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RELATIONS AND EDUCATION

**Reference: Safety, Rehabilitation and Compensation and Other Legislation
Amendment Bill 2007**

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**SENATE STANDING COMMITTEE ON
EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION**

Wednesday, 31 January 2007

Members: Senator Troeth (*Chair*), Senator Marshall (*Deputy Chair*), Senators Barnett, George Campbell, Fifield, Lightfoot, McEwen and Stott Despoja

Participating members: Senators Allison, Bartlett, Bernardi, Boswell, Brandis, Bob Brown, Carr, Chapman, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Forshaw, Hogg, Humphries, Hutchins, Johnston, Joyce, Ludwig, Lundy, McLucas, Ian Macdonald, Mason, McGauran, Milne, Moore, Murray, Nash, Nettle, O'Brien, Patterson, Payne, Polley, Robert Ray, Sherry, Siewert, Stephens, Sterle, Trood, Watson, Webber, Wong and Wortley

Senators in attendance: Senators Barnett, Marshall and Troeth

Terms of reference for the inquiry:

To inquire into and report on: Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006

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Committee met at 8.59 am**MARLES, Mr Richard Donald, Assistant Secretary, Australian Council of Trade Unions****MORAN, Mr Jarrod, Workers Compensation Officer, Australian Council of Trade Unions**

CHAIR (Senator Troeth)—Good morning. The Senate Standing Committee on Employment, Workplace Relations and Education reconvenes its inquiry into the [Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006](#) this morning with witnesses from the Australian Council of Trade Unions. Before this committee begins taking evidence, I advise that all witnesses appearing before the committee are protected by parliamentary privilege with respect to their evidence. Any act by any person that operates to the disadvantage of a witness, following their testimony providing that evidence, is treated as a breach of privilege. Witnesses may request that part or all of their evidence is heard in private. However, I also remind witnesses that giving false or misleading evidence to the committee may constitute a contempt of the Senate. I welcome any observers to this public hearing and witnesses from the Australian Council of Trade Unions. Thank you for your submission. Do you wish to make any amendments or alterations?

Mr Marles—No.

CHAIR—I invite you to make an opening statement, after which committee members will ask questions.

Mr Marles—It is our view that the federal government is, at the moment, establishing a national occupational health and safety jurisdiction and a national workers compensation jurisdiction. We believe that those jurisdictions are being created on the basis of a lowering of standards, a disempowering of working people and a reduction in the entitlements which are payable under that workers compensation scheme. In our view all of this is being done by stealth.

The bill that is being considered today is simply another brick in the building of that edifice. It is an edifice which began with the granting of licences to private companies which have had no corporate history with the Commonwealth government to participate in the Comcare scheme. So you now have Linfox, K&S transport, the National Australia Bank, John Holland and Optus covered, or about to be covered, by the Comcare scheme. The second step was the Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2006, which aligned the Commonwealth's OH&S jurisdiction to coverage by Comcare—that is, the five companies that I have just mentioned now becoming part of the Comcare scheme will also, as a result of that act, be covered by the Commonwealth's OH&S jurisdiction.

We then saw an attempt to lower the standards of the occupational health and safety act through the Occupational Health and Safety (Commonwealth Employment) Amendment Act 2006, which sought to remove all reference to trade unions and place the process by which health and safety representatives in the workplace are chosen into the hands of the employer. And perhaps an even more radical step is the review currently under way by the Department of Employment and Workplace Relations into the Commonwealth's occupational health and safety act. If the discussion paper is any guide in relation to that then what we are facing is a Work Choices magnitude reform to the Commonwealth's occupational health and safety act

which will similarly place that act, in international terms, right out on a limb. Then we have the bill that you have before you, the basis of which is to reduce the entitlements which are to be paid out under the Comcare scheme.

Senators, I give you that overview—that history, if you like—for two reasons. Firstly, I think it is important to set it out like that because in our view the government has been very shy in stating its true objectives, particularly in relation to the democratic process—that is, particularly in the lead up to elections. So I think it is important that it is said up front in that way. Secondly, it places an important context around your considerations in relation to this bill. For example, there are approximately 300,000 employees covered by the Comcare scheme. One of the aims of this bill is to remove journey accident claims in relation to the Comcare scheme.

Taken in isolation, you might fairly look at this bill and think that what you are being asked to consider is whether or not journey accident claims should be removed for 300,000 employees. But were that the only thing you considered—or were you to consider it simply in that light—that would be completely wrong because the government's agenda is to create a much bigger jurisdiction than that. What you change in relation to this act is going to apply to every other company which seeks to join the Comcare scheme. And if the government gets its way then it will also set the agenda for every other worker in this country. So you are not simply considering whether or not journey accident claims, as an example, ought to be removed for 300,000; in our view you are considering whether or not that agenda should be set for the entire Australian workforce. So the point to be made up front is that that is the basis by which we think you should consider this bill.

We should say at this point that we acknowledge that there are aspects of this bill which will be beneficial to working people—for example, increasing the limits on funeral benefit payments—and there are some beneficial alterations to the superannuation bills, but when considered against those reductions in entitlements those benefits are very minor indeed. If you look at the stated rationale for this bill, which is that there is an increased cost pressure on the Comcare scheme, then clearly the whole point of this bill is to reduce the entitlements paid out by Comcare. It would hardly make sense, when trying to address an increased cost pressure on the Comcare scheme, to extend the benefits to working people. So there is no doubt that the thrust of this bill is to reduce those entitlements.

There are three specifics that we do want to address but I want firstly to speak to the rationale behind the bill. We do contest the idea that there is in fact an increased cost pressure on the Comcare scheme. If you look at the comparison performance monitoring, it shows that there has been a consistent downward trend in not only the numbers of claims that have been made under the Comcare scheme but also the numbers of hours that have been lost as a result of those claims. I would refer you to pages 4, 5 and 6 of our submission, which detail those precise figures. But the point gained from that is that we question the basic rationale for this bill. We do not believe that there is in fact an increase in the cost pressure on the Comcare scheme. To us that makes sense because we think that the actual rationale for this bill is to be part of a much larger agenda which I outlined at the start.

There are three particular concerns that we have about this bill in the reduction of entitlements. The first is the change to the definition of disease. If you are an employee

covered by the Comcare scheme and you have a disease right now which has a work related component to it, then you can validly found a claim under the Comcare scheme. But as a result of this bill, if you are an employee with a disease then you will not be able to found a claim under the Comcare scheme unless the work related component is the substantial component to that disease. In legal terms, there is a very significant difference in that. It absolutely means that the number of people entitled to make a claim will be reduced and that is the point of the amendment.

I guess the only thing that we would say about it is that this government was elected in 1996 on the platform that no worker would be worse off. The government has been perhaps a little more reticent about making that claim since the introduction of the Work Choices legislation, but when you are talking about reducing entitlements under a workers compensation scheme you can no longer make that claim. For the group of workers who would have been entitled to make a claim before this bill but will no longer be able to make a claim after this bill is passed, it is absolutely black and white that they will be worse off as a result of the Howard government. So if this bill goes through that claim can never be made again.

The remaining concerns we have are firstly the removal of being able to make a claim where there has been a reasonable administrative action taken by an employer in a reasonable way. That is bureaucratise for saying that you cannot put in a stress claim if you have been the subject of disciplinary action by your employer, be that a warning or ultimately dismissal. You will find similar provisions to that in other workers compensation schemes around Australia but you will also find workers compensation schemes where there is no such provision. We do not believe it should form a part of the Comcare scheme. I will come back to the reason for that in a moment because it is essentially the same reason that relates to our third concern. That is—I think really this is the big-ticket item of this bill—the removal of journey accident claims. So right now if you are covered by the Comcare scheme and you have an accident on your way to work or on your way home from work then you can validly put in a claim. Similarly, if you have accident during a break, you can validly put in a claim, but as a result of this amendment, you will not be able to put in a claim. Journeys to and from work and indeed breaks will be excluded from the nature of the scheme.

The rationale for these two reforms—for removing stress claims for disciplinary action and for removing journey accident claims—is essentially that it is not the employer's responsibility or it is not the employer's fault. If I am an employer and I validly discipline my employee, and I do so in a reasonable manner, and that employee then has some form of stress claim as a result, that is not my fault. Similarly, if I am an employer, I can hardly be responsible for the way in which a worker travels to my employment or has a break from my employment.

The problem with accepting that rationale in passing this bill is that it completely undermines the philosophical underpinning of workers compensation systems around Australia and indeed throughout most of the Western world, that being that they are no-fault schemes. We have a no-fault scheme in this country because if you do not have that you end up with unfair and arbitrary results. You can have two workers with the same injury, the same pain and the same economic loss, but one worker has an injury as a result of fault and so can

get compensation and the other worker has an injury with no fault and so can get no compensation. Because of the arbitrariness of that, in this country—and indeed in most Western countries—there is a decision to have no-fault workers compensation schemes. But the rationale for the amendments that have been put before you or are being considered by the Senate now is in fact all to do with fault: ‘It is not my fault as an employer that this person had a stress reaction to my reasonable behaviour.’

The truth is that fault ought not to be relevant in terms of a workers compensation system. We say as a society is that if you have an injury as a result of your contribution to our national economy then we as a society will provide compensation for that injury. So it is absolutely clear that the worker who suffered a stress reaction to disciplinary action did so in the course of their contribution to our national economy, that the person is on the road to their work and is contributing to our national economy. So if they have an injury in the course of that, we should have schemes which compensate them for that. Indeed, I would go so far as to say that if this bill passes it really is the thin edge of the wedge of undermining the no-fault basis of our workers compensation scheme, and that will ultimately lead to very unfair and very arbitrary results.

Those in essence are our concerns about this. We see this as part of a much larger agenda on the part of the federal government to establish a national OH&S and national workers compensation scheme, and we see that being done on the basis of a reduction in entitlements. That is clearly the aim of the bill that is being considered by you today. Thank you.

CHAIR—Thank you. Do you wish to comment, Mr Moran?

Mr Moran—I will make some brief comments. My experience with workers compensation goes back seven years at least. I have been working for the union movement for 10 years and for the last seven years exclusively in workers compensation. My experience is that you must take a long view of workers compensation schemes and the effects of amendments that you may make to those schemes. The effect that I see happening through this bill is an increase in disputation. The disputation rates for Comcare at the moment do not compare favourably to disputation rates around Australia.

I will take you to two particular points I would like to make on that. This information is also from the comparative monitoring surveys released by the Workplace Relations Ministers Council. The disputation rate for Comcare for the financial year 2003-04 was that 25 per cent of claims were disputed, compared to a national average of 9.7 per cent. The average legal cost per dispute for Comcare was \$8,150, compared with an Australian average of \$6,730.

Senator BARNETT—What were those costs again?

Mr Moran—For Comcare in the financial year 2003-04 it was \$8,150.

Senator MARSHALL—Is that the cost to Comcare or the total cost of the dispute?

Mr Moran—It is the total cost of the dispute. The Australian average was \$6,730. The last figure I want to point out to you is the percentage of disputes resolved. At or within nine months, for Comcare, 68.9 per cent are resolved. I do not have an Australian average, but the other percentages are: New South Wales, 86 per cent; Victoria, 87.9 per cent; Queensland, 98.8 per cent; Western Australia, 89 per cent; Tasmania, 88.8 per cent; New Zealand, which is

also included in these figures, 96.6 per cent; and Comcare was 68.9 per cent—still unresolved after nine months.

CHAIR—There are just a couple of things I would like to ask you about. How would you comment on the change in the definition of ‘disease’ with the upgrading from ‘material’ to ‘significant’, in that under this legislation it has to be proved that the workplace played a significant role in the escalation of a disease?

Mr Marles—As I said in the opening statement, essentially that involves a shrinking of the coverage. That is the point. Any lawyer will tell you that there are going to be fewer people who qualify under a definition of ‘significant’ than there would be under a definition of ‘material’. The stated aim of this bill is to reduce the cost pressure on the Comcare scheme. That is a measure which will reduce the number of people who get access to it.

CHAIR—What about people who have a predisposition to a genetic type of disease or a disease that is of long standing? Do you think it is fair for Comcare to contribute to that?

Mr Marles—Perhaps I did not answer the question properly in terms of stating our position. Our view is that if there is a work related component to someone’s disease then they should be compensated. So the specific answer to that question is that, notwithstanding having a genetic predisposition to some form of disease, if there is a material work related component to it then we believe that ought to be the subject of compensation. That is the level at which we think the net should be cast, so we are obviously in favour of a broader casting of the net.

It is clear—and the stated object of this bill—that this is trying to cast the net in a narrower way. Yes, we think that is unfair. But the real point we want to make is that, measured against the basic test of this government at its outset, which was that no worker would be worse off, clearly a whole group of workers are going to be worse off as a result of casting the net in that way.

CHAIR—But surely, if the contribution of the work to the disease can be proved to only be a small element, that would be a reason for making this particular proposition?

Mr Marles—We now have three words in the pot, in terms of what you have just said: ‘small’, ‘material’ and ‘significant’. We are saying that if there is a material—which is the word that is in the act at the moment—contribution then it should be compensated.

CHAIR—Which can be observed or—

Mr Marles—Yes.

CHAIR—be given to contribute.

Mr Marles—But this bill is about shrinking it from that, shrinking the coverage to the contribution being ‘significant’. We go back to the basic philosophy. If you are contributing to our national economy and you suffer as a result of that, no matter whether that is somebody’s fault or not, then our society ought to compensate you. If there has been a material contribution to your suffering, which is what the act says at the moment, then you should be compensated. That is fair. That will no longer be the case. There will be, by definition, a group of people who are going to miss out. They are workers who will be worse off.

CHAIR—Have you read the Telstra submission? No? It is reasonably straightforward in this sense. One of the examples that they use is a worker leaving his place of employ to go to a shop to purchase lunch. He slips and falls, suffering injury. Now, in those circumstances Telstra put the proposition that the company would have no control over the worker's movements in that shop, the footwear being worn by the employee, the journey to and from the shop, or the floor, and Telstra believe they should not bear the cost of treatment for such an injury. What would be your comment on that?

Mr Marles—Again, that goes to the opening statement. The philosophy of Telstra's comments there is about trying to make this a fault based system. The answer to that question is that the person was in the shop because they work at Telstra. That is why they were in the shop. If we want to go down Telstra's path and say that they will only get compensation if you can attribute some fault to the part of Telstra, in that they have behaved in some bad way, then we are talking about a radical readjustment of our workers compensation system in this country which will ultimately lead to very arbitrary and unfair results. The fact of the matter is that what we have is a no-fault scheme. It is not about whether it is Telstra's responsibility or whether it is their fault. It is about the fact that that person was in the shop because they work for Telstra, because they came to work that day contributing to the national economy, so we should have a system which compensates them for doing that. That is why the ideas underpinning these amendments are, in a sense, so dangerous. They fly in the whole face of the basis of workers compensation systems in this country.

