LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PUBLIC ACCOUNTS

(Reference: Annual and financial reports 2008-09)

Members:

MS C LE COUTEUR (The Chair)
MR B SMYTH (The Deputy Chair)
MR J HARGREAVES

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 1 DECEMBER 2009

Secretary to the committee:
Mr G Ryall (Ph: 6205 0142)

By authority of the Legislative Assembly for the Australian Capital Territory

APPEARANCES

Privilege statement

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Amended 21 January 2009

The committee met at 9.31 am.

Appearances:

Gallagher, Ms Katy, Deputy Chief Minister, Treasurer, Minister for Health and Minister for Industrial Relations

Chief Minister's Department
Cappie-Wood, Mr Andrew, Chief Executive
Hudson, Ms Cathy, Deputy Chief Executive, Governance, and Commissioner for Public Administration
Gotts, Mr Robert, Acting Director, Office of Industrial Relations
Brighton, Ms Megan, Senior Manager, Workers Compensation Policy, Office of Industrial Relations

ACT Insurance Authority
Fletcher, Mr John, Fund Manager, Default Insurance Fund

ACT Construction Industry and ACT Contract Cleaning Industry Long Service Leave Boards
Collins, Mr Phil, Registrar and Chief Executive Officer

THE CHAIR: Good morning, everybody, and welcome to this hearing of the public accounts committee inquiry into annual and financial reports 2008-09. Today we will be talking to the Treasurer, Ms Gallagher, about industrial relations, the default insurance fund and the occupational health and safety council. I assume that you have all read the privilege statement. Minister, do you have an opening statement?

Ms Gallagher: No thanks, chair. I did not have this area of responsibility for the period of the annual report, so I am happy to just proceed to questions.

MR SMYTH: With respect to page 23 of volume 1 of the Chief Minister's Department's annual report, what monitoring analysis has been undertaken of the regulations that the government intends to make and what feedback have you got from industry over the new regulations?

Ms Gallagher: In relation to work safety?

MR SMYTH: The work safety regulations, yes.

Mr Gotts: In putting the regulations together, we undertook considerable consultation with industry, with unions, with the Work Safety Council. We had several sessions where, first of all, they were able to provide submissions, and then we worked through them for the Work Safety Council and, as a result of that, refined and developed the regulations before they came in.

MR SMYTH: What is the process now to review them? Is the review in place, minister? Will you be looking at them over a period of time to assess their effectiveness?

Ms Gallagher: Is there a built-in review mechanism? I am sorry, Mr Smyth; I am new to this portfolio and I had my first briefing last Thursday. I have not had any approaches from industry at all over the regulations. I have not had any correspondence regarding any concern. I always think that reviews are useful, and I am happy to do so if there is a need out there. But I certainly have not had it drawn to my attention as being an issue that people want looked at more closely than it already has been.

MR SMYTH: Is there a review mechanism?

Mr Gotts: Not formally, but we constantly look at the operation of regulations and decide whether they need to be improved. We are also conscious that there is a move to national harmonisation. Should that go ahead, it would overtake the need to review those regulations because they would be replaced by national regulations. So in that sense, we are watching now how the current regulations are going and reviewing as necessary.

MR SMYTH: There was some concern from small business, particularly in the construction industry, about the level of services that would need to be provided to workers under these regulations. Were those concerns addressed in the regulations?

Mr Gotts: Yes, we think so. There were discussions with, again, all levels of industry. The thing that is most important about the regulations, in particular the consultation that is required around them, is how flexible they are. So while it does impose a requirement on all businesses to consult, regardless of how large they are, it is extremely flexible in how that consultation is undertaken. So it does not impose a very strict, formal process in situations where that is not necessary.

MR SMYTH: So if the harmonisation goes ahead, has a time frame for that been set?

Mr Gotts: All other things being equal, the time frame for that is 1 January 2012.

MR SMYTH: Would that involve amendments to our act?

Mr Gotts: That would require the ACT, and indeed all other jurisdictions, to pass the model legislation that is currently being developed by the jurisdictions in conjunction with the commonwealth.

