?

MR TUCKER: I would have to say it probably gets to a level of detail that we haven't had as a group. What I would say about that is - - -

PROF WOODS: But you know Comcare personally.

MR TUCKER: I have to say to you, having worked in Comcare, and now as a director of CMI, they have some features in common. They are both outside the mainstream. They are both, and I'm being flowery in my language but - - -

PROF WOODS: You're on the record, but apart from that.

MR TUCKER: By public servants for public servants. The culture there is very different, and I have worked for four years inside then Australia's largest workers comp insurer, being MMI and now Allianz. There are very key features about the insurance culture, and to some extent they play the hard role of asking the questions and processing the claims, and in this pragmatic game there is a role for the sort of firm but fair tough issues. I know that can go too far and lead to other disputes and go the wrong way, and there has been a big move to introduce injury management and claims management rather than claims processing into the private sector, but I have to say to you I couldn't sit here and say, "Yes, I'm sure Comcare is the perfect model."

I certainly saw projections many years ago which - probably the first time it was mooted that Comcare might be able to broaden into the private sector, and at that time the New South Wales government was able to demonstrate that if you applied the claims features in New South Wales to the Comcare scheme that the costs would be very much higher. So I would be very cautious of just saying, "Yes, Comcare is fine." I think we put so much time and effort in trying to get this little insurance company connected to the mainstream and up to the standard of workers comp insurers generally, which some would argue that needs to shift higher itself. So I think one of the points I did want to make today was, whatever model is taken in step 2, to be very careful and make sure it's right. I again point to the Treasury managed fund model in New South Wales.

There are other models where you can have a defined pool. You can go to the market. It can be competitive. The Treasury managed fund goes every - I think it's either two or three years they put it out to tender - I think three years, and by going to tender they say to the insurance company, "You be innovative. You bring us injury management, risk management innovations in order to win that business."

PROF WOODS: That's still within a defined benefits structure regime.

MR TUCKER: It is.

PROF WOODS: If you were a self-insurer, you then either choose to have in-house or contract-out capacity.

MR TUCKER: You're right. It's a very different role of supervision.

PROF WOODS: At this stage I'm a bit interested in the benefits structure, whether that could translate across to your industry.

MR TUCKER: I suppose the key message for us is to say if step 2 was to occur, we would implore the federal government to not make exemptions on the basis of a little pocket of an industry in one state. We would like to see that available to the likes of the BHP Billiton should they choose to explore that. The industrial realities of achieving such a shift is another matter altogether, and whether companies and their workforces in their negotiations could agree or choose to go down that path is another matter altogether. It would be an exceptionally difficult task. I would not like to pretend it would be otherwise, but when you come down to the principles of equity, what we seek from all governments is simply access to mainstream provisions. So perhaps it's the role of governments to impart the equity in the real sense of choice for employers regardless of the industry or sector. The path for those to take up those options I suppose rests on their shoulders.

PROF WOODS: What about occ health and safety standards? How different are the standards that you have for this particular sector? Would you migrate them and tack them onto the current menu of occ health and safety that the Commonwealth operates so that your scheme could be covered both under workers comp as a self-insurer and under the Commonwealth occ health and safety? Is there a need to do something beyond just migrating your current - - -

MR TUCKER: Therein lies perhaps an even more difficult industrial issue in part, if you were to look at that sort of move. I think what I'd say to you is that occupational health and safety is paramount in the industry, and it has no concerns in operating in a beyond-compliance framework. I had conceived of this as far as

having - and I know you make a point that they are about the same standards of OHS for self-insurers, but generally there's an expectation of excellence in performance in that field and of audit procedures, such as the New South Wales ones I'm familiar with.

Most of these global companies operate fairly sophisticated OHS systems, whether it's DuPont or the like of those sorts of things, so certainly no concerns about complying with stringent OHS requirements in relation to self-insurance arrangements. If I can perhaps take a step back a little bit and just briefly talk about OHS in this industry, both coal and metalliferous sectors in New South Wales have separate occupational health and safety legislation. Both have either just been amended or are about to be amended to make them far more parallel with mainstream OHS outcomes-based duty of care requirements.

The coal industry bill came through in 2001, and is in the process of a couple of years of transition. The mines bill just failed to get into this parliamentary session that is coming in, but both have moved very much to adopt the principle of safety management systems in a fairly sophisticated manner - or I should say are varying levels of sophistication in relation to the size and level of risk in their operations. Frankly, even within the industry there are two different schools of thought: the coal industry is of a single mind that it wants mainstream OHS provisions, and it would be very attractive therefore to the National OHS Comcare-like provisions.

The metalliferous sector has a different view. It values very strongly that it has had some separate legislation, a separate inspector, a separate department through the Department of Mineral Resources that administers that, and they are not at all supportive of moving away to that, so that's a slightly complex answer.

DR JOHNS: I think you've given the sense of what the industry might or might not do.

PROF WOODS: Certainly in developing your final submission to us, you can see the line about questioning, and I'll pass over an aide-memoire to that effect. If you could address those matters that we have raised in this questioning as fully and in consultation with your member bodies, that would be very helpful to us, because we just need some sense of - - -

MR TUCKER: We have a major meeting in just under a fortnight so the opportunity will be there in that time frame to flag to do that.

PROF WOODS: If you could flag it to them ahead of time so that they come prepared to discuss that, that would be good. One other thing, when you're doing your final - I notice that you attribute to us that the interim report reports some

damning factors about CMI. You might more correctly report that the interim report quotes you as describing some damning factors about CMI.

MR TUCKER: "Reports" was an attempt to say that I appreciate your comment.

PROF WOODS: The subtlety is somewhat important. Anything else you want to raise with us?

MR TUCKER: Thanks, commissioner.

PROF WOODS: Thank you very much. We will break for 10 minutes and resume at 3.50.

PROF WOODS: Our next participant is the Direct Selling Association of Australia. Could you please, for the record, give your name and organisation and position.

MR DELL: I am Les Dell, executive director of the Direct Selling Association of Australia.

PROF WOODS: Thank you. We've had the benefit of a submission from you in June and we have some discussion points at this stage which you'll be turning into a formal submission?

MR DELL: We will, yes.

PROF WOODS: That will be helpful but we'll use these for the purposes of today's hearing. Do you have an opening comment you wish to make?

MR DELL: Our interest in this is purely and simply in the area of the definition of "worker". As an industry association we're generally not involved with the administration of claims and workplace safety. Our members do that independently. The question of the independence of the 600 thousand-odd salespersons in the industry is something that's industry-wide and goes over all aspects of the operation. Quite apart from workers compensation, there are income tax, payroll tax issues and employment issues generally. The definition of "worker" is something that's very important to the industry in a generic sense, so that's our interest and that's why our submission you may have found somewhat narrow in the sense that it's confined to that issue and that issue alone.

PROF WOODS: That's your point of interest, isn't it?

MR DELL: Yes.

PROF WOODS: We can understand that.

MR DELL: Just to add to the profile of the industry, our members control about 90 per cent of the industry in Australia by turnover dollar, which accounts for about $1.3 billion a year in retail sales. So we're a niche area of the retail industry. That's where we see ourselves. We're a niche distribution channel in the retail industry to that extent, and there are about currently 620,000 predominantly female independent contractors involved in producing those results.

PROF WOODS: You used the word "contractors" then, which implies sort of a principal-agent relationship. To whom are they contracted and is it for a service or is it - - -

MR DELL: No, they're contracted direct selling organisations, organisations like Avon, Amway, Nutrimetics, et cetera.

PROF WOODS: I was fascinated by the list.

MR DELL: The contract is really a contract that doesn't require them to do anything. Typically the contract that's used in the industry is a contract that doesn't require them to do anything. The contract in its broad terms says, "This is the relationship we've established and if you do this, this is what you'll get." There's no compulsion on them to do anything. They're not required, in terms of the contract, to do anything. They can walk away from the contract. The generic type of contract typically gives them the right to terminate at will. The company, on the other hand, can only terminate if it has proper cause, so in many respects it's a one-sided thing. But they're really not required to do anything; it's not a contract of service.

PROF WOODS: That was just the distinction I was making because we oscillate in the wording between "contractors" and "independent salespeople" and the two - - -

MR DELL: Yes, I'm sorry if that's caused confusion.

PROF WOODS: No, I understand.

MR DELL: The terms are interchangeable in my mind. There has been some litigation over the years - some pretty substantial litigation. There was a case in Victoria, it was a payroll tax case back in the early 80s, when the Victorian government claimed that the earnings of Mary Kay consultants - Mary Kay Cosmetics - the earnings of those ladies were subject to payroll tax. That was litigated through two courts and both found that the Mary Kay consultants were not employees and the earnings were not subject to payroll tax.

The other landmark case was what's become known as the World Book case, which involved a distributor for the World Book Co selling encyclopaedias. It was litigated by the federal Tax Office, which said that the World Book Co should have deducted PAYE tax at the time from the earnings of the bookseller. That also went through two courts and the courts found in favour of World Book. But interestingly, the decision hinged on the contractual relationships and the court found that the contract was a contract to produce a result. It wasn't a contract for service and it wasn't a contract for services. It was simply a contract to produce a result. In other words, there was no compulsion on the bookseller to do anything but if he did sell some books, he got some money.