CHAIR—But we do have systems which would look after the employee in that circumstance. They are such things as medical insurance, Medicare and—in the case of travelling to work—third party insurance or TAC, to which the worker contributes through his contribution or taxes. So, in a way, the employee is partially covered or covered to some extent by those schemes, so why do we then need to make the employer responsible?

Mr Marles—We are making the scheme responsible; that is the first thing. I take your point that the basis on which an employer contributes to the scheme in terms of their premiums is in part determined by how many accidents occur, and there is a link there which for other reasons is an important link in promoting health and safety. But basically it is a no-fault scheme and so it is the scheme, not the employer, that is primarily responsible for that employee.

The answer to your question was embedded in the way you asked it. They will only be partially covered by those other schemes and only to an extent. The facts of the matter are: they came to work that day, they were in the shop because they worked at Telstra and they should be fully covered by a scheme which relates to their work. That is how workers compensation works.

CHAIR—I understand that.

Mr Marles—Going down a mindset of trying to find fault and blame is relevant if we are talking about common law claims and the law of tort, but we are not. This is a legislative regime establishing a no-fault compensation system and so that is just not a relevant path to go down. The answer to that Telstra thing is that you ought to put a line through all of those

arguments, because Telstra is trying to make an argument based on fault. That is not what this scheme is about.

CHAIR—I would have thought it was more about equal responsibility, but anyway—

Senator MARSHALL—Thank you for your submission. I was involved in the previous legislation you mentioned and, if the government has some other motivation, it is hard to see what it could be, given their behaviour and the introduction of the legislation that has led us to the bill before us today.

I think your argument has been fairly straightforward. I was going to ask you—and to a degree Senator Troeth has already mentioned this—about the difficulties with underlying genetic disorders. With the change of the definition to ‘disease’, are we going to be in a position where claims are disputed at a higher level on the basis of trawling through people’s medical histories to try to establish some genetic predisposition to some disease or injury to avoid any obligation by the insurer to make compensation? Where ultimately does that take us and where does the cost burden ultimately fall or where is it transferred from and to?

Mr Marles—I think that is a very good point in the sense that, when you are talking about a material contribution by work, it is a test in isolation in that you can make a whole lot of judgements about whether or not the work is a material contribution irrespective of whatever else is going on. Once you walk down the path of a higher test of significance, there is a much greater degree of relativity to that—is it significant relative to whatever the genetic predisposition is? The forensic exercise involved in trying to determine significance as opposed to materialness is much greater and, as you said, would involve trawling through much more of that worker’s medical history, which at one level is obviously invasive and traumatic for that worker but, from a public policy point of view, is also going to involve a whole lot more costs. I think the point is right; I think trying to enforce a test of ‘significance’ as compared to enforcing a test of materialness will be much more difficult, much more costly and much more invasive.

Senator MARSHALL—We expect everyone in this community to work. Part of the other legislation we have been dealing with in this inquiry is about penalising people who do not fulfil their obligation to society to work. So we require everyone in our community to work and contribute to the national good. In terms of the discrimination in that aspect, are we now potentially saying that there is a group of workers or potential workers but that some of those people that we require to do these things, who have a genetic disposition to some injury or illness, will be treated less favourably than others, and is that not simply blatant discrimination? Should we be saying that if you have a predisposition to injury or illness we do not require you to work?

Mr Marles—You are exactly right. Such people will come to work every day knowing that they are far more exposed to the liability or the cost of any injury or impact of their work than any other worker, and that is absolute discrimination.

Senator MARSHALL—As I have said, I will certainly be asking the department and Comcare what their publicly stated motivation for this legislation is, but it is hard to see any motivation other than the one you have outlined today.

Senator BARNETT—Can I just go, Mr Moran, to the comment you made—I found the figures interesting and I had not seen them before—that 25 per cent of all claims were disputed under Comcare compared to nine per cent. I wonder what your analysis of that is and what you think the reason for it is.

Mr Moran—I think that it is a result of the dispute mechanisms under the act. The dispute mechanisms under the act are totally different to dispute mechanisms that we have in any other jurisdiction. That is one area that we will happily sit down with the department, Comcare or the ASCC and talk about. We think there is lots of room for improvement through the disputation processes. It is just the nature of how it is framed under the act—the ability for disputes to be raised and how disputes are raised. We think that also contributes to the other figure that I read out, which is the percentage of disputes resolved. You have a very low percentage compared to the rest of the jurisdictions for Comcare of 68.9 per cent versus the other jurisdictions, all above 86 per cent.

At nine months a transport worker working for Linfox or K&S is not going to have nine months of sick leave available to wait for their dispute to be resolved. These are workers who are feeling the brunt of Work Choices and have fewer than 10 days sick leave but are expected to wait nine months for their dispute to be resolved.

Senator BARNETT—Thanks for that. Do you accept that the changes will deliver some decreased costs, in terms of savings to the Commonwealth, under the scheme, and do you think that that will deliver a downward pressure on premiums?

Mr Marles—If you reduce entitlements, yes, you are going to reduce costs. So the bald answer to your question is yes. It will produce a saving to the scheme but the real agenda here is to provide a saving to the self-insured private companies which are being invited to come into the scheme. They are not paying premiums; they are bearing the cost of the scheme themselves, as it were, which then becomes a huge enticement for those companies to come into the national scheme. This is all about trying to establish a national workers compensation scheme by stealth.

The answer is obviously yes but the flip side of that coin is that if that is the stated object of this bill then you are absolutely making workers worse off. It is black and white. There is no argument about it; there are fewer entitlements. So this government, if it passes this bill, can never go out there again and say that workers will not be worse off. You are defining workers—or a group of them—to be worse off.

Can I add to the question you asked Mr Moran. Mr Moran will correct me if I get this fact wrong, but I think this is right. In our view the dispute resolution procedure in the Comcare scheme is simply defective compared to other workers compensation schemes around Australia, where the dispute resolution schemes are to an extent tailored to the scheme before you end up in a more general path of arbitration. In Comcare, basically, disputes take you to the Commonwealth Administrative Appeals Tribunal, which is a much more lengthy, time consuming and costly process.

If you want to reduce cost pressures on the scheme the point Mr Moran is making is that that is the place you ought to look. Tailoring a proper dispute resolution mechanism which is not so costly would be far more beneficial to reducing cost burdens on the scheme than going

out and out and, with a very blunt instrument, reducing the entitlements that are available to workers.

CHAIR—Thank you very much for your appearance today.

[9.30 am]

COLEMAN, Mr Richard, Director of Health, Safety and Environment, Telstra Corporation Ltd

SIRCA, Ms Jennifer, Legal Counsel, Telstra Corporation Ltd

CHAIR—Good morning and welcome. Thank you for your submission. Do you wish to make any amendments or alterations?

Mr Coleman—No, not at this time.

CHAIR—I invite you to make an opening statement, after which the committee members will ask you questions.

Mr Coleman—Thank you for the opportunity to speak to the proposed amendments. As noted in our submission, Telstra strongly support the proposed amendments. I do not intend to restate in detail our submission; however, I believe there are a few salient points that would assist the inquiry. I will go through them as they relate to the major proposed amendments on which we commented.

We note that the proposed amendment to strengthen the connection between disease and the employee's employment reflects the intent of the parliament at the time of the introduction of the 1988 act, as articulated by the then minister, Brian Howe, in his second reading speech:

It is intended that the test will require an employee to demonstrate that his or her employment was more than a mere contributing factor in the contraction of the disease. Accordingly, it will be necessary for an employee to show that there is a close connection between the disease and the employment in which he or she was engaged.

We would note that that intent has been significantly watered down by tribunals over time and that the proposed amendment more closely aligns the federal workers compensation system with the philosophy of workers compensation across the states.

I would also like to make the point that there is absolutely no evidence that the amendments will have a negative impact on the implementation of prevention programs or access to workplace rehabilitation. I would like to give you an example. Telstra regularly conduct prevention campaigns for health conditions which very few people would argue have any relation to work—for example, bowel cancer, prostate cancer and breast cancer. I note that none of these conditions appear in our workers compensation data, yet we still run these prevention programs. Our rehabilitation programs extend to people injured at home, on holiday and returning from extended non-work-related illness. Similar programs exist in businesses that operate within state workers compensation schemes.

I would now like to move on to the proposed amendment to exclude injuries arising from reasonable administrative action. We believe that the proposed amendment to exclude injuries arising from reasonable administrative action addresses the narrow interpretation put on disciplinary action by tribunals. I would like to give you an example. A person may suffer an injury from a conversation which progresses as: 'Richard, I'm not happy with your performance. What are we going to do about it?' Today, that person is arguably entitled to compensation if they suffer an injury. But the conversation might run: 'Richard, this is a

conversation under Telstra's performance improvement and consequence management process. I'm not happy with your performance. What are we going to do about it?' Arguably in that context the injuries that I have just suffered, if I have suffered any, are not compensable.

Under our current system, a person can suffer a compensable injury simply by receiving a letter requesting that they attend work for an interview regarding workplace behaviour. The result of all this is that layers of careful bureaucracy are built to ensure that inadvertent missteps by managers do not result in technical access to workers compensation, while the key issue, which in this case is workplace behaviour, goes unaddressed or, worse for the employee, becomes escalated into some sort of formal process. The workers compensation system has foisted on business and employees a level of formality in relationships that is actually somewhat counterproductive to the types of interpersonal relationships you want at work. Within Telstra we want an honest, open, two-way dialogue with our employees. We want to be able to formalise the processes and procedures at an appropriate time—not too early simply to avoid exposure to workers compensation claims.

I would like to move on to the amendments to remove claims for non-work-related travel and recess breaks. We believe that those amendments will address a costly workers compensation issue that is outside the control of employers. Eleven per cent of our claims are journey claims. On average they are 28 per cent more costly than other claims. We think that aligns our compensation obligations with our OHS prevention obligations. The requirement under the Occupational Health and Safety (Commonwealth Employment) Act is simply that an employer must take all reasonably practical steps to protect the health and safety at work of the employer's employees. We also note that the amendments deliver on policy recommendations in the 2004 Productivity Commission report on workers compensation arrangements in Australia.

Finally, the amendments will align the federal scheme with Victoria, South Australia, WA and Tasmania and move it closer to those states in which entitlement to journey claims still exists, because, with the exception of the ACT, all the states where journey claims exist have some restrictions on those.

It is important to note that the amendments will not exclude liability while the employee is at his or her place of work, including during an ordinary recess; while the employee is temporarily absent from the employee's place of work undertaking an activity associated with employment or at the direction or request of Telstra; while the employee is, at the direction or request of Telstra, travelling for the purpose of that employment; while the employee is at a place of education in accordance with a condition of employment or at the request or direction of Telstra or with Telstra's approval; or while the employee is obtaining a medical certificate for the purposes of the SRC Act, receiving medical treatment for an injury, undergoing rehabilitation under the SRC Act, receiving payment of compensation, or undergoing a medical examination or rehabilitation assessment under the SRC Act.

Once again, these amendments will not exclude employees from workplace rehabilitation or stop us from attempting to influence the health and safety issues surrounding journey claims. We are still going to try, so we are still going to have programs that attempt to influence driver behaviour. Just this Christmas, we ran a large driver safety program across

Telstra, not to do with driving to and from work but to do with driving, basically because we know what the road toll is like across Australia over the Christmas break. We are concerned about those issues.

I would also note that I have seen in a few of the submissions people noting that the proposed amendments are likely to change the way people travel to and from work. There is no evidence that access to compensation affects how people choose to go to and from work. If you look at patterns of pedestrian and bike usage across Australia, you will see that the determinants of those are not related to workers compensation.

Finally, I would like to make some remarks on the proposed amendments to the definition of 'suitable employment'. I want to get to the rationale that drove the definition of suitable employment to require employment within the Commonwealth. Our view is that that no longer holds true, and our industry is a great example of why that does not hold true. At the time of the 1988 act, Telstra were wholly Commonwealth owned, and we essentially made up the entire telecommunications industry within Australia. For anybody who was injured but had some residual capacity for work, really the only suitable employment opportunities were likely to exist within Telstra. For somebody who had been moved out of Telstra for whatever reason, it was therefore highly unlikely that we were ever going to get those people back to work. That is simply not the case today. Today, we are just one of many large, medium and small companies that are in the telecommunications, media and IT industries.

Senator MARSHALL—Are you large, medium or small?

Mr Coleman—We would be one of the large ones.

Senator MARSHALL—And who are the other large ones?

Mr Coleman—I would call Optus a large provider.

Senator MARSHALL—What is their workforce?

Mr Coleman—I do not know off the top of my head. My point is simply that there are a number of employment opportunities outside what was once a very monolithic Telstra. In fact, the conception of Telstra as the only player in the telecommunications industry—and that the only thing we do is connect copper wires to copper wires—no longer holds true.

The most critical detrimental aspect of the status quo is that employees who have been terminated are not encouraged to seek employment, even though they may have a work capacity. This is a negative long-term consequence for those employees. In their 2001 paper, *Compensable Injuries and Health Outcomes*, the Australasian Faculty of Occupational Medicine noted that not encouraging resumption of normal behaviours as far as possible and not encouraging return to work or normal activities is a cause of negative health effects within the compensable injury arena. They go on to note:

Unemployment is, in itself, a risk factor for poor health. There are multiple and interrelating effects of being away from work, including loss of sense of identity, loss of social networks, loss of economic control and independence, loss of social status, loss of financial security ... and so on. Long-term unemployment is notoriously hard to break.

Our view is that the current system structurally encourages people with capacity to sit at home and discourages external efforts to redeploy. We think that is bad for all.

These cases are costly for Telstra. Currently, ex-employees cost Telstra in the order of \$20 million a year, with a significant proportion of that directly related to incapacity payments. A smaller proportion of that would be incapacity payments where there is some residual capacity for work. In our view, the amendments are sensible and reasonable and should be passed by the Senate.

CHAIR—Thank you for that. You mention in paragraph 4.3:

If introduced, the proposed amendments will ensure that compensation is not payable in anomalous or absurd situations.

You have given us two examples. Could you give us another example?

