COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT AND WORKPLACE RELATIONS

Reference: Aspects of workers compensation

TUESDAY, 26 NOVEMBER 2002

MELBOURNE

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

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STANDING COMMITTEE ON EMPLOYMENT AND WORKPLACE RELATIONS

Tuesday, 26 November 2002

Members: Mrs De-Anne Kelly *(Chair)*, Mr Bevis *(Deputy Chair)*, Mr Dutton, Ms Hall, Mr Hartsuyker, Mr Lloyd, Ms Panopoulos, Mr Randall, Ms Vamvakinou and Mr Wilkie

Members in attendance: Mr Bevis, Mr Hartsuyker and Mrs De-Anne Kelly

Terms of reference for the inquiry:

To inquire into and report on:

Matters that are relevant and incidental to Australian workers' compensation schemes in respect of:

- the incidence and costs of fraudulent claims and fraudulent conduct by employees and employers and any structural factors that may encourage such behaviour;
- the methods used and costs incurred by workers' compensation schemes to detect and eliminate:
    a) fraudulent claims; and
    b) the failure of employers to pay the required workers' compensation premiums or otherwise fail to comply with their obligations; and
- factors that lead to different safety records and claims profiles from industry to industry, and the adequacy, appropriateness and practicability of rehabilitation programs and their benefits.

WITNESSES

Committee met at 9.05 a.m.

GRINDLAY, Ms Anita Ellen (Private capacity)

PERS, Dr Paul Laszlo (Private capacity)

ACTING CHAIR (Mr Bevis)—The chair, Mrs De-Anne Kelly, has been delayed and will join us shortly. In her absence, as deputy chair I declare open the public hearing of the inquiry into aspects of workers compensation. I welcome Dr Paul Pers and Ms Anita Grindlay; thank you for coming along to meet with us today.

The proceedings here today are formal proceedings of the parliament and warrant the same respect as proceedings in the House. In providing your evidence today, please do not name individuals or companies or provide information that would identify those individuals or companies. The committee is interested in the broader principles and the issues that you may wish to raise. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals. The committee prefers that all evidence be given in public, but if at any stage you should wish to give evidence in private, please ask to do so and the committee will consider that request. I now invite each of you to make some preliminary comments about the issues that you think are important to this inquiry before we move into some questions and discussion.

Ms Grindlay—I have a nursing and case management background, and I have worked in consulting for the last six years, predominantly in workers compensation. Our focus has been working with authorities, self-insured and employers looking at how they are currently managing their workers compensation. Our role has been to go in and review an organisation through interviewing staff and stakeholders, reviewing files, helping them identify where their issues are and putting systems into place to manage those issues. I understand the focus of this inquiry is fraud. In the last 18 months we have reviewed over 1,000 workers comp claims files across three states—both Commonwealth and state schemes and also self-insured. We can honestly say that we have seen but a handful of what you would call genuine fraud.

Our argument is that workers compensation is fraught with a lack of accountabilities, that there is a lot of paper shuffling, that it is about processing and not about management, that there are very few people that are proactively managing an injury when it happens and that often people get back to work almost in spite of the system. I know that is very negative, but we are coming from looking at the 80-20 rule. That is, 80 per cent of people who have an injury will get back to work off their own bat with very little help, but 20 per cent of the claims become long term. It is those 20 per cent of claims that make up 80 per cent of the costs to the system.

What we have seen in looking at the files is that a lot of the poor return to work outcomes are due to the fact that employers are often acting to the letter of the legislation without necessarily to the spirit of the legislation. They will provide alternative duties until—for example, in Victoria—52 weeks has hit and then suddenly they will not be available. This is happening. Where there is an injury at a small place of employment and it is quite obvious that the employee will not be able to go back because there are no alternative duties, no-one at an early point is actually recognising that and putting in a plan to try and get the injured worker, for instance, into another job. They will just bundle through until it hits 12 months. Their people are not being managed.

Providers are paid on an hourly rate, and their outcomes are not measured. While we are not saying they are fraudulent, if you pay somebody $100 an hour to do something and they can do it in 100 hours or in two hours, at the end of the day they are a business and they have bills to pay. If no-one questions that it is taking me six weeks to do something that potentially could be done in five minutes then it will happen. We would argue that what the system needs to do is look at outcomes and pay on the delivery of outcomes, not pay for the hours that it has taken to do something. We have seen claim after claim where multitudes of services have been provided, and there is still not even a clear direction about where it is happening.

This all sounds very negative—I am sorry—but I guess you do not want to hear all the good stuff! Another thing we have found is that there is a lack of what we call symmetry of information in workers compensation. Employers are often saying one thing, claimants are saying another, the treater could be saying something else and there is no-one taking responsibility for aligning expectations and aligning what has happened and what is going to happen. The claims staff at the insurers are often quite young and often have enormous case loads. In Victoria at the moment, they are supposed to have about 80, but we have been working with all the insurers over the last few weeks and they are averaging about 120. If you have 120 files to manage, it is very difficult to manage. You are lucky to get through the processing side of it, let alone actually get into management. They are often using occupational rehab providers as quasi managers—for want of a better word—yet occupational rehab providers are not paid and are not supposed to be case managers. So people are slipping through the holes and no-one is taking responsibility for the management of what is happening.

Dr Pers—I have been in general practice for 25 years and for nine years worked in a workers compensation authority. For a lot of that time, I was involved with policy advice but also with training doctors and other providers in the best management of workers compensation and disability. As Anita said, there is a vast asymmetry of knowledge between the employers and employee stakeholders, insurance companies, workers compensation authorities and self-insurers. This results in a huge cost to the community: the employers are paying much higher levies, penalties and premiums than they should be paying, and unfortunately the management of disability is very much less than ideal.

The management of disability in workers compensation should be approached in the same way as the management of disability from sports injury is, where the employer and all the players are aligned in what they want to achieve. Unfortunately, in Australia—as in many Western countries—there is very poor access to evidence based treatment, and injured workers unfortunately receive passive treatments, are encouraged to rest and therefore develop chronic pain and other negative pains and behaviours which result in long periods off work. This is costing the system not millions of dollars but probably billions of dollars, and that is reflected in the premiums and in the outstanding liabilities of all the workers compensation schemes in Australia. To change a system, as we have seen from looking at 1,000 plus workers compensation claims, all the parties need to have the same access to information. Employer and employee stakeholders should be working together. Their interests are not always aligned, and that is understandable, but in other countries—such as European countries, like Germany—the stakeholders actually get around the table to try to solve those problems. I will stop there, and we will respond to questions.

ACTING CHAIR—Thank you both for that.

Mr HARTSUYKER—On the issue of your review of 1,000 cases, firstly, how do you define a case? Is a case when someone puts in a claim and then perhaps withdraws it later? Is it a case from commencement of the claim right through to finality?

Ms Grindlay—The claims we have looked at have been open claims and predominantly of between three and 12 months duration; they are still active, so they are still open. When we have been looking at it, we have looked it from two perspectives. The first is advising organisations on what is happening and the second—and we have been doing a lot of this—is working with groups to help them identify what has gone wrong, what they should have done and what they need to do now to resolve the claim.

Mr HARTSUYKER—In relation to that, you said there were a handful of fraudulent claims. How is that fraud broken up between employees, employers and service providers? How do you see the picture of fraud appearing in that?

Ms Grindlay—In other words, what is our definition of fraud for this. We have looked at fraud where there is very little evidence that the injury actually occurred or that it occurred at the workplace. Often that was in the file and, if you actually read the file and asked a few questions, you found that it had been turned over. But in saying that, there are very few claims that are denied. They are 'pended', if you like, for want of a different reason. I am sure that half of the time they are pended it is because people say, 'I've got too much and I'll get to the pending box when I've got a chance.' You could call it fraud that employers are not meeting their requirements to offer alternative duties. We have seen employers who will, say, offer Joe whatever duties he needs but there is an obvious dislike of another person on staff so there are never any positions for that person. When you call them, they will openly tell you that they do not like them, they do not want them back and there is no way they will offer them alternative duties.

The difficulty there is that, for the insurers, the large employers are their clients. That is in itself a perverse system because the insurers are agents for the state and yet, at the same time, they are trying to develop a client relationship with the large employers. In our experience, there is a real reluctance for the insurers to dob in—for want of better words—employers that are not meeting their requirements, because they do not want a large company to pack up their bags and move down the road to another insurer. If an employer is getting hassled by their insurance company, that is what they will do because the insurer down the street will not necessarily behave in the same way. I know that sounds awful but, again, that is business. The insurance companies are in business and they need to have employers on their books to maintain their workers compensation.

ACTING CHAIR—Can you tell me what evidence based treatment is?

Dr Pers—Yes. I was hoping you were not going to ask me that! Evidence based treatment is really the treatment that has been demonstrated in the international literature to be the best for a particular condition. For instance, an understandable condition would be, say, for diabetes. The evidence based treatment for that is antidiabetic tablets or injections and diet and exercise. There are other treatments for asthma et cetera. In workers compensation and the management of disability, which is predominantly to do with injuries to the musculoskeletal system, back, shoulders, knees—and of course back injury is the highest cost injury in the Western world—evidence based treatment is the proactive management of that: early activation of the injured

worker, resumption of normal activities, including work, and a return to work as soon as possible. Efficient medical therapy—medications; tablets; six, eight, nine physiotherapy treatments—is evidence based treatment. Unfortunately, many workers are not getting that treatment; for instance, they get encouraged to rest, stay at home and wait for things to get better. We all know that the musculoskeletal system does not repair itself by waiting. It actually repairs itself by the person being active physically and mentally, and returning to work is part of the restoration of function. That is what evidence based treatment is. We now have an enormous amount in the international medical and scientific literature telling us what evidence based treatment is for musculoskeletal injury, particularly back pain.

ACTING CHAIR—If I can paraphrase that for my non-medical, non-technical brain, does that simply mean that, with those procedures—whatever they may be—evidence in the past has demonstrated that they produce improvements or cures?

Dr Pers—Yes.

ACTING CHAIR—I would have thought all medicine was based on that.

Dr Pers—Unfortunately not.

Ms Grindlay—A lot of medicine is more art than science. As Paul was saying, there are mountains of clinical guidelines that are available for workers compensation injuries. They will look at, for example, a sprain and strain and say what should happen over six weeks, and that 90 to 95 per cent of sprains and strains should be healed by that time.

ACTING CHAIR—Let us talk about payment for outcomes on an outcome based system rather than a process system. How do you structure a payment for outcomes system, given the complexities of the range of injuries? If you say, 'We'll pay you, as a service provider, additional money if 90 per cent of your claimants return to work within a certain time frame,' I would have thought that that would provide an incentive for those providers to take on those less injured and with less severe problems and avoid the ones that are long-term difficulties.

Ms Grindlay—Absolutely. I will give an example of how a state fund in the US went about doing this. They wanted to move to an outcome based funding system but were worried about the things you have just raised: that there would be cherry picking and no-one would want to touch the seriously injured. They drew a line in the sand and looked at all service providers and what their costs and time frames had been to date. Everyone has the sickest claimants and everyone has employers who do not provide duties. It is like every doctor has the sickest patients. They said, 'You've got a group of claimants. What we will do is say that next year we will pay you at 80 per cent of what you've earned and 20 per cent of your funding will be based on you achieving outcomes. Those outcomes will be based on what you did last year.' Providers had to improve; they had to get greater return to work outcomes based on their population.

ACTING CHAIR—Doesn't that assume that the population next year will have the same profile as last year's?

Ms Grindlay—They got actuaries to come in and work it all out.

ACTING CHAIR—But if we are talking about injuries, I would not have thought they would necessarily present the same, year on year. If they do, we are learning nothing about occupational health and safety.

Ms Grindlay—There is not a lot of difference each year. If you went to any insurer or authority and looked at the last five years, with the exception of a few per cent either way, the injuries are exactly the same.

ACTING CHAIR—If indeed that is the case, that is not a glowing endorsement of our occupational health and safety practices, is it?

Dr Pers—It is not.

Ms Grindlay—No.

Dr Pers—It is a disaster. As I stated, it is very expensive for employers and for injured workers.

ACTING CHAIR—Rather than take up too much time on this issue now—I am interested in it—I ask that you think about whether there is anything you want to expand on, at least for my benefit. I should give you a heads-up on what is in the back of my mind on this. Once upon a time I was a teacher. When I hear people talk about payment by outcome, I remember the debates we had in education when this issue was raised, on the basis that, if the children in your school performed at a higher standard, you got better resources. In fact, that is exactly the opposite prescription, very often, to what is required because the clientele of students is not identical school to school or over time as socioeconomic factors in the regions change. So you cannot even use a time series to predict future performance; it is a far more difficult matrix of inputs. I therefore translate that prejudice, as it were, to this issue. If there is anything you can tell me on that to illuminate it, I would welcome it.

Ms Grindlay—We agree with you completely. We recently did some work for an employer who decided to reward their different areas for every week that an injury did not occur. We found, when we went back and looked at the last 12 months, that everyone was saving up their injuries until someone had to get carted off in a ambulance, and then everyone who had been saving their injuries up for all those weeks claimed. On the employer's system, it went in a straight line and then it jumped with all the walking wounded, so to speak. They all put their injuries in once someone was taken off in a ambulance. You have to be very careful about that.

ACTING CHAIR—You make a comment in paragraph 6 on the impact that surveillance has on what you describe as 'already problematic situations'. I invite you to elaborate on that and tell us what you mean.

Ms Grindlay—In my experience, I have not seen surveillance alone result in the closure of a claim. On a number of occasions, I have seen surveillance being done on the wrong person. I know recently that the family of a gentleman who died were surveilled because the claim number got mixed up. You might get someone who has a back injury skipping down Bourke Street, and then they will get their doctor to write a letter saying that they got home that night and were exhausted and did not get out of bed for the next two weeks. Surveillance alone does not stand up when you get to conciliation, unless it is used very strategically where you have a

doctor, an independent medical report and surveillance—then surveillance can be used. But the way surveillance is used at the moment is: 'Oh, it's got to six months. We're not quite sure what to do. We'll order surveillance.' By itself it means nothing, and it is thrown out of conciliation every time.

Dr Pers—Can I raise a related topic to surveillance. The other very problematic area, probably in every Australian jurisdiction, is when claims get to dispute resolution in the conciliation system. One of the things that we have found, to our amazement, is that conciliators who are quasi-legal or whoever they may be have virtually no training in understanding evidence based medical treatment, which seems to us to be an extraordinary situation. When insurers and others take information before a conciliator about a person perhaps being under surveillance and walking down the street carrying various things, the conciliator will accept the opinion of their GP. The GP has not bothered to get off their backside and examine that person properly, clinically, and yet will be supporting this injured worker in the belief that that is best for that injured worker. It seems extraordinary to us that the conciliation and the legal system administering workers compensation in Australia—and I think it would be fair to say that this is fairly widespread—lacks a fundamental understanding of how occupational injury occurs and how you manage disability. It seems to us to be an extraordinary situation.

Mr HARTSUYKER—The concern that I have had in other areas with case based funding is that, putting it in a workers compensation context, a particular injury is worth 10 hours, which is what is allocated under some form of case based system, and we get to the 10 hours and the employee still needs more. Do you see a mechanism to allow that to occur? How do you see that working where there is the exception to the rule and we do not want to short-change a person in need of care?

Ms Grindlay—I think you have just answered that yourself. What needs to happen in workers compensation is a move to exception based reporting and exception based management—going back to engineering using pathways. There is evidence as long as your arm about what should happen for an injury, and we need to start identifying the exceptions. If the evidence is saying most sprains and strains should be healed in six weeks, surely the claims staff should be working from a management template that says over the six weeks what should happen, what needs to be done and what the stakeholders need to be told for the symmetry of information aligning expectations. If someone gets to this point, that is when people should be asking what has gone wrong and what needs to be done, not when it gets to the 26- or 52-week review, which is what the legislation says. Someone in parliament has picked 26 and 52 weeks and has said, 'These are the review points.' Those review points are not based around evidence based healing times; they are based around some sort of legislation. If we were able to introduce exception based reporting, we could start funding based on the identification of the variants and, in turn, the management of them. It would be a bit like case payment in private hospitals. They might get paid, on average, for 10 days, but if they can demonstrate that this person does have complications, a payment kicks in again from the private health funds at 12 days so that the risk is shared. The first step is to have people accountable for identifying where these exceptions are occurring. At the moment, most of them are exceptions.

Dr Pers—I would like to respond to that. What most insurers in Australia do not have are IT systems to support that. In other words, you cannot manage anything unless you measure it. The only measurements that they tend to do at the moment are the processing measurements, processing pieces of paper. If you had IT systems to measure that, you would be able to manage

it. You would then know where to put in your interventions and who are the injured workers who are most at risk.

Mr HARTSUYKER—Your submission comments on 'poor enforcement of both employee and employer responsibilities' in relation to the return to work. Do you want to elaborate on that?

Ms Grindlay—That was what I was alluding to before. The insurers are acting as agents for the WorkCover authorities yet at the same time are looking after their clients. Where somebody does not provide suitable duties, for example, there is a reluctance. In addition to that, when we have gone through files we have seen claimants who do not turn up for medical appointments, do not meet their rehab conditions and who get sent 15 or 16 letters saying, 'You have to do it. We might cut your payments off,' but it is not always happening. I think that the first time something happens, a letter should go out, stating very clearly: 'These are your rights and responsibilities. If you do not meet your responsibilities, these will be the consequences.' Sometimes it takes three or four cancelled appointments before a letter goes out.