MS PORTER: With respect to dangerous substances, we know that asbestos has been in the news a little bit lately. How is the government ensuring that adequate resources are allocated to the enforcement of asbestos regulation to ensure worker and public safety?

Ms Gallagher: Asbestos and asbestos regulation is an area that is going to continue to be an issue for our community for some years to come, as redevelopment and refurbishment are done across the city in buildings that have large amounts of asbestos. The work is currently under the portfolio responsibility of Minister Corbell, who, in response to the Pickles situation, has brought together a whole-of-government task force to review a whole range of things, including the ACT government's regulation of this area and to ensure that we are doing everything we can.

The Pickles matter is under investigation, so it is difficult to go into that matter on its own. But I think the issue that it raises—and the minister and I talked about it at the time—is that, considering it was such a serious incident, it really required the ACT government to have another long look at this. We did look at it very closely, I think in 2005, and had significant law reform done around it at that point in time. I think I was the Minister for Industrial Relations then.

The Pickles situation is such a concerning incident that it has required us to have another very serious and long, hard look at it. That is across all areas. We will look, I am sure, at the resourcing, as these reviews always do, of the regulatory agencies who look at it: ACTPLA, from a planning point of view and an approvals point of view; Health is on there; ORS; and Chief Minister's, with industrial relations. That task force will report fairly soon, next year I think, and the government will then have to respond to what that finds. But I know people are working very hard on it at the moment.

THE CHAIR: Continuing on asbestos, has the occupational health and safety council discussed that as a specific topic?

Ms Gallagher: I am sure they have. I have not been to a meeting yet, but knowing the individuals that sit on that, I would be very surprised if they have not.

THE CHAIR: What recommendations did they have?

Mr Gotts: Asbestos does come up from time to time on the OHS—it is actually now the Work Safety Council. In the meetings I have attended, I do not remember any specific recommendations from the council, but I will check with one of the other people who has been on it for a little longer than I have. No, it has come up from time to time, but not in the form of a recommendation.

Ms Hudson: We had a meeting on Friday and we did provide an update on the task force. There was a planned review for 2010 of the ACT asbestos management strategy. Even though there was not a recommendation, there was a feeling that we would be consulting them as part of that review and that perhaps then they would be making recommendations at that time, next year.

THE CHAIR: Are you thinking about how you are going to move out more into the community? Pickles obviously involved the community at Rankin Street in Campbell. Again, the people involved are not the people who think this is part of their job. This is getting a bit too broad a question.

Ms Gallagher: The people involved do not think it is part of their job: is that in relation to the role of ORS in terms of communicating?

THE CHAIR: As you said, the government is looking at asbestos again as a problem. The communications I have had about it have not been from people who were working with asbestos. In Rankin Street, it was the next-door neighbour who had to pay for the testing to be done. This is a whole-of-government issue. How is it going to improve things for the next-door neighbours of the people who have demolitions done

and asbestos found?

Mr Gotts: With regard to consultation with the community on asbestos, one of the things I should point out is that there is quite a lot of asbestos removal done around the ACT all the time; it happens quite regularly. OIR is in the process of removing asbestos from the roof of a house at the moment in Mawson. More often than not the communications with the community work successfully. In our case we sent out letters to all the surrounding houses, put notices out and so on and spoke to the schools in the vicinity and told them what was happening, so that the community were fully aware and really knew what was happening in the vicinity of that asbestos removal.

The review of the ACT's asbestos management strategy that the minister referred to will look in quite some detail at how those processes work and at the different agencies that are involved in asbestos management across the ACT. Different agencies have their own specialisations, so Health, for example, focuses on the public health aspect, ACTPLA focuses on aspects related to building, ORS focuses on those aspects that relate to a work site or a workplace, whereas we focus on the policy. So we will be looking very closely at how those agencies work together to make sure that the right agency is responding at the right time to whatever issue comes up and that the communication with the community is constructed appropriately for that kind of situation, because there are so many different kinds of asbestos-related situations that can occur. Some asbestos waste up on the slopes of Mount Ainslie requires one sort of response; in a house it requires a different sort of response.

THE CHAIR: As there are no more asbestos questions, I will move on to page 149, the default uninsured. How many claims have been made under the uninsured employer fund?