Mr Coleman—I am not sure whether we put it in the submission, but we are aware of a former journey claim where a person left Telstra, on the way home went to the hairdresser and, later that evening, was walking home and got assaulted at her front door. That is not good. It is a tragedy. That person was entitled to compensation.

CHAIR—Because they were theoretically on their way home from work.

Mr Coleman—On their journey home. Subsequent amendments to the act have basically said that once a person gets to the front of their property then the journey ends. So you could quite easily come to a situation where the person was assaulted at their front gate rather than at their front door.

Senator MARSHALL—That example you just gave us now would not meet the claim.

Mr Coleman—That is correct.

Senator MARSHALL—Well, why have you given that as an example?

Mr Coleman—Can you ask me the question again? I am not sure I understand your question.

Senator MARSHALL—You said that someone was assaulted at their front door, and you went on to tell us that subsequent amendments would say that it was at the front gate, so they would not have—

Mr Coleman—Had they been assaulted at their front gate rather than at their front door, today that would be compensable.

Senator MARSHALL—Yes, but the example you gave us is not compensable now.

Mr Coleman—Not now; that is correct. But the issue is the boundary, rather than the front door. The risk of assault is equal—

Senator MARSHALL—So where do you think the boundary should be?

Mr Coleman—I think the boundary should be connected to the nature and extent of the work. When somebody leaves their employment, I think that is the point of the boundary.

CHAIR—Going to the hairdresser, I guess, is a personal choice. How many people go to the supermarket between 5.30 and 6.30 on their way home from work, as I usually do? So an accident in the supermarket, if I were under the Comcare scheme, on my way from work to home, at present, would be compensable.

Mr Coleman—Yes.

CHAIR—Right.

Senator MARSHALL—You gave us some percentages which I did not have time to write down about your journey accidents. Could you give us those figures again? I think you said they made up 28 per cent of claims?

Mr Coleman—They make up 11 per cent of claims and they are on average 28 per cent more costly than other claims.

Senator MARSHALL—What proportion of all claims do they cost?

Mr Coleman—Can I take that question on notice, Senator?

Senator MARSHALL—Sure. So the removal of journey accident cover will result in savings to Comcare. How will it result in savings to Telstra?

Mr Coleman—Because we are self-insured, so our shareholders fund every dollar that goes out in compensation costs.

Senator MARSHALL—So this will be a direct saving to Telstra.

Mr Coleman—Absolutely. I am sorry, I do have those numbers for you. The percentage of total spend due to injuries received while commuting has varied over the last six years between 11 and 16 per cent. It varies year to year, obviously, depending on the nature of those injuries.

Senator MARSHALL—What are your total costs of workers compensation?

Mr Coleman—It depends how you measure it. At the moment we have a forward liability approaching \$200 million of workers compensation. Each year we pay out in the order of \$32 million.

Senator MARSHALL—So this will save you 16 per cent, this one measure alone—16 per cent of \$32 million?

Mr Coleman—Yes.

Senator MARSHALL—Even though it would appear this bill removes coverage from breaks, you told us it does not.

Mr Coleman—Not where those breaks are essentially part of the work or—

Senator MARSHALL—Which breaks are part of the work and which are not? Is your lunch break part of the work?

Mr Coleman—No, your lunch break is not part of your work, particularly where you leave the facility and go across the road to the sandwich shop.

Senator MARSHALL—Let's be clear about this, about your interpretation. Your lunch break either is or is not.

Mr Coleman—No, that is not what I am saying at all.

Senator MARSHALL—You said 'particularly if you leave the premises'. I just want to be clear. If it is a lunch break and you stay at work you are covered?

Mr Coleman—In our view you would be covered by these amendments.

CHAIR—As in the canteen or within the building?

Mr Coleman—Yes, absolutely, because the likely types of injuries that you suffer in that event would be related to the workplace, which goes to this issue of control that we firmly believe in. Obviously I did not have the opportunity to read Richard Marles's submission, but his views around fault are actually incorrect. This is not about fault; it is about control. Fault is about blame. Control is about the ability to influence the outcome. I think that is taking it down an interesting path with the argument about it being about fault. We are not talking about blaming people.

Senator MARSHALL—I guess we will make our own conclusions on that. So, okay, if you leave the building at all or your workplace—but how does someone who moves around out of a van, for instance, control that?

Mr Coleman—Again, we would argue that that is part of the nature of their work. We are not attempting to—

Senator MARSHALL—No, but if they are on their lunch break, if they sit in the van and eat their lunch, they are covered?

Mr Coleman—Yes. Their workplace is their van.

Senator MARSHALL—If they get out of the van and eat their lunch on a park bench are they covered?

Mr Coleman—It would depend on the nature of the facts of the incident. If the ladder from the top of their vehicle fell on them while they were sitting, then it potentially would be compensable.

Senator MARSHALL—I do not see how the ladder would fall off their car when they are sitting on a park bench having their lunch. I am just trying to get a picture because I am not clear what you are saying. You are sort of trying to give me the impression that sometimes it might be, that if you decide that it is compensatable it is, and sometimes it will not be. But it is not really up to you to decide, is it? Isn't the legislation going to determine it? I am just trying to get your view. So, again, if a technician is in a van and stops for their lunch break, gets out of the van at a park and sits on a park bench but, getting up from the park bench, falls over and injures themselves, are they covered then or not?

Mr Coleman—We would argue no.

Senator MARSHALL—So they are not?

Mr Coleman—No, on the basis that we have virtually zero control over where that person chooses to stand, sit, walk and carry on their normal day-to-day activities.

Senator MARSHALL—So you would make provision for them to be able to come back to your premises to have lunch so they are covered during their lunch period, or not? Or would you expect them to take their lunch out on the road?

Mr Coleman—That is not an issue that we had considered and I will take the question on notice.

Senator MARSHALL—Well, it is about control, isn't it? If you are controlling the work process and the work method—unless you are saying don't have a break? Take that on notice and come back to us. What about rest breaks?

Mr Coleman—What about rest breaks—what is your question?

Senator MARSHALL—Are they covered? Or, again, is it the same position: if you are in the building or at your workplace or what you consider to be the workplace, which is easy to determine when it is a building—but Telstra isn't about that, is it, mainly?

Mr Coleman—No, most of our people actually do work in offices or call centres.

Senator MARSHALL—Do they?

Mr Coleman—Yes, the vast majority.

Senator MARSHALL—I probably should have gathered that, given the time it takes to get repairs done to the telephone system.

Senator Barnett interjecting—

Senator MARSHALL—You're not going to defend Telstra now, given the Tasmanian experience, Senator?

Senator BARNETT—Come on, focus!

Senator MARSHALL—Given your argument—I do not agree with it at all, I must say—yes, it is easy to determine when it is a building but you do have other locations so what if it is a rest break out on the road?

Mr Coleman—Again, if the injury occurred as a result of the nature and conditions of employment and was something that was related to work, it would be compensable. If it were outside that, it would not be.

Senator MARSHALL—Okay, and are you going to ensure that people are able to come back to your premises for their rest breaks? Could you take that on notice too?

Mr Coleman—Absolutely.

Senator MARSHALL—Out of all the changes to the bill, how much have you predicted you will save?

Mr Coleman—We have not actually got to a tight number, on the basis that it is not particularly around the incapacity payments. We have not conducted a review of the total number of people who have left Telstra who are on incapacity payments but who have some capacity to work. I would say the low end would be \$10 million; the high end might be \$20 million.

Senator MARSHALL—What you said then about people who are off work—will this bill impact people who have already had claims processed?

Mr Coleman—My understanding of the amendment is that the bill will affect new claims from the date of assent. The answer from my colleague is that, in terms of suitable duties, it will be incapacity going on from determinations made after the bill reaches assent.

Senator MARSHALL—It is not your view that any existing claims or individuals will be affected?

Mr Coleman—No.

Senator MARSHALL—There was something else you said in your submission which I wanted to talk to you about, but I cannot recall what it is at the moment. I might come back to it if I can recall the point.

Senator BARNETT—Thank you for your submission, Mr Coleman. In your response to the ACTU's comment, you said it is not about fault, it is about control. Are there any other things you want to share with us in terms of your response to the ACTU's submission? They made some allegations about the Telstra submission and I was wondering if you wanted to respond.

Mr Coleman—The comment that did make my ears prick up was in the case of the example that you used, Chair, that the scheme bears the cost for that person who falls over. That is not correct. Telstra bears the cost. This is a scheme where the number of self-insurers is rising and self-insurers pay the dollars themselves; it does not come out of some magical bucket that is somehow owned by the Commonwealth.

Senator BARNETT—All right. What is your response to the comment on the level of disputes under Comcare? Are you familiar with those? It was 25 per cent compared to nine per cent.

Mr Coleman—No, I am sorry.

Senator BARNETT—I will be asking Comcare that question.

Mr Coleman—We did not look at that issue. We kept to the issue of the amendments.

Senator BARNETT—That is fine. You also mentioned that you had read some of the other submissions and you said that the effect on people travelling to and from work, for example cycling or walking or what have you, is not determined by these types of arrangements. Have you any evidence to support that claim? That was made by I think at least three witnesses yesterday.

Mr Coleman—I can provide the inquiry with references to that. My experience comes from a former life where I was the head of public health and safety for the State Transit Authority in Sydney. We had a considerable amount of interaction with pedestrian and bike councils and others. I sat on a number of committees looking at transport options in and around Sydney in particular. I never heard that people's decisions around transport choices had anything to do with compensation. When you look at patterns across the country, the major issues are access to public transport, road congestion, the desire to be physically fit—a whole range of issues—but compensation is never one that is reported as an issue.

Senator BARNETT—I am particularly interested in the health of the community, like others. I would be interested in any feedback you have. Could you take it on notice to provide any evidence or information to support those comments?

Mr Coleman—Absolutely.

Senator BARNETT—Do you think we are in this position, at least in part, because of the courts' expansive view and the common-law decisions that have been made by the courts over the last decade or so in terms of the current law?

Mr Coleman—I am not sure I want to get into the area of common law, but, certainly in terms of some of the decisions of the AAT in relation to compensation, that is exactly the case. Our view is that the tribunals have severely weakened the intended provisions of the original act and that the amendments that are now being debated essentially bring us back to the point of the 1988 act and align us with the intent of the acts in other states.

Senator BARNETT—You have quoted Brian Howe and others and you make the point quite clearly at point 4.2 of your submission where you talk about 'the ever expanding liability being imposed by tribunals in the federal workers compensation scheme'. So I guess my question includes the tribunals, not just the court system.

Mr Coleman—Perhaps my language in the submission was a bit florid. I am particularly commenting on the AAT, the tribunal which most of our issues work through.

Senator BARNETT—You mentioned that some of the states—and you named them—were restricting the journey provisions under the relevant schemes. Could you outline that to us again, identify the states where those restrictions have been provided and provide the committee with any details of those restrictions?

Mr Coleman—I have not brought the detail of those restrictions with me. The information is contained in the Heads of Workers Compensation Authorities comparison of workers compensation schemes, published, I think, in 2005. I am more than happy to provide that reference.

Senator BARNETT—That would be appreciated. Can you identify the states?

Mr Coleman—The amendments will align the federal scheme with Victoria, South Australia, Western Australia and Tasmania and move it closer to those states. The outliers there are New South Wales and the Northern Territory.

Senator BARNETT—So in those four states—Victoria, South Australia, Western Australia and Tasmania—there have been restrictions on the definition of 'journey'?

Mr Coleman—In those states there are either full exclusions on journey or very large exclusions on journey. In New South Wales the exclusions are somewhat minor. It is the same in the Northern Territory. In the ACT it is wide open.

Senator BARNETT—Do you know in which states there has been a full exclusion?

Mr Coleman—Yes, Victoria is a classic example.

Senator MARSHALL—In terms of the process of disputation, as a self-insurer how do you manage claims? Do you have a policy of challenging every claim?

Mr Coleman—Absolutely not. We manage claims in accordance with the conditions of our licence. The major condition of our licence is that we comply with the requirements of the SRC Act, and we determine claims on the basis of fact and evidence and our obligations under that licence.

Senator MARSHALL—So what percentage of claims do you challenge?

Mr Coleman—I do not have that information off the top of my head.

Senator MARSHALL—Can you find out? Is it below or above the average? The ACTU provided some figures about claims. I think it was 25 per cent of claims.

Mr Coleman—I do not know the average. I simply know that, every year, Comcare audits our performance against our licence and assesses whether or not we have met the requirements of our licence. They did so as recently as July 2005 and extended our licence for four years on the basis that we manage claims appropriately.

Senator MARSHALL—As a self-insurer, is that a cost saving to you? If you were not a self-insurer, you would be under Comcare and you would be paying a premium.

Mr Coleman—That is correct.

Senator MARSHALL—So is it cheaper for Telstra to be a self-insurer?

Mr Coleman—Yes, it is.

Senator MARSHALL—How much cheaper?

Mr Coleman—Again, we do not have the hard and fast numbers, but we believe it is in the order of \$10 million a year.

Senator MARSHALL—And this could save you another \$10 million and up to \$20 million?

Mr Coleman—Sorry, we are not actually allowed to be under Comcare. We could not be under Comcare because we are not a Commonwealth authority.

Senator MARSHALL—That does not matter anymore. There have been changes to the SRC Act.

Mr Coleman—Can I introduce Jennifer Sirca, who is our in-house workers compensation lawyer.

Senator MARSHALL—I would be interested to know, because if Linfox and others are not allowed to be in it, that is terrific.

Ms Sirca—The position is that we have a licence, and Linfox, Optus and the like all have licences. But we cannot actually pay premiums to Comcare. We cannot be a premium payer because we are not a Commonwealth authority. That is why they introduced the licensing scheme.

Senator MARSHALL—So the comparison I should make is that you would have to pay premiums for the relevant states' workers compensation schemes?

Mr Coleman—That is correct.

Senator MARSHALL—Do you have figures on savings, or is that the same?

Mr Coleman—Again, it is a woolly number but it is large, and the issue is not so much around claims cost but around the fact that we would then be required to implement multiple state systems, multiple computer IT systems, different benefit scales in different states, different training requirements, and we have a workforce that is highly mobile. So that is

essentially where most of the cost is. There would be some cost differentials in terms of payments and they obviously would be different by state.

Senator MARSHALL—So you are saying that there would be very few savings in moving from a self-insurer to a premium based system; it is simply administration savings?

Mr Coleman—Yes, but they are very large. In fact that is where most self-insurers get the benefit—in bringing that administrative function in-house and controlling those costs.

Senator MARSHALL—That is the woolly number of \$10 million you suggested earlier?