Dr Pers—The workers compensation system is plagued by monitoring, delays and waiting. This waiting costs money and it costs injured workers proper rehabilitation.

ACTING CHAIR—Doesn't the core of the system that I think you are suggesting we should be moving towards rely on an initial accurate medical assessment that is both accurate in the science of medicine as we have it and in which all of the stakeholders have confidence—and the two do not necessarily go hand in hand—and how do you arrive at that when we have probably taken enough evidence to get a feel for the fact that a lot of people in the system do not have a lot of confidence in the medicos in the system?

Dr Pers—I guess one of the problems is that if you go back to our medical education system and the deficiencies in that we still worship at the temple of the large hospital. We have trained doctors in the large hospitals—the Princess Alexandra, the Royal Brisbane, the Royal Adelaide or the Royal Melbourne hospitals. We have trained doctors in those environments. It has changed in the last 25 years but there is a mismatch between what the community needs in medical education and what the community is getting. That needs serious readdressing. One state workers compensation authority has been trying to address that and is addressing it by introducing education for medical students and doctors. My belief is that we need to engage those stakeholders. We need to make the medical profession and the training institutions accountable for their actions and their funding. After all, doctors when they graduate are highly paid parts of the system. When specialist surgeons and others are in the full flight of their careers they are very highly paid people. I think the community expects at least some accountability from them.

ACTING CHAIR—Which state is doing something?

Dr Pers—South Australia. They have done some very interesting work on engaging the medical profession, the AMA and the medical schools.

Ms Grindlay—Just to add to that, I think the other problem, to be fair to GPs, is that they might see 30 people in a day. A lot of it is now about: 'If you don't move them through, you don't make money.' So GPs might have five minutes on their books. Workers compensation is

not just about injury, and we would argue after six weeks it is not about injury at all in the majority of cases. There are often a lot of other complex issues that cause the claim. GPs neither have the time nor necessarily the skills to work through those issues. They do not have the time to get on the phone and talk to the employer to find out whether there has been a fight between, say, the line manager and the employee. They do not have the time to question this person about whether they hate their job and they do not have the time to get on to the insurance company and say: 'I think this person needs A, B and C.' What we argue is that the system also needs to support GPs. Ideas we have had around that are, for example, providing a trained case manager that actually sits with divisions. Let us get away from insurance companies. Let us have someone who is actually accountable directly to the system, not to other players, who is trained in communication and who is there to support the GPs so the GP can refer immediately: 'I've got a workers comp claim. They've got an injured back and there are other things going on.' It may mean an immediate email referral. This person then takes responsibility for putting a proactive plan together: getting on the phone, aligning expectations and getting them back to work. GPs need that; they do not have the time. If we do not provide them with support, all the training in the world is still not going to improve the system.

Mr HARTSUYKER—What is your view of medical assessment panels in the workers compensation system?

Ms Grindlay—Panels or independent medicals?

Mr HARTSUYKER—Panels.

Dr Pers—That is a very difficult question to answer. I guess it depends on a number of things. First, the status of the medical panel. Secondly, whether the panel is able to get the best doctors who can assess in a non-judgmental and very appropriate clinical way and also take into account all the other psychosocial and behavioural factors that are involved in workers compensation claims. I think medical panels are seen sometimes as a panacea for dispute resolution. I guess we see it as just a part of that process; perhaps an essential part, but just a part of it—not to be seen as a cure-all for all of these problems.

Mr HARTSUYKER—Can I paraphrase by saying you have some doubts as to their effectiveness in many cases?

Dr Pers—In the past there have been. I would not comment on individual state medical panels because I am not clear on how they all operate. I think some in the past have been less than ideal in the way they operated.

Mr HARTSUYKER—Would you like to comment on how the rehabilitation system is working in regional and rural areas, given the problems associated with isolated workers and getting the necessary services to those workers?

Ms Grindlay—It again comes back to having someone there to support the GP so that it is done in a timely manner. We did not have any trouble throughout our projects finding rehab providers, unless someone was a long way out. All the major regional areas did have them. It is very difficult when a farmer who lives miles out of town hurts himself—how you manage that I do not know; there will always be exceptions—but most of the regional areas do have good providers. It all comes back to the timeliness of intervention. Unfortunately, OR providers are

often brought in at the last minute. A lot of the OR providers will argue that, if they get a referral within a week of injury, their cost and outcomes are a lot better. And that is true: if you do not get someone until six months afterwards, you are chasing your tail from day one.

Dr Pers—We have found that the management of workers compensation in rural areas is not always a big problem. I think it is fair to say that medical services in Australian rural areas are of a very high standard. This is a personal view: general practitioners and allied health practitioners are generally of a very high standard and do understand the issues very well.

We see many more problems in the inner urban and industrial areas of cities, where perhaps there are more doctors and allied health providers trying to divide up the pie, so to speak. I would not be that concerned about rural areas because I think the medical services in rural areas are often of a very high standard.

ACTING CHAIR—Thank you very much for appearing before us today. If there are any issues that we need to follow up with you subsequently, we will do so.

[9.39 a.m.]

COCKER, Mr Simon, Regional Secretary, Tasmania, and National Executive Member, Community and Public Sector Union

RODDA, Mr Graham Lloyd, ACT Regional Secretary, and National Executive Member, Community and Public Sector Union

ACTING CHAIR—The proceedings here today are formal proceedings of the parliament and warrant the same respect as proceedings of the House. In providing your evidence today, please do not name individuals or companies or provide information that would identify those individuals or companies. The committee is interested in the broader principles and the issues that you may wish to raise. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals. The committee prefers that all evidence be given in public, but if at any stage you wish to give evidence in private, please ask to do so and the committee will consider your request. I invite each of you to make some preliminary comments about the issues that you think are important to this inquiry before we move on to any questions and discussion.

Mr Cocker—We would like to reinforce some of the points that we have made in our submission. The system that we are referring to is the workers compensation system primarily for Commonwealth public servants, the Comcare system. We believe that the workers compensation system is in fact the system that deals with the failure of the health and safety system that applies. Where you have good health and safety systems, your workers compensation outcomes are always going to be better—that is, there will be fewer injured workers and less cost to the system. It is a key theme of our submission that a good health and safety system is one that allows representation of workers through their unions. We have referred to that in our submission and we would like to take it a little bit further. We note that Comcare itself, in its submission to the committee, has highlighted the fact that a good system includes union representation.

We note that there has been research into this particular issue. The National Occupational Health and Safety Commission has done a literature review and looked at the whole issue. It has found that union participation is always a factor in a good system and that the lack of representation is often a blocker to an effective system. We also note that the parliament of New South Wales conducted an inquiry and came to similar conclusions. That is rather topical at the moment because that very question of union participation in health and safety systems is one that the parliament is looking at. The legislation currently before the parliament would remove those participation rights of unions. We consider that a retrograde step and one that will lower the standards of the system.

We have tabled with the committee copies of some papers, which detail one of those participative agreements that I am referring to. The particular one we have tabled comes from the Australian Taxation Office, which is one of the biggest employers of people in Commonwealth government employment. It recently started expanding itself to cover some 23,000 employees. The reason we have tabled that particular document is that it has been recognised by the Safety, Rehabilitation and Compensation Commission as an outstanding

example of a health and safety system. The SRCC instituted some awards for good examples of work in its jurisdiction, and this particular agreement was singled out last year as an award winning example of participation.

I want to highlight the fact that this document is quite lengthy. It spells out how the tax office goes about its health and safety processes. Right through the document there is a role for the union. The union responsibilities are spelt out, the union participation is spelt out and the tax office recognises and welcomes that contribution. The document attached to the agreement itself is a description of the initiative that was developed for the purposes of the award and describes in detail how the tax office goes about its initiatives. Again, the fact that the CPSU is a welcome participant and shares in this responsibility with the tax office is highlighted throughout the document.

That sort of participation is, we believe, fundamental to good outcomes. Of course the evidence is there in Commonwealth employment. The premiums which the employers pay are significantly lower than the premiums of any other scheme in Australia. The average rate for premiums is currently around the one per cent mark, whereas the other schemes trend up towards three per cent. I noted that in the Comcare submission they extrapolated that data somewhat to look at specific job tasks or industry tasks within the Commonwealth, and found the same sorts of results. Even when you compare jobs with like jobs in other areas, the premiums are still significantly lower. Of course the Commonwealth has a very wide variety of employment tasks within it. That, again, is reinforcing our view on that participative process.

The other theme that was part of our submission was the discrimination against mental injury which is found in this system. We believe that there is a level of understating of workplace injury because of the difficulties in dealing with mental injuries in this system. We found, through both experience and dealing with cases, that because of the difficulties in getting a stress claim the system is actually a disincentive to a number of people, and they quite often do not bother. They use their sick leave and Medicare rather than workers comp. We also find that quite often, where people do bother, the difficulty in dealing with this system is in fact another stress all in itself. People quite often find themselves reliving the whole stressful event, and the injury can be prolonged and made worse. The Comcare submission did make reference to this—it touched on it. There are a couple of points I would like to emphasise in relation to that.

We have said that the Administrative Appeals Tribunal has taken the definitions of mental injury and made them more difficult than we believe the legislation intended. The Comcare submission referred to a particular case where the courts decided that to have a viable claim there had to be a diagnosed injury. That had particular impact here, because a lot of doctors used to simply write ‘stress’ on their workers comp certificates. Technically, there is no such disease as stress; the AMA does not recognise stress as a diagnosable injury. The actual technical term is anxiety disorder. This initially became another barrier to applying.

The other thing that has happened over a period of time is that the tribunals and courts have taken up one of the exclusions to a claim. That is, the act provides a claim is not allowable where the injury is caused by what is termed reasonable disciplinary reaction. In itself, that is probably a reasonable thing: if somebody is subject to disciplinary action and ends up injured because of it, that scheme will not accept liability. I believe that when reasonable disciplinary action was written into the act it was intended to mean formal disciplinary action, where there is a misconduct proceeding et cetera. Initially, the courts ruled that way. During the nineties, that

particular term was turned around. At the end of the nineties, we found that reasonable disciplinary action was being taken to mean any management action which was intended to instil order into the workplace. Bit by bit, Comcare have been knocking back claims to the point now where any conflict between a manager and a staff person is quite often coming into this exclusion. They are saying that the manager was acting to instil discipline in the workplace through the procedures that they were working with, and that therefore the dispute between the worker and the manager which led to the injury is excluded.

I think this actually covers up a lot of causes of injuries. We all know that people are working longer hours, have more complex work and have difficult tasks. All of these things can contribute to stress related injuries, but they are not being recognised because of this exclusion. We effectively have a situation where the worker has to prove that the manager has acted unreasonably before they can have their claim accepted, which is of course a direct contradiction of the concept of a no-fault scheme. We have a particular problem with that. Those are the points I wanted to make. My colleague wishes to bring to your attention something which might fit under the broad heading of fraud, as we are not aware of precisely how fraud is defined in this inquiry.

Mr Rodda—This is an issue which we wanted to raise as a supplementary issue, and we have tabled some documentation to that end. Certainly we do have some evidence that initially appeared in a newsletter from the Superannuated Commonwealth Officers Association, SCOA. Their May newsletter detailed three cases of individuals who they had assisted to get quite substantial back payments from Comcare with respect to their compensation payments. The group of cases is characterised by individuals who are former employees and who had a work related injury which is still covered by the compensation system. For some of the individuals who were detailed in that newsletter, the back payments ranged from around $10,000 to up to $25,000. They are quite significant back payments. After some discussions with SCOA, I approached SCOA and they wrote to me and supplied me with some more data. Just keep in mind that they do highlight that this is not just an issue for the Commonwealth as an employer, but some of the cases do relate to the ACT government. There are some further cases, and some of them in fact are quite substantial: $60,000 and $100,000 worth of back payments.

Certainly, from the CPSU's perspective, that is quite alarming, given that clearly the system is not meant to operate in such a way. We have written to Comcare requesting some data. Comcare has got back to us and said, 'Look, it's an issue that we want to address but it is an issue that relates to the agency's requirement to report to us adjustments to earnings over time.' Clearly, some of figures indicate that the adjustments have not happened for numbers of years, so it is not a short-term issue; it is a medium- to long-term failure to report these adjustments to Comcare so that the injured individuals can receive their adjustments.

The workers compensation legislation places the obligation onto the agencies to provide that data to Comcare. While the motives behind such a failure are not that clear at this moment—and certainly the agencies indicate to Comcare that it is a clerical or administrative error—what is clear is that the former employees are considerably distressed and disadvantaged by the failures. From their perspective, the issue is that they are the ones who suffer the disadvantage through the failure by the agencies to report that data.

I think from their perspective they might feel that they have been defrauded in a broad sense, because they have been left out-of-pocket and at a considerable disadvantage. It is an issue of:

what is reasonable for employers? What are the reasonable processes that we would expect from employers to make sure that these sorts of things do not happen? What is their duty to be thinking through these issues? I would have thought that a reasonable person would think that, if you do not provide that information to an agency like Comcare, it is not that difficult to see that then that person will not get an increase in their compensation payments. They are the sorts of issues which get down to more systemic issues, such as how does Comcare or the Commonwealth ensure that agencies have the processes in place so that these things do not happen?

There has been an amendment for these people which will mean that these payments will be adjusted by increases to average earnings from 2001, but the issue is how we make sure that the base payment is correct so that the people who come onto the new system are getting what they are entitled to. We have asked Comcare to provide us with some data on the numbers, so we are not clear yet about how many former Commonwealth employees or former ACT government employees that this relates to.

Mr BEVIS—We had some evidence from other places about the importance of establishing partnerships between the various stakeholders to improve the workers compensation environment. Hand in glove with that goes the question of occupational health and safety. To what extent does having union representation on OH&S committees, which you described in your submission, add to that partnership? There would be some people who would say that having union elected representatives would be adversarial rather than part of the partnership regime. What is your experience?

Mr Cocker—There are a couple of points. The research that has been done indicates that, where there is a union involved, it is around five times more likely that a given workplace will have an elected health and safety representative and a health and safety committee operating. It has followed on that, where those two things happen, the health and safety outcomes for a workplace are better. The concept of an adversarial relationship is generally a little outdated. The document that we have tabled—the tax office agreement for the cooperation in health and safety—is a really good example, and it is something that is happening right across Commonwealth employment. The union has a role and it wants to participate, to support and to be involved in those things. It brings expertise into the system; it does not become adversarial. We have a system across the Commonwealth where workplaces have an elected health and safety representative. That representative is given significant powers and rights and duties in the workplace, and they quite often look to the union for support and advice in doing their job through information about particular hazards, processes and ways of behaving. We see it as an absolutely fundamental part of our job to provide that support and advice. It is very rare that it creates an adversarial situation, because we are all working for the same aim: a healthy workplace.

Mr BEVIS—There are two other things I want to raise. In paragraph 10 of your original submission, you refer to a code of practice on stress. I am not familiar with the purpose of the code of practice. Can you tell us what it is and what it does?

Mr Cocker—The code of practice is a term that comes out of the Occupational Health and Safety Act. Comcare, as the administrator of that act, has the right to issue a code of practice—in fact, in some cases it is required to. If the National Occupational Health and Safety Commission has issued advice on particular issues, Comcare is required to pick them up. A

code of practice goes through the process of identifying a hazard, identifying ways of dealing with that particular hazard and providing direction to employees on how they should deal with a particular issue. The real value of a code of practice is that it is guidance material but, if necessary, it can be evidentiary. Demonstrating that an employer has failed to follow the code of practice is taken as evidence that they have failed in their duty of care.

Mr BEVIS—I take it from point 10 that there is no code in respect of anxiety disorders.

Mr Cocker—That is right. That is something we would very much like to see. It is a difficult area, one where some guidance would greatly assist.

Mr BEVIS—My other question relates to the very final comment you made in the most recent addendum, about those retired officers having their base rates set to the correct pay before the standard formula kicks in. If someone has left a position a couple of years ago as a result of an injury—so they have a compensatable injury and they are part of the Comcare system—what becomes their base rate in the public sector, given that you have certified agreements in some places? I assume some of these workers would be on AWAs. If the term of the AWA has expired, as may be the case, what becomes the benchmark for those people? How is that meant to operate?

Mr Rodda—It is a difficult issue. The responsibility is on the agency to make those sorts of decisions and to, in a sense, do what is reasonable. When you had an agency where everybody of a particular classification was getting similar rates it was simpler. Where you have people on various rates—particularly if you have an AWA which may have a base component, a skills component and a performance component—they may be on the same classification and may well be getting the same base rate, but they may also be getting paid for different skills components and different performance components. The difficulty with AWAs is that they are secret, so it is very difficult, certainly from the point of view of the CPSU, for us to get access to the data.

Mr BEVIS—But if I am on an AWA that expires on 31 December this year and I get injured next week and am unable to go to work for six months, how do they base my rate of pay next year, because my AWA will have expired?

Mr Rodda—As I understand the requirement under the legislation—and I am not a lawyer so you will need to take my comments in that light—they look at what similar employees are being paid. You can look at AWAs that would be signed by people who are doing similar work or who have similar levels of responsibility to you. The employer would be obliged to make that assessment. With the AWAs, they would need to make some assumptions and have some sort of averaging process to say, 'The average sort of increase has been three per cent, some people have got more and some people have got less. It is hard to know what you would have got, given that you are injured and at home. Clearly it is not fair for you to get zip, because 95 per cent of people who are doing similar sort of work to you got something; it is probably not fair for you to get the minimum, because there is no reason for us to assume that you would have been at a minimum level—

Mr BEVIS—This may be something I will need to ask Comcare and the department, because it is a whole new area of interest stemming from AWAs that I have not previously explored. I thought I had been down every rabbit hole with AWAs, but there is a new one.