Mr Gotts: There are roughly 40-odd open claims at the moment. I will need to check with the manager of the fund to get the exact detail at this moment. It changes from time to time as places open and shut.

THE CHAIR: Obviously. Are they all from a small number of employers? Regardless of whether or not that is so, do these employers continue to operate in the ACT?

Mr Gotts: There are different reasons why a claim can fall on the DIF. In some cases it might be a very long latency issue like mesothelioma and the employer and the insurer of that employer can no longer be found; that exposure may have been 20 or 30 years ago and they simply cannot be found. In that case, the employer is certainly not still operating in the ACT. In other cases, it is an employer who, unlike the vast majority of employers, has not done the right thing. They can from time to time not have a policy, a claim goes on the DIF and they can simply close down. The DIF has considerable powers to follow up on an employer, but that is difficult if the employer is bankrupt.

THE CHAIR: In general, if the employer does not continue to exist, if one of their claims ended up—

Mr Gotts: If the employer is still in place, the DIF will want to speak very clearly to them about recovering the cost of that claim. As I said, the DIF has significant powers to recover the costs of claims. So where the employer continues to exist it is the practice of the DIF to follow up with that employer and recover the cost of the claim.

THE CHAIR: On that note, I note that only $0.2 million has actually been recovered over the last reporting period. What proportion is that of what you paid out? How much do you expect that you will recover? When you recover, do you just have to get the money back from the employer, or if they were not covered are they fined or something as well?

Mr Gotts: Some aspects of that question I will need the manager of the DIF to come and answer because they are quite detailed. On the last point you raised, there are significant powers in the legislation to recover, to fine. I will pass over to John Fletcher to answer the rest of the question.

Mr Fletcher: In terms of the amount of money that is recovered, I probably cannot answer that. I will have to take that on notice, but I can tell you that it certainly is a small proportion of the payments that we make.

THE CHAIR: In the instance where you can find the employer who should have been insured but was not, do you just try to get back the money that is owed from the insurance point of view or do you fine them or something else as well?

Mr Fletcher: In terms of the fund, our interest is in pursuing the costs of the claim, and that is really where our role ends.

Mr Gotts: It is the role of ORS to pursue a fine, which under the current arrangements can be up to three times the cost of the avoided premium.

THE CHAIR: So potentially a very significant fine. I suppose that most of the people you are talking about are about to go bankrupt anyway.

Mr Gotts: That is why the recoveries are low.

THE CHAIR: You will give us some idea of the percentage?

Mr Fletcher: I will take that on notice and let you know, yes.

MR SMYTH: On the matter of where the DIF sits, I note on page 2 of the ACTIA report that it says:

> … on 9 May 2006, the management of the Default Insurance Fund (DIF) for private Workers' Compensation was added to the General Manager's responsibilities. This function has two positions, the DIF Fund Manager and a Claims Officer …

If the insurance fund is responsible for running it, why is it reported in the Chief Minister's annual report?

Mr Gotts: The reason for that is that it was felt in 2006, I believe, to be operationally more effective to sit the operational aspects of the DIF with ACTIA—by that I mean the components that actually manage the claims—because there are like businesses there. The policy responsibility for the DIF remains with Chief Minister's Department. There is an MOU that exists between the Chief Minister's Department and ACTIA to govern the operation of the fund. The two staff that you refer to are technically CMD staff and they operate in an environment that contains similar business to the business that they do. It is an administratively effective way of doing it.

MS PORTER: In a related area, minister, why are ACT workers compensation schemes so expensive and what is the ACT government doing to curtail the cost in this area of high premiums?

MRS DUNNE: Just before that, I wanted to ask some questions about the default insurance fund.

THE CHAIR: Yes, that makes sense.

MRS DUNNE: I wanted a little advice. Mr Gotts spoke about, say, an asbestos home where the employer is long gone and the insurance is long gone. What is the general responsibility for employers for ongoing liabilities once they cease employment? If somebody is a building contractor and retires, something like that, do employers have an ongoing responsibility for undiscovered claims?

Mr Gotts: There is a risk, and the risk is held by the insurer. The employer takes out insurance, and it is known as incurred but not reported. That is where the employer may now no longer exist, but there was an insurer of risk at the time the event happened. It is the insurer that continues to carry that responsibility on behalf of the employer into the future.