Mr Coleman—Yes.

Senator MARSHALL—What is your claims ratio?

Mr Coleman—Again, I did not bring those numbers with me. We report a range of performance indicators to the Safety Rehabilitation Commission on the required basis and I am happy to share those with the inquiry.

Senator MARSHALL—How are you going to manage the issue of predisposition to injury or illness, underlying genetic defects, et cetera? Do you gather information on the health of your staff through the employment process?

Mr Coleman—For most roles there would be a pre-employment process.

Senator MARSHALL—That covers the medical history?

Mr Coleman—For some roles but not for all.

Senator MARSHALL—Are they asked whether they have genetic predispositions to anything?

Mr Coleman—No.

Senator MARSHALL—Is it your intention to do so?

Mr Coleman—No.

Senator MARSHALL—How do you see any underlying illness or injury impacting upon your claims in the changes here?

Mr Coleman—I think the issue of causation of some diseases is debatable. The medical professionals will debate the extent to which inherent human characteristics—whether they be genetic, lifestyle, work related or current factors—contribute to a particular disease. That will always be debated. The science will expand and we will apply the act as appropriate as science expands.

Senator MARSHALL—Do you expect some claims that are allowed now not to be allowed in the future, given this change?

Mr Coleman—If we are talking about the increase from ‘material’ to ‘significant’, yes I do.

Senator MARSHALL—Do you know how much? Have you done any work on that?

Mr Coleman—No, but I know that we have experience of claims where we believe that if the definition were changed those matters would not be deemed to be compensable.

Senator MARSHALL—And that would be a direct saving to Telstra?

Mr Coleman—Correct.

Proceedings suspended from 10.04 am to 10.30 am

PARMETER, Mr Nick, Policy Lawyer, Secretariat, Law Council of Australia

REDPATH, Mr Bill, Deputy Chair, Tort Law Working Group, Law Council of Australia

WORSLEY, Mr Stuart, Member, Personal Injury Litigation Committee, Law Council of Australia

CHAIR—I welcome our witnesses from the Law Council of Australia. Thank you for accommodating our somewhat earlier start. Thank you for your submission. Do you wish to make any amendments or alterations?

Mr Redpath—No.

CHAIR—I invite you to make an opening statement, after which committee members will ask questions.

Mr Redpath—Thank you. Since there was a comment about it, the Law Council is, of course, the peak body of lawyers in Australia, representing some 50,000 lawyers. The Law Council is very pleased for the opportunity to provide a statement today to this committee and to raise serious concerns for Commonwealth employees and workers covered by the schemes. It is clear that the key thrust of the proposals is to temper the cost of those workers compensation schemes. The senators would be aware of the relevant amendments, so we will not go through what those are.

We are not here to address the political or fiscal necessities of reducing the cost of the scheme. We do, however, have some concerns with some of the amendments and whether they are workable on a legal basis. Having had the advantage of reading the other submissions, it is clear that there is a very sharp divide in the submissions in respect of the question of the test of contribution for disease and the exclusionary provisions for the definition of injury and journey claims. We submit that our proposals are, in fact, a useful compromise between the very distinct and competing views, and which we say provide a fairer way to achieve the policy aims of the minister as stated.

Turning to those, it is suggested by the minister that the change to ‘material contribution’ is necessary because of the expanded definition by the courts. In support of that, cases of Treloar and Peters are cited. With respect, the Law Council says that these decisions have effectively been neutralised or the concern ameliorated by the most recent decision of the full Federal Court in *Canute v Comcare*. The result of that decision is that there must be a close connection between an employee’s disease and his or her employment. We do not understand why the minister does not think that the tribunals and courts will follow the *Canute* decision, but, if that is the concern, it seems that the best way to deal with that is to define material contribution as meaning a close connection between an employee’s disease and his other employment so that there can be no doubt over what material contribution means. In respect of that, we say that that is a preferred course to the test ‘significant degree’, which means substantially more than ‘material’, as that seems to involve a fair degree of subjectivity and has the potential of altering the original intent of the test. If, in fact, it is meant to clarify the original intention, it does not do that. It seems that that it is, in fact, a more confusing way to proceed.

On the definition of injury and the exclusionary provision, we understand the concern is to make it clear that it covers all disciplinary action. However, we say that altering it to 'administrative action' takes it too far. Arguably most decisions made constitute administrative action, and so potentially a wider range of decisions are covered, as the definition of administrative action simply says it includes various things but it does not say it is an exclusionary definition. Those provisions would apply to all diseases and may catch a range of other events. Our main concern regarding the focus of such a broad definition of administrative action is that the concept of 'reasonable' really introduces a fault based notion into a no-fault scheme. What you end up with is an investigation of whether what happened was a reasonable thing to happen or not in a scheme that is clearly designed as a safety net no-fault scheme.

Our concern is—one of the provisions is that it is cost saving—that it will simply lead to greater litigation as the question of the reasonableness or otherwise of this administrative action is litigated. There are two jurisdictions that have a similar definitional approach, and in at least one of those, Tasmania, there has been increased litigation as a result of that vagueness. We say the broader definition is particularly unfair having regard to the decision of *Hart v Comcare*, which seems to be interpreted such that if one can point to any disciplinary aspect of a decision then it will be excluded irrespective of whether there are other non-disciplinary factors.

We suggest that rather than unintentionally expanding the range of exclusions by those words it would be better to simply define 'disciplinary action' and have a definition that suggests that disciplinary action means all steps taken in the disciplinary processes established by the relevant employer. That would make it clear that it means all disciplinary action, which seems to be the intent.

On journeys, we understand the question of coverage is a policy matter, although we do say the implication of noncoverage, as identified by the various reports, is to shift the burden. We have some difficulty with the rationale offered by the department—which says that the rationale is that the employer does not have control and occupational health and safety coverage—because injuries at a place of study during some kind of approved study are covered, and injuries that occur as part of rehabilitation and medical treatment are covered. And obviously those are circumstances where the employer does not have care of those areas. Those situations are covered because work has sent them there for whatever reason. It seems to us that on that basis journeys to and from places of education and to and from medical rehabilitation programs ought to be covered as well.

Finally, the amendments highlight the problem with the interaction of the compensation scheme and the superannuation provisions of the act. The Commonwealth compensation schemes are the only ones to take into account superannuation. This was understandable under the 1971 act, because that paid compensation for life, but it is less easy to understand in circumstances where compensation is paid to 65 only.

We do not need to recite the reasons we have entered into a regime of compulsory super and the need for savings—I think everyone understands that—but often the interaction has devastating consequences. To illustrate that we can give you a real life example and some paperwork. I will hand that up; it might be of some assistance. This relates to an injured

Telstra employee who was a pole inspector who was injured on 9 August 2002. He could not return to his original employment and Telstra found him some light duties, which he was happy to do, but then Telstra eventually said, 'We don't have any more of these duties for you and we are going to retire you.' So he was retired in 2004, even though he would have been happy to work.

The problem with that is that he then had a lump sum of \$240,000-odd gross, and he wisely rolled it over on the basis that it was to be used for retirement. The difficulty is that he has some access to it so that is taken into account. Once you go through what happened you see that prior to retirement, but when they could not find suitable duties for him, he received \$778.50 but by the time the device was taken out—\$466.15 for the superannuation amount plus the five per cent—his post-retirement compensation dropped from \$778.50 to \$260.28. So the savings to Telstra are nearly two-thirds of his compensation, the burden of which is then his money as part of Telstra superannuation.

At the end of the day the whole savings to the system of him being retired this way are \$440,000. Basically, that is the deduction of that superannuation amount plus another \$49,000, which is the deduction of the superannuation contribution. It ends up being a very large saving for Telstra and of course it goes against what is the rationale of the act, which is to find people suitable employment, because it is actually much cheaper for the employing department to give him invalid retirement or to retire him in circumstances where the cost of this is borne by the superannuation. We say that outcome contradicts the other aims of the act.

Some of the amendments help that, and obviously the question of the interaction of superannuation and the compensation system is more than what this committee is today charged with, although we say it is a broader issue that this committee might want to take up as a more general public issue. In respect of the amendments, we support the move to at least a deemed rate so that the 10 per cent rate, which is certainly too harsh, is reduced. However, it does seem that there is some value in there being consistency with the deeming approach of interest rates for aged pensions and the military. We recommend that the five per cent superannuation contribution not be included in post-retirement calculations, that the calculation should be based on the net lump sum received and that there needs to be a causal connection between retirement and injury for these provisions to come into effect. Essentially, in our submission we say that Lonergan is a fair decision and ought to be kept. We are now happy to answer questions.

Senator MARSHALL—It appears to me from what you have described that someone, because they are a member of a particular superannuation fund, is being substantially disadvantaged in terms of their compensation. If they were not a member of that superannuation fund they would have been significantly better off.

Mr Parmeter—What would have happened is that in terms of his entitlements there would have been no deduction for any superannuation amount so that if he was retired he would have got 70 per cent of his income. There would have been some notional discount of five per cent on retirement but he would have continued to receive compensation at that rate, as compensation. So he would be getting 70 per cent. What it simply means is that it shifts the burden to those people who have super. Obviously, the effect of that is that in order for Darrell

to continue to live at 70 per cent he is forced to draw on retirement income to the point where at retirement that money has been expended on what should be compensation entitlements.

Senator MARSHALL—That is a case study for Darrell as a Telstra employee. There are other private employers who are also under licensing arrangements with Comcare and many of them would be in a contributory, standard nine per cent SGC scheme. Under those schemes what would happen? I am trying to work out whether it is the nature of the old public sector fund that acts as the disadvantage or it is superannuation generally in this circumstance. What would be the difference if it were, say, a community standard fund with a different employer as opposed to Telstra as an ex-public sector organisation?

Mr Redpath—It is superannuation itself—having a super fund and access to it becomes the problem. In a sense, the problem is solved if these people are told, ‘Sorry, you have to roll it over and you receive compensation at 65.’ There is a different formula if you receive a pension, where whatever you receive as a weekly pension is automatically deducted from your compensation entitlement. There is a different formula for lump sums, which in the old days was a formula based on 10 per cent where you divided by 520. If you have a mix of those—a mix of lump sum and pension or whatever—then they take the lump sum and divide it by 520 and then deduct your pension. It different again for superannuation schemes which you are caught up in if you are invalided or retired. Mr Lonergan was retrenched, but at that stage he was working. The effect of the amendments now is to say that in a case like his—where the person received superannuation because their employer no longer had a job for them, they continued to work and then their injury got to a point where they could no longer work—the superannuation moneys and payments, which they received because they were retrenched and not because they were injured, will be taken into account in trying to calculate their compensation entitlement. Parts of the amendments are proposing, irrespective of whether there is any connection between receiving any superannuation entitlements and subsequent invalidity, that that will be taken into account.

Senator MARSHALL—How common is this? I have had correspondence from some people who are in this situation. I know that there is a number. Are you aware of how many people are involved in this? It is not a huge number, is it?

Mr Redpath—Perhaps the department can tell you those things. I guess that there are a significant amount of people who have over the years been retired on an invalidity basis. As the public sector is one of the most advanced sectors in terms of superannuation entitlements across the work force, I guess that a lot of people will be caught.

Senator MARSHALL—Going back to the definition of ‘disease’ and the definition of ‘injury’, can you give me a feel for how many fewer claims will be able to be compensated under the new definitions compared to the existing definitions?

Mr Redpath—The department’s figures say that it will only be about a two per cent saving. I do not know how they reached those figures.

Senator MARSHALL—You have talked about the legal problems and the difficulties with ‘material’ versus ‘substantial’. You have quoted some experience from other jurisdictions. I am wondering whether you agree with that two per cent figure or whether you think it will be higher.

Mr Redpath—Our difficulty is that we do not have a way of knowing the figures.

Mr Parmeter—We will take that question on notice, if you like, and get back to you. But we do not have the information at this stage to be able to provide you with an answer.

Mr Worsley—I can speak anecdotally about the experience in Tasmania. There is no doubt that the introduction of the ‘substantial contributing factor’, which is the Tasmanian definition, has given rise to a significant amount of litigation and a lot more disputes about people’s entitlements. I cannot give you numbers, because I do not have them. It is a real barrier.

Senator MARSHALL—There is no dispute, even from the department, that there will be fewer claims able to be compensated under the new definition than there are under the current definition. You say that there will be more litigation. Will there just be more litigation or will existing litigation become more costly and lengthier as well?

Mr Redpath—Yes.

Mr Worsley—Can I answer that by going back 150 years? Workers compensation was introduced as a no-fault scheme to compensate people who were injured. It was introduced after the Industrial Revolution. That is what it was designed for. Now we are regressing and introducing notions of fault. The moment that you say that something has to be reasonable, you are going to have two lawyers, one on each side, who are going to have different views about it. That is going to lead to litigation. The only winners out of that are the lawyers.

Senator MARSHALL—And this is coming from the Law Council of Australia.

Mr Redpath—You are right, and in a sense perhaps we should be supporting this and telling you that if you make it as complicated and confusing as possible that would be excellent. But I do not think that at the end of the day there would be a public benefit.

Senator MARSHALL—But at the end of the day you can rely on us doing that, regardless of your advice.

Mr Redpath—I think the answer to your question is that the definition going from ‘material’ to ‘substantial’ will simply mean more litigation. I think once you move it to ‘reasonable administrative action’, there will be longer and more complex litigation because you are going to have to go through a whole lot of details and evidence as to what the administrative action was, whether that was reasonable and who perceived this. So you will have a rerun of the administrative action. ‘Material contribution’ will be a matter of some further medical evidence, and there will be more medical disputes, but it will be simply calling doctors and more disputes about that. The other one is much more complicated because, as Stuart says, you introduce a question of reasonableness of fault or otherwise, and of course the department will say: ‘We didn’t do anything wrong. We’re not at fault.’ I think that will end up as more complex litigation. We say, if you narrowly said, ‘It’s about the disciplinary process and we’ve made it clear what the disciplinary process is from A to B,’ there would be much less room to say that falls within the disciplinary process as opposed to administrative action.

Senator MARSHALL—It is always easy to use some examples, as Telstra did, which look quite ridiculous to normal, rational people, but those examples are really used to mock a very

serious situation and are very superficial. I was concerned that they would use those cases without providing all of the detail. You did mention, in answering some of my questions already, the no-fault contradiction with the control argument. The ACTU were very clear about that too and went as far as to say that, if you are leaving the premises to have your lunch, the fact that you are going to the shop down the road from your workplace is due to the fact that you came to work that day. On the weekend you would not be going to that shop, I suspect, to have your lunch. Can you further expand on the relationship, if there is any, between the control argument and the no-fault argument, because Telstra were saying the arguments are completely separate—they have nothing to do with each other?