Mr Rodda—Following on from your comment, some of the agencies do appear to be saying that they look to the certified agreement for these sorts of decisions, not to AWAs. There is nothing that I have observed from the Comcare legislation that would support that approach. The legislation does not say, 'It will be the rate in the certified agreement.' Instead, it talks about the sorts of salary outcomes that employees who do similar work to you are being paid; it has nothing to do with what form of agreement you have.

Mr HARTSUYKER—With regard to stress claims, do you feel that there is a need for changes to the legislation?

Mr Cocker—We have highlighted the problem with stress claims: the way that the tribunal and the courts have redefined 'reasonable disciplinary action'. If there were to be a change in the act, it would be to define 'reasonable disciplinary action' to take it back to what I think it was originally meant to be, and that is a formal disciplinary process under the discipline codes of the various employers rather than direction straight off. There could usefully be a change in the definition in the act.

CHAIR—I apologise to Mr Rodda and Mr Cocker for my delay this morning. It is inexcusable and I am very sorry to have kept you waiting. I am also grateful to my deputy chair for taking over. Thank you for your submission. On the question of Centrelink's early intervention that identifies staff at risk of injury, particularly stress type injuries, at an early point, do you see that as a model that is used in other departments or private enterprise? Is it one that you recommend?

Mr Cocker—In my personal experience I have seen it working and working well. To put some context around it, on the one hand Centrelink staff interpret and apply some very complex legislation and on the other hand they deal with people with a range of problems. Quite often, Centrelink workers are caught in the middle of that. Quite often, they deal with people who do not understand and cannot cope with the complexities of the system.

CHAIR—I have great regard for my Centrelink office in Mackay. I see the people whom they deal with. They are always there at a time of disconnect in people's lives. It is very difficult.

Mr Cocker—That process can be very stressful for a worker. Centrelink have developed this early intervention program. In the end, they funded it through savings in their Comcare premium because they reduced the costs of workers comp. They put in place this program that sees these problems emerging and, for example, says, 'Go home for a couple of days; go and talk to a counsellor and deal with this problem.' They get right in at the start and stop it becoming a problem. I cannot comment on how widespread the model is. I am not familiar with anybody else who has that model but, yes, I would recommend it.

CHAIR—How did it come about and when was it put in place?

Mr Cocker—We are probably talking about five years ago. It came about because we had moved to this system where workers compensation premiums were being directly linked on an employer-by-employer basis, so the amount of money you paid for workers comp directly related to your claim. They set about trying to reduce their premiums to save funds and they came up with this idea as one way of doing it.

CHAIR—Thank you for the information on the ATO's claim frequency, cost and premium rate. I notice it has declined significantly on all fronts, despite the fact, as you say in your submission, that they have had quite a heavy workload. What do you put that down to? They do not have a similar model to that of Centrelink, I gather, although they have departments that would interface a lot with the public. What model do they use that enables them to reduce their costs?

Mr Cocker—I think the model is spelt out pretty well in the papers we have given you—their structure and health and safety committees. The key issue is that they have a determined approach to reducing the incidence of injury. It has become a corporate ethos. From management right down through the whole structure they put great emphasis on those sorts of issues. They have committees at the workplace level, they have cooperative structures all the way through, and they have a national committee which meets four times a year and looks at issues, problems, statistics and so on. They are on top of it, actively dealing with the issues involved and identifying problems at an early stage and stopping them becoming injuries.

CHAIR—What injuries would you see in the ATO—just an example of the range of typical injury?

Mr Cocker—The typical job in the ATO is probably more desk bound, using screen based equipment. We see field officers but it is pretty rare to see an injury to those people, so we are talking about office based injuries such as strains, eyesight problems, stress and those sorts of issues.

CHAIR—I would like to ask you some questions about stress, if I may. You say in your submission:

... there is still no code of practice on stress in Commonwealth employment.

I recall from your verbal submission that the AMA does not recognise stress as an illness or injury. Do you see that as a deficiency or do you think that, with the medical definition, it is a reasonable outcome that stress is not recognised?

Mr Cocker—The medical profession prefers the term 'anxiety disorder'. Stress covers a multitude of sins. Most people have had one of those days where they pull the doona up over their head and do not want to go into work because of what happened yesterday. That is a mental and physical reaction to what has happened in the workplace. Stress is a very complex issue—it is a mental thing; it is a physical thing. The causes, the issues, are never simple. To say that stress is not worthy of attention as a workplace hazard is wrong. I think it needs the development of guidance material for dealing with issues. I take the view that Comcare have a role across Commonwealth employment, as an expert agency, to provide assistance and advice. By not doing it, I guess they are leaving it up to individual agencies to develop their own approaches, which may or may not be effective. It would probably be more effective in the big agencies that have the resources and the people to do these things, and less effective in the small ones that do not. It is a complex area.

CHAIR—It is a problem, as you said, and it is certainly something that needs to be addressed. I take it from what you said—and correct me if I am wrong—that you would not

necessarily see it as a compensatable difficulty but there needs to be programs in place to address the incidence of stress. Am I understanding you correctly or not?

Mr Cocker—I think that is a fair statement. It becomes a compensable thing when it develops into a full-blown anxiety disorder which is caused by work. If you can get in early and deal with the stressors and the issues that are leading to it then you are going to stop it getting to that point, and that is a win-win for everybody. The worker does not end up injured, the problem is contained to a short term and the costs are a lot less. Early intervention, in that sense, is a win for everybody.

CHAIR—We had a submission in Perth from another party in which the gentleman postulated what he called 'imposed disability'. Some individuals found that they could not cope with their work because of a minor injury—quite a legitimate one. Because of the inability to cope in the work force; the delay in rehabilitation; the loss of self-confidence; difficulties at home; questions about compensation, income and all of that, people either covertly or overtly exaggerated their injury. They just could not go back to work. Is that something you would agree or disagree with?

Mr Rodda—We support quite a few people who are claimants. Our experience would support that—that is, if someone returns to work quickly there is a better outcome. The longer they are away from work, the harder the situation becomes. Often people seem to present in a similar situation, but factors outside their control seem to be the ones that are linked to the length of time that they are off work. If the employer is not that sympathetic and does not want to make adjustments to the work which would allow them to come back to work, that seems to make the situation worse, often to a point where the relationship is such that people are invalided out. If you look at those situations and wonder how the person got to that point, you will see that it was not just the injury; it was a whole process that happened—the delays and possibly the attitude of the employer made the situation worse. It is almost as if the process of dealing with the injury has caused further injury.

CHAIR—As I understand your submission, you attribute the $8 million that Comcare has said that it has been able to save to administrative actions. Are you saying that things like the Centrelink program, which was addressing early intervention and so on, and the ATO program, have contributed to that? Am I correct to understand that from your submission?

Mr Cocker—When we talk about administrative action, we mean administrative action by Comcare. The Comcare submission indicated that they have had three successful fraud prosecutions in the last two years. I think they have 11 cases pending or under dispute in the AAT. Obviously the incidence of fraud is not very high in that scheme. The Comcare submission talks about their up-front processes where they thoroughly examine claims and knock them off up-front. That is where they are saying the bulk of those savings come from. They come from claims which they have not allowed which might otherwise have cost large amounts of money. In some cases, that causes problems of its own and, from where we sit, we end up dealing with these cases of people who have genuine claims which, for whatever reason, have been cut off. They then have to go into the adversarial—

CHAIR—Do you mean they do not make a claim?

Mr Cocker—They have made a claim and it has been rejected or they have made a claim that has been accepted but Comcare has a review process and they quite often cut people off.

CHAIR—In your opinion, what percentage of claims would fall into that category?

Mr Cocker—It would be very small.

CHAIR—Could you give us a rough percentage?

Mr Cocker—I don't know, to be honest, but it would be very small—less than one per cent. It is at the very small end of the scale. Comcare indicate that they deal with about 8,000 claims a year and have 18,000 live claims at any time. We have come across cases where people have been cut off after two years on the scheme and they are involved in a fight to have their rights recognised. As Graham says, that fight can be more damaging than the original injury. You have to go through the AAT and the courts to prove your right to make a claim. We always have two or three of those on the go at any given time.

CHAIR—In your opinion, are the Commonwealth's rehabilitation programs adequate?

Mr Cocker—In the main, yes. It is always possible to find examples where the system has failed people but, if you talk about the greater good, you would have to say that in the main they do work well.

CHAIR—In your submission you mention that the current government's term in office has been notable for its persistent attacks on occupational health and safety and workers compensation. You list a number of matters that support that proposition. However, plainly national agencies such as the ATO and others seem to have reduced their claim frequency, the costs of their claims and their premium rates. Perhaps I can say modestly that the outcomes in many ways do not support your assertion. There have been better outcomes in terms of the number of claims, certainly from the major agencies that you have presented to us here. Is that different for smaller agencies or overall is Comcare experiencing fewer claims, less cost and lower premiums?

Mr Cocker—I guess the only answer I can give you is that Comcare has reported that there will be a marginal increase in fees this year. They will be going up from 1 to 1.13. I think the impacts of the changes that we have referred to are probably a lot broader than that and they will be felt over a longer period, particularly with the cutback in the research efforts of the National Occupational Health and Safety Commission, for example. That is a body that conducts research over a broad range of areas and the work that they do is more likely to have an impact in the longer term than in the shorter term, and their ability to deal with issues is reduced by the fact that they are funded a lot less than they used to be. Those impacts will, I think, be felt over a period.

CHAIR—What sort of longer term impacts are you expecting, Mr Cocker?

Mr Cocker—There will be a diminishing of the intellectual database for health and safety.

CHAIR—Thank you very much for your submission. Do my colleagues have any questions?

Mr HARTSUYKER—I have one more question. In relation to stress claims—say, in environments such as Centrelink, where there is an interface with the public which could be very stressful—do you think that staff selection has a role to play in OH&S practices, as far as matching people who are perhaps better suited to a high stress environment is concerned, as opposed to those who may not be?

Mr Cocker—That is a thought. I do not think I can really answer that question. I do not think I have the expertise to comment on whether it is possible to single out somebody who can handle a job better than somebody else can. I guess there are people who would say that they could, but that is a little bit outside my area.

CHAIR—Thank you for coming today and, again, thank you for your submission.

Proceedings suspended from 10.22 a.m. to 10.37 a.m.

REGIONE, Ms Gwyneth Theresa, Industrial Officer, Australian Manufacturing Workers Union

VALLANCE, Dr Deborah , National Health and Safety Coordinator, Australian Manufacturing Workers Union

CHAIR—I welcome today Dr Deborah Vallance and Ms Gwyneth Regione from the Australian Manufacturers Workers Union. Thank you for coming today and making your submission. Do you have any comments to make about the capacity in which you appear?

Ms Regione—I am an industrial officer in the South Australian office of the Australian Manufacturing Workers Union. I represent our injured members in disputes about workers compensation.

CHAIR—The proceedings here today are formal proceedings of the parliament and warrant the same respect as proceedings in the House. The committee asks that, in providing your evidence today, you do not name individuals or companies or provide information that would adversely identify those individuals or companies. That is not to say that you cannot raise those issues. The committee is interested in the broader principles related to the terms of reference and to the information that you might wish to provide in regard to that. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals. The committee prefers that all evidence be given in public, but if there is a matter that you would like to raise privately with the committee, when you make that request we will certainly consider it. I would like to invite each of you to make a preliminary statement, and then we will move to questions.

Dr Vallance—As far as I understand, we are not wishing to have anything in private at all, so that is no problem. Thank you very much for the opportunity to speak to the committee. As we have said in our submission, we represent a broad range of workers in the manufacturing industry in Australia. We were unable to meet some of the terms of reference because of the short time frame that we were given and also because of the fact that much of that information is financial information that we as a trade union obviously do not have access to, because it is about statutory authorities or governments and insurers and their financial dealings.

The basic tenor of our submission is that if one is to look at workers compensation one must first understand that it was introduced as social legislation during the early 1900s—1914, I think—and that therefore it is really a right of people who are injured or made ill because of their work. Currently the workers compensation schemes in this country, as witnessed by evidence from the Australian Bureau of Statistics and from our anecdotal evidence, are an underrepresentation of the real extent of workplace injury and disease. The Australian Bureau of Statistics surveys suggest that maybe one in two workers do not claim workers compensation for work related injury and disease. This country does not collect very good data on disease, so we really do not know. We are all working from the fact that we do not actually understand and that a lot of it is best estimates. So we would submit that in fact workers compensation schemes are underrepresentative of what really happens in our workplaces and that that has perhaps become more underrepresentative because of the significant structural changes that have happened in our labour market.

In our industry, as the submission notes, there are significant levels of casualisation, use of labour hire and contractors within manufacturing industry that have risen significantly in the last 15 to 20 years. Our anecdotal evidence and also research that is done in occupational health and safety areas shows quite strongly that those groups of workers are people who actually do not claim workers compensation as much as permanent employees. Even when they are entitled to it they do not apply, for a whole range of reasons which I am happy to talk through. Therefore you have got an underrepresentation of who actually gets workers compensation. That is reinforced by numerous Australian Bureau of Statistics inquiries, but also in 2001 we conducted a national occupational health and safety rep survey, which is the first time the Australian trade union movement had done that. One in four of our respondents showed that they had casuals, labour hire or contractors at their workplace, so it is actually a significant group of people within manufacturing.

In terms of going through information, as we have indicated, a number of state jurisdictions have done a huge number of bits of research. We know that you have had the jurisdictions come and talk to you, and we would indicate that any indication of looking at fraud would indicate that that is not backed up by statistics. When talking about so-called fraud in the workers compensation system, we use quite a broad definition, basically because we are talking about a system that should be covering people who are injured or made ill by their work. So we have got a whole range of examples where people are not accessing those entitlements and not accessing their right to be compensated in terms of their pay being picked up by the workers compensation scheme and also by access to certain payments, for instance permanent impairment ones.

We have numerous examples there and I do not intend to go through them in my opening remarks, but I will say that the lack of access to those benefits covers a whole range of things: the people who are not covered, the people who do not claim and the people who claim but the processes take a very long time and so they are actually disadvantaged through the process. That is particularly the case for casuals and for labour hire employees, and unfortunately we are finding that a lot of self-insurers are also making it rather difficult for employees to actually claim when they are injured or made ill at work. So you have got a whole group of people who are not covered. Also, because workers compensation systems over the last decade have cut down in terms of how long people are able to access workers compensation payments, ceasing payment in many cases at the end of two years, there are people who, despite the fact that they may not be able to work full time, actually go out of the workers compensation system and often go onto sickness benefit, so there is actually a cost transfer of people from the insurance system onto a Commonwealth benefits system.

The third term of reference which you talked about relates to wanting to look at different safety records and claims profiles. I suppose I have been a bit terse in my response to that to the committee given that that is such a huge thing to do. With the time frame that we were given it was really impossible. So I have just looked at saying, ‘In our survey these were our most common hazards.’ The safety records and claims profile are not the same thing. The claims profile is what happens with claims management and with successful workers compensation claims, which mean you meet the criteria of the system. It is not indicative of what actually happens at the workplace. They are two different things; we are happy to talk through those.

Just as one example, for instance, in this country, if people are chronically exposed to solvents which can have a neurotoxic effect on them and develop some neurological impairment

they will not generally get accepted for workers compensation payments because we do not recognise it. But people in another country will be able to. That is just an indication of the difference between workplace disease incidence and how workers compensation systems actually work.

The last of the terms of reference was to do with rehabilitation. We, of course, strongly support effective rehab and return-to-work schemes. The problem is that often there is a huge amount of pressure for people to return to work, which may not be synonymous with effective rehabilitation and good rehabilitation practices. We are happy to go through some of the examples we have got there, but there is a lot of pressure on people to return to work because of all sorts of issues about the employer's premiums or staffing levels and other issues which may not necessarily be related to the employee's ability to work. We have got many examples of where that actually has not always been to benefit of the employees.

The discrimination or potential discrimination against people who were injured at work occurs in a lot of areas, such as in their access to employment after they have been injured and with people going through redundancy processes. The numbers of those vary considerably across state jurisdictions because of the variation in the state laws, but we have given a couple of examples of incongruities in the system. Gwyneth is much more able to answer questions about issues directly concerned with the workers compensation processes in terms of the nitty-gritty stuff of the examples that we have given in the submission. Thank you.

Ms Regione—One of the major difficulties we see is that there is a hegemony in Australia to do with workers compensation—that is, employers and workers see the system as a benefit system rather than a system of entitlement. I represent our members, and they frequently say that they have not made claims—when they should have—or that they do not intend to make a claim. For example, in the case of somebody who is permanently impaired, a lot of workers who are permanently impaired do not actually claim the compensation for permanent injury which is their right under the law until they are retiring, because they feel that their employer may not like them making this claim. I always respond by saying, 'Are you going to give them your long service leave as well?' It is an entitlement that they have and they should not feel that it is somehow not right to apply for it, but this is a common feeling amongst the members of the union which I represent. It is a feeling that workers compensation is some sort of benefit rather than a legal entitlement.