They're the typical arrangements that exist in the industry. Our purpose in

wanting to make a formal submission to the inquiry and to come here today was to draw the commission's attention to the fact that there is a large body of these people out there that need to be identified if serious attempts now are going to be made to reach some agreement on a national definition of what's a worker, because while we spend an enormous amount of our association resources on protecting that position, it's a constant battle because there's always somebody wanting to chip away at the edge.

PROF WOODS: There's a bit of an incentive to bring you into the net.

MR DELL: Yes.

DR JOHNS: So you want to stay outside the net.

MR DELL: Yes.

DR JOHNS: But do you want your members to have some sort of coverage or some sort of insurance for workers compensation?

MR DELL: No, our members are really not interested in that. These people are independent people and a very large number of them, of course, are really not business people at all. They're really not in business.

DR JOHNS: Mums who want to make a quid.

MR DELL: When you look at the figures we've provided, 98 per cent of them earn less than the tax threshold each year - that's $6000 - and about 94 per cent of them earn less than $2000 a year. We spent lots of time with the Tax Office over the years. From the Tax Office point of view the great number of them are not in business at all. They're not business people. Only about 5 per cent of them, for example, would be registered for GST. Probably about 40 per cent - - -

PROF WOODS: This means that they're racking up 50 grand.

MR DELL: Or they've become registered for GST for some other purpose, that kind of a voluntary registration. About 40 per cent of them we estimate probably have an ABN. We have special dispensation arrangements with the Australian Tax Office on ABN withholding, which indicates that the Tax Office takes I think a particular view on the vast bulk of people that are down at that bottom end .

The other thing that I think we should point out is that these people are not in any defined working place. First of all, they're totally uncontrolled. Secondly, their workplace isn't defined because, if the truth is known, an Avon lady or a Nutrimetics

lady or an Amway distributor - I mean, they conduct their business on a food queue at a supermarket or waiting for kids at the kindergarten of an afternoon when they're networking with other ladies - and it's predominantly ladies. So the workplace can be anywhere people meet. It's totally undefined, it's totally uncontrolled. We have over the years negotiated exemptions from WorkCover in Victoria.

PROF WOODS: If they're independent in fact they can't cover themselves, can they?

MR DELL: No, but we have that specific exemption inserted in the act in Victoria, in the Accident Compensation Act. We also have their earnings exempted for payroll tax in Victoria and also in New South Wales. We've been talking with the minister's advisers in New South Wales for the last 12 or 18 months on having a specific exemption in the New South Wales act. In fact, the LeCouteur and Warren report contained some issues there that will probably take our people outside of it, and I put a copy of those sections in our submission. We think we'll out there under two of the seven tests but, notwithstanding that, we're still going to petition Minister Dellabosca to specifically exempt our people anyway, to take away any lingering doubt there may be.

DR JOHNS: That's one of the problems you have there, obviously, when you say your people. They're not all of a type though, are they, as you say? Some of them are running other businesses or other activities.

MR DELL: Some of them could be. When you get past the 95 per cent mark, of course, you've got some very substantial income earners there. At that point of that upper 5 per cent level, you've got some very substantial business people earning incomes in the hundreds of thousands per year, but that's really at the top end of the 600,000. So at that end, of course, you've got real - - -

DR JOHNS: You may have some workplace issues. They would be shifting a fair amount of World Books or Nutrimetics or whatever.

MR DELL: Well, they would be, through an organisation. What happens, you see, they create an organisation underneath them, an organisation either of users or sellers. Just in New South Wales, gentlemen, if I can just maybe say one other thing there, we've had a situation in New South Wales since 1988 when we petitioned the then Greiner government, who wasn't at that time prepared - for reasons best known to themselves - to legislate our people out of the Workers Comp Act. We did, however, get a letter from the minister of the time, John Fahey, who was the minister for industrial relations, and I put a copy of that letter in the submission.

PROF WOODS: Yes, I saw that.

MR DELL: We've sort of relied on that letter ever since, and it's been very effective as against WorkCover in relation to the collection of premiums. Since 1988 there have only been two serious attempts to collect premium from our members on the earnings of these independent salespeople. On both occasions the inspector went away and no further action was taken when we produced this letter from John Fahey. So the WorkCover people in New South Wales obviously took the view that our people were outside the net, and it's only in recent times that it's become a real issue when one of the WorkCover claims agents in New South Wales refused to pay a public liability claim for one of their members and said, "This person is a deemed worker under the New South Wales act, and it's a workers compensation claim; it's not a public liability claim. That came right out of left field and it's that, I think, that has rekindled this whole question in New South Wales and has forced us back to the minister's office to get our exemption that we thought we had with the John Fahey letter, now encapsulated in the law.

PROF WOODS: If somebody is injured and they fall up the footpath and they just do it all through public liability, presumably they don't want to sue home owners too often - - -

MR DELL: If it's on our member's premises, which this particular case was, it's generally handled through the public liability cover and some of our members, certainly the major member companies, have insurance systems in place for their people which their people can contribute to, if they wish.

PROF WOODS: What's that insurance against - - -

MR DELL: It's a public liability - - -

PROF WOODS: A loss of income or - - -

MR DELL: No, it's against - it's a public liability insurance.

PROF WOODS: Presumably individual salespeople, particularly if they're earning more than their sort of, you know, two or three thousand, but earning a substantial amount could take out income protection against - - -

MR DELL: Yes, they do and many of them do.

PROF WOODS: Or some do.

MR DELL: I'm sorry, I can't give you the number.

PROF WOODS: No, no.

MR DELL: But many of them do.

PROF WOODS: That would be the way they would go through that.

MR DELL: Yes.

DR JOHNS: Are there any difficulties you have, or comments about our discussion of definition of worker?

MR DELL: No. Gentlemen, we're pleased with what we read in this report, frankly. We think the way you've covered this definitional problem would be in accord with what we would be looking for. Currently there's a reliance on the common law definition and we're happy with that, except that sometimes that's not quite as precise as it should be, and that's why we tend to favour specific exemptions - because it takes that grey area away - but we're pleased to see that you don't appear to be - at least the interim report doesn't appear to be moving away from the common law test in principle, and if that remains we would be comfortable with that.

PROF WOODS: We haven't had any evidence to this date that would cause us to change our views.

MR DELL: Yes. There is a reference in the report to - there is a reference to deeming there where you say that in some cases deeming may be necessary to eliminate doubt and no doubt that's true, but we don't think deeming works for our people because of the undefined workplace, the uncontrolled working conditions - "working" in quotes, by the way. We don't think deeming is appropriate. It probably is appropriate for jockeys and sportsmen and trotting drivers, where they're working in a controlled situation. Where there is some doubt about the relationship we think deeming probably works in those cases, but it wouldn't work for us.

PROF WOODS: Not in my backyard.

MR DELL: Taken by and large we're not unhappy with what we've read so far in the interim report.

PROF WOODS: Great. That's excellent. Anything else you want to raise with us?

MR DELL: I have nothing else, unless you - - -

PROF WOODS: No, we've covered it.

DR JOHNS: Thank you.

PROF WOODS: And we look forward a final submission from you.

MR DELL: Further submission, thank you very much.

PROF WOODS: Before 30 January.

MR DELL: Thank you.

PROF WOODS: We appreciate that, thank you.

PROF WOODS: Our next participant is LMR Roofing. Could you, please, for the record state your name and the organisation you are representing.

MR MARTIN: Yes, Michael Martin from LMR Roofing. I'm a director. Good to see you. How has your day been?

PROF WOODS: Just terrific. It has been actually; quite productive and quite helpful

MR MARTIN: I was interested to hear some of (indistinct) comments actually on the deeming and contracting employee situation.

PROF WOODS: Okay, we have your earlier submission. We have had a presentation. You have a new additional submission. Do you have an opening statement or do you just want to run us through this?

MR MARTIN: Yes, I just wanted to give you a - we've been doing a few things in the interim to our final report and we've been doing a few experiments, so I just want to do an opening statement. There's a lot of big business in insurance companies that have come in sort of representing small business and we're sort of trapped in between the unions and big business, I suppose, so sort of half the workforce. We are here representing our sort of half of the workforce, because usually most of the guys are out there working and I think it's necessary that we (indistinct) I suppose. As far as your interim recommendations go, you've really done a good job. It's really evident, we feel - as far as small business - it's heading in the right direction, so as long as - I thought I'd mention that.

PROF WOODS: Thank you very much.

MR MARTIN: But as long as something gets done, I suppose that's the main thing.

PROF WOODS: That bit is a little harder, but if our report is broadly supported by a range of bodies then the chance of it happening is more likely than less.