Mr Redpath—I think that the best way to look at it is whether the risk has been increased by that employment. This committee may take the view, about travel to and from work, that people travel and that is a risk anyway. But look at various things such as what happens in recess breaks—work does contribute to that more. Obviously in circumstances where somebody is sent to a training course and is covered for injuries at that training course we say that the reason they are going to that training course and the reason for that increased risk is entirely brought about by the work itself and by being asked to go to this training course as part of their employment; therefore work has made an increased contribution to risk.

By moving away from the control argument, because we say that is actually not the rationale for it, to the question of whether the workplace has increased the level of risk, you can assess different journey claims and say, ‘That’s one that isn’t really contributed much by work but this one really is contributed by work and therefore should be covered.’ It provides a much better rationale. If you are going to a course at the institute of technology and you are injured there, Telstra say: ‘We don’t have any control as employers over that. We don’t know what they do over there.’ On the control argument that ought not to be covered either, but that would be unfair. On that basis, the real rationale for this is not control; the real rationale for this on journey claims is whether it substantially increased the risk. This committee ought to assess each of those journeys and each of the provisions to see whether it does increase that risk and, if it increases that risk, it is probably fair that it is covered.

Mr Worsley—It is whether the employment secures the risk.

Mr Parmeter—You might also consider the policy arguments that have been raised in some of the other submissions, concerning the lifestyle choices employees are able to make while they are carrying out their busy lives at work and so on. With somebody who decides to go for a run at lunchtime or to ride to work, for instance, there may be a policy benefit in having those people covered, as they receive a benefit from better health later down the track. But I am sure you have had those arguments raised with you by other people before.

CHAIR—I think your suggestion of a definition of ‘material degree’ as meaning a close connection between the disease and the person’s employment is a good suggestion. I would probably sooner see it apply as ‘significant’ rather than ‘material’, which probably removes your basis, but I think that there should be a definition, because I have asked nearly every witness their idea of the distinction between those two, and obviously it is a matter of degree and of opinion. I do think a definition would be helpful, so thank you for that suggestion. But, as I said, I would sooner see it apply as ‘significant’.

Senator MARSHALL—If that same definition is applied to the word, regardless of whether the word is ‘material’ or ‘significant’, does the word matter?

Mr Worsley—It does not matter.

Mr Redpath—In the ACT the definition is ‘substantial contribution’, but really the test is a close connection. It really depends what the definition is, but whether we call it ‘substantial’ or whatever, I think it is—I am glad the committee agrees—

CHAIR—Well, I agree. Whether or not the others agree is another thing. But I do think that is a good suggestion. With what you are suggesting, workers compensation is no fault, but, from what you were saying then an employee need take almost no regard for his or her safety from the time that they leave home until the time that they return home, because they will be covered by workers compensation—to take the extreme end of the argument.

Mr Redpath—In all schemes, including this one, there are some factors in terms of misconduct that are taken into account. Obviously if somebody does something illegal or whatever, there are a range of exclusions there. Journey claims have traditionally, at least, relied on people taking a direct journey. If the journeys have involved a whole range of things and going shopping and so on, the tribunals have tended to disallow them. That is where the rationale, I guess, of the no fault scheme is—it is whether it has increased the risk at all or made some increase of risk as the rationale for journey claims. As with anyone who gets into a motor vehicle, there are a range of other incentives to not run through red lights, to not speed, to not drink-drive, to not do a range of other things which are in fact covered by other courts and through other means to make people act safely. One would hope that, notwithstanding that employees might say, ‘We are covered if we are injured,’ they would also say, ‘But we have duties as good road users and good citizens to be careful and not to do any of those things, notwithstanding that if we make that error we may be covered.’

CHAIR—Yes, so that is why some judgements say sometimes, ‘But the person contributed X per cent to the end result of the accident.’

Mr Redpath—Yes. That is at common law, and there are some places, such as Tasmania and Victoria, where there is coverage of motor vehicle accidents even if you are at fault. But I do not think there is evidence that Victorians and Tasmanians have any more accidents as a result of the wonderful benefits they have of being covered for the first 12 months.

Mr Worsley—I agree with Mr Redpath. The situation in Tasmania in terms of motor vehicles is you have got two years of payments for incapacity plus anything up to about \$300,000 worth of medical expenses, regardless of fault. You contrast that with what might be the result of this bill being passed and you get a class of person who is injured in a car accident that is getting substantially increased benefit compared to those who are injured in the course of their work. There is no justification for that.

Senator BARNETT—Thanks for the submission. In your submission, under ‘General Observations’, you refer to the expected \$20 million saving. You say it:

... “may have” a beneficial effect on workers compensation premiums...

Do you think there will be a reduction in premiums as a result, or that it is less likely to increase? How would you like to express it?

Mr Redpath—Going through it we were curious that although there was a view that they were going to be the same as the premiums, there was not a suggestion that that may flow on. We found that a bit curious. We thought that if there was a commitment to there being a reduction in the cost of the scheme, then that would have a solid corollary promise of a reduction in premiums rather than a promise that they might somehow go into consolidated revenue.

Senator BARNETT—That is something we can pursue—

Mr Redpath—It may be that ‘may have’ were careless words and that they really intend it to be ‘will have’, so in that sense we are probably simply curious about that.

Senator BARNETT—Yes. I want to talk to you about your journey claims concerns and the changes proposed. You referred to the Heads of Workers’ Compensation Authorities’ comparison of workers compensation arrangements in October 2005. Just to summarise, obviously under the coverage for journey claims to and from work the Commonwealth is included. Victoria is ‘not included’. South Australia is ‘not included unless there is a real and substantial connection between the employment and the accident.’ WA is: ‘not included. However workers are covered for injury during journeys made in the course of employment or at the direction of the employer,’ are included. Tasmania is ‘not included, except where the journey occurred at the request or direction of the employer; or if the journey is work related, with the authority (expressed or implied) of the employer’. So there are four states. I was wondering if you are familiar with legislation in those states and the rationale behind the legislation in those states.

Mr Redpath—In respect of two of those states, Victoria and Tasmania, it is perhaps understandable because both of those have a no-fault public scheme for motor vehicle accidents irrespective of fault for a period. So in those two states it would be to reproduce entitlements. We already have a scheme that is available to everyone. I guess we would say it is the same rationale that this committee will need to deal with in terms of journey claims—that is, it is a question of what journeys have been brought about or what greater risks have been caused by the journey—and to make an assessment about that. For example, with journeys from home to work are really, work adds a minimal risk to that. We say journeys that are work-related clearly ought to be covered.

The two major parts that really do not make any sense—journeys to education or journeys to medical treatment, where the education and the medical treatment sites are covered—are clearly an increased risk as a result of a worker not being covered. We would say that you have a difficult job because some states clearly think journey claims ought not to be covered; an equal number of states and territories say, ‘We think they should and therefore we are covering them.’ I suppose their rationale is that question of whether work has contributed to it. That is a policy question for you, but we would say it is clearly respectable if half the states of Australia still think it is reasonable for you to adopt that policy position. We appreciate that up until now the minister has seen it in a different way, but we say, using that rationale, it ought to cover all cases where there is clearly an increased risk as a result of the workplace.

Senator BARNETT—I raised the point because I think it relates to this issue of fault/no fault versus control and whether it is work related. Four states—the two you mentioned,

Victoria and Tasmania, and also New South Wales and Western Australia—have a variation on that approach. The rest of the details are in that report. I think that it is not as clear-cut as you might suggest that it is, that it is simple for the Commonwealth to say, ‘Let’s just include it and cover them all,’ because there is a rationale behind all of the state legislation which—certainly in terms of Victoria, Tasmania, South Australia and Western Australia—is a similar rationale to what the Commonwealth is pursuing in this regard.

Mr Redpath—Yes. What we are saying is that we understand that there is a rationale and argument both ways and that is a policy question. Many of the other submissions that have been made to you on policy issues—those from the unions and Pedal Power—say that for a range of policy reasons those journey claims should be included. What we said in our submission is that the policy question is a matter for your committee to make recommendations about, but we do say that there are clearly two instances of travel which really are corollaries of injuries that are already covered—that is, the education and training ones. So all that we are saying to you in our submission is that, by any logic, those should be part of the coverage.

Whether you choose to cover other journey claims is a matter for you policywise, having looked at all those submissions, but by any kind of logic, with those ones having coverage on those sites themselves, journeys to them are an obvious corollary of attending them and thus a substantial risk. I guess the control factor is that either as a result of injury at the workplace or as a result of the need to do a training course as required by the employer—and those training courses are required by the employer—that control issue is in respect of both of them because those were matters that the employer, if you like, put in place or set about. So we say that, regardless of what policy decision you make about journey claims to and from home, these are ones that ought to be covered in any event.

Senator BARNETT—Thanks for that. It was well noted and appreciated even before you sat down today. I have one other question relating to Mr Parmeter’s comments about the travel arrangements and whether they are impacted on by insurance arrangements—whether it is on a bike or walking; the health of Australian people is very important. Do you have any evidence to demonstrate that the insurance arrangements affecting those people affect the way they travel?

Mr Parmeter—We have no evidence other than anecdotal evidence and some of the statements that have been made in submissions to this committee. It was just a point of interest that I thought I might note—that it did raise policy considerations for the government and for the parliament if they were to legislate to remove journey claims as to whether that was going to cause people to think twice about whether to go and play sport at lunchtime or ride to work, for instance.

Senator BARNETT—I think they are important issues and I appreciate you raising them. We have had a submission this morning from Telstra saying that from their perspective—and they are going to provide the evidence to us; they have taken it on notice—there is no evidence that there is a link between the two. But we have also had submissions from witnesses saying that this is important and that there is anecdotal evidence. So we have to weigh those things up.

Mr Parmeter—I might add in relation to your first question in relation to the estimate of \$20 million in savings that these amendments might bring about, I am not aware of how they were calculated and I am not aware of whether they took into account any cost shifting that might occur as a result of these amendments. As senators are probably aware, the likely effect of people not being able to claim under one scheme is that they will fall back on to another. Therefore there will be, maybe not an equal one, but a significant cost to, for instance, the public health system, to Centrelink and perhaps to motor accident compensation schemes. Whether or not those have been taken into account is possibly an issue that you might want to put to the department when they provide evidence today.

Senator BARNETT—Sure. That point is noted. It is also noted that in some respects there is a doubling up, where there are two or three systems covering people, perhaps travelling to and from work, under workers comp, motor accident insurance arrangements or the public health system, and then you have this system as well. So you would think there is a bit of duplication. There is a bit of a rationale, I understand, behind the way we are going to remove some of that duplication. But the point is noted, and it is appreciated.

CHAIR—Thank you very much, gentlemen, for appearing before us today.

[11.13 am]

BENNETT, Ms Barbara, Chief Executive Officer, Comcare

KIBBLE, Mr Steve, General Manager, Research and Policy Branch, Comcare

O'SHEA, Mr Alex, Director, Safety, Rehabilitation and Compensation Policy Section, Comcare

PARKER, Ms Sandra Denise, Group Manager, Office of the Australian Safety and Compensation Council, Department of Employment and Workplace Relations

RYAN, Ms Melissa, Assistant Secretary, Commonwealth Safety and Compensation Policy Branch, Department of Employment and Workplace Relations

SOUTHWOOD-JONES, Mr Peter, Director, Safety, Rehabilitation and Compensation Act Team, Department of Employment and Workplace Relations

CHAIR—I welcome our final witnesses from the Department of Employment and Workplace Relations and Comcare. Thank you for your submission. Do you wish to make any amendments or alterations?

Ms Parker—No.

CHAIR—I invite you to make an opening statement, after which committee members will ask questions.

Ms Parker—Thank you for inviting DEWR to appear before the inquiry. Officers of Comcare have joined the department to assist the committee. I will make a brief statement in support of the department's submission. The government's stated primary objective with the workers compensation scheme established under the Safety, Rehabilitation and Compensation Act is to minimise the human and financial cost of work related injury and disease while at the same time providing appropriate compensation and support for employees injured or made ill through their employment. The proposed amendments in the bill reflect the government's aim to strike a balance between the obligations of employers towards injured employees and the need to ensure that the costs of the scheme are reasonable.

Submissions from other parties to the inquiry have tended to focus on three of the proposed amendments: the definition of disease; the definition of injury, particularly relating to claims for injuries purportedly arising from management disciplinary action; journeys to and from work; and recess breaks. I would like to make some brief comments on these. It was the original intention of the 1988 legislation to ensure a close connection to employment as the cause, aggravator or contributor of a worker's disease before payment of workers compensation. Further, it was the intention to enable legitimate and reasonable human resources management actions, and not to have these result in workers compensations claims.

The government's view is that these objectives have been eroded over time by courts, and this is placing increasing pressure on the scheme. In relation to journeys to and from work and recess break claims the amendments respond to findings of the Productivity Commission inquiry into occupational health and safety and workers compensation frameworks in 2004—that is, that the cost of these claims can be significant and influence the affordability of

workers compensation. The Productivity Commission also found that journey and recess claims are not, in most circumstances, matters over which an employer exercises any control.

The amendments proposed are consistent with the Occupational Health and Safety (Commonwealth Employment) Act 1991—now the Occupational Health and Safety Act—which provides that an employer must take all reasonable practicable steps to protect the health and safety at work of the employer's employees. The proposed amendments address these issues and bring the Commonwealth into line with most of the other states and territories, supporting COAG's goals of national consistency.

In relation to the three issues I have outlined, the proposed amendments will ensure that compensation is paid only where employment contributed in a significant way to the employee's condition and substitute the reasonable disciplinary action exclusion with 'reasonable management actions undertaken in a reasonable manner' and provides examples of actions, such as performance appraisals, counselling and so on.

For journeys to and from work and recess breaks, the amendment will adopt the approach that workers compensation coverage for injuries sustained in circumstances where the employer does not have control, either over the environment or the actions of the employee, should be removed from the act. In summary, the amendments aim to restore the original policy intention of the government in 1988 in establishing the SRC Act and they also aim to improve the administration and provision of benefits. We are happy to discuss the three issues or any other amendment to the act.

CHAIR—During the course of the inquiry we have had a degree of discussion over legal terms and definitions such as material, significant and reasonable. Will the new definitions and tests foreshadowed in the bill be easily understood or do you think they will present similar problems?