MRS DUNNE: What is the statute of limitations on that?

Mr Gotts: In the case of asbestos, those claims can be 30 years old. If the insurer is still there, they bear the risk. I do not believe there is a statute of limitations.

MRS DUNNE: If there is, someone could get back to me on that?

Mr Gotts: Yes.

Ms Brighton: Technically, there is a three-year limit on lodging a claim. But the provisions regarding diseases of gradual onset that we have in the workers compensation act mean that the date of injury is the first time that a worker goes to see a doctor about the issue and the injury—that is the disease—is identified. So from that date onward, there is an opportunity for a worker to lodge a claim. Diseases of gradual onset, by their nature, are very complex in terms of the determination of liability—that is, which employer at which point in time is liable. The ACT's exposure to date has not been very significant with asbestos and related diseases.

MRS DUNNE: What I am trying to get at is, with diseases of gradual onset, for

example, you have determined that employer A was responsible when the injury occurred. They may have been complying with the law and had an insurance policy in place, but the insurance company may have departed the field, so that it is not necessarily the case that the employer is delinquent, but would that end up with the default insurer?

Mr Gotts: Not necessarily, and there are two cases in the ACT where an insurer has gone out of business, the most recent and most significant of those being HIH. There are two components to the DIF: one is to protect workers whose employers do not have policies; the other component is to protect against collapsed insurers. In that instance, that is what happens there. So the DIF steps in in the place of the insurer who has gone broke.

MRS DUNNE: In the annexed report you talk about the collapsed insurer fund, and that covers the HIH contingency, and then there is the uninsured employer fund. Are they actually separate funds?

Mr Gotts: They are.

MRS DUNNE: Why are they separate funds?

Mr Gotts: Because they are there for separate purposes. The legislation sets them up as quite distinct funds. The money does not transfer between the two funds.

MRS DUNNE: I just thought it was interesting that the default insurer is effectively running two quite separate funds?

Mr Gotts: Yes.

THE CHAIR: Mr Smyth.

MR SMYTH: On page 148, part of the role of the Insurers Advisory Committee is to advise the minister on matters relating to part 8.2 of the act. Did, in fact, the committee give the minister any advice on part 8.2 of the act?

Mr Gotts: It is difficult for me to answer that question, because the current manager of the DIF has only been in the job for a month, and the members of the advisory board do not necessarily advise me if they have given advice to the minister.

Ms Gallagher: We can follow that up, though.

MR SMYTH: The final question is: if you got advice, what did you do with it?

Ms Gallagher: I cannot speak for this reporting period, but, looking at the names there, I have worked with the Insurers Advisory Committee before in previous times as the industrial relations minister. When I have dealt with them in the past, they have usually written to me with issues that they have, and I have usually taken advice from the department on whatever they have raised with me. I just know from the people on there that I have had discussions with them in the past. I cannot speak for this reporting period, but we are happy to find out by doing a check with the former

minister's office.

MRS DUNNE: On the subject of the Insurers Advisory Committee, I notice that there is a representative from an organisation called Finity Consulting, which has also been a source of external labour, the same company. Are there problems of conflict of interest with advising and providing consultancy services?

Mr Fletcher: My understanding is that Bruce Watson is engaged as the actuary and provides actuarial advice, so he attends the committee, but, technically, he is not actually appointed to the committee.

Mr Gotts: The role of the person on the committee has been recognised. The bill that was introduced into the Assembly in November with regard to workers compensation goes to some aspects of the membership of the DIF advisory committee, and it recommends that Mr Watson no longer be a member of the DIF advisory committee and that he simply play a role as the actuarial adviser to the DIF advisory committee.

MRS DUNNE: So you have recognised that there is a potential for conflict of interest?

Mr Gotts: It just clarifies things to keep the roles very distinctly separated.

THE CHAIR: Are there any more DIF questions?

MR SMYTH: Yes. On page 189 of volume 2 in the financials, I see that for the uninsured employer fund, the net average claim size has almost doubled from 2008 to 2009. Is there a reason for that? It has gone from $87,000 to $172,000.