MR MARTIN: Yes. Certainly if you don't anything it won't change, so this is a good step, so well done, fellows. I've been doing an experiment in and out of some of my recommendations in regard to employees, group apprentices. We've had a product premium discount scheme audit and we've received as - to protect the main risk of danger - so we've got good safety systems and sort of just set up a discount for incentive for having safe work systems and we need a discount because we've got a safe work systems, and keep on re-auditing that safe system so not only focusing on preventing accidents and maybe moving towards self-funding, so we don't want accidents to happen because we'll have to pay for them, so we're very focused on not

making them happen. I suppose pretty topical at the moment, with the young chap (indistinct) dying the other day falling through a commercial site, metal roofing, three stories - 1.2 rafter lengths.

PROF WOODS: No safety harness in that case?

MR MARTIN: Didn't have a safety harness, negligent by the contractor and the builder - and third day on the job. I think there's a procedure for laying down safety netting, especially on commercial jobs and that site is safe before they go on. So that was also neglected, so not a good thing for the industry, for that to happen, most certainly. Yes, so it's copped a bit of - it will have ramifications from the unions and WorkCover, I suppose, as it most probably should, but if you are doing the right thing you shouldn't be penalised by this.

PROF WOODS: Yes, it's called collateral damage.

MR MARTIN: Yes. One of the other experiments we've been doing is we've got 13 apprentices and we changed them from our employees - we were getting a subsidy for it so we changed them to (indistinct) and the federal minister has changed it to group apprentice scheme and they took the responsibility of workers comp and all that sort of stuff, and accidents - so we had our safety system was looking after them saying the same things. That reduced our - our risk was still there but the risk was related to Newcastle, the MBA. They were the employer and we were the host. So we still have responsibility for the safety but, you know, they actually bought the financial risk, if there was - but we're finding that that - - -

PROF WOODS: How clear are those lines of responsibility?

MR MARTIN: Not very; we're not too happy.

PROF WOODS: No. There are two lines of responsibility - or, I guess, maybe three - but there is at least the line of responsibility of who actually controls the site. There's the line of responsibility of who has paid a premium to cover whom. There's a sort of line of responsibility of ensuring that the correct procedures are undertaken, irrespective of whether or not you actually own the site. You may own the labour, but not the site.

MR MARTIN: Yes. We've sort of remained - our safety systems have remained unchanged. We have a toolbox meeting every smoko before we go back - is there any consultation if there's any differing risk that is changed, there is a risk assessment done before we start the job, because we do a job - one job a day and it's at a different site each day, and that happens. There could be three different sites, three different crews, so that's unchanged. The MBA don't actually have an active

part in managing safety. I suppose they are assuming we are doing it, but they don't regulate it.

We will most probably be getting out of that come Christmas - just really the actual cost they're charging us, or from what they told us they were going to charge us to what they're actually charging us is most probably - I thought I'd most probably save a lot of the days, wet days and holidays and union days and RDOs and all those sort of things, but it's working out that it's going - more administration for us so I've got to employ my cousin nearly full-time to do the administration of the time sheets and - yes, so there are a few downsides to that and the guys have gone into more of a wage, an hour mentality and "us and them" sort of situation, so we are going to most probably take them under our own yet again.

Yes, so we've been doing some things with our contractors who are - just like (indistinct) mentioned, they are contractors and we give them works orders. They're sole traders - these guys - that have just started with us and they've worked with us for three months now, so we have to make a decision between getting them on as an employee or deemed worker, I suppose. As a sole contractor working with quite a few people during the year our sickness and accident policy is around about two grand, about $38 a week. They're on - - -

DR JOHNS: Sorry, that's what they are paying for income protection?

MR MARTIN: Yes, and like 2.50 a day, 75 grand a year, plus a loading now on superannuation. That was about $218 a week for the same contractor, doing the same work as a sole trader and then a deemed employee. That's where we find it's a little bit inequitable.

DR JOHNS: But who - in their case, where do they derive the power to ensure that they're working in a safe environment? Do they - - -

MR MARTIN: They have a safe work method statement, the sole trader, but they actually - I think there's a case where there's employees and contractors working on the side of the road and a car, a drunk, came in and hit somebody and they controlled - the employee was - if it that was an employee it was sort of covered, but a contractor was killed and I think the ruling was that as controlling the site - you always need to control your contractors as part of your work method statement, so it would be under our work method statement, of controlling the contractor.

DR JOHNS: Does that mean, though, that you're picking up some of the liability?

MR MARTIN: I would think so.

DR JOHNS: So they're paying somebody for income protection at the same time you're paying - - -

MR MARTIN: Yes, they're sort of working in a group, where we sort of may have a responsibility as per this car coming in and hitting a contractor near a road, where the employer said not to work in this area and the contractor was in that area and the car killed him.

DR JOHNS: Sorry, so you in effect have control over the site.

MR MARTIN: Yes.

DR JOHNS: Legally.

MR MARTIN: Yes.

DR JOHNS: Do you - - -

MR MARTIN: Controlling the contractor. You know, so - - -

PROF WOODS: But it's not your - you don't own the site?

MR MARTIN: No, no. It's a - - -

DR JOHNS: No. You're liable if something happens at the place where they are working.

MR MARTIN: Yes.

DR JOHNS: Do you only select people who have good practices and who have a certificate auditing - - -

MR MARTIN: We've been audited and we've got a corporate manual. We've got our safety system of risk identification and controls. If they don't do something we issue a CA, which is corrective action statement, to this guy and he signs it and gives it back when his behaviour has been changed. So to contract as an employee we issue all those and that's part of our safety maintenance each day. Because we go to a site - a new site every day - we have to - risk assessment on things that have changed. You know, on a two storey, maybe electrical wires are going to the job, and we assess that risk every day. If it's just a normal risk we continue on and then every smoko, before we go back, "Is there any safety issues today?"

DR JOHNS: In practice, though, as you say, you are turning up to a new roof every

day to clad it.

MR MARTIN: Yes.

PROF WOODS: How often in practice, though, do you tell the site owner, "Sorry, this is an unacceptable site. We're not actually cladding today"?

MR MARTIN: Well, the situation - - -

PROF WOODS: Or do you actually negotiate the outcome?

MR MARTIN: We have a sales rep that says it's ready, the supervisor checks the job to see that - - -

PROF WOODS: So you've done a pre-site check.

MR MARTIN: Pre-inspection, yes.

PROF WOODS: So it's not turn up in the morning with a crew and all your materials there and then make a decision.

MR MARTIN: We're actually licensed scaffolders, too, we have a - all our guys are licensed scaffolders, so we erect a safety rail; that's the first thing we do, and then put sarking on top of the roof, which is anti-fall heavyweight - you can't - you can stand on it, it's so thick. So, yes, that sets up a safety work environment so then they continue on from there, so it's just a - it's just like a sausage machine really. It's the same sausage and if anything changes it's identified. We feel that if we had these guys as contractors, if they're deemed workers, that they would be penalised by paying this higher rate of workers compensation. It just seems they're paying, since the accident, $38 a week and if they were doing, we'd have to take $218 a week out of their pay. Now, that's a sizeable sum. If there were a lot of accidents - I think in 2001 there was 212 accidents for a week, or more, in the whole industry and we're a copping a 13.91 premium and, I suppose, electricians are 3 or 4 per cent and they actually get killed, and plumbers are pretty well below - if it was a low premium, we wouldn't have this conversation, you know, because the actual cost would be minimalised.

PROF WOODS: But you can't directly compare the two payments, though, in a sense, can you, because presumably their income protection (a) is only a percentage of their standard wage and it usually has a fairly low termination date and may not pay their medicals so, I mean, you know, it's not a simple comparison.

MR MARTIN: Yes, that's true, but I'm just saying, you know, for $38 compared to

$218 - - -

PROF WOODS: Yes. I understand the cost impact but you then also have to look at the benefit side and it's a bit different because their medical would be picked up, their income protection would be greater.

MR MARTIN: I'm not dodging the fact that, you know, I would like to move towards self-funding. I was talking to Mark Walker from the CGU who we are insured with and they love self-funding workers comp funds. You know, it's just like a superannuation fund, you pay into it and if there's an accident you pay out of it. I suppose, under - - -

PROF WOODS: So it's self-insuring?

MR MARTIN: Self-insuring.

PROF WOODS: By or for individual firms? I presume you couldn't afford that because you'd just get hit with a quadriplegic and you - - -

MR MARTIN: The thing is that you would underwrite it for a serious injury.

PROF WOODS: Okay. That does raise then a very interesting area and that's this question of some sort of pooling of small mediums into industry insurance pools and then you could look at injury management, claims management procedures. You could look at negotiating with insurers - well, you can't in New South Wales because the government will not let it in. In other states you could sort of take that bundle of premium and negotiate it around various bodies.

MR MARTIN: Most certainly that's there and I suppose that larger businesses can do that because there are larger organisations where executives can get - they've got, I think, 1.2 million small businesses in Australia all out there earning a dollar and doing it pretty tough, I suppose, so they don't get together in associations except for HIA and MBIA I suppose, so hopefully we can sort of bring pressure to bear for them to bind together and get some rationalisation of this workers comp thing. The main thing is stop injuries and I know that when I have a major injury - because I've been really focused on not having them - and we're going to put our hand up and say we are committed to that because we have funded ourselves.