Ms Parker—I suppose it is difficult to say. It depends on what the court interprets. The government's view is that this will clarify the matter and make it much clearer for courts to determine; it is significant rather than material.

Ms Bennett—Can I add to that? In some of the large jurisdictions—Queensland, Victoria, Western Australia—they already use the word 'significant'. So there is a body of legal material and understanding in tribunals and courts of what that means. It is not just in the area of workers compensation; that terminology of material or significant is also used in common law claims. So there is a legal perception, and when we received assistance from the drafters in the Attorney-General's Department there was a view that there would be a legal understanding of that terminology.

Obviously, individual matters or cases will be brought forward and the court will look at the circumstances and apply that to those particular cases, but there is a broad legal acceptance of what those terms of 'material', 'causal', 'close', and 'reasonable' actually mean. As I said the legal interpretations have a whole body of law that sits behind them—in a number of areas, not just workers compensation. So we believe it will bring greater clarity to the idea of a 'connection', which is how it has been interpreted, and that has been too loose.

CHAIR—Will claimants need to engage in litigation in order to determine whether they are entitled to benefits? Do you think there will be any increase?

Ms Bennett—No, we do not believe so. Perhaps if I explain a little about how it happens from the Comcare side. I understand that there is an interest in Comcare dispute rates, and I will talk a little about that as well. When someone is injured they make a claim with their employer. The employer form is filled out and it is submitted to the employer with supporting statements by the direct supervisor or someone else. Employers who are self-insurers have an individual area that makes an interpretation.

In cases where Comcare is the claim manager, those claims are submitted to us. We have people who are trained in administrative law and professional claims officers linked to a whole body of legal and current decisions. A decision is made as to whether to accept the compensation claim or not. Then there is our internal review mechanism whereby if you, the injured person, do not agree with the decision that Comcare has made, you can ask for a fresh set of eyes to look at it. At that point you can provide new information to support your claim. After that process, you have the avenue of the AAT—the Administrative Appeals Tribunal—and you can ask it to look at the decision. If you are not happy with its decision, you can then go to the Federal Court. If you are still not happy, you can go to a full court of the Federal Court and then perhaps go to the High Court. There are a lot of avenues.

After adjusting for the discussion with the states about our dispute rate, it was found that, when our dispute rate was counted the same way as every other state, it was actually lower. We do not think there is going to be a significant increase because of those internal mechanisms that we provide.

Senator MARSHALL—Will there be some injuries under the new definitions that will be no longer compensatable compared to the existing definitions?

Ms Bennett—I think that question is too black and white. It is when the injury occurs, the circumstances in which it happens and the employment relationship to it rather than the specific injuries. That is not very clear. For people injured in a motor vehicle accident in those circumstances it will still be an accepted injury. It is the circumstances and the work contribution that has changed rather than the injuries that are in the pool.

Senator MARSHALL—I should reword it: will there be fewer compensatable claims accepted as a result of the new definitions when compared to those accepted under the existing definitions?

Ms Bennett—The explanatory memorandum refers to injuries that occur in the circumstances of ‘journey to work’ and ‘recess breaks’ and with a closer connection—

Senator MARSHALL—No, not yet. I will come to that one in a minute. I am just talking about the definitions of ‘disease’ and ‘injury’ and employment being a substantial material contribution to them. I am just trying to find it in your submission. I thought the previous witness said that the department had estimated two per cent.

Ms Bennett—Are you talking about it in relation to management action? Is it in terms of disciplinary—

Senator MARSHALL—No, I was not getting on to that yet. I am interested purely in the definitions of ‘injury’ and ‘disease’.

Ms Bennett—No injuries have been taken out or precluded. It is the employment connection. A higher benchmark has been set for the employer's responsibilities and obligations and the employment connection. We have not said that this disease is in or that injury is out.

Senator MARSHALL—How many claims do you think will no longer be compensatable? Two per cent was mentioned. I am trying to work out where that came from and how that has been determined. No-one—including even Telstra, which is a licence holder—has suggested that there will be no change. They have all indicated that there will be a reduction in the number of claims being accepted as a result of the new definitions. Everyone has said that.

Ms Bennett—In providing the information for the initiative, we did an estimate on the information that is available on the types of claims that are work stress and psychological injuries and then we extrapolated a sample that would indicate how many of these, with that tighter threshold, would not be precluded under those new arrangements. Our estimate—and it is made very clear here that it is an estimation—is that 2.5 per cent of total claims, in the 2004-05 dollars, would equal about \$5 million worth of fewer claims, on the new threshold for disease and injury.

Senator MARSHALL—Okay. And in terms of the management arrangements?

Ms Bennett—That is included in that costing about increasing the threshold.

Senator MARSHALL—Telstra indicated that they expected to save between \$10 million and \$20 million themselves. Are they bigger than Comcare?

Ms Bennett—My recollection of Telstra is that it includes the journey to work. That is a high proportion of claims for us as well. You asked about the definition of disease and injury. That is separate from the journey to work and recess break costings. I can provide that to you, but it is a greater proportion.

Senator MARSHALL—All right. I will have to look at the *Hansard* regarding Telstra, but I thought they talked about 16 per cent of \$36 million as their journey accident and that in terms of the definition itself, of 'material' to 'substantial', that was between \$10 million and \$20 million. But I do not have the *Hansard* in front of me.

Ms Bennett—That will still be a smaller percentage.

Senator MARSHALL—Mr Kibble was here for that evidence. Mr Kibble, do you recall them giving that?

Mr Kibble—Not for Telstra, no.

Mr Southwood-Jones—I believe Telstra was talking about the benefits of being a self-insurer under the Comcare scheme as opposed to being a premium payer under state schemes. I think that was the \$10 million they were talking about.

Senator MARSHALL—Yes, that was the third level of my questioning. They talked about \$10 million. If I can find their submission, I probably have it.

Mr Southwood-Jones—I do not think they were talking about savings, from memory.

Senator MARSHALL—That is right; they say there is a \$10 million saving from being a self-insurer, \$10 million to \$20 million in savings as a result of the changes to the legislation

and, yes, sorry, they may have counted journey accident cover in there. They said that journey accident cover was 16 per cent of their \$32 million in payouts.

Ms Bennett—So the higher threshold for disease and injuries is a small proportion of that versus the journey to work?

Senator MARSHALL—Well, no. It is sixteen per cent of 32. If I had a calculator in front of me I would give you the exact figure. If you compare that with \$10 million to \$20 million, I would not say journey accidents are the biggest proportion.

Senator BARNETT—I think that is of their total payout. Sixteen per cent of the \$32 million in payouts—which was the total payout.

Ms Bennett—I was not there for the evidence. I can talk to you of the 2.6 per cent that it will be for our claims with that higher definition.

Senator MARSHALL—Two point six per cent?

Ms Bennett—Yes, 2.6 per cent of claims, estimated at about \$5 million.

Senator MARSHALL—That is because of the definition and—

Ms Bennett—It is because of the definition of the work connection and because of a clearer definition of what reasonable management means.

Senator MARSHALL—The issue about people with a genetic predisposition to some injury and illness is affected by this change in definition, isn't it?

Ms Bennett—No, it is not. There are two things. Can I refer you to the legislation as it exists—and that is unamended? It is section 7.7—

Mr Kibble—Section 7.7, yes.

Ms Bennett—which has existed since 1988 and is not changing and which makes it perfectly clear that there is an obligation on an employee who has an existing ailment or a predisposition to inform their employer. That is about safety, so that the employer can provide the right environment to reduce the opportunity for that person to be injured. I dispute the submissions made by beyondblue that this will somehow either inhibit employees from declaring that they have some ailment or injury, or push employers not to give people those jobs. As I said, it has existed; it has not changed; it has been the arrangement. This is about the relationship at work, how much work contributes and what is within the employer's control to provide that safe environment.

Senator MARSHALL—But we should not confuse workers compensation with obligations under the occupational health and safety acts. They are different and you are talking about the obligation to provide a safe workplace.

Ms Bennett—I am the regulator for the Commonwealth jurisdiction for both workers comp and safety and I see it as a continuum. It is one of the levers that we have to influence employers to provide safe workplaces. If you are an employer who does not provide a safe workplace, you have a very high workers comp premium and workers comp costs. If you provide a safe workplace, you have a low premium, a low entry rate and a low loss of staff. Workers comp is one aspect of the cost of workplace injuries. We see it as part of a continuum.

Senator MARSHALL—I am not disputing that and if there are requirements for people to provide that information, if they know about it, that is okay. But not everyone knows about genetic predispositions before injury and illness takes place.

Ms Bennett—I am disputing that there has been an amendment to that.

Senator MARSHALL—So are you saying that the change from ‘material’ to ‘significant’ will have no impact whatsoever on underlying predispositions whether they be genetic or otherwise?

Ms Bennett—In my role in Comcare we see—

Senator MARSHALL—That is not how I read the amendments. And it is not what other people have said.

Ms Bennett—As I said, it is a small proportion, but we do see issues. In fact, there are legal cases where it is cited, so I am not talking about individual cases but cases where, in making decisions, the courts have said, ‘Here is someone who is having a bout of depression because their marriage has broken up and their teenager is in trouble or whatever and then work may have been stressful as well but what proportion of that is in the employer’s responsibility?’ That is what this is trying to draw on. It is not saying that there is a fault; it is about saying who should pay for those things. Is it a right and correct cost to be pushed to the employer or is it that in these incidences—this small percentage of cases we are talking about—there are other mechanisms that exist such as Medicare, other health insurance arrangements, Centrelink and social welfare. Is it a cost to the employer when 80 or 90 per cent of that person’s stress is the employee’s responsibility? That is where there is a slight confusion. Let us say I am bipolar, is that going to preclude me from employment? My view is no and it is very clear, there is antidiscrimination legislation that exists but there is also what the act says. I tell the employer that I am bipolar and so there is the obligation for the employer to provide, under the employee’s unique circumstances, the safest environment possible. So when a compensatable claim comes in, there will be some greater clarity about how much of that relates to work and how much is that something which the individual has had always.

Senator MARSHALL—So we are moving away from a no-fault system then? It is about who is responsible and what proportion of responsibility people should take?

Ms Bennett—That is not about fault, that is about, if someone is injured at work, how much is a work issue rather than a responsibility—what is genuinely a workplace issue.

Senator MARSHALL—For the purpose of reducing the compensation.

Ms Bennett—It is for compensation, safety and duty of care

Senator MARSHALL—It will reduce the compensation, so it is moving away from no fault. If you are saying that there are other contributing factors—

Ms Bennett—I would go back to what Ms Parker said, which is that all workers compensation schemes in Australia are no fault. This definition is in line with what a majority of the states are doing, it is bringing clarity to what is fair and appropriate compensation and affordable for everybody—the taxpayer, the employer, everybody who contributes to it. It is bringing it in line so that it is not blaming, it just defines what is a workplace injury. It brings

a clarity to that which I think will bring comfort to those that administer it, to employers and to employees.

Senator MARSHALL—Let us move on to journey claims. The Law Council pointed out the inconsistency in your approach. You have accepted the control argument, obviously, but your inconsistency is that you have some exemptions—for travel to study et cetera—and people were covered in other workplaces where there was no control. I am not suggesting you then exclude those areas; I do not think you should be excluding any of those propositions. But you should explain the inconsistency.

Ms Bennett—Again this goes to the issue of what is in the employer's control. I listened to the Law Council's submission. I would disagree in some aspects, particularly on this issue of training and attendance for study. If the employer directs you to attend something—which might be, for example, everybody learning a new computer system or going to management training—as part of learning work based skills, then you will be covered for that journey to that injury. They were right in saying that if you were attending an out-of-work evening at another educational institution, and the employer has provided some support and endorsement for that—my view is that there is a balance between the individual benefiting from this and the employer benefiting. A lot of work was done in looking at how other states and jurisdictions have defined this, with the aim of bringing some consistency to across-state jurisdictions. Senator Barnett quoted the state interpretations of recess break and 'non-related work. These changes would put the Commonwealth in line with South Australia, Western Australia, Tasmania and the Northern Territory. So it is not an inconsistent approach.

Senator MARSHALL—So the rationale, purely, is to bring you in line with some of the other states.

Ms Bennett—I think it is a strong rationale of national consistency. I also think that it relates to our earlier discussion that said, 'In most states now they are bringing together the workers compensation authority and the regulator of safety'. That is the full picture about making the employer responsible, and firmly responsible, about providing safe workplaces to reduce workplace injuries and so being able to clearly define to the employer what their responsibility is and where they can have control over it. I think that is important.

Senator MARSHALL—You have not really explained the inconsistency. So the rationale is to bring you in line with some of the states?

Ms Bennett—Certainly it is a commitment—and technically it is a commitment from all the other states as well—that we would be nationally consistent. It is something that has been a concern, both to individuals and claimants.

Senator MARSHALL—Why have you not brought yourself into line with some of the other states? Why have you picked on these ones? Are we picking the lowest common denominator?

Ms Bennett—I am on the HOWCA and I do understand that some of the states are also canvassing ways of reducing these costs. I do not think it is the lowest common denominator. But, that aside, it is the majority of the states and then others debating those issues as well.

Mr Southwood-Jones—Four states do not include it, as has been mentioned earlier. So most of the states do not provide for journey claims, and that was shown in that comparison document.

Ms Bennett—Actually we can provide you with the latest one if you are interested.

Senator MARSHALL—No; you can provide it to the committee. Does the employer—

Senator BARNETT—Sorry to interrupt. Could you please provide the latest one, either now or in due course, because that would be appreciated.

Ms Bennett—Yes, we brought the latest comparative stuff.

Senator MARSHALL—Does the employer require you to attend for work?

Ms Bennett—For—

Senator MARSHALL—Does the employer require you to attend for work?

Ms Bennett—Are you talking about us appearing at the committee, Senator?

Senator MARSHALL—I wish I were your employer but I am not, yet. Maybe after October.

Mr Southwood-Jones—Obviously, people have to attend, have to front up to the workplace, but how they get there, the mode of transport they choose and the route they take, are matters for them.

Senator MARSHALL—What the employer requires you to do was mentioned and I suspect an employer requires you to attend for work—

Mr Southwood-Jones—I have to get dressed to go to work too, but the employer does not pay for my—

Ms Bennett—In the last few years, Comcare has also paid more attention to cross-claiming motor vehicle accidents and making insurers, who would do so in normal circumstances, pay. If someone hits someone else and someone got injured, what used to happen was that we just paid and the person who actually did it maybe got away with an excess and a ding. That is not actually fair either if you hit someone on their way to work. So we have actually increased quite significantly—

Senator MARSHALL—You have relieved yourself of that burden now, haven't you?