In South Australia, we have a very high incidence of self-insurers because our legislation says that any employer who employs 200 or more workers can apply to become self-insured. In fact, even some employers whose numbers have fallen below that have retained their exempt employer status. There are systems in place in South Australia so that the employers' exempt status—that is, where they manage all their own claims—is reviewed every three years but not one exempt employer has ever lost their exempt status despite this review process. There is an employer—I will not name names—who was responsible for a workplace death which injured not only the worker, who was killed, but also other workers. The employer was prosecuted by the government department and found to be negligent and responsible for that death and, despite submissions from the unions that they should not continue to be self-insured, they have maintained their exempt employer status.

The reason is that it is cheaper for the workers compensation system if an employer is self-insured but it is not in the best interest of the work force. As we say in our submission, many of

our enterprise agreements have provisions for insurance to cover income protection for people who are unable to work because of illness or injury. This is not intended to cover workers compensation injuries. However, I have dealt with a number of workers who have been told by the company doctor that they can claim income protection insurance. They have claimed income protection insurance, the insurance company has knocked them back, because it is clearly a compensable injury, and then they are in the position of having to mount a claim for a compensable injury some months after the injury occurred. This makes things far more complex and slows things down a great deal and the workers are left without income frequently, for many months while they go through this process, which has often a tragic effect upon their lives.

The biggest problem of all is the issue of rehabilitation. Once people are injured, it is obviously best for them to be rehabilitated to the workplace as quickly as possible. It is in their interests, the interests of the workers compensation system and the interests of the employer. However, many employers fail to provide suitable duties or refuse to provide suitable duties. This is frequently a problem while the claim is being determined. It sometimes takes three months to determine a claim. The law in South Australia says claims must be determined within 10 days but it is the exception rather than the rule when they are. During this period, while the claim is being determined, employers usually do not provide alternative duties or rehabilitation opportunities. They have no legal obligation to do so until it is an accepted workers compensation claim, so opportunities to get workers back to work quickly are lost there.

In other cases, workers who have accepted workers compensation claims are refused suitable duties. Frequently in manufacturing they have a cost accounting system where each plant within the company's operations has its separate budget and there may not be suitable duties in the plant where they work because it may be an area of heavy work. The obligation is on the employer as a whole. There are frequently opportunities to place these people in other plants, but the plant managers of the other plant refuse to take them because it will impact on their plant budgets. So there are all sorts of reasons why people are not accommodated with suitable duties. If they are not, they are left sitting at home, they become alienated from the workplace and their recovery is not enhanced.

One of the other things that happens is that, in order to reduce the number of days lost due to injury, some employers will require the worker to return to duties which are not suitable. I dealt with one case only the other week where the employer told the worker to return to certain duties on a moving production line. The worker's doctor looked at these duties and said that they were not suitable; a company doctor looked at them separately and said that they were suitable. The worker was required to continue performing those duties, and did so—which caused further aggravation to their injury—until their own specialist arranged to meet the company specialist on-site and watch this worker perform the duties. The company specialist then agreed that the duties were not suitable. However, this worker had been required to perform these duties for some eight weeks in the meantime, which caused further aggravation to the injury and increased the cost to the system—as well as, as you can imagine, causing him a great deal of pain.

I cannot emphasise enough the problem of the transfer of the cost of the workers compensation system onto the public system. Workers who are injured once and recover fairly quickly usually manage to make their way through the system without too much difficulty. It is the workers who suffer long-term injuries or who are unfortunate enough to work in a workplace where they suffer a number of injuries who are, in my opinion, targeted by

employers, because—and I am talking particularly about production workers—their work requires them to be physically fit. In terms of the people who are long-term injured and, quite clearly, are never going to become physically fit again, the employer wants to remove them from the workplace. Under South Australian law, employers are not allowed to dump workers. They are supposed to continue to provide them with some duties or retrain them for other work within their organisation.

So what happens to them is that they are given duties which are unsuitable; so they have an aggravation. Then they lodge a claim because they have been injured further. Every claim they lodge is rejected. I represent workers in the South Australian Workers Compensation Tribunal. For some long-term injured workers, I am in there over and over again, because every claim they put in is rejected and every time they go to the tribunal they are offered a payout to leave the company. Eventually they do take the payout; they become worn down. I see it as a form of system abuse—using the system itself to force injured people out of their workplaces.

One of the ways in which this happens is through the increasing rate of company takeovers in our industries. Under South Australian law, the employer must provide suitable duties; this is what the law says. However, an employer who has taken over a business where there are injured workers does not have that same legal obligation. They have no obligation to retain the injured and provide them with work. This means that, usually, there is a company takeover, the new owners restructure the business—downsizing is the normal way—and amongst the first to be laid off are the injured workers.

One of the other big problems that we experience is where there is a company medical centre. Usually this involves the larger employers. Obviously, it is useful to have medical facilities available to people when they are injured, but the problem is that, quite often, people seek treatment in the company's medical centre and the doctor may treat them for months before issuing a workers compensation medical certificate. In South Australia, a workers compensation claim is not validly lodged unless it is accompanied by a workers compensation medical certificate. So the cost of this medical centre is met by the employer and the injury does not show up in the workers compensation statistics, but in the long term this can be a real problem.

As an example, I represented one member who had torn a tendon in her foot and this was not diagnosed for seven months. She continued working and continued receiving treatment from the company medical centre until the doctor finally did some investigative tests scans, found the tendon was torn and recommended to her that she go and seek treatment from her own doctor. She then lodged a claim. It was rejected on the grounds that she was supposed to lodge a claim within six months of the date of injury and that time had expired. I am sorry, I do not want to bore you all to death—I could go on for years, and I will not do that.

CHAIR—The committee is never bored, Ms Regione. Would you like us to move to questions now?

Ms Regione—Yes; I am conscious of the time.

Mr HARTSUYKER—You referred to self-insurers in South Australia and indicated that that was not a preferable thing. What are your concerns over a self-insurer as opposed to a company insured the other way?

Ms Regione—If a company is insured through the workers compensation system their claims are assessed by somebody independent of the workplace and the rehabilitation is managed by somebody independent of the workplace. What happens with the self-insured employers is the claims are determined by the employer and the rehabilitation is managed by the employer, and sometimes this works well but sometimes there are real difficulties with it. I represented a worker in the tribunal recently and the lawyer for the employer said to me that he had real difficulty persuading the employer that they ought to settle, because they did not have a case, because they were particularly hostile to this particular worker—there was a poor personal relationship between them.

There is the problem of the recording of injuries. The records of exempt employers are not readily accessible. I recently had to ask an employer's medical centre to provide their medical records for injuries and they could not provide them from back beyond 1990. That may seem reasonable, but the worker in this case had been injured before that and since. There is also systems abuse, as I described before, to get workers out of the workers comp system and throw them onto the sickness benefit. When the insurance is covered by an outside body this is less likely to occur, because it is the employer that has an interest in replacing that worker with an able bodied worker.

Dr Vallance—Gwen is talking from the perspective of South Australia. Unfortunately, that is our experience across the country. In Victoria we have a big employer who is a self-insurer. There was an accident in which a machine cut someone's foot off and they had to have a below-knee amputation. That employer still has self-insurer status, and we have great difficulty with returns to work and suitable duties. That experience with the same company happens as well in Western Australia and Queensland, where they are self-insurers. It is a problem about the fact that for them as a company all of the costs are in house, so they can control their workers comp premiums and all that sort of thing by not putting stuff through the system. Workers will get all their payments, but that is actually not put through the workers comp system so it looks as if it is not related to work. The worker is not disadvantaged immediately, but if there is the problem of access to a permanent impairment payment, for instance, then that whole process becomes incredibly difficult because of the delays through the system.

From our perspective, South Australia is particularly poor in terms of the high percentage of self-insurers; other states have self-insurers and they are variable. We find it is really difficult to get the role of the regulator, which we see as the role of government, the workers compensation authorities, to regulate the self-insurer because the self-insurer does everything in house. The self-insurers may well go through audit systems to get to that, but just because you amputate someone's foot or kill someone does not mean you will fail audits. Audits are paper systems, and that does not necessarily mean the self-insurer is questioned.

Mr HARTSUYKER—Surely the occurrence of an accident, however caused, is not the be-all and end-all as to whether they should or should not cease to be a self-insurer. It would be a factor. With regard to self-insurers, I presume your problem is self-insurers with in-house medical care. I presume there would be some self-insurers that have a self-insurance system but use outside medical staff or medical advice.

Ms Regione—Sure. There are some of what we call exempt employers—the self-insured—who do not have in-house medical centres. One of those recently became self-insured—when I say that I, mean in the last 12 to 24 months. Every person I have dealt with there who has been

injured has had every claim rejected, has had to go to the tribunal time and time again and has taken a package and left the company. At the other company, where the worker I talked about was killed, a large die rolled out of a trolley that was the wrong size, and crushed the man to death. His coworker was pinned against the dead body by the die. They lay there on night shift for some time before they were discovered. When they were discovered, people tried to move the die. It rolled, and crushed the head of the dead man, splattering his brains over the man lying pinned next to him. The man who was lying next to him suffered extreme psychiatric injury, as did the man who discovered them. Their claims were rejected and had to be fought through the workers compensation system. At the end of the day, the employer was found responsible for the accident. Those left living after that went through all the legal processes of the workers compensation appeals system unnecessarily, I would say. I think that, if there had been an independent insurer in that case, the claims would have been accepted.

Dr Vallance—Safety records are one of the very big reasons why a company is granted self-insurer status. It is one of the justifications for why you can be a self-insurer—because you are treating and behaving properly under law; that is, the occupational health and safety law in each of the states. If you have a system where people have obviously not met their duty of care—by the fact that there have been significant traumatic injuries or deaths—that does, in our opinion, place under question the justification for becoming a self-insurer.

Mr HARTSUYKER—Have you come across any evidence of fraud by insurance companies and service providers to the system?

Ms Regione—I cannot readily think of examples. I can think of examples where there is gross wastage; I would not call it fraud necessarily. Say, for example, you are a boilermaker working in the construction industry. Boilermaking is terribly noisy work when they are grinding. They all suffer hearing loss. We tease them; they are all deaf. Say you are working with one employer on one building project, and you know you are losing your hearing. You book in to see a hearing specialist and you will probably have to wait a couple of months to get into the specialist. By the time your hearing test is conducted, you are probably working on a different construction project with a different employer and it is quite possible—and it does happen sometimes—that when you lodge your claim you are employed by a different employer yet again. Under South Australian law, the employer responsible is the one that you lodge your claim with, in the absence of evidence to the contrary.

However, when you lodge a claim on that employer, they say, 'You have only been here for three weeks; you could not possibly have lost 25 per cent of your hearing in three weeks,' which is obviously true. Their agent—in our system there are insurance companies which act as agents for the corporation—rejects the claim and tells you to lodge a claim against their previous employer. This happens again and again. I have attended conferences in the workers compensation tribunal at which there have been as many as five companies, each represented by their insurance company agent and each agent represented by a lawyer. They have been in the tribunal for five or six conferences in which everyone in the room accepts that this worker has an entitlement and that the sole question to be determined is: who is going to pay it? That is such an abuse and waste of money. By the time the process is over, the amount of money that has been spent is many times what the worker is entitled to receive.

Dr Vallance—Insurer fraud can depend on whether the people are corrupt. A system might be designed to not be beneficial to the people who make the claims or there might also be a

system where the insurers, as we have said in our submission, are in some ways at the end of a process that is questionable when you are looking at the overall context of workplace industry and disease. I will give you an example. As I often explain to our members, workers compensation is about doing the high jump. To make a workers compensation claim, you have to jump a hurdle—that is, the law—about saying whether or not your injury or illness is related to work. In Victoria in 1991-92, 60,000 people were able to claim workers compensation. After changing the law many times, we are now down to 33,000 or 34,000 people who are claiming workers compensation. As someone who has worked in health and safety for over a decade in manufacturing, I assure you that I would love to say that our workplace safety has increased two-fold. It would be fantastic and I would be sitting here very proud of our industry. In certain parts of industry there has been some improvement, but those figures are indications that the bar has moved.

When talking about workers compensation, you must see it in the context that it is meant to be a no-fault system that helps people who have been injured or made ill as a result of their work. Our indications, from both our anecdotal stuff and the figures, show that it falls far short of doing that. You can call that whatever you like, but it is obviously a system that is not working for the people it was meant to be designed for.

Ms Regione—I will add that, because I represent people in the tribunal—it is where I do most of my job—I think that about 80 per cent of the long-term injured people I see suffer from psychological disorders. This is caused partly by living in pain with a disability—and the inconvenience of that—but also partly by the stigma attached to being on workers compensation and the hoops they have to jump through in the workers compensation system. Another thing associated with that is a high incidence of suicide among injured workers. The South Australian WorkCover Corporation has been doing some work on this, because people do become very depressed.

Mr BEVIS—At paragraph 2.10 of your submission, you raise an issue that I had not contemplated before. This is the circumstance in which an exempt corporation is taken over by another company that is not exempt. As I understand from paragraph 2.10, the exempt status transfers to the combined entity without any further tests as to whether the combined entity satisfies the necessary requirements. Do I understand that correctly?

Ms Regione—That is correct. I thought on one occasion that I had found one of these employers who was not paying WorkCover levies, because I contacted the corporation about a particular employer and was told that they were not registered. However, when I investigated it further I found that in purchasing the company they had purchased the exempt status. They do not describe it as purchasing the exempt status; they just say, 'You have purchased that company. That company passed the various hurdles required to get exempt status, so you can continue with the exempt status.' It is so much cheaper for the system to allow them to do that regardless of any checks or balances as to how the new management are going to conduct themselves.

Mr BEVIS—In that context, it becomes conceivable to view it as an asset in its own right as part of the sale.

Ms Regione—Absolutely.

Mr BEVIS—On the previous page in paragraph 2.8.2, talking about small employers, you mention the difficulty of employees not knowing who their WorkCover compensation—Comcare or whatever it might be—is paid to. The issue of workers actually knowing who their employer is was raised with us as well, and the two are related. I think that in New South Wales they have now moved to requiring the identification of the legal employer on the pay advice. I am a bit hazy about whether or not the compensation cover is there, but would that be a useful mechanism? If the pay slip had to identify the name of your legal employer and the name of the people taking the risk for your WorkCover, would that go some way towards addressing the problem?

Ms Regione—That would assist in identifying the employer, although there is currently federal legislation about what has to be included on pay slips and so on which is frequently not adhered to. But it is crucial to know who the employer is. I am pleased to tell you that in South Australia, since our many complaints to the corporation and to the minister, that has now been changed so that anyone can ask which insurer or which agent of the corporation is responsible for the claims of a particular employer and be told the answer. That is a great improvement.

Dr Vallance—One of the difficulties for casuals and certain groups of contractors and labour hire people is that awareness of their rights—of the fact that they are covered by a workers compensation system—is really low amongst those groups of people. When people are injured and have to go through that process, the hurdle of saying, 'Do I have an entitlement when I've been injured at work?' is a real disincentive. Those issues continually come up.

Mr BEVIS—You also comment on income protection insurance. When I saw the heading I wrongly assumed that it meant the protection of income in circumstances where companies might become insolvent. I know that is an issue floating around and I am aware that your union has packages, but it is clearly not that. Can you tell me what it is and how that interfaces with the workers comp?

Dr Vallance—The income protection scheme that we are talking about is a sort of sickness insurance scheme that we have in significant parts of our industry. People forwent part of a pay claim and that went into establishing an insurance system to cover people who have, generally, at least two weeks off work for sickness or related reasons. It is basically a sickness scheme to cover income lost.

Mr BEVIS—Does it top up?

Dr Vallance—There are two parts. There is the general sort of income loss but there is also the top-up. Part of that came about for us, particularly in the metal industry, when changes to workers compensation systems were changing an industrial agreement with our employers about make-up pay to top people up closer to their full wages than the workers comp system does—because workers comp systems do not give people their full wage. We negotiated further things to cover workers when the make-up pay was not working. People put in a claim if they have been off work, and industry is telling us that between seven and 10 per cent of those claims are really workers compensation entitlements but that people are putting them in under their own insurance schemes.

The point I am making is that our members have paid for this insurance scheme, because it is a forgone wage rise; so they put in a percentage to their insurance scheme. What is happening in

7 per cent of cases is that people are transferring the costs directly back onto the employee, which, of course, is not how workers compensation is meant to work.

Mr BEVIS—Thank you, I understand now. You also refer to the situation of interstate workers falling through the net because they are working predominantly on one side of a state border but they might be on the other side for a site and suffer an injury. This is an issue that we have raised with different people around the countryside, and it has been raised with us. There appears to be a growing move on the part of the states to establish memorandums of understanding and mutual agreements, and the legislation to support those agreements appears to be coming on line. Assuming that that web of agreements across the states were to be comprehensive and cover all of the states, does that address those problems?

Dr Vallance—I think so, predominantly. I gather that one of the big problem areas is southern Queensland and northern New South Wales because of the huge amount of economic activity that is there that never used to be there, particularly in the construction industry. Then, of course, that covers all the issues of what happens with labour hire and the inherent problems for workers compensation systems there, too. I had understood that as a result of a considerable amount of lobbying by the trade unions in those areas there are some moves between Queensland and New South Wales. Personally, I am much more familiar with Victoria's system. In the Victorian system, when we have members who, for instance, go and work in WA, that system works quite well.

Mr BEVIS—The only other area that I wanted to pursue with you is this question of labour hire firms and the like. Who pays the premium if I work for a labour hire firm and this week I am placed in company A and next week I am in company B?