PROF WOODS: I hope sincerely that you're completely right but you can't foresee all possible situations all the time.

MR MARTIN: I realise that but, I mean, if you're that scared about it you wouldn't walk down the road or stand on a railway with a train coming.

DR JOHNS: How big is the discount on your premium? What is the - - -

MR MARTIN: That's another thing, you know. 15 per cent in the first year and then, if your system is up to scratch, it just goes down - and I know this for sure now - you just get 10 per cent and in the third year you get 5 per cent and it's not a building, it's not 35; it's a 5 per cent discount; and in the fourth year you get nothing - no discount at all on your workers compensation.

PROF WOODS: So it's actually a rising premium.

MR MARTIN: It's a regressive premium discount so it's hardly - as I think I said, it's not Pavlov's dog rewarding stimulus. It's like, "If you do the right thing, we'll give you less of a discount."

DR JOHNS: Front-loaded, if you like, to get you into it, isn't it?

MR MARTIN: Yes.

DR JOHNS: Not much reward after that.

PROF WOODS: No.

DR JOHNS: But it accumulates to 40 or more, or less?

PROF WOODS: No, because - - -

MR MARTIN: No, it doesn't.

DR JOHNS: Because it's 5 per cent of the lesser amount.

MR MARTIN: It's actually - it's of $100,000?

PROF WOODS: No, you lose all discounts.

MR MARTIN: You lose all discounts? It's 15 per cent - - -

DR JOHNS: I'm sorry, I was reading it the other way.

PROF WOODS: No, you get your 15 per cent in year 1 but in year 2 you only get 10 per cent of your base.

MR MARTIN: First year, $100,000 - - -

DR JOHNS: Sorry, I thought - - -

MR MARTIN: Yes. We went through the exercise just for this commission, so we really to change roof tiling and all workplaces in the workplace, not all the bosses talking about how we can make it safe. It's where the accidents happen, how to make that workplace safe, with real incentives to do that. So that's one of our points. Let me see: the self-funding thing, moving towards self-funding. We have our own superannuation funds. We have the responsibility of looking after - - -

PROF WOODS: Who is "we" in this case?

MR MARTIN: LMR Roofing.

PROF WOODS: Okay, yes.

MR MARTIN: We have put a lot of our employees with AMP but, I mean, we hold, for our workers, superannuation funds which is like their nest egg. We've got the responsibility of that and I can't see why we can't have the responsibility of saying, "We're going to pay you for injuries." Instead of paying into an insurance company we pay into our own fund. That gives us more commitment to say, "We're not going to let accidents happen because we're going to make sure everything is safe."

PROF WOODS: So if I can just finish, back on the self-insurance, I remember annotating one of your slides earlier, strongly supporting the no explicit minimum employee requirement regulation.

MR MARTIN: Well, you've got to have at least - well, at the current - - -

PROF WOODS: Yes. I mean, it's different in different - some states don't have one, like WA and Queensland has 2000 and some have 500 but - - -

MR MARTIN: We're talking about the main game is Brisbane, Sydney, Melbourne, as where 75 per cent of the population is, so that's - - -

PROF WOODS: But in that case, I mean, how many employees does LMR - - -

MR MARTIN: At the moment, with our two companies, we would have 26. So we're getting up from the small to the medium business side of things.

PROF WOODS: But in terms of your prudentials and all the rest - and this is no reflection on your company as such - it's unlikely that as a single entity you would

become a self-insurer. I mean, it really is only through pool - - -

MR MARTIN: The parameters at the moment would limit that. We don't have 500 employees. We think that's unreasonable. I'm just saying that we are given the task as a superannuation provider. We can provide our own superannuation and put it in a fund with the rules not to touch it and all that sort of stuff because it's there for superannuation. A similar fund would be there for accidents so that's - - -

PROF WOODS: You would have to lay off your bet for a big claim somehow.

MR MARTIN: Most certainly, underwriting a large client, you know. As you say, they're the main things: electrocution, falling through a roof, as the young chap did, are the main things. We have put up guard rail and put anti-fall sidings so those things don't happen. As I say, you can be standing next to a railway platform and, you know, so we're really talking about the - we're covering our own risk - self-funding our own risk and we're backing ourselves to say we've got safe systems and we want to fund it. We don't want to cost anybody any money. Most certainly what affects me is maybe putting on an old subcontractor and him doing a low back situation, is our main risk. So we have guys that check their backs out and say, "At this stage your back is - - -"

PROF WOODS: As in a medical practitioner or?

MR MARTIN: Yes. He's a special back and physical - - -

PROF WOODS: So you run all your employees and contractors - - -

MR MARTIN: Yes, and contractors through it, yes, just to - - -

PROF WOODS: That's interesting because we had a discussion earlier about whether having a prior medical record was sufficient to be able to protect yourself against a claim where - you know, whether it's hearing loss or backs or, you know, the progressive degeneration.

MR MARTIN: Well, most certainly the back thing is one of the injuries that does affect roof tiling. That's why we have a high number of people on a roof, so they don't get bogged down in bending over and doing the same job, they're doing a lot of different things and they're moving around, so we've addressed that situation of back injury and safe work practices for every other part of the roof, you know, so it's - - -

PROF WOODS: But are you confident that by having a medical practitioner assess that this person's back was sufficient for the purpose of the task that if there is a subsequent claim - I mean, what's that saying is then that it must therefore have

happened as a consequence of working for you.

MR MARTIN: Most certainly there would be a base there, if he did have a sore back, so I mean we have a structure there now that if somebody was to have - and we have got a guy that's got a sore back and we've got him there as a finger-pointer and he doesn't do the task if his back is hurting. He does what he has to do and trains the guys on how to tile, so training mode is - we have enough employees to have that training mode so - obviously you don't want too many trainers, otherwise you wouldn't get too much work done.

PROF WOODS: That's right. It's the old move into head office but how many years can you - - -

MR MARTIN: But I think the focus on, yes, there is a return to work and I've got employees that have worked for me for 15 years. Yes, their backs are sore and they're all supervising now. So there's three supervisors with sore backs but they're only sore if they do continual tiling.

DR JOHNS: Presumably you don't take on an employee though who has a sore back.

MR MARTIN: That's right, yes.

DR JOHNS: So it's a filter as well as a protection.

MR MARTIN: We're just about to enter into some AWAs with our sole contractors that have been with us just on that two, three-month period now, so we've got to make the decision whether to have them because the MBA has advised us that they could be dealing with the law as it is there now, that they could be deemed employees. So we are going to bite the bullet and put them as employees and get their banks checked out and enter into an AWA, which is an Australian Workplace Agreement, which is a very flexible document. It's quite a good enterprise bargaining tool.

DR JOHNS: Thank you.

MR MARTIN: I suppose on the deemed contractors we have touched on the Australian workforce is changing and we need to address that people don't want to be employees. Our contractors - I give them a works order and they just get the job done and I don't know if they are doing other work. They do the job. I don't have to tell them how to do it and when to do it, so long as it's done properly. You have supervisors going around to make sure - to see if the job is ready or finished. If people choose to be a contractor they should not be made to be employees.

I think the exercise we did, when we passed the guys over to the group apprentice board, when they got into the industrial relations, bundying on and off and travel times, it really set up and us and them thing, which was - we train our guys to be tradesmen and have them for a long time, so they can be tradesmen and start a business. It creates a very unsavoury taste just getting the award wage. I am quite strong to not make people employees, because I want them to start a small business and make money down the track and not be a non-productive employee, as being in both workplaces, over my history, I know it does exist. You just go to work and roll your arm over and not be productive. That's why I'm very strong on it. Small businesses in Australia, especially the building industry, are one of the most productive works in the world. I think there is a proven study on that. The HIA did one. The more work you do, the more money you get, so it shouldn't be taken away from the Australian workers I suppose.

I don't know. There were a few other things that I wanted to go through. I was going to recommend, leading into this - depending on how things went I suppose - that governmental reform - we are being efficient and for the government to be efficient. The states compete against each other to a national trade and they undercut each other. It's not in the common interest of Australia. I think we really need to - - -

PROF WOODS: There is agreement amongst most states, although I notice Queensland didn't sign up.

DR JOHNS: Yes. "Leave us alone."

MR MARTIN: Just the mere fact of - - -

PROF WOODS: I'd like to avoid that sort of competition.

MR MARTIN: There is a lot of money wasted in over-government now, inconsistent and inequities, in certainly workers comp, that need to be ironed out in Australia and you guys are doing it now. Hopefully, if we can get this one sector of this done maybe it can be spread to other sectors. I think another issue, the Australian Trade Contractors, have done a study. I suppose WorkCover may or may not have union members in it. They have made small companies, made them so you have to pay out - they have made judgments on a person's bank and said that you have to pay $100,000 to this contractor and he is down the south coast putting steel pegs in the ground and using a sign.

So clearly this is brought to their attention and they still made him pay it back. They still handled the claim. He had to pay that money over the next three years. It's

the ethics of WorkCover making small business pay this money out to illegitimate claims - you know, checking out claims which insurance companies aren't doing now - they are just letting them go through - that is building up that deficit of workers comp, which we now we are faced with in New South Wales.