Mr Fletcher: I would have to take that on notice. There is such a small pool of claims within the fund that all it takes is one claim that is a high-cost claim. That tends to blow those statistics out. So I would have to take that on notice. I am happy to provide a comparison of those two financial years to provide an explanation of that.

Mr Gotts: To assist Mr Fletcher, there were two significant asbestos claims that came in in this financial year, and it is most likely that they are the cause. I think one was about $1.3 million and the other one was something like $200,000. I think they are likely to be the reason. In a small pool of claims, two large ones like that will make a big difference to the average cost.

MR SMYTH: On page 191 there is reference to asbestos. Why has the recognition of further asbestos claims made such a difference to the revenue? It was $0.6 million in 2008 and $3.4 million in 2009.

Mr Gotts: The way the fund has operated is that as costs come in, employers—

MR SMYTH: Are you upset that I have read your notes?

Ms Gallagher: No. I was just commenting that I have got a different numbered volume. Your page 191 is my page 193. You have the same page numbers as Cathy Hudson. I just wondered whether this is the minister-only copy.

Mr Gotts: To answer your question, the way that the DIF operates is that, as claims come in—and the claims can be lumpy; a large number can come in or there might be a period with no large claims—on a quarterly basis the fund has levied the insurers and, through the insurers, employers in the ACT for the cost of claims. That means that when you get a series of high claims you get a series of high levies. The model under the legislation that went through earlier this year of funding for the DIF has changed to allow it to be smoothed out more evenly to the benefit of all concerned. It will also allow insurers to report the cost of levies on the invoices that they issue to insurers. Again, that is a clarity mechanism to make sure that people know very precisely what the cost is on them, as employers, of claims on the DIF.

MR SMYTH: That is the explanation for the levies in note 6 on page 191 and the claims expenses on page 192?

Mr Gotts: Yes.

MR SMYTH: And page 194?

Ms Gallagher: Yes.

Mr Gotts: That is essentially it in note 6.

MS PORTER: Why is the ACT workers compensation scheme so expensive and what is the government doing to curtail the high cost of claims?

Mr Gotts: I will ask the workers compensation manager to answer that.

Ms Brighton: The ACT has an expensive scheme. In fact, next to South Australia, we are the most expensive scheme in the country. The key driver behind the expense in the ACT is the territory scheme's design, which is the tag which we workers comp technical people attach to how workers comp works in the ACT. An efficient and effective workers comp system strikes the right balance between cost to employers and compensation paid to the workers.

Keep in mind that that also needs to take into account the social costs of injuries in the workplace, fair compensation, access to return to work and rehabilitation. They are the elements that make a really well balanced workers comp system. The ACT does not at the moment have that. It is a scheme that is heavily litigious. Even clinical decisions about a worker's entitlement to a lump sum amount for a permanent injury have the legal community involved.

We are a small business jurisdiction. Ninety-six per cent of our policy holders are small and medium businesses. Trying to return someone to work in an environment where there are only six or 10 people employed is very difficult. We are a small jurisdiction in that the costs and overheads to run a business here, from an insurance perspective, are more significant than what they might otherwise be. There are limited economies of scale.

The compliance regime is not as effective as it could be in that, for some employers, it

is cheaper not to have a policy, run the risk of getting caught and ending up in the Magistrates Court and only getting a $200 fine. We have a disputes system whereby we are not growing in expertise in the subject matter because of the way the court allocation of time works. All of these factors contribute to our really expensive design.

We have got claim payments that are 25 per cent higher than what they might be in Queanbeyan. We have got claim payments that, on average, are 80 per cent higher than Tassie. Ten per cent of claims in the ACT account for about 80 per cent of the scheme's costs. So it is an expensive structure.

Another element is that the intended beneficiaries of our scheme—that is, the injured workers—are not the sole beneficiaries. The current structure leaves lots of opportunity for businesses to leverage off the scheme. We do not currently regulate fees. So there is opportunity for providers—health providers, legal providers, brokers, all those people who provide services in this industry—to access an opportunity that might not otherwise exist.