Dr Vallance—Your employer—the labour hire firm.

Ms Regione—The difficulty is that the labour hire firm really does not have any day-to-day control over the health and safety practices at the host employer's site, nor do they have any ability to place people for rehabilitation because there is no legal responsibility on the host employer to provide rehabilitation opportunities.

Dr Vallance—The lack of suitable duties for people who are employed under labour hire arrangements is appalling. Basically, what happens is that you are injured, you do not get rehab.

Mr BEVIS—If that is the way in which it works, doesn't that raise the other question, though, of how the insurers determine a premium for a labour hire firm if the labour hire firm is paying the premium for people being placed in hundreds of different enterprises that may or may not have satisfactory occupational health and safety regimes?

Dr Vallance—The systems vary across the nation; I would not pretend to know each of them. I know that in one jurisdiction labour hire employers are actually in a category of labour hire, irrespective of whether they are labour hiring to workplaces in construction or manufacturing or community services, all of which have extremely different injury profiles, safety records and insurance premiums. I understand that there is considerable activity at each of the jurisdictional levels, under a fair bit of pressure, of course, from labour hire employers to look at that. But it is a real problem.

Mr BEVIS—As a related issue, it seems to me that, both with the casual employment that you refer to and with labour hire, they are, by their nature, far more transient, with populations moving through and the total volume of people engaged changing, as well. Have you any concerns about how the insurer, WorkCover or whoever, validates that the employer is actually paying the required premiums for the required number of people, given that the work force fluctuates so dramatically in those types of employment?

Dr Vallance—As our submission indicates, a lot of this evidence is from our very active people in New South Wales, where you have people working in the steel construction industry who are deemed to be fishmongers. It is vaguely amusing—we cover those people because they are welders and boilermakers. There was a difference in premiums because they were categorised totally incorrectly. Also there is understating, for instance—people will say they have a certain number of employees on the books which may well be their standard number of employees. They might have a core group of 20 but their work force will vary on top of that 20 and they should be paying premiums on 80, not 20. The union have recently done an exercise with an employer where we had to go through, one by one, each individual employee's pay record to find out whether the person was actually covered.

Mr BEVIS—Thank you.

CHAIR—I want to clarify your roles, if I may. Ms Regione represents injured workers in the compensation tribunal. Dr Vallance, you would see claims of all types at all levels. Am I correct? Or do you see those that generally become contentious? I am not sure of the stage at which you come in.

Dr Vallance—Ignore the 'doctor' bit. I am a qualified medical practitioner but that is not my job.

CHAIR—I did not question that at all.

Dr Vallance—I am the national occupational health and safety coordinator so I am responsible for a whole lot of coordination. My background is in occupational health and safety. I have had 10 years experience of working in our Victorian branch where I had responsibility for looking after people in both workers compensation stuff and health and safety, and I do work in the Commonwealth for our members who are covered by Comcare. I do not have direct day-to-day experience for individual claimants, but given the terms of reference and my position, it is crossing over between occupational health and safety and workers comp.

CHAIR—What I was talking about was the claim that goes in for a week or two weeks off work and which would go through without any problem. The employee is off work and is paid for that. Do you become involved in those sorts of claims?

Dr Vallance—There is no need for us to be involved in those.

CHAIR—So you would be involved in more traumatic claims where they are not settled. I am just trying to establish where you come in.

Dr Vallance—The claims profile in manufacturing is that, depending on which part of manufacturing, 40 to 60 per cent of the claims will be what are called 'sprains and strains'; 25

per cent of them are actually back injuries. They are the huge bulk of our claims and they are the sorts of people we are much more likely to be involved with, because of, first, chronicity and second, the fact that, despite the fact that they are the bulk of the claims, they are the ones that are handled very badly. We get involved where people do not get their entitlements, where people have their claims denied or where people have to go through the workers compensation system where there is a difficulty. We do not see the ones where there are two days off and there is no problem. However, as a union we do sometimes see those because the employer will say it is not work related when it quite clearly is. We then get in the disputation process. However, because of my work in health and safety, I have a reasonable understanding of what happens before, even when it is going quite well, because that is where my work is—in the prevention area.

CHAIR—I just wanted to establish where this activity came in. One of the issues that you raised in your submission was the transfer of costs to the taxpayer where employees are willing to work but denied the opportunity. Is this more prevalent in some states than others or is it generally pretty much the case across the nation? This is a big question, I guess, but could you put a percentage on it? Is this significant?

Let me give you an example. When we went to Queensland, one of the submissions said that it could be as high as five per cent of their lump sum payouts. It could be as high as that; it was between two and five per cent. That came to a maximum of 4,200 people a year, which was not an insignificant number and that was just through lump sum payouts. They have been given the lump sum payout and then they sort of fell off the end of the table. How significant is this transfer of costs to the taxpayer; the taxpayer being the de facto workers compensation system?

Dr Vallance—Firstly, you have to look back at the things that the industry commission said back in 1994-95 when we had an inquiry into workers comp and occ health and safety. Overall, if you looked at the way that costs are borne out of a workers compensation system, a third is by the employer, a third by the injured worker and a third by the community. The whole basic workers compensation system is not a self-contained entity and the whole insurance system just does not work by itself without any costs outside it. That was their intelligent estimate, so already there is a third of the costs.

In terms of the figures, we would be guessing because we do not look at them but, for instance, in Victoria about a third of the claims are from manufacturing industries and every year there are about 10,000 claims. In the metal industry, when we looked at our make-up pay arrangements and the figures, which we had great difficulty getting from the workers compensation authority, something like 12 per cent of our membership of people in manufacturing had work claims that were lasting longer than 26 weeks. There is going to be a big tail but if you cut that 12 per cent down by three-quarters, say, at the end of that time, you would be looking at three per cent of people in manufacturing who would actually be on the system after two years. Those people in the Victorian system have nowhere else to go.

CHAIR—Except the Commonwealth.

Dr Vallance—That is a guesstimate.

CHAIR—That is an intelligent estimate of what you believe it would be. How many people is that roughly per year?

Dr Vallance—Three per cent of 10,000.

CHAIR—That is 300.

Dr Vallance—That is just in manufacturing and looking at people with long-term injuries. That is not permanent impairment or any of those other entitlements. I am just looking at our better performing part of manufacturing.

CHAIR—These are not people with a lump sum; these are people with a long-term injury?

Dr Vallance—Yes. The metal industry performs better than, for instance, the food industry.

CHAIR—Would it be presumptuous of me to ask you to do that calculation across all industries in Victoria?

Dr Vallance—Yes, it would be!

CHAIR—Fair enough.

Dr Vallance—I could get myself into a spot of trouble, I reckon!

CHAIR—Fair enough. What about lump sum payouts?

Dr Vallance—I would not attempt it. I could go back and look it up.

CHAIR—Fair enough. But they would be another group that could fall into that category?

Dr Vallance—Yes.

CHAIR—Mr Bevis raised a very interesting point about these employer buyouts of self-insurer status. When there is a takeover of the company, they can assume the self-insurer status. Is that across all states?

Ms Regione—I can only speak for South Australia, which is where I come from.

CHAIR—So it is true for South Australia at this stage anyway. Ms Regione, you said that when there is a takeover of the company the first thing that they do is to remove the injured workers, because in South Australia there is a requirement for injured workers to remain with the company to the extent that they can. Is that common?

Ms Regione—Firstly, I suppose that it is possible that when they buy a company not all employers first restructure and rationalise, but it is not uncommon that they do that. A new owner wants to look at the organisational structure, and in the process, there are usually lay-offs. The numbers employed in the manufacturing sector have reduced significantly over the last 20 years. So downsizing is one of the things they look at and then they often select people on the basis of skills.

For example, I had the case of a man who had worked for 30 years for a company—he is mentioned in the submission. He had so many skills and so much knowledge but because of his physical injuries he was unable to actually fulfil those duties himself, although I thought he could have been used to train others. But when the new owner took over he was displaced, along with other injured workers, because they gave them points for skills they could exercise and he could not exercise the same skills.

CHAIR—Time is running short, so I am trying not to be unfair to our next witnesses but, in your opinion, what percentage of companies taken over in South Australia would approach the injured workers on-site and simply remove them? We are talking about redundancy, aren't we? That is what happens. Is that correct?

Ms Regione—Yes, that is what happens.

CHAIR—What percentage of companies would it be? Would it be half or a quarter?

Ms Regione—I could not estimate.

CHAIR—But is it significant, in your opinion?

Ms Regione—I think that when there are redundancies there is a far greater tendency for the injured to be the ones who are found to be—

Dr Vallance—It is common practice in manufacturing that, when a company is downsizing, there are people who are either offered redundancy or denied redundancy—because often it is one or the other, depending firstly on the state jurisdiction and secondly on the employer. In one of the examples we have given, for instance, people were actually entitled to redundancy payouts but were not actually given them, because they were on workers comp. And because they were on workers comp, they thought they were not entitled to them.

So there is a breadth of examples there and it is not uncommon that, when downsizing occurs, those who have got a work history are offered the first go. And many people take it, because the system is not generous to them and it is easier to take the money and think, 'Let's hope that life works out a bit better in the long run.' Of course, they can end up on the federal system, you see.

CHAIR—That is what I was going to ask you. When their redundancy payouts and everything else are exhausted, do they end up on the federal system?

Dr Vallance—Yes.

Ms Regione—Yes.

CHAIR—Is there any way you have of quantifying those numbers in South Australia, Ms Regione?

Ms Regione—I cannot think how I could. I am involved with the corporations and their stakeholders and the consultative group and could discuss with the corporation whether there is any way of doing that, but I think it would require a special project to collect the—

Dr Vallance—There is actually a dearth of information. People need to go and actually look at it.

CHAIR—With regard to those employees given redundancy when there is a takeover, Ms Regione, are there steps that could have been taken in terms of rehabilitation or whatever to ensure that they had somewhere else to go rather than eating into their redundancy and then finally going on the Commonwealth system?

Ms Regione—I think this is a problem with rehabilitation. Often rehabilitation fails altogether, but even when it does not fail altogether the system naturally tries to be cost saving. If a worker can never return to their occupation they need retraining, but the system operates so that as little as possible is spent on their retraining. So that, in the example in the submission, the metal worker was retrained to be a packing office assistant. There are some heavy duties in packing, but he was not required to perform them. The problem emerged when he was laid off. He was on social security for a long time, but I eventually managed to get him workers compensation on 80 per cent payments because the tribunal found that he was virtually unemployable because he had not been retrained. Yet he was a man with a lot of skills and knowledge, who I think could have retrained as a trainer in that industry.

I had a woman with 12 years service as a production worker who could not work as a production worker any more. The insurance company—the agent for the corporation—wanted to send her on a six-week training course to become a clerk. I asked her to explore what she would really need to become a clerk; she would need a certificate II at least, which was a six-month full-time course at TAFE. We pushed that through the tribunal; it was refused, but we pushed it through. She has now completed the course and is working as a clerk. The problem is that if she had done the six-week course, with no clerical experience it is very unlikely that she would have obtained work as a clerk. So not enough is spent on rehabilitation and retraining.

CHAIR—What do you think could be done federally to address that? That seems a very significant factor to me.

Ms Regione—I am sorry, I have not really considered that. Given that the workers compensation and rehabilitation systems are all state based, I have not given any thought to how the federal government might deal with it.

CHAIR—You mentioned in your submission that:

... the Australian Workplace Industrial Relations Survey data showed an increase from 14% to 23% of manufacturing enterprises using labour hire …

That was from 1990 to 1995. Did you find commensurate data during that period, showing that claims for workers compensation either decreased or increased? You made the point about people moving to labour hire, but you did not make the link that it had an effect on workers compensation.

Dr Vallance—Part of the problem is the particular time period being looked at. For instance, in Victoria the workers compensation system underwent considerable change in terms of where the entitlements system was. Therefore, it is just about impossible to make comparisons. If you do not have a stable workers compensation entitlements system, each time you change the high jump any comparative figures become extremely difficult. You just cannot make comparisons; it is comparing apples with oranges, and it is intellectually quite dishonest to do that. The other problem is the classification I mentioned before, for instance of labour hire as 'labour hire' rather than by the industry. The figures there are not comparable. So we have not done that, predominantly because it is very difficult to make comparisons. We do not have adequate information.

CHAIR—You make a point in paragraph 2.12 of your submission about stress related conditions. If I understand your submission correctly, you assert that this is one of the disincentives to employees making a claim when it is appropriate to do so. One of our previous witnesses made the point, though, that stress by itself is not recognised as an injury or illness. How, then, do you see stress related conditions? Do you believe they should be compensated?

Dr Vallance—Yes. The little bit of work we have done in Australia, and the research work that has been done throughout the Western world and particularly in the European Union, has very firmly shown that work-related stress is a considerable cost to the community, workers and insurance systems. It is not a phenomenon that is just Australian; it is a phenomenon of workplace change and restructuring of our labour markets and workplaces. I am going to get the figures wrong, but I was recently at a conference where the Swedish, for instance, were talking about huge figures like 10 per cent of their sick leave as actually related to work-related stress. I am happy to give that information to the committee out of session. So I am saying that this is recognised as a problem throughout the world.

We have workers compensation systems that are designed to not make it easy to make those claims. Concomitant to that is a perception amongst workers so that they may think, 'I may have a stress-related illness related to how work and I have been getting on and how work has treated me, but I have got Buckley's of trying to get it up through the workers compensation system so I will not apply for workers compensation.' The other perception is that injured workers may well be advised by people like us who say, 'Go for it, but be well aware that this system is not kind to sick people and it is definitely not kind to stressed people. So the process may actually end up with you personally going through a whole lot of trauma that may not help your personal condition.' So there are many layers there.

CHAIR—You have given us some very useful examples in relation to lost time programs. You made the point, though, that this program could well become a disincentive to employees making claims. On the other hand, does it have some inherent merit or do you believe it simply is not a program that—

Ms Regione—I would like to comment on that. In South Australia, the South Australian WorkCover Corporation is actually introducing a new system for levy rewards which looks at the injury prevention management systems that companies have in place as a way of determining the levies rather than the number of days lost. This is because determining levies on the basis of the number of days lost obviously encourages employers to conceal the number of days to minimise them. Looking at injury prevention management systems and what is in

place and how effectively they are set up and then rewarding that with a levy reduction is far more likely to prevent injury.

Dr Vallance—From a health and safety perspective, I only have to draw the committee's attention to the Longford royal commission. Esso, like most of that industry, has a fantastic lost time injury frequency rate, because it is about the injuries that mean someone is not off work. As Andrew Hopkins has written about quite clearly, Judge Dawson said in the royal commission, Graeme Johnstone said in the coroners report and Justice Cummins said in the occupational health and safety prosecution of Esso, it is not necessarily reflective of workplace health and safety. For those reasons we have grave misgivings about total reliance on lost time injury frequency rates. Sure, they are a useful tool and can be used in certain ways, but as the only measure they are not good.

CHAIR—You have been very helpful. Thank you for your time.

[11.51 a.m.]

BARNETT, Ms Jane, President, Victorian Council of Occupational Rehabilitation Providers

ELRINGTON, Mr John, Treasurer, Victorian Council of Occupational Rehabilitation Providers

LINDHOLM, Ms Catherine, Honorary Consultant, past vice-president and past president, Victorian Council of Occupational Rehabilitation Providers

CHAIR—Thank you for appearing today. The proceedings here today are formal proceedings of the parliament and warrant the same respect as proceedings in the House. In providing your evidence today the committee would request that you please not name individuals or companies or provide information that would adversely identify individual or companies. The committee is interested in the broad principles related to our terms of reference and in any information you can offer towards that. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals. Plainly we would prefer that all your evidence be given in public, but if there is a matter you would like to raise in private, the committee will certainly consider your request. I now invite each of you to make a preliminary statement and then we will move to questions.

Ms Barnett—I really appreciate and thank you for the opportunity to speak with the committee today. We are speaking about an industry that we believe is critical to achieving optimum outcomes cost effectively for workers compensation schemes.

Occupational rehabilitation's prime focus is on achieving return to work outcomes. We believe that this is the critical element to achieving viability in and across workers compensation schemes. There are four issues that I want to emphasise in my presentation. The first is the need for a safety net professional rehabilitation assessment. The second is the crucial necessity for early intervention. The third is performance monitoring in the occupational rehabilitation industry. The fourth is the value of consistency across states in some key areas.

My first point relates to the need for a systematic approach to the utilisation of professional occupational rehabilitation services. Our view is that too many claimants are falling through the gap because they receive minimal effective return to work intervention. As a result, in most schemes, many claimants are still on weekly compensation when they reach the standard termination point for their scheme. In Victoria this is reached after a worker has been on weekly benefits for two years. Most of these claimants subsequently transfer onto social security benefits. From a workers compensation authority's perspective this is a positive outcome. However, from the Commonwealth government's perspective, and also the broader Australian community's perspective, the problem is an ongoing one. The only way to prevent what is effectively cost shifting, rather than problem solving, is to address the issue at its source by involving professional occupational rehabilitation consultants when a claimant is still off work at the time that a claim is received.

Some may argue that many workers return to work without the assistance of occupational rehabilitation, and this is certainly the case. However, the cost of occupational rehabilitation intervention can be recouped by returning to work the injured worker only one week earlier than they would normally have been. At present, too many workers are not assisted and remain off work weeks, months and, in some cases, years after they could have effectively been returned to work. This ends up costing schemes tens of thousands, and sometimes hundreds of thousands, of wasted dollars on many claims. By spending less than $600 per claimant off work at receipt of a claim, a workers comp authority can play a responsible part in reducing the financial and social cost to the Australian community.