Mismanagement done on a company level, they go to gaol, as in Brad Williams and Skase. It's just as bad in the public sector. These people have to be responsible and know they are negligent. I made the comment that the Tax Department is very well - I think the accounts payable section of the government needs to have a look at it I suppose.

PROF WOODS: I think that's wandering a little bit out of our terms of reference.

MR MARTIN: I know. I was going to suggest the Productivity Commission and to the government, but we will wait on that. As you say, that's the guts of it.

PROF WOODS: Thank you.

MR MARTIN: Is there any other - - -

PROF WOODS: No. I think we have covered most of it. I have sort of annotated variously. There are little bits and pieces. Like, you talk about premiums for all being experience-based. Again, the whole point of insurance is pooling risk for those who can't afford the hit of an individual significant claim.

MR MARTIN: Right.

PROF WOODS: So to some extent that then means that your premiums are going to be risk-weighted but not experience-based.

MR MARTIN: I suppose as far as that goes roof tilers have got a 13 per cent, 14 per cent workers comp rate and that's our accidents compared to commercial sites, where this young chap was killed the other day - high storey, with large centres, high risk and, yes, there is a high rate of injury there. We've got a low rate of injury and we're paying their premium.

PROF WOODS: What that says is that there should be a finer gradation of industry groupings as distinct from individual firms being all experience rated.

MR MARTIN: Well, that - yes. The categories are there, but maybe not small enough.

PROF WOODS: Yes.

MR MARTIN: We're grouped, so we're paying for other people's non-safe activities.

PROF WOODS: Yes. We do address some of that in our interim report.

MR MARTIN: Yes, I know. It's certainly been in the right direction. I've mentioned about that - the premium-setting board, the make-up of the premium-setting board. I just want to make a comment on - make sure small business actually is represented on that premium-setting board, so it gets a say. We've got the unions and big business, they're actually 55 per cent of the workforce; the other half is not getting represented, so they're setting up premiums for the other half of the workforce. So we want to have a representation there. So that's something I think can be added to your recommendations.

As Lou said, the crystal clear - non-academic, plain, insignificant people in the building industry need to understand rules. You need to be crystal clear and in plain language, not some of the cryptic, grey, descriptive way that they've described workers and deemed workers.

PROF WOODS: While we're talking in that area, do you have a view for occ health and safety as between prescription versus performance outcome orientation for the codes? I mean, is it easier for small business - building industry or wherever - where you've got limited time, some of your managerial colleagues have got very focused opportunity to look at things - to have more prescription - they're told what to do and know what to do, as distinct from being given broader oriented performance-based codes?

MR MARTIN: Yes. Broad stuff is very hard to - I mean, the accidents happen. We've got to get from up there to on the street. The site workplace is where it's at and they have to be trained on how - and their safety. So risk assessments on the job, is what you need, and not up there - that broad stuff. It can be so broad - this is that particular situation. So bring it right down here, is where you need to do a risk assessment, and that's where the accident happens - so the training - - -

PROF WOODS: So the clearer the requirement, the better, but that doesn't necessarily mean that it has to be prescribed in detail, but at least it has to be clearly expressed?

MR MARTIN: Most certainly WorkCover has got some good ideas and they talk about identifying risk and having controls in place, and that mechanism can go to each work site, so that's a good application - so identifying risks and putting control in. We have the advantage of being a builder and a roof tiler, so as a tiler you have a

work method statement of training; as a builder we have from slab right through to carpentry, floors - we have to make sure we've got all those work method statements and insurances and make sure they do the work method statements and give corrective actions, where they're not so controlling; or their individual risks to make sure there is, and if that had have been done, that kid wouldn't have died a couple of weeks ago. I think that's just about me. It's right on the knock of four minutes.

PROF WOODS: Yes. That certainly exhausts my annotations.

MR MARTIN: Self-insurance. Common law - we most certainly want to keep common law out of it, there's a lot of profiteering going on with solicitors, and they should have a code of conduct, and if they go past those - I know they're very - if you don't make rules for them, they'll certainly do the profiteering, and that's what is driving the debt. There's unrealistic claims that are getting - well, they get a percentage of the claim, and that's what they're - they're trying to make some money, so there needs to be a cap on all of the injuries, a recognised cap, and keep them out of it. I think - just definitions, and I think we've addressed all those - clear consistent definitions of the workplace and deemed and employees, so you're heading in the right direction. I think that's just about it.

PROF WOODS: All right. Thank you. You've now provided us with two submissions, very thoughtful and very practical, so we've appreciated the contribution you've made to this inquiry.

MR MARTIN: Thanks.

PROF WOODS: If there's anything else that comes to mind, preferably before 30 January, drop us a note.

MR MARTIN: Yes. As I say, you guys are doing some good work, and it's good to see. We just want to see that it actually happens.

PROF WOODS: That's your next task.

MR MARTIN: I did put a bit of a section there - Pressure to Bear.

PROF WOODS: Yes, I - - -

MR MARTIN: Did you see that?

PROF WOODS: I noted it but I didn't - - -

MR MARTIN: I suppose it's like painting a house, isn't it - like, if you paid

somebody in advance to paint a house and they don't paint it and when they come back to do it again you sort of say, "Well, I paid you to paint the house and you haven't done it, so you're not getting more money."

PROF WOODS: Yes.

MR MARTIN: Okay. Thanks, guys.

PROF WOODS: Thank you very much. We appreciate that.

PROF WOODS: We have a presentation from the Association of Payroll Specialists. Could you please for the record state your name, the organisation you are representing.

MS MARTIN: My name is Maureen Martin. I'm the national research manager for the Association for Payroll Specialists.

PROF WOODS: Thank you very much. We have some written material from you, but you wish to make a presentation today. Please proceed.

MS MARTIN: Firstly, the association would really like to thank you for taking notice of our previous submission in relation to especially the definition of "wages" and the difficulties that the payroll officers that we represent Australia-wide find in actually managing the claims and the wages declarations for their workers compensation.

PROF WOODS: We were impressed with the complexity that you face.

MS MARTIN: And we would like to think as an association that represents payroll specialists that probably the majority of workers compensation wages declarations and a lot for the small businesses - the claims management is handled just by the payroll person itself. They're responsible for making sure everything is accurate for their employer, and finding out the correct definition.

After our initial submission, when we provided the table of the various yes/no answers - you know, "Is this covered in each stage? Is it not?" - we actually found that - I would like to note page 103 in your interim report about your recommendation that perhaps they could focus on definitions of "employee" "employer" and "wages" - we'd actually even like to do a pre-step to that, in that the various workers compensation bodies actually provide a more detailed and comprehensive list of what their definition of "wages" is.

New South Wales has a very good list of what is "wages" for workers compensation, but we found, for example, Western Australia, they have I think about three paragraphs on their web site about what "wages" is, and when you ring them and you say, "Well, we know fringe benefits is supposed to be included in your definition of wages, but what sort of fringe benefits and what is the value? Do we use the taxable value, do we use the grossed-up taxable value, do we use any other sort of value?" We know the answer in New South Wales. The answer from WorkCover in Western Australia was, "Call the Tax Department." We thought, well, the Tax Department can tell us how to value the fringe benefits, but they can't tell us what value you want us to include in our wages declaration for premium calculation. So that's the problem that payroll officers often face, is the lack of information

available just to make a good decision, even though the definition may vary from jurisdiction to jurisdiction.

Another problem I was thinking of this afternoon, as I came back to the hearing, was just who is actually liable to pay the worker after they're injured, especially after the time an employer may terminate that injured worker, whether it's because they've been off work for a certain length of time, or whether it's because the department has been made redundant and everybody has gone, including the injured worker. In some states the insurer will take over paying the injured worker for their benefits. In other states, whether this person is still your employee or not, you're still liable to make the payments to that person, and that is difficult for employers who work in many jurisdictions because some people they say, "Right, this person is terminated, they're off our books, we don't have to worry about it any more," and for others they have to have a dummy payroll for people who aren't employees, that they still have to keep paying. That's one of the difficulties as well that they face.

So we'd like to - as I said, we'd like a pre-agreement between states to start telling us what they want included in wages, to make it easy, and then we would really like agreement so that the definition of "wages" is the same all over, so that we know that if we only have to pull one report from our payroll - whether the premium is based on 13 per cent in one state, 10 per cent in another, 3 per cent in another state, the wages part of the premium calculation is the same across the board, whether it costs more in one state or the other.

PROF WOODS: Yes. You're going to have differences in the rate of premium to which you apply it.

MS MARTIN: That's right, but the basis would be - - -

PROF WOODS: But you want a base.

MS MARTIN: Now, New South Wales in particular has started a program to bring the payroll tax regime and workers comp regime for the definition of "wages" mostly into line. New South Wales has just brought in some new definition of "wages" in the last week or so for payroll tax, and we're not aware yet whether that will also be then picked up for workers compensation for next financial year, but we're assuming, if they're going down the track for it to be the same, that it will be so.