Ms Bennett—We will have, but we did quite—

Senator MARSHALL—So who is disadvantaged?

Ms Bennett—I think there are lots of avenues for people to seek compensation and be looked after on a journey to work, as with any journey.

Senator MARSHALL—If you are in a motor vehicle accident, in some states that is true. But all journey accidents are not ones involving motor vehicles, are they?

Ms Bennett—No, but a lot are.

Senator MARSHALL—Sure. And there could be costs—

Ms Bennett—I do not actually think it is fair that the NRMA gets to have record profits and not pay what is due compensation. That is a personal view.

Senator MARSHALL—No, but it is about who ought to pay as a result of that. You have simply shifted that burden onto the individual as to whether they are successful in recovering that. I know that as an individual it is much more difficult to recover costs from an insurance company as opposed to other insurance companies doing it on your behalf. Can we just move on to the other issue of the treatment of superannuation, which is quite different. This does sound quite bizarre to me.

Ms Bennett—Can I bring an expert on this? Superannuation is so complicated.

Senator MARSHALL—I hope you have. I thought you were pointing to Mr Kibble. He's not an expert?

Ms Bennett—Not on this technical formula.

Ms Parker—He is developing his expertise.

Ms Bennett—Start with the question and I will see what we can do.

Senator MARSHALL—I want you to tell me why we are in this mess. Explain to me what you are going to do or intend to do about the deeming rate. Please justify why you deduct in effect five per cent of people's compensatable income for a notional superannuation contribution which they never benefit from and why would you deem the pretax amount? Why have these things occurred? Do you agree that they are right and, if not, what are you doing about it and when?

Ms Bennett—I would just like to give a big picture answer on this first because I think that this is something that is actually to the advantage of people. I will just explain the background. Prior to the changes that were made in 1988, someone that received workers compensation received it for their whole life under our scheme; it was until you died. Changes were made by the government in 1988 that said workers compensation ceased at 65, which was then defined as the end of a working life. Medical expenses continued to be paid, but your superannuation would take over from 65 to retirement. That connection with the superannuation was interpreted at the time to be that workers compensation and the way we pay it was income and that people should contribute to their superannuation while they were receiving this compensation in the form of weekly payments. There is no question that the rate set in 1988—at a time when there were quite high interest rates—was too high. We think that this has come about from quite successful lobbying of the superannuants and certain individuals and that it is to their benefit. By changing the deeming rate and changing how it is applied, there are a number of people who will actually get more money now as a result of these changes.

Senator MARSHALL—What sort of people?

Ms Bennett—Mr Emery will actually be better off under these arrangements. Mr Emery writes to us regularly and I have met with him. He was certainly a strong proponent of these changes. I think perhaps it did not go as far as he wanted, but certainly he will be better off.

Senator MARSHALL—Well, then I am lost. What changes are you making to his benefit?

Mr Kibble—The change to the deeming rate.

Senator MARSHALL—Are you legislating it?

Mr Kibble—The changes in the bill particularly to the deeming rate in terms of the interest that people would earn on their superannuation lump sums will increase the workers compensation benefits.

Senator MARSHALL—I have missed that. Could you point me to where that is. What will be the new deeming rate, or how will that be calculated?

Ms Bennett—It will be determined every year. Rather than being locked into the legislation at an inappropriate rate, taking years, it will be done by 1 July every year, by regulation through the minister. So it will be current, on the best information that is available.

Senator BARNETT—What is it linked to?

Mr Kibble—It has not been decided yet.

Ms Ryan—It is proposed that it be based on the 10-year government bond rate.

Mr Kibble—It will be 5.6 per cent rather than 10 per cent. So, to take a real life example, a retired person, a person on invalidity, who got a lump sum, might go from \$500 a week in workers compensation benefits to about \$615 or \$620 a week. The change in the deeming rate—from that 10 per cent as it is now in legislation to what probably will be the 10-year bond rate—will increase people's benefits. That is item 24 in the legislation.

Ms Parker—It is in the regulation impact statements outlined on page 11, as part of the explanatory memorandum attachment.

Ms Bennett—The other change being made which you raised was about the superannuation deduction. It is actually being paid now to a super fund to enhance their post-superannuation income, post ceasing of benefits at 65. So we are surprised that there is still some noise of concern about it.

Senator MARSHALL—It is a personal contribution which does not go to a personal account, does it? Is there some benefit?

Ms Bennett—It will now under this change. This five per cent that they are paying will actually go to the super fund.

Senator MARSHALL—It is alright to go to a super fund, but is it to the benefit of the individual who is making the contribution? That is the question.

Mr O'Shea—There is the proposed amendment to change the SC to 5 per cent. The government has admitted that naming it an SC causes confusion. While an employee is still at work, they are paid under section 19 of the act. Under section 19 of the act, provided there are no other earnings, after 45 weeks a person gets 75 per cent of their normal weekly earnings. They get 100 per cent up to 45 weeks. Post 45 weeks the benefit drops to 75 per cent. The legislative intention of that was to encourage people to return to work. It was a financial disincentive to the employee after 45 weeks.

From 1988, the legislation basically said that the amount of compensation you receive is what you would receive under section 19. Under section 19 it was a minimum of 75 per cent.

Once you retire it is a maximum of 75 per cent, minus SC. The vast majority of people in the scheme at that stage were contributing five per cent to super. By using the SC formula it was effectively saying minus five per cent—so 70 per cent. So it was always the intention of the act to remunerate a person who had retired or terminated their employment at 70 per cent of their normal weekly earnings. Most people at that stage, if they were invalidity retired, would be receiving an invalidity pension, and the act said that the addition of your invalidity pension and workers comp could not be such that you were more advantaged than a person at work. The combined benefit would be 70 per cent.

Senator MARSHALL—I understand the contribution if you are at work, but we are still only talking about 75 per cent, so I think that comment is out of place.

Mr O'Shea—When you are at work you are a superannuation contributor. When you are retired from work and you are in receipt of a superannuation pension or a lump sum, you are a superannuation recipient. There is no semblance that you will continue to contribute; it is a fact. Once you are retired, you are ineligible to contribute to a super scheme which attracts an employer benefit because you are a superannuation recipient in that situation.

Senator MARSHALL—So you will get 75 per cent once you have retired.

Mr O'Shea—Effectively, once you are retired you will get 70 per cent of your normal weekly earnings.

Mr Kibble—It takes account of the five per cent that people who are still at work are contributing to a super scheme.

Mr O'Shea—The clear difference is that, when you are still at work, workers compensation pays you 75 per cent and then your employer deducts five per cent of that to contribute to your compulsory superannuation contribution. It also attracts an employer's contribution. What you are getting in your back pocket each week is effectively 70 per cent of your normal weekly earnings after 45 weeks. However, as a current employee, you do receive an advantage over retired employees in that you remain a contributor to super. So your fund in the superannuation scheme is continuing to build, as is the employer's contribution to that fund. So while you are a current employee, yes, you do have an advantage. When you cease to be an employee—you retire, resign, take a lump sum or whatever—you are no longer a contributor to superannuation; you are a superannuation beneficiary. You are either receiving a pension or you have received a lump sum which you can do with what you like, and you receive 70 per cent. There is still the same amount of money in your back pocket, but clearly you are not contributing to a super scheme, nor are you benefiting from an accumulating amount in a super scheme. It is a matter of fact that people at work are super contributors; people not at work in this case are super beneficiaries.

Senator MARSHALL—But the act still talks about 75 per cent. So when you are not contributing to the scheme—

Mr O'Shea—By referring to the amount that you would receive under section 19, yes, it refers to 75 per cent, and the amendment is to take five per cent off that.

Senator MARSHALL—While you are working.

Mr O'Shea—No.

Senator MARSHALL—I want you to—and you do not have to do this now but at some point in time, just so I can deal with some people who are talking to me about these issues—point me to the part of the act that says that once I am out of the workplace I should lose the five per cent.

Mr O’Shea—Sections 20, 21 and 21A.

Senator MARSHALL—Of which act?

Mr O’Shea—The SRC Act.

Mr Kibble—Section 19 sets out what the benefits would be and the formula and then sections 20, 21 and 21A, which is what the Law Council was speaking about briefly, deal with people who have retired and provide formulas. The third leg to your question—if I can come back to it—which has also been raised by Mr Emery and others, relates to gross versus net amounts. All the formulas in section 20, 21 and 21A deal with gross amounts. The wording of the legislation talks about the superannuation benefit received. All the formulas in the bill, current and future, deal with gross amounts, not net amounts.

Senator MARSHALL—That may be the fact. I am sure you are applying the scheme according to the legislation. I would be surprised if you were doing otherwise. But it makes no sense to me that you would be deeming a rate on an amount that does not exist in reality.

Mr O’Shea—It actually makes sense to me.

Senator MARSHALL—Does it?

Mr O’Shea—Yes. The key to it is section 20, and that is entitled ‘Compensation for injuries resulting in incapacity where employee is in receipt of a superannuation pension’. That is a weekly benefit. It says:

The amount of compensation is an amount calculated under the formula:

The amount of compensation, the amount you get under section 19, 75 per cent, minus the weekly superannuation amendment of five per cent is what you get. So all those amount are gross amounts.

When we get to section 21 and 21A, which deal with what happens if an employee, rather than receiving a weekly pension amount, elects to receive either all or part of it as a lump sum, they say: ‘How do we treat this lump sum? We’ll deem an earning capacity on that lump sum.’ It deems the earning capacity on the gross amount, just as it minuses the superannuation pension amount—the weekly pension amount—as a gross amount. It looks at what you get in gross terms and takes off a gross weekly pension amount to deliver an outcome. If you only subtracted the net of a lump sum, you would be giving those people an advantage; you would be creating an anomaly there.

Senator MARSHALL—You have explained it. It is more of a perceived unfairness when you look at it. It is not logical, because the whole outcome is based on that formula.

Mr O’Shea—If you isolated that one lump sum and applied the earning potential to that, yes, it looks like an anomaly. But it is even more anomalous not to deal with it in that way.

Senator MARSHALL—Let us go through the Law Council’s case.

Ms Bennett—Can I provide a sample? It is based on an average salary at the level of whatever, so it is not an individual. We did an example of what they currently get and how the changes would affect the outcome for someone. It is just figures put in on what an average person on compensation would get—it is a snapshot. What it does is nicely takes that formula and shows it with real figures so that people can see. I can table that, if that would help the committee.

CHAIR—Yes.

Senator MARSHALL—Yes. Have you got a copy of the Law Council's case study of Darrell?

Ms Bennett—I want to give an example.

Senator MARSHALL—I would like to use this example, because this seems inherently unfair. It may be, like Mr O'Shea's example, that it looks unfair but that is the way that it was designed to be to give a particular outcome that is thought to be fair. But this looks quite unfair. They related this because it was Telstra as a self-insurer. The proposition that they put to us is that Telstra in this case study pushed their obligation of some \$440,000 onto the superannuation fund, so that is an aspect of this example also. You all were not here for the Telstra example, and it may be that you want to look at the *Hansard* and take it away and come back to us in some detail. But if you do it that way I would like some detail about all of the difficulties that we have with this, because this looks inherently unfair.

Ms Bennett—We will have a look at this and we will try to do it in the way we have done our examples, which say what it is now and what it will be with the changes.

Senator MARSHALL—All right.

Ms Bennett—We will try and put that in. Was this provided by the Law Council? If some of the figures do not make sense, we will ask them to make sure that we are all talking about the same type of figures.

CHAIR—So it is consistent and from the same point of view.

Ms Bennett—Yes, rather than them putting one scenario and us another, we want to be clear—apples and apples—on this. We will get back to you.

Senator BARNETT—You have answered quite a few questions that I had, including the Darrell matter, so thanks for that. We have had this argument from various witnesses pretty much throughout this inquiry that it is moving from a no-fault system to a fault based system. Do you want to deny that and say that it is based on work related matters? You said earlier that it is based on a work relationship. Do you want to flesh that out for us?

Ms Bennett—I want to reiterate that Australian workers' compensation schemes in every state are no fault. They also have stronger levels. We talked about injury, and the exclusionary provisions, or the high threshold, are not inconsistent with what is happening in other jurisdictions. We are still a no-fault scheme.

Senator BARNETT—That is what I wanted to hear: that we are still a no-fault scheme. I wanted to get that on the record.

Senator MARSHALL—It is all right to say it; it is another thing for it to be true.

Ms Bennett—What it means is that it is a no-fault scheme within the parameters of what is allowable. It is still a no-fault scheme; we are just trying to make the link between work and the injury much more obvious.

Senator BARNETT—Absolutely. Very good; that is a good summary. There is a reference to the cost savings, in the Law Society submission, of \$20 million. I want you to clarify for the record what the savings are. You mentioned it is 2.6 per cent or \$5 million regarding the definition of injury and disease and the management relationship.

Ms Bennett—And it is estimated journey to work will be \$15 million.

Senator BARNETT—That is what I wanted to know. Is that a percentage? Is it \$15 million savings?

Ms Bennett—Yes, \$15 million per annum savings.

Senator BARNETT—What percentage is that?

Mr Southwood-Jones—Of the premium pool?

Ms Bennett—The question is just about journey to work because we have provided the figure of 2.6 per cent.

Senator BARNETT—Yes, I am just talking about journey to work, the \$15 million savings and the percentage of the total.

Mr Kibble—Of the total premium pool?

Senator BARNETT—Yes.

Ms Bennett—On just journey to work and recess.

Senator BARNETT—I want to compare apples with apples. You have told me 2.6 per cent is \$5 million.

Ms Bennett—Yes. And what proportion is the \$15 million? We have that—

Ms Ryan—To give you a sense of when we developed the costings, compensation coverage for journey claims was estimated to cost Comcare, in 2004-05, \$25.9 million, which was 13.2 per cent of their payout. So we have extrapolated some of those figures, making some amendments to the journey claims—

Ms Bennett—Because it is not all journeys; it is those in those circumstances. So, of the \$25.9 million that Comcare currently pays, we will still pay about \$10.9 million a year on journey to work, in the circumstances where it is the employer directions.

Senator BARNETT—Of course, work related. I am with you. I think that helps. Let's just go through these others. We have had some discussion about the dispute rate under Comcare. Disputes of Comcare is 25 per cent compared to nine per cent, and there was a legal cost of \$8,150 compared to \$6,730. Can you respond to those comments.