My second point is related to this, and it is in connection with early intervention. An early intervention in our industry means referring workers to occupational rehabilitation when they are off work following workplace injury. We believe early intervention is the key to a viable scheme. I would like to show you a graph that illustrates this. This is the Comcare system. It shows the time from date of injury to date of referral, and this relates to the cost of the claim. It is a graphic illustration of how the earlier a referral is made to rehabilitation, the lower the costs on the claim. In our current Victorian system, there are often significant delays between the date of injury and when the claim is received, let alone processed, by insurers. Given the crucial impact that early intervention has on outcomes, more priority needs to be given to facilitating the early receipt of claims. In our present system, the sole responsibility for submitting claims lies with the employers.

Unfortunately, employers have not only the least incentive to submit the claim but also a disincentive. Workers comp claims and their associated costs usually result in significantly increased premiums for the employer. If a workers comp claim were in triplicate instead of in duplicate, the worker could submit a copy of their WorkCover claim form direct to the authority and, in this way, employers and agents could be held more accountable for dealing with claims promptly. Employers could also be offered incentives, such as discounted premiums, for early reporting of claims. An electronic claim reporting mechanism, such as by phone or Internet, should be developed as a matter of urgency. Furthermore, in the Victorian scheme, employers pay the first $480 of medical and like expenses, which include occupational rehabilitation costs. Unless employers understand the principle of spending dollars up front to save dollars—and that is really going to apply only to medium to large employers—they will be reluctant to pay up front for occupational rehabilitation. The result is often that precious time is lost in the early phase of a claim and this often translates into increased anger, frustration and loss of trust, which is a poisonous mixture when trying to achieve a timely, safe and durable return to work.

My third point relates to performance monitoring. The occupational rehabilitation industry is well aware of the need for accountability and monitoring of performance to ensure that services are delivered effectively. We are fully supportive of a structure in which we are held appropriately accountable for achieving optimum outcomes cost effectively for the scheme. The Victorian WorkCover Authority's current database dates back to 1985 and has some serious shortfalls that prevent meaningful, accurate and appropriate monitoring of occupational rehabilitation provider performance. Our national association, the Australian Rehabilitation Providers Association, is currently developing a national database that captures meaningful, accurate and comprehensive data on outcomes achieved and costs incurred across the occupational rehabilitation industry nationally. The depth of the data being collected is at a far more comprehensive level than that which the workers comp authorities currently have access to. It is expected that this database will become live in early 2003. We see this as a crucial tool

of both the industry and workers comp schemes, and we are seeking some financial support to subsidise this venture.

The fourth point relates to some key issues which we believe would be of value if they were consistent nationally. The first relates to the nationally consistent measurement of occupational rehabilitation outcomes, the second relates to national occupational rehabilitation standards and the third relates to a national re-employment incentive scheme. First of all, I will address the national measurement of return to work outcomes. It is really stating the obvious that there is great value in having nationally consistent measurement of return to work outcomes—to identify where best practice is occurring and to therefore spread the learning and provide the challenge across the nation to strive to exceed the benchmark. The current national measurement of return to work outcomes, the Campbell survey, is not an appropriate measure of occupational rehabilitation effectiveness, as occupational rehabilitation is only involved in a minority of open claims.

The second point relates to national OR standards. A set of national OR standards is another piece in the jigsaw to ensure quality occupational rehabilitation services are being delivered nationally. At present there is wide variation in OR standards across the nation. In order to raise the standard of service to best practice there needs to be a harnessing of the best OR expertise to establish national appropriate standards. It is in the interests of both the OR industry and workers compensation schemes to have benchmark standards pitched at best practice occupational rehabilitation. Having national occupational rehab standards will also assist in dealing with a current problem facing some large occupational rehabilitation providers who are seeking to enter the Victorian market but are unable to obtain approval from the Victorian WorkCover Authority. We argue that if a provider has proved its worth in another state then there should not be a barrier to that provider being able to operate in another state.

The third point relates to the effective re-employment incentive scheme, which we believe is a vital component in any healthy workers comp scheme. Job detachment is one of the biggest issues facing workers comp schemes because it means that injured workers need to find alternative employment and are competing for that alternative employment against non-injured workers. The Victorian WorkCover Authority Sprains and Strains Care Model has highlighted, among other things, just how significant this problem of job detachment is for injured workers. Job detachment invariably means a significantly longer time on weekly benefits, with every week off work costing most schemes another $600 to $800 per worker per week. Although some state workers comp systems do have limited re-employment incentive schemes, there are often significant restrictions on access to the schemes, particularly if a worker moves interstate. An effective national re-employment incentive scheme could significantly enhance the chances of securing alternative employment for injured workers. This issue needs priority attention.

Finally, an effective and healthy occupational rehabilitation industry satisfies the needs of workers, employers, agents and governments. For too long, the occupational rehabilitation industry has been the scapegoat when workers comp schemes have not been performing, when the failure is largely due to design features of the scheme. We seek to work in partnership with statutory bodies responsible for workers compensation schemes and we offer our expertise in achieving optimum return to work outcomes. In return, we seek recognition of what is required to ensure a healthy industry, which is timely information about policy changes, support in industry training and support in running a national database. Thank you for your time. I welcome questions.

CHAIR—Would any of your colleagues like to make a statement at this time?

Ms Lindholm—No; Jane has made the statement on our behalf. The only thing I should say is that we would like to make some responses to some of the issues you were discussing with the previous witnesses. I assume that will be covered in question time.

Mr BEVIS—What professions are covered by the phrase 'occupational rehabilitation providers'? What are we talking about?

Ms Lindholm—There are many different professions employed. Largely, they are occupational therapists, physiotherapists, ergonomists and psychologists and there are some social workers. All those people are not operating in their profession as treatment service deliverers. They are operating with that background, with a training in delivery of occupational rehabilitation. So they are developing their expertise in the workplace-based negotiations and assessments.

Mr BEVIS—Some other witnesses have raised issues associated with the either real or perceived independence of occupational health and safety providers, rehab providers—that is, that the insurers or large employers have, in some cases, an ownership or direct financial investment stake in the rehabilitation providers' operations. You can also envisage that they might have a fairly significant market hold just in terms of the normal market share. What is your view—from the other side of the table as it were—of that issue? How do you go about putting in place mechanisms to ensure that independence of professional judgment is unfettered and transparent?

Ms Lindholm—At the moment we are in the process of trying to develop our standards for occupational rehabilitation providers. Delivery of services against those standards should go a long way to ensuring that independence.

Ms Barnett—Another thing is that, as occupational rehabilitation providers, we cannot achieve effective outcomes unless we can win rapport with every party. We cannot influence a worker unless a worker really believes that we are interested in their wellbeing and a safe and durable return to work. We cannot influence an employer unless they get our professional commitment to achieving a win-win outcome. It is our ability to achieve outcomes that ensures the ongoing viability of our business. It is actually inherent in the job that we be seen as—and operate as—an independent party in the process and that we be clear on what the needs of each party are and what actions each party needs to be taking in order to achieve a safe and durable return to work.

Mr BEVIS—The dilemma I have in trying to piece all this together is knowing who the client is

Ms Lindholm—That is an age old question in occupational rehab. One of the difficulties is that very often the insurer agents are purchasing the service on behalf of the authority and they believe they are the client. Most rehabilitation providers have come from professional service delivery backgrounds. When they enter the industry, very often they believe the injured worker is their client. Others come from working with an employer, and they believe the employer is their client. Our training and our support of occupational rehabilitation providers is designed

very much to help them develop a system of operation where they view all those parties—and, in fact, the scheme—as their clients.

Mr BEVIS—There are a couple of very big insurers—and in some states there is a monopoly insurance arrangement. The market hold that provides is significant. That is, if you want to be involved in rehabilitation, you have to satisfy that person, corporation or agency because, at the end of the day, they are paying the bill.

Ms Lindholm—They should be happy if the job that you do creates a satisfactory conclusion for the claim. What we believe is the best satisfactory conclusion is that the person returns to work.

Mr BEVIS—There is a bit of a circular argument in this, but I would like to go back to my earlier question about who the clients are. It may be that injured workers see themselves as clients and see the service as providing them with the ability to go back to their former employment or the possibility of being as rehabilitated as medically possible in order to take on some other employment. Employers may see themselves as the clients at the end of the day because they are paying a premium and their interest may be the same as the employees' or it may be to have whatever course of action produces the lowest premiums for them or, if they think the employee is a bit of a headache, it may in fact be to not have them rehabilitated or coming back to that place. The insurer's interest might be to get the person back to work or it might be either one of the employer's responses.

That all assumes the insurer does not have a financial interest in the operation of the provider, which is something I would like you to comment on because it has been raised with us, although I do not have any statistics or data, on it. I think there is an interesting perspective to the whole issue in respect of delivery of service if indeed the insurer also has a financial investment in or ownership of the provider.

For the insurer, if you want to be really Machiavellian, it is not a question of how many people are out there because it is a closed market. The law says you will be insured, so the insurer is guaranteed a market. If a series of factors ratchet up the costs within that whole cycle, the insurer is simply guaranteed a higher premium. A high turnover means a higher premium and, depending how they structure themselves, that may be a good thing, because they can put the money on the short-term market and that is all good news for them. So the insurer's interest, depending on how Machiavellian you want to be about the interpretation of this, might actually be satisfied by having a slow process of return with higher costs and higher premiums, generating higher incomes and higher cash flows and more money to put on the short-term money market.

Ms Lindholm—Sometimes with the red tape in the Victorian system you would swear that was what was happening!

Ms Barnett—The design of the scheme actually used to foster that. I think a lot has to do with the design features in the scheme and where the incentives are. In Victoria, up until recently, what you were saying was very much the case. The actual incentive for the insurers was to actually have more claims and increase costs because then they would actually get paid more. In the Victorian scheme, there has been a shift towards providing incentive for agents to achieve return to work outcomes and get claim resolution. Their remuneration is based

significantly on that, which is a very different way of them being remunerated from how they have ever been before.

Mr BEVIS—Should insurers be able to have a financial investment in providers? It is a bit like saying: 'Should a health insurance company be able to own a hospital, a doctors surgery or an orthopaedic specialist operation?'

Ms Lindholm—It is a very difficult question. Perhaps that is where you get down to the issue of worker choice, which they used to have. They used to be able to choose their occupational rehab provider. They can no longer do that. We as an industry association, if a worker or an employer was not happy with the service that they were receiving—

Mr BEVIS—To make that judgment you have to have a knowledge base, and the fact is that most of the injured workers who would come along would not know this rehab provider from that provider, much less who was providing the money to build the building, pay the wages and all the rest of it. The choice thing does not work. I go back to my earlier question. As people who are providers, and as the association that represents the providers, do you have a view about the issue of workers comp insurers having financial investments in the provider end of the cycle?

Mr Elrington—If there were indications that it was affecting the ethical practices and the competency of the company, we would have a concern. We do not have an indication that that is occurring.

Mr BEVIS—I will tell you about the reaction that I have had, separately from this inquiry, over the years. If I have a fair analogy when I talk about private health insurance companies owning and operating medical centres and hospitals, certainly whenever that issue has been raised the people who currently operate and run those medical centres and hospitals go berserk. There are countries around the world—for example, the United States—where health funds do in fact run hospitals and medical providers. There is an ongoing raging debate about whether, if you are sick and go to one of those places, the hospital is looking after the funds of the health insurer or your good self. It seems to me there is some parallel here.

Ms Lindholm—It is an old dilemma.

Ms Barnett—I think the key is in what sort of design features provide incentives in what direction. That is a critical issue in ensuring that what is going on is appropriate and is aimed at achieving a win-win outcome overall. It is to do with the design features and the incentives they provide.

Ms Lindholm—For all parties.

Ms Barnett—What is important is not whether or not a provider has a business association with an insurer but what the design incentives in the scheme are that incentivise appropriate behaviour which is focused on achieving return to work outcomes.

Mr BEVIS—I would have thought that adopting such an approach obliges there to be a process of transparency and public accountability

Ms Lindholm—Absolutely. That is what we are after—open measurement.

Ms Barnett—We are very open to that. What we really want to see is more effective monitoring of performance that creates transparency in what sorts of outcomes are being delivered by all providers.

Ms Lindholm—And the ability to compare the services from different providers. That is not possible at the moment. In fact, the VWA's data on occupational rehabilitation is confused by the inclusion of some other services with the occupational rehabilitation costs. Our preliminary investigations about the actual cost of occupational rehabilitation in Victoria in a given financial year ,compared to their claims of the cost, give a figure of about half. That is all we can find; we do not know what the rest is.

Mr BEVIS—What do you think the effect would be on your members' work as rehab providers, on the cost of the system, on getting workers back in to gainful employment and so on if the legislation around the country did not permit workers compensation insurers to own and operate other parts of the cycle? I am thinking particularly of the rehab aspect of it. They cannot own a doctors surgery, for example. They can employ their own doctors but, if I am injured and I need to go to an orthopaedic surgeon, they cannot own the orthopaedic surgery.

Ms Lindholm—In Victoria, it would just mean one less provider. The work would be shared among the others.

Ms Barnett—It would not necessarily impact on one level on the effectiveness of the delivery of OR. There are two issues. One is that there can be a lot of useful learning when there is a good close working relationship between an occupational rehab provider and an agent. I believe better outcomes can be delivered as a result of that.

Ms Lindholm—But those could be delivered by a panel of providers used by an agent, as opposed to an ownership arrangement.

CHAIR—You suggested a national re-employment incentive scheme be implemented to facilitate the return to work of workers with a disability. Do you see a significant opportunity for Commonwealth social security to be a de facto workers compensation scheme at present?

Ms Barnett—That is what is happening.

CHAIR—Is it? Good. I do not mean it is good—it is a disgraceful outcome—but I am glad someone has finally said it. Can you quantify it? Ms Lindholm, you mentioned that you could answer some of the questions that we gave to the previous witnesses, but first of all can you elaborate on what you have just said?

Ms Barnett—It is hard to quantify how prevalent it is.

CHAIR—Have a go.

Ms Lindholm—We certainly have lots of anecdotes.

CHAIR—With the greatest respect, we need to get some idea—even a very general one—of what the size of that might be. It could be within limits—it might be two per cent or five per cent, it might be this or it might be that. I would like some sort of feeling from your perspective of what that figure is.

Ms Lindholm—When the others were speaking, I made myself a note, because I thought that those statistics must be available from the Victorian WorkCover Authority. Their database should be able to tell us which claims are terminated with no return to work.

CHAIR—Unfortunately, because of the election they cannot appear before us, so we are asking other people to give that answer to us.

Ms Lindholm—I suspect that we could probably get that information in that way. We will see if we can follow that up and provide that to the committee.

CHAIR—Would you take that as a question on notice? Our question to you is: within very broad parameters what is the number or percentage of people ending up on the Commonwealth social security scheme through disability who could have been dealt with in a more thoughtful way?

Ms Lindholm—If a claim is terminated and they have not returned to work, then the only justification they would have for terminating their claim is that they had a work capacity. By definition, that says that the person had a work capacity but had reached the countdown period—and therefore they were able to terminate the claim.

CHAIR—What does terminate the claim mean?

Ms Lindholm—There are no more payments made.

CHAIR—They have run out of time for receiving benefits. Is that a 26-week period in Victoria?

Ms Lindholm—It is 104 weeks in Victoria.

CHAIR—That is two years, so after that, if you have used up 104 weeks—

Ms Lindholm—There are no more weekly payments and no more treatment paid for.

CHAIR—Nothing more, that is it?

Mr Elrington—That is for the bulk of claimants. If you are seriously injured, there are allowances in the scheme to continue on.

Ms Lindholm—If you do not have a work capacity.

Ms Barnett—If you have a work capacity and you have accumulated 104 weeks of comp, it is deemed that it is viable for you to find alternative employment. I think there are exceptions made: for example, a worker aged 63 who is a labourer with a back injury living out at Drouin

remains on the system. If it is considered that it is viable for them to find alternative employment and they have accumulated 104 weeks of weekly comp, they lose their entitlement to it. Their medical and life expenses might continue for a further 12 months, upon review.

CHAIR—What circumstances bring that about? This is someone who has the capacity to work. Is it that their illness is taking longer to recover from?

Ms Lindholm—Not usually. Our big argument is that many of these people could have been rehabilitated back into work.

CHAIR—So they are not on rehab?

Ms Lindholm—No, many are not. Often they get referred at 104 weeks because they have not had any rehabilitation assistance. They are being referred for an assessment where the outcome the agent is seeking is that we say that the person has a work capacity. They would like to have an assessment stating a work capacity, in which case they will say, 'This person no longer has an entitlement.' The sad thing about that is that many of those people possibly do have a work capacity but the likelihood of them actually being able to get a job to use that work capacity is very low without assistance. The likelihood of them believing that they have a work capacity after two years of incapacity is very low. So they feel very hardly done by and they do not believe that they have had appropriate assistance and there is no scheme other than social security to pick them up.

Our argument is that we would like to have in place this safety net that Jane described. We do not want people to limp along in the system or have a failed return to work attempt organised by their employer or, as Mr Bevis said, have an employer who actually chooses not to have them back for some reason or another. Then they become disconnected; maybe they are made redundant or they no longer have a job to return to.