We know that often different bodies in the same state don't talk to each other, so we're quite impressed with New South Wales talking to each other, and we'd really like to encourage other states to do that too. Even if we can't get the state workers comp bodies to talk to each other, at least if each state has the same definition for everything that employers are required to pay, that would also be a

benefit, and we know that's a pipe dream, but that's one of the aims of the association, is to encourage harmonisation between states to make payroll officers' lives a little easier.

PROF WOODS: Well, New South Wales have that LeCouteur and Warren report, and it's something they've devoted some time and effort to, and we've picked up that. In terms of our treatment of your submission and drawing matters out, are you reasonably satisfied that we've - - -

MS MARTIN: We are very satisfied with your consideration of our matters, although we'd like you to perhaps give more focus to encouraging states to get together and work on their definition of "wages" and "employees" and "employers" as a priority over other issues, but then that's our focus.

PROF WOODS: Yes.

MS MARTIN: And others will have a focus on getting the OH and S right first before the wages. We would really like it to be a priority that wages - and that really it could be something that could be worked on that could be settled in two financial years.

PROF WOODS: I guess the question is whether states try and get a commonality for workers comp definitions across the states or whether, within each state, they try and get a commonality of definition between payroll tax and workers comp. So depending on which way you go - - -

MS MARTIN: Either way, yes - - -

PROF WOODS: Because one will drag it one way and not the other.

MS MARTIN: That's right. Even if we could get workers comp all the same and payroll tax all the same, even if they were different it wouldn't necessarily matter, but ultimately - - -

PROF WOODS: Any commonality is good commonality.

MS MARTIN: Any commonality is good commonality from a payroll officer's point of view. In an unrelated subject, all of the state industrial relations bodies got together, over the last 18 months or so, and have now come up with a harmonised definition of time and wages records and pay slip records. It took some time, but they did actually get together, talk about what wage records they had to keep for time recording, and things like that.

They have now given a template that everybody could use and if they use that one template they will meet all the obligations under every jurisdiction, even though they still acknowledge that every jurisdiction's requirement is different. If you use this one template it's sort of an over-bridging template, that if you use this template you will meet every obligation because it has sort of built in the highest ground of everyone to make everybody happy. Even that sort of template would be satisfying to payroll offices for workers compensation. Even if the legislation is different in every state, if we use this template we could know that we weren't going to be in breach of a particular state's legislation by mixing up a definition from one state to another.

PROF WOODS: You have provided us with further written material. Are you going to - - -

MS MARTIN: We are going to make a final submission.

PROF WOODS: You are going to make a final submission.

MS MARTIN: We are actually hoping to get some of the members of our association together and draw on some of their opinions and experiences, to make a final submission before the end of January.

PROF WOODS: In the sense that this was unscheduled, we will take that as a statement in progress and look forward to your final submission. If it could be available by 30 January.

MS MARTIN: Thank you.

PROF WOODS: Thank you very much.

PROF WOODS: Our next scheduled articipant is the Australian Manufacturing Workers Union.

MS BUCHANAN: Good afternoon.

PROF WOODS: If you could for the record please state your names and the organisation that you are representing and any position you hold in those organisations.

MS BUCHANAN: My name is Margaret Buchanan. I work as a national research officer at the Australian Manufacturing Workers Union.

MS VALANCE: My name is Deborah Valance. I work with the Australian Manufacturing Workers Union as the national occupational health and safety coordinator.

PROF WOODS: Thank you very much. We had the earlier submission from you, towards the end of June and thank you for that. We drew upon that as we prepared our interim report. We now have a further submission, 21 November, where not only do you provide cover commentary but helpfully also include some other material in fact, which we drew on, on Monday, when we were talking to the ACTU in Queensland and Tasmania, and the NUW also came along.

MS BUCHANAN: Good.

PROF WOODS: They were told that this was on your bit here and that they should come along.

MS VALANCE: Yes. They knew that. That's right.

PROF WOODS: We had quite a useful discussion at that point in time. Some of the attached material here really is quite revealing and useful to us. Do you have an opening comment you wish to make?

MS BUCHANAN: Yes, please. One of the issues that we would like to elaborate our concerns about are the proposed defining of access of who is an employee, for the purposes of any comprehensive national scheme. The report itself refers to - I will just find the pages - the interim recommendation is on page 130 - sorry,

PROF WOODS: 137. Is that where you are looking?

MS BUCHANAN: It's actually 125.

PROF WOODS: Sorry, those items.

MS BUCHANAN: The interim recommendations there.

PROF WOODS: Yes.

MS BUCHANAN: It's the first dot point, about employer control:

> Recognising that the common law contract of service provides a solid basis for defining an employee in those situations.

I think that's true to say, where it's accepted that a person is on a contract of service, that the common law tests are fairly readily applied. However, where there is any contention about what the nature of the employment relationship is we would contest that the common law tests are, firstly, applied in a consistent way. For example, even the High Court decisions around couriers, as to whether or not they are contractors or employees, as an example of that. More generally we would also suggest that the issue of employer control is also in some ways shifting, as to what is the relevant test there as well.

The report has set out the extract from the Australian Industrial Relations Commission's decision, Abdulla. That decision sets out what might in fact be, as you say, where the common law is at currently. Even if you look at Australian Industrial Relation Commission decisions, when it comes to making dispute findings, that's where, for example, the commission will take into account and make a dispute finding even where there is not a direct employment relationship, but the corporate entity has the ability to have a significant impact on the employment relationship itself.

Where I am heading with all of this is the issue of labour hire, and that's a particular issue amongst our members within the union. There are already considerations arising as to whether or not the US concept of joint employment might be an appropriate concept to use. It hasn't been adopted in any jurisdiction in Australia, as yet, although it was recommended in a recent South Australian review of the industrial relations laws. The reason why we are raising the issue about the labour hire situation is that it can also connect to the proposal about self-insurance.

PROF WOODS: Just at this point, you refer to labour hire in a generic sense but in some models of labour hire it is very clear that the workers are employees of the companies and presumably in those cases you don't have an issue because they are employed by (indistinct) or somebody that they are a direct and recognised employee and sure, they work on different sites but that relationship is clear, established, they pay workers comp premiums for them, et cetera, et cetera. It's more those who act as

an umbrella sort of recruitment entity I guess is the ones where you have your greatest concern. Is that right? Labour hire is such a big title.

MS BUCHANAN: It is.

PROF WOODS: I'm not quite sure where within it you want to - - -

MS BUCHANAN: It deals with a number of scenarios. Correct.

PROF WOODS: Yes.

MS BUCHANAN: The first scenario that you have described; that's a fairly clear relationship. Presumably in that relationship the labour hire company itself is taking responsibility for the occupational health and safety aspects of the worker.

PROF WOODS: Yes, they do. The theory is that they do the site checks and - - -

MS BUCHANAN: Exactly. Yes. There are also labour hire companies where our members - the only work they will do will be with a particular host employer and they are only engaged by that labour hire company to work for that particular host employer.

PROF WOODS: Such as in an abattoir or something.

MS BUCHANAN: That's right. There is a particular project, a mine hunter project. It might last for several years. In fact our members may work for several labour hire companies throughout the course of that project.

PROF WOODS: Performing the one function for the one host.

MS BUCHANAN: Exactly. Yes. So in that scenario it's quite probable that the host employer in that situation would be a potential self-insurer. Then there is the issue about, well, how do you assess what the appropriate insurance should be? So we see that issue of labour hire, and particularly what the costs of self-insurance should be, as highly relevant in coming to that sort of arrangement. While we would certainly agree that it's very hard to come up with a definition that deals with all of the possible scenarios we would be urging, whether it's through a deeming or even if it's in terms of direction regulation of self-insurer companies, that labour hire is not a way to escape the responsibilities there.

PROF WOODS: We deliberately included reference to the Queensland results test, in the middle of page 115, which sort of gives you a three-part test. Do you have any view on that? If not now I wouldn't mind if you could reflect on that and come back

to us.

MS BUCHANAN: Yes.

PROF WOODS: We put it there deliberately, to attract people's attention to it. If you could come back with that, that would be helpful.

MS BUCHANAN: Thank you. Yes.

PROF WOODS: That's the question of who is in control and what is the nature of the contract and therefore whether you need to extend, through deeming or some other way of capturing those who need to be covered.

MS BUCHANAN: That's right.

PROF WOODS: These other criteria, the certainty and parity, that's obviously what you are looking for.

MS BUCHANAN: Yes.

PROF WOODS: Administrative simplicity, that's something we always urge. The other one, consistency with other legislation, that's an issue that was just being discussed earlier, in terms of the payroll people, where you are having to head in one direction for payroll tax and another direction for workers comp, or you are looking at workers comp across different jurisdictions, even if you are the one employer. That one is fairly self-evident. Any other commentary on that set of interim recommendations?

MS BUCHANAN: No, not at this stage. One of the issues that arises in that last dot point I guess is what legislation and whether there should be a nexus with the industrial legislation or not.

PROF WOODS: Do you have a view on that?

MS BUCHANAN: That is one we really need to think through more, I think.