The ACT government in 2006 initiated an independent review of the scheme. That review, combined with the recent actuarial review of the scheme, has helped inform a range of improvements to the performance of the scheme. The first tranche of these improvements was tabled in the Assembly in November. That bill, combined with some further work, will ultimately bring about fairer premiums, better outcomes for workers and a more balanced regime in the scheme.

THE CHAIR: Have you considered making the ACT part of New South Wales or any other jurisdiction? You said one of the issues is that, as a jurisdiction, you are too small.

Ms Hudson: I might say that one of the things—and Meg might not say this herself—is that Meg has come to the ACT from New South Wales and we now have someone who has got a lot of expertise in the New South Wales scheme providing advice to us, plus the knowledge and skills to look across all jurisdictions to see what is the best that we can do here to bring about reforms and changes in this area. We are systematically going through all of what happens in other jurisdictions and what is best practice and, as Meg outlined, what is feasible and possible in the ACT and putting a number of those reform proposals or improvements to the government for consideration. As Meg mentioned, the first tranche went to the Assembly in the last sittings. The next lot will be considered by government in the new year.

THE CHAIR: Our problems are not principally related to economies, diseconomies or absence of economies of scale. The overheads are very small, in fact.

Mr Gotts: Of the jurisdictions that have workers comp schemes, Australia splits into four that are privately underwritten schemes like the ACT. They are the Northern Territory, Tasmania, Western Australia and the ACT. The other four are publicly underwritten schemes, including New South Wales. There are some differences in the nature of that scheme and the nature of this scheme.

If we look at the privately underwritten schemes, we are the most expensive by far of those underwritten schemes. However, in terms of the total amount of premiums

collected, we are actually larger than the Tasmanian scheme and we are larger than the Northern Territory scheme. But each of those schemes has a lower premium rate than we do and provides better benefits to injured workers than we do.

As Meg was outlining in her answer, a lot of this is around the scheme design. How do we put the various components together in such a way that, despite the diseconomies of scale we have in a small economy, we can achieve the outcomes that are achieved in other privately underwritten jurisdictions that are actually smaller than we are in terms of the total premium?

It is a very tricky balancing exercise, which is why we are taking it in stages. We do not want to act in one area and then find we have pushed out an element of the scheme in another area and get an adverse result. We are being very cautious about how we do it.

MRS DUNNE: Ms Brighton, you were saying that there were opportunities for people at the margins to gain access to some of the money in the scheme. Can you give us some examples of those which may not apply in comparable schemes in other jurisdictions?

Ms Brighton: If I can refer to some notes I have got that would be of use. If we look at legal providers, they are probably a good example. In the New South Wales scheme, legal providers access about eight per cent of claim payments. In the ACT, of the order of 17 per cent of all claim payments go in legal costs. That 17 per cent is of the order of $13 million. That is equated with only 10 per cent of claims, in the order of 450 claims.

MRS DUNNE: You are saying that 10 per cent of claims need legal interventions?

Ms Brighton: Ten per cent of claims drive 80 per cent of the scheme's costs. Most of those 10 per cent of claims are—

MRS DUNNE: They are the catastrophic claims?

Ms Brighton: They are not necessarily catastrophic. They are the claims that are litigated or have a heavy involvement of the legal community. There is not necessarily a correlation between the most severely injured workers and legal costs incurred.

MRS DUNNE: Part of the process is to wind back, for instance, the capacity for these matters to be litigated, finding ways to resolve matters without litigation?

Ms Brighton: In other jurisdictions, considerable work has gone into rebalancing the schemes, both in the privately and publicly underwritten schemes. Part of that is, for example, taking those clinical decisions out of courts and back into the hands of the doctors. If a worker is permanently injured, then it comes down to a panel of expert doctors who make a determination as to the quantum of that injury. A rating scale equates to the benefit the worker would then receive.

Other jurisdictions have made great savings on the evaluation of permanent impairment, which is what we have in the ACT. But we still have that one step further

that other jurisdictions do not have whereby workers have multiple assessments. They go to a lawyer, the lawyer then does an assessment, provides some advice on common law and it goes to the Magistrates Court for signing off. All of that adds considerable expense to the scheme with really no extra benefit to the worker.