What we are really after is this safety net idea where a professional rehab person comes in when a person has not been able to return to work in, say, 10 days. After 10 days, it becomes a major claim in Victoria—another issue in Victoria is that the employer has responsibility for that first 10 days, so there is very little incentive for them to do anything or to get any help. If they have not returned in 10 days, we would like to have a professional rehab person meet with the worker and the employer, establish what issues both those parties have and then try to bring them together, negotiate some common ground and put together a professional, workable and agreed plan as to where to go from there, so that they have some hope of following that plan and positively managing the return to work process and the needs of the claim. Very often only one visit is required to help each party see the other's point of view and to start to work together, but usually we do not have that opportunity.

Some cases may need ongoing occupational rehabilitation because they do not have the relationship or the skills between them to actually work it out, but many would not. Many would only need that setting on the right track and they could follow it independently. They sometimes need somebody to help talk to the doctor to find out what they can do. Doctors are very clearly able to tell us on certificates what the person cannot do, but we often need to identify what they can do and be the doctor's eyes in the workplace. If we could get that plan together, and have people following it, many of them would resolve.

With respect to those who do not resolve, those who need further input, we can usually sort out very early on in a claim what it is that is stopping the person from going back to work. In many cases it is not their injury. People talk about slow resolution of the injury and slow resolution of the symptoms, but in our experience that is not what keeps people off work.

What is keeping people off work is, in many cases, the relationship between them and their workplace—whether it is their direct boss, their supervisor or issues that they are having at home that mean that they are not being a very good employee at that time. They have an injury, but often they have carried it for a very long time before they have finally put in the claim. In many cases, something goes wrong at work which means that they just cannot or will not put up with the pain or the discomfort that they have been managing for a long time. There is still a stigma attached to putting in the claim. Even cases that we do see, for what we could call early intervention, have often become chronic really before they are even reported. That is why it is so important for us to get them as early as we can.

So often, though, we get the claims for rehabilitation after the employer has tried to do something with them, after their claim has been denied by the agent. Many cases are denied by the agent. The worker is already feeling anxious about having to put in a claim and it really almost does not matter what their employer says to them. They will feel that their employer is going to judge them harshly, and often their peers judge them harshly. The whole scenario is set to be adversarial right from the start. If we can get in there and sort out that rubbish, we can usually help them all move forward together. Often we get the claims after the employer and the worker are fighting; they may not have spoken for a year.

Several years ago in Work Solutions, which is my organisation, we analysed over 1,000 claims and found that the average time from injury to referral was longer than eight months. The reason we were looking at the eight-month point was because, in the Campbell survey, that is how they measure return to work. In over 500 of those claims, we did not have a chance of impacting on return to work.

There is so much damage done at that point. When we get a claim at 104 weeks, and they have virtually had no assistance, the chance of rebuilding the bridge between that worker and their workplace is very low. It can be done if the employer is willing, and if the worker is willing, but there is a lot of work to rebuild it. We feel that we are not being used at the right time.

CHAIR—So there is fraud in the system? It is the fraud of the state system on the Commonwealth—the taxpayer—and the worker, who would probably, were circumstances different, have had an opportunity to return to the job. Is that correct?

Ms Lindholm—After 17 years in the industry—and we have all been in the industry for a long time through lots of changes of policy—I have rarely met a worker who did not want to work. Their behaviour is usually driven by fear, sometimes by anger, and by their experience with the claims system. If the claim is denied in the first place, and they have had to fight to get weekly payments, or they have not had weekly payments for months before it went to conciliation, all of those things militate against a positive outcome.

CHAIR—One of the other witnesses said to us that there is what is termed ‘self-imposed disability’. Workers do have an injury but they lose their self-confidence. There is a long period

before matters are resolved and it is very disheartening. Then, covertly or overtly, they tend to exaggerate their injury or their disability.

Ms Lindholm—They are asked to do that. Every time they go to a medical assessment, they think, 'I am going to a doctor tomorrow and I have to prove how sick I am, because if I am not sick, they will take me off my payments. If I show I have a work capacity, I am no longer entitled.'

CHAIR—So you are suggesting that this national employment incentive scheme and very early intervention by a rehabilitation provider would overcome much of that?

Ms Lindholm—Yes. In Western Australia, they have recently picked up that safety net approach that we have been talking about. They are implementing it after one month. If a worker has not come back to work after one month, meeting certain criteria, they would have a professional rehabilitation assessment. Whenever we say that, it just sounds like we want more work but, of course, we believe it is of great benefit to the system and these Comcare statistics, which we will give you, will certainly show that.

CHAIR—I think we have those.

Ms Lindholm—Self-insurers could show the same pattern.

CHAIR—If you would give us those statistics that would be helpful; we may have them but we are not entirely sure. Your submission has been very helpful.

Ms Lindholm—I would just like to say something about the use of rehab. The previous witnesses made a comment about rehab often failing and the issue of retraining. Unfortunately, in the scheme there is an incentive to provide minimal retraining because the answer that the administrators of the scheme are looking for is to say a person has work capacity. The outcome we, as rehabilitation professionals, are looking for is re-employment, which is the outcome we believe the scheme and the community should be looking for. But because they have this exit point there is a very low incentive for the scheme to look for re-employment. If the minimal retraining is to say the person has a work capacity, that does not actually help in the long run because of the cost shifting to the federal system.

CHAIR—Thank you very much.

[12.33 p.m.]

BURT, Mr Peter Ralph Howard, President, Victorian Branch, Australian Plaintiff Lawyers Association

GARNETT, Mr Simon, Vice-President, Victorian Branch, Australian Plaintiff Lawyers Association

CHAIR—Welcome. The proceedings here today are formal proceedings of the parliament and warrant the same respect as proceedings in the House. The committee would ask that, in providing your evidence today, you would not name individuals or companies or provide information that would identify adversely individuals or companies. The committee is interested in the broader principles related to the terms of reference. The committee is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals. We prefer all evidence to be given in public but if there is a matter you would like to raise privately please ask the committee and we will consider that. Generally we ask you to first make some preliminary comments but because some of our members have to leave early today and they are very eager to question you, I would ask if you would incorporate your opening statement in the *Hansard* transcript. Is your opening statement generally reflective of your submission?

Mr Garnett—I just have rough notes I was going to refer to, really just summarising what APLA's position is with respect to the workers comp fraud issue.

CHAIR—Is it the wish of the committee that Mr Garnett's opening statement be incorporated in *Hansard*? There being no objection, it is so ordered.

The statement read as follows—

In APLA's view it is a damning indictment on society that workers when injured not only have to suffer the physical, emotional and financial burden of their injuries but are also tainted with the suspicion that they are feigning or being fraudulent and carry the stigma of that whilst on the system.

This perception has been generated and re-inforced by some Compensation Authorities, Employer and Insurer Organisations over many years and popularised by the media.

WHAT ARE THE FACTS?

All official inquiries over the last 20 years have found no cogent evidence to support the widespread perception of claimant fraud, which are referred to in our written submission.

When questioned and asked to produce evidence rather than anecdotal assertions none of those organisations can!

APLA is not so naïve to suggest that there are no fraudulent claims by workers, but rather, that the number is so minimal that they pale into insignificance when compared to the amount and cost to the system of employer fraud.

See: NSW W/C Insurance Green Paper Oct 2001

Interim Report Reviewing Employer Compliance with W/C Premiums March 2002.

The Compensation Authorities own documents reveal the nature and extent of it;

Recovery of unpaid/avoided Premium:

NSW: 1996: $15m, 97/8: $4.9m, 99/00: $7.4m, 00/01: $14.8m

Vic: 1995-9: $41-5m

Qld: 1995-9: approx $15m

WA: 1995/6 18% of business who should have did not have an insurance policy and in 2001/2 166/22288 had no policy.

We have provided some examples of questionable Insurer and Service provider conduct in our written submission.

APLA is of the opinion that more resources should be directed to detecting employer fraud rather than claimant fraud as that is the area where the major costs occur in terms of fraudulent behaviour.

In respect to rehabilitation of injured workers, we make the following comments:

It is not working effectively.

Employers are reluctant to provide suitable employment to injured workers.

Introduction of rehabilitation needs to be at an early stage for both medical reasons and to maintain the employer/employee relationship.

There is a lack of effective sanctions against employers who fail to provide suitable employment

There is no effective incentive for prospective employers to employ injured workers.

Over the last 15-20 years the various Workers Compensation systems have been regularly amended but with a common thread:

the curtailing of injured workers rights and entitlements; such as;

Abolition/restrictive access to Common Law

abolition of journey claims

introduction of medical assessment/monetary thresholds

Limitation on weekly payment entitlements resulting in costs shift to the Commonwealth.

changing the definition of compensable injury

limitation on stress claims

introduction of Medical Panels as the final arbiter

use of the AMA Guides as an objective tool to measure impairment

Unfortunately, over the years the combination of the physical, emotional, financial and the social stigma of having a work related injury has been too much to bear for many workers.

Employers, Insurers, Compensation Authorities and Governments should lead the way in changing society's current perception of there being rampant claimant fraud because quite clearly on the facts, that perception is a fallacy.

Ideally the findings of this Inquiry will assist that process.

CHAIR—Mr Bevis will start the questioning.

Mr BEVIS—Thank you, Chair, and thank you, Mr Burt and Mr Garnett, for your consideration in reshuffling the order of events. One of the things that some have suggested to us is that the common law access for injuries at work should be either changed or eliminated. As you go around the country there are different ground rules. Obviously, one of the reasons for that is the payouts that are given in those jurisdictions. I am interested in any comments you, as lawyers, have on that. The other consideration, which goes across all of this—I have really two or three questions in one, if I may—is the total cost of workers compensation which goes to legal fees. Often we are told that it is most significant in common law actions as distinct from the rest of the process, although there is some conflicting evidence, I think, about that. I would be interested in your comments about what I have just put as a conglomerate of two or three different questions.

Mr Garnett—On the issue of common law access, as you would all be aware, over many years there has been a lot of tinkering with the common law access for injured workers. There have been many amendments to the statutory schemes across Australia. Some have abolished the access to common law; some have got thresholds which injured workers have to get over in order to be able to access those. The Australian Plaintiff Lawyers Association's view on common law access is that it should be available to injured workers because it provides a much better system of compensating people for the injuries that they suffer than the base statutory schemes.

In respect of the total cost of legal fees, unfortunately we are not in an ideal system. Workers need protection, they need legal advice and they need legal representation. Despite some

submissions made by various compensation authorities that it should not be an adversarial process, it is. After looking after the interests of injured workers for over 20 years, I believe that those workers certainly need legal protection because the administrative nature of the scheme does not take care of them.

Mr Burt—The law also provides that the insurer only has to pay legal costs to the injured worker where there has been litigation and the injured worker has been successful. In the context of workers compensation—or any other type of insurance claim—essentially, if the insurer says no and that is challenged by the worker or plaintiff and then a court says that the insurer got it wrong and the answer was yes, the unsuccessful party is then required to contribute to the successful party's legal costs. So we would say about legal fees that, if the insurers got it right more often, they would pay out a lot less in legal fees.

Mr BEVIS—In the state of Victoria, does the opposite happen? If an action is taken as plaintiff lawyers on behalf of an injured worker and it is unsuccessful, is the insurer entitled to have costs awarded?

Mr Burt—Yes. In fact, the courts do award costs in favour of the insurer against the injured worker. If the injured worker has the assets or capacity to meet such a judgment then the insurer does in fact chase the injured worker.

Mr Garnett—In fact, it even goes further than that now. Under the statutory offer and the statutory counteroffer system in Victoria, the workers not only have to win their case but have to reach a certain percentage of their statutory counteroffer to be protected on costs. So not only have you got to win but there are all these additional thresholds that are imposed on injured workers in order to even have their legal costs paid.

Mr BEVIS—At the risk of offending the legal fraternity, one of the things that strikes me not only about this area of the law but more generally is that, even if there is a barely arguable case, there are examples drawn to our attention where a lawyer will encourage—I should not say encourage, but it is put to us in those terms—action to be commenced and then negotiate a settlement, knowing that the prospect of success is slim but that the employer or the insurer would be at some inconvenience—in terms of cost, time, travel and all the rest of it—even if they were at the end of the day to succeed. You might have a claim for, say, $50,000, and you might end up settling for $5,000 because it is just easier to settle for $5,000 than to go through all the hoops.

Mr Garnett—We actually filter a lot of claims that should not go to court at all. The no-win no-fee policy is much talked about in society these days. Lawyers are not going to risk their own fees and their own disbursements that they have to incur to run these cases if there is going to be a fanciful chance of success. We cannot operate that way as a business.

Mr Burt—The no-win no-fee arrangements are not well understood, unfortunately, by the public. When people do understand how no-win no-fee works they realise that in fact it is a very significant disincentive for lawyers to take on cases without merit because lawyers will only be paid if the claim is successful. There is no incentive to take on cases where the person's prospects of success are very small. In fact, if one subscribed to the commonly held view that lawyers are like white pointers circling around accident victims, then you would think it is more logical that those people would be suggesting that no-win no-fee arrangement really are

counterproductive in that lawyers, if they are truly greedy, would be refusing to take on any case but a case that was going to be a certain winner. So I just find the whole logic of the argument interesting.

Mr BEVIS—I have no other questions. I want to again thank both of you, and the chair, for allowing the program to be changed around so I could ask those couple of questions and then catch a plane.

Mr HARTSUYKER—The submission raises a number of cases where perhaps the practices by the insurance companies or persons acting against the worker were questionable. In what proportion of cases in your experience do those parties working against the worker act in a questionable way?

Mr Garnett—In general, because of the very nature of the system, agents and insurers have to investigate claims. From my experience I have found that this perception of rampant claimant fraud in the system, which obviously leaves a very big stigma on those people who are claiming compensation, right from the very outset causes an 'us versus them' mentality or attitude. There are a number of instances that I have quoted in that paper of actual court cases where the insurer's conduct was questionable. I am sure that it happens more than is brought to our notice because a lot of workers, if they receive a decision from insurers or agents, simply accept it at face value without taking the next step and questioning the validity of that decision. In relation to the examples of service provider behaviour, the very nature of the system requires people to continue to justify their ongoing entitlement to weekly payments, therefore there is a lot of overservicing that goes on because of the very nature of the system, in that they have to keep updating WorkCover certificates—I am talking about in Victoria—every 28 days so there is this continual review process.

Mr HARTSUYKER—If you set aside what would be generally considered part of the adversarial system of putting a case forward as strongly as possible, would you describe those cases that are, let us say, inappropriately represented as a small percentage?

Mr Garnett—I would say a small percentage; I would not put it any higher than that.

CHAIR—You claim in your submission that the number of fraud prosecutions against claimants is small in comparison to the number of compensation claims per year. However, we have had other witnesses say that prosecutions are a fairly poor yardstick of real fraud. There is an assertion, as Mr Bevis mentioned, that where the claimant proceeds to court action with a modest claim of $5,000 or whatever, those claims, if they were properly investigated, may or may not be fraudulent, but that, because of the cost of investigation and the likelihood of not getting a successful outcome, insurance companies simply settle on the basis that all it is going to do is push up premiums—and that is not something that they have to bear the cost of. What is your comment on that?

Mr Garnett—APLA would encourage that, if there is evidence of fraudulent claims made by claimants, they ought to be vigorously defended and investigated by agents and employers.

CHAIR—But are they? What percentage of claims that the Plaintiff Lawyers Association deals with are settled out of court?

Mr Burt—Probably close to 98 per cent would be settled out of court. It is a rarity to have a case that actually goes to court. That observation is not made just in relation to workers compensation; it is made across the board in relation to all forms of personal injuries litigation. The court system encourages the resolution of claims without going to court, without going to a full hearing. A lot of cases get resolved without the issue of proceedings. Many cases are resolved after the issue of proceedings. Lots of cases are resolved simply on the basis of a letter of demand being made. But with each of the workers compensation schemes—and certainly in Victoria—there is a statutory process in place for how claims are initiated, and it is very tightly regulated. In Victorian workers compensation, for example, with back injuries, which seem to always get a guernsey when this sort of is issue is raised, under the no-fault provisions you cannot get a lump sum payment unless you have an impairment of greater than 10 per cent due to a spinal injury. That is under the American Medical Association guidelines. To have such a level of impairment you have to have an injury that is very significant indeed. So there are thresholds in place in the workers compensation scheme in Victoria.

CHAIR—If 98 per cent are settled out of court—and I agree with you that that is a desirable outcome in terms of mediation—then the assertion from other witnesses still stands: a percentage of them may well be due to a decision that it is too costly to investigate, it is going to be too costly to go to court and it is easier to settle.

Mr Garnett—We are not naive enough to suggest that there is no claimant fraud in the system. We accept that some claimants have been fraudulent. On all the evidence, in all the inquiries that there have been over many years, no cogent evidence has been found of widespread claimant fraud. But what does stare everybody in the face—and which is not publicised—is the fact that employer behaviour is costing these systems millions and millions of dollars a year. You are aware of that because the evidence has been put before you. The community perception, which is reinforced by compensation authorities, employer groups and insurer groups, and which is publicised in the media, is that there is a big cost to the system because of claimant fraud. There is simply no cogent evidence to suggest that. I know that some of the submissions you have received have suggested that it is 10 and 20 per cent. There is no evidence to suggest that. If you look at the authorities' own figures on what employer behaviour or fraudulent behaviour has cost the schemes, it is there in black and white.