PROF WOODS: The, over the page, which I guess is the one that in part you're referring to, because of the nature of these changing work arrangements, whatever we come up with has got to be able to deal with them rather than constantly having to go back and see if something else has changed a bit.

MS BUCHANAN: Correct.

PROF WOODS: But that's just a little harder than most. Where do you want to head, otherwise I'm happy to head in various directions?

MS BUCHANAN: The other issues that we would like to elaborate further, not necessarily today, are about the level of credential requirements that would be placed on self-insurers and picking up some of the comments made by the Institute of Actuaries on that whole issue.

PROF WOODS: You do have some interesting material that you did kindly attach to your submission on self-insurers. I guess several messages come out of that. One is that there is variable performance between self-insurers. I mean, there are good self-insurers, there are some not good self-insurers in this particular respect. One of the challenges is to create a structure that designs the right incentives for those who aren't to become good insurers. There is not point just legislating to say, "You shall be good self-insurers," you've got to create the incentive structure that gets everyone focused to that end.

That's a bit problematic but the challenge is there and the fact that the diversity is recognised here, I thought, was helpful. Some of the statistics that come out of that - some I don't understand like self-insurers reluctant to retrain injured workers in other parts of their businesses. I would have thought the incentive structure was for them to find and train people to that end, but that doesn't seem to be - - -

MS VALANCE: That's the problem with a lot of the assumptions that we make about self-insurers, and I think as indicated in some of the opinions that you've given - have been given to you in the appendices, the assumptions that self-insurers - things will necessarily flow on and that there is a vested interest from the self-insurer to behave in a particular way. I think what our surveys in Victoria have shown - which included in some of that were some interstate companies, because some of them are large employers - also in the work that the Victorian self-insurers return-to-work monitoring things have done have shown that there is a fair bit of mythology around the performance of self-insurers; that they don't necessarily have a higher return-to-work rate and that was actually what we got quite clearly from our survey work; that that again is incredibly variable.

Despite the fact of some of these companies being actually large entities, the assumption that they will retrain is again an assumption that is not necessarily borne out in reality. The assumption that claims will get processed quickly, again, is an assumption that doesn't always meet with the reality. We have the assumption that medical and like expenses will automatically be paid because they're easy and quick, again is not the case. Our experience in Victoria in those workplaces who are self-insurers, who we have rehabilitation and return-to-work agreements with - which actually add a further industrial layer on the legislative and workers compensation

processes - that's when we actually get better performance. But when we don't have those we don't get better performance.

We had sort of thought - you know, some of the bureaucrats in the organisation, I suppose, that perhaps that was the case, but it wasn't until we had actually done the survey and looked quite closely that we saw there was really a very consistent feature, that without extra mechanisms at the workplace level, self-insurer performance was really as variable as anybody else's performance. So that's why, from - given that we're an organisation and we think that workers compensation should be a system that insures well for the insured - ie, the injured worker - we find it difficult to understand why one would promote such a system when it doesn't, from the evidence, appear to improve what gets delivered to the injured workers. Most of the argument in the interim report is about benefits and cost saving for the employer and we think that, given it's an insurance system for injured workers, then there needs to be much further consideration of the benefits for the injured. Our evidence doesn't indicate much there.

PROF WOODS: All right. Let's deal with the return-to-work monitor data in a minute, but as a slight counter to some of that, you mentioned under claim - sorry, you've included the NUW's material which says that that particular union is greatly concerned with the behaviour of some self-insurers who have been encouraging members to not put in genuine claims and put them under a different arrangement. Yes, but what that does is create a bit of a mythology that that is something that self-insurers do, whereas perhaps it could be argued that many employers - and those who are insured - may be doing it to avoid having their claims record and claims experience and therefore their subsequent premiums affected. So they might also send the injured worker home in a cab and tell them to go to their local doctor. It's just that you can build up mythologies both ways and I'm just a little concerned - - -

MS VALANCE: No, I don't think that's a mythology because what we are - our assumptions are based on - that we assume when people talk about self-insurance in the jurisdictions, the ability to self-insure, the people who self-insure are at the better end of the market. That they, as insurers - - -

PROF WOODS: They should have a higher hurdle.

MS VALANCE: Yes, and the evidence is that they don't; they behave like many others and so that's not about a mythology about - you know, the behaviour. It's saying - people say that if you're a self-insurer that indicates a certain level of performance; what we're countering is that. You are right; there are many of those things happening across the board.

PROF WOODS: Yes, it's just the question of balance in presentation that I was

pursuing. But some of the return-to-work material does highlight some interesting things. At a macro level, though, it says the return-to-work rate for Victorian injured workers from self-insured employers was higher than from all premium - emphasis on "all" - premium-paying employers in Victoria and so from that you could draw one conclusion: well, (a) that's good, that they are doing what they should be doing at a higher bar, but then, interestingly, this material differentiates into a subclass of premium-paying employers being the larger ones from whom you should more directly compare self-insurance and what this is saying is that you don't find a difference on average in performance and the same for durability - that it is similar.

So, yes, you could draw one set of conclusions by looking at self-insurers versus premium-paying employers but you draw a different conclusion if you compare them more closely with comparable large premium payers.

MS VALANCE: Which I think is the more valid thing.

PROF WOODS: Yes.

MS VALANCE: And compare apples with apples, not apples with pears.

PROF WOODS: Quite, precisely. I'm agreeing with you. I think that is - - -

MS VALANCE: Yes.

PROF WOODS: It is a question, though, and we've addressed it here as to whether in fact self-insurers - why must they necessarily have a higher hurdle to jump than premium payers? Presumably what we're aiming for is a high standard of occ health and safety and a good return to work, injury management, rehabilitation scheme whether they self-insure or are premium payers. What you're saying is that somehow there should be some differentiation; that it's almost a right to be able to self-insure as distinct from an election, and that they must pass a higher hurdle. Why can't they just pass the same hurdle, but make sure they do, otherwise they lose opportunity to self-insure?

MS VALANCE: The concern is that the rationale in your report, which the terms of reference require - were asking you to look at both the employer side and the injured worker's side. On reading the interim report, we think that what has happened is the decision that the - what you have investigated to lead you towards encouraging more in self-insurance, is because it is of benefit to parties in it, but the only benefits that we can see that you're arguing is for the employer.

PROF WOODS: For the employers.

MS VALANCE: So if we're going to increase the spread of the scheme, we would think that it should be actually better for everybody in that process.

PROF WOODS: Right.

MS VALANCE: So it's not just saying because you're a self-insurer, you should have a higher level - I can understand your logic there - but your logic in this interim report appears to us to say this will be better for employers. I'm saying if we're going to improve the depth of the scheme we need to be improved for both groups of people - for the insured. And to back up that claim is that currently there are numbers of multi-state employers who, as you rightly point out, can currently go into the Comcare system. They could elect to do that. They do not - - -

PROF WOODS: Provided they had ministerial approval and none of them have yet been successful to that little endeavour.

MS VALANCE: Yes, but the reasoning given in some of the evidence before you, is the reason that we don't want to go into Comcare; we'd like the benefit levels changed. So it's a pretty strong indicator to us that in fact what it's going for is a lowest common denominator for a national self-insurance scheme that is not taking the best interests of the injured workers at heart, and so therefore deep concern about that trend which seems to be quite apparent in the interim report. That is aside from the effects of taking out large employers would have on state schemes, et cetera, which is a whole other argument.

PROF WOODS: It is. Let's pursue each of these and can I state at the outset that the Productivity Commission prides itself and lives or dies according to its independence, so we don't actually hold a book for one part of the economy or another. We look at this - seriously look at this as objectively as we can, and our training permits. But in that respect there does seem to be some benefit, although it hasn't been spelt out, to employees of firms who can roll out a single occ health and safety regime across their entire operation and can have a single rehabilitation return-to-work scheme, rather than the current fragmented disjoint they have to by being in individual jurisdictions.

MS VALANCE: Could I ask a question then?

PROF WOODS: Yes.

MS VALANCE: Could you tell us or show us where in the report you actually show or the evidence is that that is the case, as a benefit to the employee?

PROF WOODS: Well, there is - - -

DR JOHNS: Comcare's benefit, are you saying?

MS VALANCE: No.

PROF WOODS: No, just being able to have a common culture of occ health and safety and - of workers compensation across their firms. Are you proposing that this wouldn't necessarily result in any benefit to employees?

MS VALANCE: I'd like to be convinced about where that benefit is because - - -

PROF WOODS: Okay, all right. There's a challenge that you are putting to us and I'll take on that challenge to see where there can be support for that proposition. I think it's a proposition worth exploring. You made a jump from, "If they don't want Comcare for certain reasons - ie, they don't like some of the benefit structures" - particularly the long tail is what many have identified - but to jump from there to saying it's a race to the lowest common denominator, I think misses a middle step which might be to recognise that Comcare's benefit structure is at one end of the spectrum and that there are lots in the middle of the spectrum that you may end up at, which are not at the bottom end of the spectrum.