Ms Bennett—Firstly, this is the most current report with that dispute rate and you will notice that Comcare now reports a dispute rate of 8.2 per cent. The reason for that—

Senator BARNETT—It has gone from 25 per cent down to 8.2 per cent?

Ms Bennett—Well, no, it has not ‘gone’. What has happened is that the other jurisdictions defined ‘disputes’ as those that went to independent tribunals, and that is what they counted, or to the courts. We were counting our internal review mechanism. After discussions, it seemed that that was not apples and apples and it gave a disproportionate rate. I spoke to others and they did not do internal reviews, so we do not count them. So now you can look at that chart and you can see that when we are talking about disputes it is exactly the same for every state and the Commonwealth and that we now have lower than the national average, on the same data.

Senator BARNETT—Very good. Is that pretty much accepted by the states and the powers that be?

Ms Bennett—Yes, and it is a notation on page 30:

The disputation rates reported by Comcare have reduced substantially from previous publications due to the removal of internal reconsiderations from the number of disputes ...

Ms Ryan—This report is ticked off by all the states and territories—they all have to approve it—and it goes to WRMC, the Workplace Relations Ministerial Council.

Senator BARNETT—Just checking for the *Hansard*: this report is the *Comparative performance monitoring report, 8th edition*.

Ms Bennett—Yes.

Senator BARNETT—On travel arrangements, there is the issue about travel arrangements being affected by insurance premiums. It is a policy of our government that we want a healthy environment, a healthy community, healthy people. What is your view in response to the claim that this may have an impact on people so there is less riding on bicycles or walking to work and so impact adversely on the health and wellbeing of the Australian citizens?

Ms Bennett—Mr Kibble rides a bike and he said he would still continue to do it after the changes were introduced.

Mr Kibble—And I play touch football at lunchtime.

CHAIR—But we have also seen you tip over a glass of water, Mr Kibble—

Ms Parker—We won’t assess your claim!

Ms Bennett—I think in the last few years there has been increased awareness from employers about the value of safe and healthy workplaces and healthy employees. There is a general awareness. I do not believe that these changes are going to stop people from riding their bikes or playing sport, but we would have no way of knowing.

Senator BARNETT—So there is no evidence or research that you are familiar with that could assist us in any deliberations on this matter?

Ms Bennett—No. But I just want to make it clear that, if it is a work sporting event—for example, we in Comcare have a sports lunch day once a year, where cricket is played and tug of war and all that—that would still be a workers compensation compensable event.

Senator BARNETT—I understand that. Telstra referred to some research and Mr Coleman is going to come back to our committee with that evidence. I am looking forward to having a look at it. If the department is not aware of any, that is fine. But, if you are aware of

any information or research in that regard to say that there is or is not evidence of it changing people's behaviour, that would be of assistance.

Ms Bennett—Can I also add that, in those discussions where we looked at other states that have made these changes, a point that was being made was that there is no indication that people in Tasmania or Western Australia, that I am aware of, have stopped riding bikes and playing lunchtime sport.

Ms Parker—It's too cold in Tasmania, and too hilly!

Senator BARNETT—It's too hilly in Tassie! It has not stopped the Pollie Pedal from happening down there this year on 2, 3 and 4 March. I just want to touch on litigation. You mentioned in your introductory comments the litigation impacting on broadening the definition since 1988, when the bill was first brought into being. Can you point to any particular cases that would help us believe your views about the expansive impact of litigation and AAT decisions et cetera?

Ms Bennett—Yes. There are some in the submission provided by DEWR. There are a number of key decisions—Treloar, Wiegand—that have expanded the definition and the circumstances.

Senator BARNETT—That is all right. Have you got a page number for me?

Ms Parker—It is on page 4 of the submission.

Senator BARNETT—Good. I will have a squiz at that.

Mr Kibble—I might also mention the recent case in the Federal Court of Australia of *Comcare v Sahu-Khan*. The decision of Justice Finn of 19 January 2007 gives a good summary of the case law in relation to significant—

Ms Bennett—In reading the judgement, it seems greater clarity on relationships is needed. That is interesting to read, and it crosses almost all the recent decisions—in the last eight or nine years.

Mr Kibble—We can table that to save you looking it up.

Senator BARNETT—That would be helpful if you could send that through. Finally, on this definition of 'injury', which the Law Council raised with us and is a concern, do you have a response? I think you touched on it in your opening remarks about the three main concerns—disease, injury and journey/recess. Injury is the second concern. Can you just outline your response to the concerns that have been expressed about the definition of injury.

Ms Bennett—I think the Law Council was particularly focused on the reasonable management issue. I would like to refer to a piece of work that was conducted by my colleague in DEWR. I am also a member of the Safety and Compensation Council and a member of HOWCA, and there was a whole debate about the growth in psychological injuries—work stress injuries and work relationships. We were grappling with the full range of how we always provide a safe workplace in these circumstances, what is their liability, what are the best treatments, and rehabilitation and return-to-work issues—very big issues. What came out of the research conducted by the ASCC was that the Commonwealth was out of step with every other jurisdiction about this link between work and these types of injuries

that we are talking about. It was not a problem for other jurisdictions—they had changed, amended or put clarity in this particular area, and it was only the Commonwealth, or the Comcare scheme, that was grappling with this. When you look at the exclusory provisions in all other jurisdictions, you see that ours are the least clear, with probably the least clarity in the area of the link between the employer's responsibility and what happens in the workplace.

Senator BARNETT—The Law Council, in the sixth paragraph of its 'Definition of injuries' section, says:

Certain jurisdictions already apply a test similar to the one proposed, namely South Australia and Tasmania. The Law Council is advised that in those jurisdictions there has been increased litigation (especially in Tasmania) and greater uncertainty as to entitlement.

Ms Bennett—Mr Redpath, who represents the Law Council, is also on the Comcare consultative forum. We have previously asked if we could see some data.

CHAIR—Yes, they did say that they did not have any yet.

Ms Bennett—Yes, and we do not have any data either. From my discussions with my colleagues in the other heads of workers comp—which has its tensions at the moment, as a relationship—can I say that, with the changes that are happening, they also did not feel that that was the case. So I have no data on that. I have the comparisons of the words from every jurisdiction. In our view, ours is well in step with what most have done. We have done that work. But I do not have any evidence—and it has not been provided—that there was increased litigation due to that change in definition.

Senator BARNETT—All right. Finally, just to get clarity on your comment earlier that there have been what you referred to as cross-claims, particularly on the journey area: part of the reason for what we are doing is consistency with the other states, but I assume it is also to avoid the duplication or the cross-claims, as you referred to them. Can you just confirm that and expand on it.

Ms Bennett—It is clear from my reading—and certainly the department—that the first aim is to make sure that employers are paying workers compensation for issues which are in their responsibility where they can provide the safety and the standard. The second is that the decision is consistent with two Productivity Commission reports about national consistency, and the majority of the states have moved in this area. Thirdly, I was just making an observation that in the last few years we have increased our activity of recovering costs from insurance companies which should have more appropriately made a contribution to it—the cross-claims.

Senator BARNETT—Is there any sort of evidence or research in terms of the insurance companies that are not covering, where you are covering?

Ms Bennett—I can certainly provide information about the last few financial years, where we started to be more determined in pursuing those, and it has grown quite considerably. I think last year we received about \$6 million in reimbursement, which included—

Senator BARNETT—Where you got reimbursement from the insurance companies?

Mr O'Shea—Yes.

Ms Bennett—That is taking away the very high legal costs to start the press at the beginning, so that was a net return to Comcare. I have to say that the NRMA has fought us all the way on having to pay this, but now we have won on every decision—including a recent full bench Federal Court decision.

Senator MARSHALL—Just when they have now given up!

Ms Bennett—I know! But it was \$6 million last financial year.

Senator BARNETT—Okay.

Mr Kibble—I will just add in that context that at the end of the Law Council's evidence they mentioned that they were not sure whether those sorts of cross-claims, those nets, had been taken out of the \$20 million. They have—that \$20 million is net of those.

Senator BARNETT—That is a net figure?

Mr Kibble—They have been taken into account. So it is not just—

Senator BARNETT—Is there anything else you want to say in response to the Law Council?

Ms Bennett—As I said, we have done this work on comparing the jurisdictions on these exclusionary provisions. You might find the table, which is a summary, useful, if we were to table it as well.

Senator BARNETT—Thank you.

Senator MARSHALL—I just want to come back to the breaks, in relation to some of the questioning I did with Telstra. Let us look at a lunch break, for instance. They were of the view that, if you stayed within the employer's confines or workplace and had lunch, you were covered. That probably goes to your issue about providing a healthy and safe workplace and having some control over it. So are employers required to provide somewhere to have lunch?

Ms Bennett—No.

Senator MARSHALL—They are not. Okay. Are they required to provide a break for lunch?

Ms Bennett—That goes to industrial legislation but, yes, my understanding is that there are hours worked after which breaks are required. Also, on the safety side, we look at that as safety about fatigue and reasonable working hours. But, as to whether a tearoom is provided, I do not know. When I worked in industrial relations, it was not a requirement that tearooms were provided. But hours of work are set out in industrial relations legislation.

Senator MARSHALL—Employers are responsible for administering those arrangements, aren't they? So we make the assumption that everyone is required to have a lunch break if they are working full time.

Ms Ryan—Yes.

Senator MARSHALL—So if you are out on the road as a Telstra technician—and this is the proposition I put to Telstra—and you pull over because it is your lunch break and you are required to have a lunch break by the employer, you sit in the park and eat your sandwiches and you are injured in the course of that process, are you covered?

Ms Bennett—No. Outside the workplace on a lunch break, you are not covered.

Senator MARSHALL—Why not? It seems inconsistent because you said that if the employer requires you to do a course of study, that is fine; you are covered for the journey and you are covered at the place of the education. But if you are required to have a break, why would you not be covered?

Ms Parker—It is no different than if I am at work here in Melbourne and leave and go into the park. The employer has no control over that environment. It is the same for a truck driver. If they go to the park, there is no control over that site. They could be doing anything.

Senator MARSHALL—So if the employer requires the employee to have a lunch break, it would be reasonable to expect the employer to require the employee to come back to a place that the employer has control over for them to exercise that lunch break?

Ms Parker—That would be the only way the employer could have control over the facilities and ensure a safe workplace, yes.

Ms Bennett—Also, going back to the issue about sport, if there are work lunches that are being put on, such as farewells, that has not been changed.

Senator MARSHALL—In terms of the travel, I probably agree that it will not change people's mode of transport. People do what they do regardless of that. But what it clearly means is that, if you are injured, you are not covered by Comcare anymore. It is as simple as that. So you simply lose a coverage that people did have—they no longer have it. That is the case, isn't it?

Ms Bennett—An interesting observation is that the Law Council in parts have been a bit critical of the Comcare arrangement because we have very limited circumstances for common-law claims. In other states where there have been these changes, it has given an individual a chance to receive a different sort of compensation for that injury through common law. So some people will actually see this as not such the negative shift that is being presented. If you fell on the tram step or a motor vehicle hit you in the past, through us, your compensation would be very specific: for the first 45 weeks and then dropping down.

Senator MARSHALL—Are you saying that some people will not see this as a negative step? Did you have any requests from anyone to remove journey cover?

Ms Bennett—No, but I asked whether there were as many complaints in some of the states about it when I was talking to the other state jurisdictions on the changes.

Senator MARSHALL—They are not covered by Comcare. There may be some complaints when people who are covered by Comcare realise that you are going to legislate to take away that right.

Ms Bennett—In the circumstances where there is a responsibility of another party, whether that is in a public place—

Senator MARSHALL—Which will not be the case in every—

Ms Bennett—It will not be the case, but there are other parties that will be able to be held responsible in a number of cases—but not every one.

Senator MARSHALL—Yes. It is shifting the burden. My last question is about authorised leave and it is for DEWR. I would like some confirmation that my understanding is correct and then we can move on to the next question. If you have a compensatable claim and are therefore absent from work, that is authorised leave. Is that correct?

Ms Bennett—Through the compensation it is reimbursed.

Senator MARSHALL—No, this is a workplace relations question. Is it authorised leave under the Work Choices legislation?

Ms Ryan—Yes.

Senator MARSHALL—If you have an injury during your lunch break or journey to or from work, which you are no longer covered for, and you are absent from work without sick leave, is that authorised leave?

Ms Ryan—Yes. Sick leave.

Senator MARSHALL—No, assume you do not have any sick leave but you are now absent.

Mr Southwood-Jones—You are done, basically.

Senator MARSHALL—For example, you break your leg on your way to work for whatever reason and you are off for 15 weeks and you have 10 days sick leave. After the first 10 days, is your leave then authorised or not?

Ms Ryan—Under some industrial arrangements you can have unpaid sick leave, which can then become authorised leave.

Senator MARSHALL—Forget about the industrial instruments; what does Work Choices say about that? I think the legislation is fairly specific about what is authorised leave and what is not.

Ms Parker—Can we get back to you on that? We might be guessing so it would be helpful if we could get back to you.

Senator MARSHALL—If you are able to answer it now I would appreciate it.

Ms Parker—I think we could provide a more accurate answer if we could take it on notice. If there are any other questions that go with that, that will be fine.

Senator MARSHALL—The question I then want to ask is: if it is not authorised leave—do not worry about what people may negotiate separately; I am interested in what the act says; and assume the absence of any industrial instrument—is there any obligation on the employer to keep your job open for that absence?

Ms Parker—When you are on benefits—workers compensation benefits—

Senator MARSHALL—No. If it is during journey to work, lunchtimes or breaks, where you would have once been covered and therefore authorised to be on leave due to that injury or illness, you are no longer compensated. I want to know whether that is authorised leave or not and, if it is not, is there any obligation for an employer to keep that job open for you? At what point in time are you terminated?

Ms Parker—We will get back to you.

Senator MARSHALL—I think that is all I have. The only point I want to make, and I am sure that the secretary was probably going to make this point anyway, is that we are reporting on the 20th so we would hope that all these things that you have taken on notice—and I do appreciate you taking them on notice—will be back so that we have some time prior to finalising our written report to digest some of the information.

Ms Bennett—My understanding is that the only thing that Comcare has on notice is the Darrell scenario and the super. We have agreed to do the Darrell scenario and if we could be really clear as to what the question is we could get back to you.

Senator MARSHALL—We will get a copy of the *Hansard* to you.

CHAIR—There are no more questions.

Ms Bennett—We will see you at Senate estimates, then.

CHAIR—Yes. Thank you.

Resolved (on motion by **Senator Marshall**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.23 pm