CHAIR—I hear what you say, but you would not see the cases where somebody is off for 10 days because of illness—a work-related injury. They are obviously not matters that go to court, so you do not see them. So that level of fraud, were there fraud there, is not something that you have an overview of, is it?

Mr Garnett—I cannot comment specifically on that, apart from saying that the whole tendency in workers compensation systems these days is to question the honesty of the injured worker from day one. Because you do not see a limb hanging off or a breakage of an arm or whatever, there is already suspicion from day one: is that person genuine? That comes from the employer themselves and it can come from fellow workers. There is just this in-built perception that people are going to put in fraudulent claims. I think it is a sad indictment on society that that is what the perception is today.

Mr Burt—There is also a definitional question of what is fraud in this context. True frauds are going to be prosecuted if the evidence if there to establish them; and the level of prosecutions is very low. But if it is fraud when someone, asked the question: 'How are you

feeling today?' says, 'Oh, gee, doctor, I am not feeling all that well,' then I suspect that the human condition is such that we all behave fraudulently. I can look back to days when I was not self-employed, if I could put it that way, and if I were genuinely ill and felt very unwell and did not want to go to work that day because I was feeling not up to it but I had to ring the boss to say I was feeling ill and could not come to work, then instead of saying—and I doubt very much if *Hansard* will pick up the tone here—'Look, boss, I'm not feeling too good so I'm going to have the day off,' I would probably say, 'Oh, gee, look, I'm not feeling very well.' If that is fraud then I am afraid we probably all behave fraudulently.

CHAIR—Most of us do not have someone else pay for it, though, do we?

Mr Burt—That is very true. But I know that when people—

CHAIR—So the question comes back, with the greatest of respect, to the fact that this is a system which is not no pay. Someone pays—

Mr Burt—Yes.

CHAIR—at the end of the day, whether it be the employee, through being unable to go back to work; or the employer, in higher premiums; or WorkCover or the insurance company; or the community, at the end of the day, through having people who either exploit the system to whatever extent—and we are not entirely sure what that is at the moment—or who, as we mentioned to previous witnesses, are cast onto the federal system and the taxpayer.

Mr Burt—Yes.

CHAIR—Someone pays, so in that sense we are not talking about the everyday frauds where you say, 'Oh, I'm not feeling too good,' when you could have said, 'I'm feeling great.' We are really talking about a system where someone pays. So my question to you was, firstly, you do not see those smaller claims that do not go to court?

Mr Burt—We certainly field them. As a lawyer I advertise, so I field a lot of calls from people who inquire about whether they might have a claim. The vast majority of the people who ring in are told they do not have a claim.

CHAIR—For what reason?

Mr Burt—Because the claim is going to be too small, and they get some advice that they can lodge a claim and see what happens or, alternatively, if I see them it will be because they have a dispute with their employer that requires the intervention of a lawyer or if I can tell that the person will have a claim of some significance in terms of the seriousness of the injury sustained.

CHAIR—The claim is too small?

Mr Burt—Yes. For example, someone rang me yesterday and said that he had injured his finger at work when he put his hand into a bag of fruit he had brought to work that day, he had a knife in there and he cut his finger. I wondered why he was ringing me. He was annoyed because he said his employer had put some disinfectant on his finger but had not sent him off to

be assessed by a doctor, and he felt that he needed stitches. I just said, 'Why don't you just go and see the doctor and get some stitches put in?' The response was: 'But who's going to pay?' I said, 'If it is a workers comp matter maybe the insurer will but, surely to goodness, wouldn't you be more concerned about having your finger treated?' I was a bit surprised by that call, but you do get calls from people who think that they have an entitlement to compensation where you disabuse them of that notion.

CHAIR—I am not arguing about your central theme here—actually, I suppose I am. You say that it is all the employers; I think there is a bigger fraud, which is the one we mentioned earlier, where people end up on the Commonwealth system. Just getting back to that individual case for a moment, it may not be fraud but, as you said yourself, why does that person not go and get it treated. That is pretty much commonsense: you have hurt your finger at work on a knife in a bag of fruit—I do not know whether the fruit was work related, whether it was somebody's lunch or whatever. I think that is a classic example of letting commonsense prevail, isn't it? It is commonsense to say, 'Go and get it stitched and get on with life.'

Mr Burt—But, in a sense, that is what lawyers do. We sometimes feel as if we are the ones who are under attack.

Mr Garnett—We are.

Mr Burt—Which we are indeed. Lawyers do, in fact, deliver that type of advice regularly to people.

CHAIR—So you filter out some claims; claims which one may not call fraudulent but which certainly do not have a basis, perhaps. Would that be fair?

Mr Garnett—We filter out claims in terms of cases where people believe that they have lump sum entitlements—because the understanding still, here in Victoria, is that if you have sustained a permanent injury then you have a right to a lump sum of compensation, and that is just not the truth. There are impairment thresholds and monetary thresholds imposed. So we advise those clients as to what their entitlements are or are not in terms of pursuing those types of lump sum claims. Apart from that, if they have disputes over their entitlements to weekly payments or medical expenses—if their claims have been rejected or terminated—we give advice. We help them with the dispute resolution process.

CHAIR—So where do they go? Do they then go and make a claim against the employer?

Mr Garnett—If they have a permanent impairment and we believe that they will get over the threshold requirements then we will investigate that claim on their behalf, obtain the relevant medical records or reports and lodge the claim for them.

CHAIR—But for those, then, who you do not believe have a lump sum entitlement—or are unlikely to get there—what do they do?

Mr Garnett—It depends. They can make a claim on their own if they wish or, alternatively, they do have other rights. They have their rights to weekly payments. They may be receiving weekly payments. They may not be having an issue with the insurance agent at that stage, but, sooner or later, they are bound to because of the ongoing review process. The insurer may

terminate that entitlement to weekly payments or medical expenses and they will need assistance. They will come to us then.

CHAIR—In those cases where you carry them through to a successful lump sum payout, what happens to those people? Do you ever have the opportunity, in any way, to follow them up, see them or give them a ring? Where do they go?

Mr Garnett—A lot of them go into the social security system, as you were talking about with the previous witness.

CHAIR—What percentage, in your opinion, Mr Garnett?

Mr Garnett—A high percentage of those people who have their payments terminated at the 104-week mark because they have a current work capacity go onto the social security system if they qualify—depending on whether their spouses are working et cetera. It is a cost shift to the Commonwealth, there is no doubt about that. Your previous witnesses' statements about all people being terminated at 104 weeks is not actually correct; evidence that the person has a work capacity at the 104-week mark has to be produced by the agent. If the evidence is that they have no work capacity, they are entitled to continue to receive weekly payments beyond that 104-week period. A lot of factors are taken into account; it is not just a medical scenario: it is their age, education standard and background which are taken into account as to whether they can satisfy that definition. If they cannot, their payments are terminated and they will go onto social security—if they qualify.

CHAIR—So, in your opinion, what percentage do not meet the criteria and have their payments terminated? Is it 50 per cent, 40 per cent or 60 per cent?

Mr Garnett—It is pretty hard to put a figure on it. Of the people I see who I think have a reasonable chance, I would say that it is about 50 per cent. I cannot give you global figures. No doubt, as your previous witness said, the Victorian WorkCover Authority have the statistics as to how many successful terminations there are at 104 weeks. How many of those people then qualify for the social security system, I do not know.

CHAIR—You mentioned those who were terminated after 104 weeks—and in your experience you got the feeling that that was fifty-fifty—and then we have the lump sum payouts. Do believe there is a high percentage of those recipients who end up on social security?

Mr Garnett—The lump sum entitlement is a separate issue, of course, because in the Victorian scheme you have an entitlement to weekly payments and an entitlement to medicals.

CHAIR—So there is an annuity?

Mr Garnett—The weekly payments will continue for as long as a person has no work capacity. Beyond 104 weeks, you have an ongoing entitlement to medical treatment expenses, you have an entitlement to impairment lump sum claim and you may have an entitlement—

CHAIR—Is this under a lump sum?

Mr Garnett—No, these are the statutory benefits that are payable to injured people in Victoria: weekly payments for that period, or for longer if they so qualify; medical treatment expenses indefinitely, providing the treatment is reasonable and necessary; and, potentially, a lump sum impairment claim which is not in place of weekly payments or medicals but in addition to those. Under the current system, they have to have a 10 per cent whole person physical impairment under the AMA guides and, for psychiatric injuries, a 30 per cent psychiatric impairment to be entitled to any lump sum compensation. Alternatively, if they are injured in circumstances of negligent on or after 20 October 1999, they may have rights to pursue a common law action. They are basically the entitlements of injured workers in Victoria today.

Mr Burt—With the common-law claims where there is a big lump sum—which I think was what your question was aimed at—there is, under the Commonwealth social security legislation, provision to take into account the receipt by an injured person of a lump-sum payment. A preclusion period is calculated using a formula that disenfranchises that person, if you like, from receiving social welfare benefits for a period of time into the future, subject to the size of the lump sum payment received by that person. So, in effect, there is a method in place already that prevents cost shifting, if you like, to the Commonwealth.

CHAIR—Until that exclusion period is over.

Mr Burt—Indeed.

CHAIR—And then, as we have seen from other evidence and heard from other witnesses, people have generally not been retrained. They have perhaps not received rehabilitation, it has been a very long period of time since they have worked, which puts them at a considerable disadvantage, and then they go on the federal social security system. It is, as we have seen from witnesses who have been quite distressed, a very unsatisfactory outcome for people who do want to lead a meaningful life through their work.

Mr Burt—Indeed.

Mr Garnett—On that point, the rehab system is not working in Victoria. A previous witness talked about early intervention of rehabilitation. In effect, employers in this state are generally reluctant to take back injured workers. The rehabilitation system, for a number of reasons, does not work because of lack of early intervention and lack of employer willingness to have people rehabilitated. I see so many injured workers who have been put through security type work. We now have more trained security guards in Victoria who have been processed through the WorkCover system than the whole world needs. That is what they see as effective rehabilitation, and it is just not working.

If you look at it from an injured worker's point of view, they may have been working with this particular employer for many years and when they get injured the employer says, 'We haven't got suitable work for you'. There are no penalties or sanctions imposed on that employer for failing to give them suitable work, although the act provides for it. The employee gets weekly payments for two years, gets terminated at the end of two years and then is on his or her own, or on the social security system. It is a wearing down process. Along with that, they have the stigma and everything else attached with having a WorkCover claim. There needs to be much better and more effective rehabilitation.

CHAIR—Therefore the suggestion from our previous witnesses that there be some form of national training and incentive scheme has merit?

Mr Garnett—Yes. I think Mr Bevis raised the inherent conflict within the current system—with there being close ties between certain rehab agencies and insurers or agents. That is an inherent conflict, and it needs to be changed. A completely independent rehab system needs to be set up.

CHAIR—How many rehabilitation providers in Victoria would have a tie with an insurance company?

Mr Garnett—I cannot give you the number off the top of my head, but there are a number who specifically use designated rehab providers for all of their injured workers.

CHAIR—Are you suggesting that there is some sort of link?

Mr Garnett—From my point of view, the rehab provider should be there for the injured worker to help them to get back with that particular employer and if, for whatever reason, that cannot happen, to actively help them to find employment elsewhere. I think that sometimes the rehab providers have a difficulty in understanding who their real client is, and that is a problem.

CHAIR—I think Mr Bevis put it very well when he asked, 'Who are you acting for? Who is your client?'

Mr Garnett—That is right. From my point of view, it should be the injured worker.

CHAIR—Are there any other matters that you would like to raise or points that you would like to bring out now before we close?

Mr Burt—I would like to make two points. The first one relates to the cost-shifting issue that the committee seems to be concerned about. This goes beyond the committee's terms of reference, but we are about to witness wholesale cost shifting onto the federal system as a result of the heads of Treasury recommendations with respect to public liability insurance and medical indemnity insurance—Senator Coonan's committee.

If the Ipp recommendations for uniformity of approach to the laws of negligence—with capping of damages and so forth—are implemented by the states, people who are currently being compensated through public liability and medical indemnity claims will come onto the common law system through social welfare and through the Health Insurance Commission, because those people will not be able to access entitlements to compensation through the common law system. That is the first point.

The second point relates to no win, no fee agreements. I simply want to say what they are because there seems to be such a level of misunderstanding about them. The first point I would like to make in relation to no win, no fee is that the lawyer does not get a share of the damages, which seems to be the most common misunderstanding. In Victoria, such agreements are regulated by the government under the Legal Practice Act. The arrangements work on the following basis: if a lawyer takes on a case for an injured person, and that injured person succeeds in obtaining a lump sum of compensation, the lawyer is entitled to be paid. The lawyer

will be paid according to the court scale of costs. For taking on the risk that the lawyer will not be paid if the claim is unsuccessful, the lawyer is entitled to charge the client up to a maximum of 25 per cent of the legal costs incurred—that is, not 25 per cent of the damages but 25 per cent of the legal costs. By way of example, if the legal costs were $10,000, the lawyer is entitled to charge an additional $2,500 for taking the risk that, if the claim is unsuccessful, the lawyer will not get paid the $10,000.

CHAIR—With regard to the cost shifting you assert that, with public liability and medical indemnity, people will have no access to lump sum payouts. Is that what you are saying?

Mr Burt—What will happen is that, in almost every state—certainly in New South Wales and Queensland and, to a limited extent, in Victoria, where we will need to wait until after the election to find out exactly what will happen—there are laws, either passed or proposed, that will impose restrictions on the recovery of damages by injured people. Those restrictions will work in such a way that people injured through the fault of another person who is insured will not be able to recover those losses against the person at fault, and they will then seek their compensation where it is available. And where it is available, unfortunately for the Commonwealth, is through the social security system or through the Health Insurance Commission, which is Medicare.

CHAIR—I am not trying to argue with you; I am simply trying to get to what it is that you are saying. My understanding is that the costs of medical care and a proportion of living costs would be paid, but what is being spoken about with regard to the Ipp recommendations is—forgive me if my terminology is not correct—compensation for trauma, and pain and suffering. Without putting any judgment on all of that, people will still have their ongoing medical costs met and, presumably, will also have some ability to meet their daily expenses. I would have thought, therefore, that they would be above the threshold for social security.

Mr Burt—I would like to pose this question: somebody has had their medical costs paid by Medicare or the Health Insurance Commission, has been off work for four weeks and has received social welfare benefits during that time. They then seek legal advice along the lines of 'Can I bring a claim?' and the advice is, 'Yes, you can, but you are limited because your injury isn't of such severity. You are limited to recover only your loss of income and medical expenses.' Because of the disincentives in the tort reform proposals, the defendant against whom you bring your claim does not have to pay any legal costs unless your claim is worth more than $30,000, so you will be paying for it all yourself. That person would very quickly understand that there is absolutely no benefit for that person to bring such a claim at all. It comes back to the small claims again. If you impose a disincentive to the bringing of such small claims, in effect you will have cost shifting to the Commonwealth.

CHAIR—I am trying to get to the core of what it is you are saying. You are saying that the cases for the catastrophically injured are likely to go forward and that those people will receive the appropriate payout for medical care and ongoing care, as they should. You were then referring to the small claims.

Mr Burt—Yes, again it is a question of definition. Under Queensland and New South Wales law, and what I think will happen in Victoria, claims of up to $30,000 will not, for example, attract an award of costs against the unsuccessful party. So if somebody's negligence clearly resulted in someone being injured and suffering losses worth $25,000, the negligent party would

not have to pay any legal costs at all to the successful plaintiff. If the claim were worth $30,000 to $50,000, the amount for legal costs that the negligent party would have to pay would be limited to a maximum of $2,500.

CHAIR—But in that range of $25,000 to $50,000, with the greatest of respect, these people are not catastrophically injured, are they.

Mr Burt—No.

CHAIR—They have not, thank goodness, been made quadriplegics or something of that nature. What sorts of injuries are we looking at in that range, from your experience?

Mr Burt—For example, we are talking about a woman in her 60s in a supermarket who breaks her ankle when she slips over on some spilt oil or something that has not been cleaned up properly, or an elderly woman in her 80s who fractures her hip and requires a hip replacement. The older the person is the less the order of damage will be. The other thing is that those laws will, unfortunately, impact most upon the people one would think ought to be getting the greatest protection—that is, the elderly, the non-working mothers, and children. Those people do not suffer economic loss other than medical expenses, which are covered by Medicare anyway. So all they can receive by way of compensation when they are injured is a payment for their pain, suffering and alteration to their lifestyle.

CHAIR—Looking at the question of cost shifting, which is central to the concern, an 80-year-old lady would already be on the age pension or not, and it is unlikely that the outcome of that would be that she would go onto an age pension.

Mr Burt—Yes, that is true.

CHAIR—What I am saying is that in that case there may be other questions that would arise but cost shifting is probably not one of them.

Mr Burt—Although with her medical expenditure—the cost of her medical treatment—under the current law the Health Insurance Commission would be reimbursed the amounts paid out for her medical treatment, but under the tort reform proposals the Health Insurance Commission would no longer be able to get a recovery because that person will not bring a claim for damages if their only loss that is recoverable is a loss that has already been paid by the Health Insurance Commission.

CHAIR—Are there any other points that you would like to raise, Mr Burt?

Mr Burt—No.

CHAIR—Mr Garnett?

Mr Garnett—No.

CHAIR—I would like to thank you very much for coming today and for your submission.

Committee adjourned at 1.16 p.m.