I think you are putting forward the proposition that you either have Comcare or the bottom end of the spectrum, whereas I'm wondering - and in fact the whole tone of this report, if you carefully read it, is to urge not to start with a new sheet of paper and try and devise the cheapest possible scheme, or even to make wholesale change to Comcare, but if there are one or two areas that do warrant re-examination, so that they apply more readily across the broad spectrum of industry, then it is worth exploring that. But in discussions, consultations, et cetera, we are certainly not urging employers to think that they are going to make any progress if they try and achieve wholesale changes - certainly not as you portrayed it, to race to the bottom as quickly as they can. But I think you have to admit that Comcare is at one end of the spectrum.

MS VALANCE: On certain areas, not in terms of its decency of how it administers its scheme, no.

PROF WOODS: No, administration of the scheme - I'm not professing to be the supporter in that sense. But I'm just saying it's a position to start with and to then - to the extent you work back, if you try and work back too far then nothing is going to happen because there just won't be agreement. It's a matter of saying, "Is there a more appropriate middle ground that both parties can relate to?" - recognising that Comcare is there in its benefit structure and some other scheme is down there. We're not promoting a race to the bottom. It's not in the interests of the Productivity

Commission to put that proposition.

MS VALANCE: I would put the same - the challenge from the fact that we actually represent people who are employed under the Commonwealth scheme, so for us to be supporting a system that changed that benefit structure which was less than what they currently have - - -

PROF WOODS: Yes, I - - -

MS VALANCE: - - - we would not be representing that group of - - -

PROF WOODS: I understand your jurisdictional issues.

MS VALANCE: No, it's not just the - but the second point being that for us to be convinced of that, we then have to be convinced of the real benefits for everyone. That's a challenge I'm saying that I don't think that the interim report attempts.

PROF WOODS: I take that on board.

MS BUCHANAN: I guess one of our concerns with self-insurance is potentially the greater financial precariousness of it. That is secondary to what Ms Valance has set out in terms of our principal issue.

PROF WOODS: But important and relevant.

MS BUCHANAN: Yes, but in proposing an option that does seem to have potentially more features of precariousness to it.

PROF WOODS: Which is why we went to the Commonwealth actuary and said, "Tell us how the Commonwealth" - because ultimately the taxpayer would be - - -

MS BUCHANAN: That's right.

PROF WOODS: Together with the disruption for the injured worker in the process. Should a large self-insurer go under, there are lots of ramifications. So we're conscious of that but we have tried to address that by going back to the actuary to say what level of prudentials, and it should be tightened up, et cetera. It still nonetheless remains a risk.

MS BUCHANAN: Yes, and it also raises just what kind of regulation there might need to be for a self-insurer to attempt to avoid its obligations by corporate restructuring.

PROF WOODS: We have very limited experience in fact in Australia of self-insurers going under - one in Tasmania, one in South Australia that come to mind but not a lot - but nonetheless the risk is there. You may not have articulated it but whereas we've drawn out the consequences for the taxpayer, there are consequences for workers in terms of disruption of rehabilitation and the like, which we should also draw out more carefully and fully in our final report. Thank you for ensuring that I make that obligation. Where to next?

MS VALANCE: We intend to put in a full submission but they were the features that we were most concerned about that we just wanted to address today. I suppose there's just to reiterate the support for some of the issues that were put in the ACTU submission regarding - - -

PROF WOODS: Are you going to berate me about the NOHSC restructure?

MS VALANCE: No, I'm not going to, but I'm going to reinforce that beration, if you were given one on Monday. I'll make sure that you get a very clear message about tripartism and the fact that the structure you propose would actually not work, but I'll leave it at that.

PROF WOODS: I'm glad you've raised the topic, or I did, or somebody did, because I want to take the opportunity to report that following Monday's discussion we have been reconsidering that particular issue and whether the model that we've come up with to date is the right one. Some of the argumentation that Richard and others raised has considerable merit, so we are taking that on board and we can see alternatives there that we're happy to explore.

We do acknowledge in the report fundamentally that occ health and safety happens on the shop floor between the employer and the employees, so that's fundamental to the process, so we don't want to lose that. What we want to try and achieve is a body that can drive change and reform and uniformity more effectively than the current 18-member discussion group.

MS VALANCE: I'm sure that my ACTU colleagues put it - - -

PROF WOODS: Yes, quite eloquently.

MS VALANCE: But the issue - I think that when both the previous set-up through WorkSafe and again the current set-up through WorkSafe from the National Occ Health and Safety Commission - is there is an assumption that it's actually the structure that is the problem.

PROF WOODS: No, but it's only the structure that we can affect.

MS VALANCE: It is only the structure you can affect. However, the point is that what happens is those impediments are related to political will and many times both federal and state governments have intervened in such a way that is actually about political agendas but is not related to occ health and safety, and that's been consistent across the whole time.

PROF WOODS: You're in a better position to deal with that than the Productivity Commission. We can recommend structures that create the right incentives - the performance of the entities within those structures.

MS VALANCE: But each time there's been a structure put up there has been a barrier put up in terms of the way people behave with that structure, so it's actually about a cultural and political change that's required.

PROF WOODS: You've been very quiet during all of this, colleague.

DR JOHNS: I really want to know about your difficulties with the administration of Comcare; whether you could detail those for us in a further submission. If that's our jumping-off point, it would be useful perhaps.

MS VALANCE: In terms of claims management, we don't have near as much experience as some other unions. I suppose we have a smaller membership, but I'm sure we could easily get you information about how we see that process is not very - the claims management processes are not necessarily very worker-friendly.

PROF WOODS: And if you could encourage others within the union to come to us and talk on that matter.

MS VALANCE: I'm more than happy to.

PROF WOODS: What we're interested in there are issues such as claims management and rehabilitation, but also governance. Whether under the direction, the pathway that we're proposing, it's important to separate to the regulatory function, which is I guess best exemplified by the SRCC, from the claims management rehabilitation process, which is sort of a core Comcare-type functionality.

MS VALANCE: And there's the third feature of that - is their occ health and safety regulatory - - -

PROF WOODS: Precisely, yes, I'm sorry. I was treating that as parallel but under their model it's within.

MS VALANCE: We basically don't have a very good experience of how the Comcare behaves as a regulator, and any move to suggest that option be enhanced out would require a significant cultural and political and organisational change at Comcare that for their whole existence has not operated.

PROF WOODS: Do you therefore have a view on whether OH and S functionality should be separate from the sort of insurance, WorkCover, workers comp-type functionality? They're different models and they work different ways.

MS VALANCE: You can't disassociate them, of course. One has to inform the other. It's really administratively how you do that, and whether you do continue with occ health and safety activity being totally determined by workers compensation statistics. I've said in other forums that unfortunately this country, in all of our jurisdictions, uses an intellectually dishonest approach to health and safety performance by measuring it by our workers compensation national data set.

Whilst we continue to have that approach, we will continue to underperform. Often people make the comparison with the road toll and the actions of how we've been as a nation. We should be proud of our performance there but quite differently to occ health and safety performance in the road area, we know what our figures were. We knew the depths of the problem. We knew that we were killing 1044 people on our roads, so 1044 is an important figure.

We don't know. We don't have an accurate reflection and we persistently argue and say that it's too difficult, when in fact the information is there if we actually just try to look at it. We don't.

PROF WOODS: The Productivity Commission spends an awful lot of its time poring through data and analysing, and in this report we've said, "Well, look, we can only get hold of workers comp claims data." We've then gone to the ABS and we've said, "Well, hang on, this is only a subset of that." Also it doesn't capture disease, which is a huge issue. To an extent, yes, we've only relied on the data we can get hold of, but helpfully we've put in sufficient caveats to say, "But hang on, that's not the whole story." Now, if that needs a bit of strengthening we're happy to relook at that.

MS VALANCE: I wasn't critical of the commission in that regard. I was critical in terms of any approach that we do.

PROF WOODS: I appreciate that. It's just that some others in the broad church did try and have a go at us but we are genuinely respecting that the data that we have is only a subset of the totality of the issue and, if you could put in your final submission some pathway on how to improve the database because that's our bread

and butter - is data and what it shows and what you can reasonably conclude from it. So we're very keen.

MS VALANCE: More than happy.

PROF WOODS: If that can be a strong recommendation that comes out of our report, well, that's well founded. It's one thing to say, "Let's have better data," but if we can actually identify some pathways to achieve that, that would be in itself useful.

MS VALANCE: Yes.

PROF WOODS: We're happy to be a vehicle for that end.

DR JOHNS: That's useful, thank you.

MS BUCHANAN: Thank you very much.

MS VALANCE: Thank you very much for your time.

PROF WOODS: It's been a pleasure and we do appreciate the submissions you've put in to date, and look forward to your concluding one. If you could report back to your colleagues at the ACTU that we are taking seriously on board the views about NOHSC - - -

MS VALANCE: I'll happily give Richard a call.

PROF WOODS: Thank you. Are there any present who wish to make an unscheduled statement? Only have one potential left - no? Everyone else has done that, in which case I will adjourn the hearings for today and resume tomorrow at 11.30. Thank you.

AT 5.41 PM THE INQUIRY WAS ADJOURNED UNTIL
FRIDAY, 5 DECEMBER 2003

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