THE CHAIR: You said that it was not just lawyers who were getting more money out of our scheme. I think you mentioned Allied Health Professions. Is there evidence that they are charging more for workers comp cases than they do for other cases? Is what you are basically saying?

Ms Brighton: Most other jurisdictions in the country have, after much research, pursued a path of deregulation for their medical providers and allied health providers in order to create a level playing field, provide that clarity around fee for service and the value of workers compensation to ensure that there is no gaming provided and to ensure that workers compensation gets good access to medical treatment. So we are just doing some work at the moment with the insurers to get an understanding of what is happening here in the ACT in terms of what fees insurers are providing. I am not in a position to give you any further detail at this point.

MRS DUNNE: But we do not have a schedule of fees for these?

Ms Brighton: No.

MRS DUNNE: Most other jurisdictions do?

Ms Brighton: Yes.

MRS DUNNE: Is there anyone who does not?

Ms Brighton: Not that I can tell you off the top of my head. I will have to double-check. Certainly, Victoria, New South Wales, South Australia, Tasmania all do—and Queensland is a central scheme, anyway. The government is the insurer there.

THE CHAIR: You said that this would take a period of time. Do you have any idea how long this is going to take?

Mr Gotts: The first bill related to this was introduced in November, as we said. We are anticipating the next one in the autumn session next year, but I would be loath to say precisely when. That is largely because of the time needed to be very clear about the details of the scheme. That needs more actuarial work on our part and more analysis of the other schemes, more working with stakeholders on the different options, more consultation with them on exactly the best way of approaching each of the issues that Meg has described. I can't be certain and we would rather continue progress than try to do it omnibus. We expect that there will certainly be one in the autumn. There may be one more after that. It is difficult to say.

Ms Hudson: The overriding message for all of this is that there are four themes of what we are trying to look at here: an affordable system for employers, fair treatment for injured workers, improved performance of scheme providers, and an effective governance and management regime for the scheme. Megan, Robert and the team are

effectively systematically going through all of these areas that need to be looked at with workers compensation and then putting improvements up for consideration. We will keep going until we think we have met all of those four themes.

THE CHAIR: Can you tell me more about how you do the consultation? Clearly this is a big issue.

Mr Gotts: It is. There are different forms of consultation we are going through. Some of it is required under the Workers Compensation Act, which requires us to consult the Work Safety Council. So there is the formal component of the consultation that we work through. The Work Safety Council comprises a range of stakeholders—employers, employees and technical people. Separate from that, our practice has been with the work we have done so far, to work with both employer and employee representatives starting with the general concept. So we talk about just the possibilities and then we work with them and help firm those up.

For example, in the bill that was introduced in November there are some clauses that relate to the definition of a worker for workers compensation purposes. That is a good example of the sort of consultation we did. We started out by recognising that there is a potential issue and that employers needed absolute clarity with regard to whether this person was a worker for workers compensation purposes or not. They really needed to know what side of the fence they fell on. Were they, for example, an independent contractor, in which case they did not have a responsibility for workers compensation, or were they an employee, and they did? So we started out from that position.

We then worked with different employer groups in the first instance talking about the possibilities. We looked at what happens in other jurisdictions and we worked with insurers as well. We kept refining the idea. So we did presentations for insurers and said, "These are the sorts of things we are looking at." We took feedback from them. We went to the Work Safety Council. We went to employers and employee representatives. We took feedback from them as well and that resulted in a refined position with regard to the definition of a worker for workers compensation purposes.

We would anticipate similar sorts of approaches for other components of this as we go along. I think Meg has made it clear that it is a very complex issue. It is very easy to act with all the right intentions in one area and then have an unanticipated consequence in another area. We are very concerned not to do that. That is why I was reluctant earlier to say exactly how many bills we think this would need and exactly when they would come in, because if it needs additional consultation to nut through a particular issue, then we will undertake that consultation.

I should add that it is not just insurers; we have consulted with the brokers. We talked to them about what we are doing. Everyone that has a role in the system either has been consulted or, as it gets to those elements of the system that relates to them, they will be consulted. Again, it not just consultation in the form of "this is what we are doing", but starting from "these are the ideas we are thinking about and the outcome we are trying to achieve", and working with them to narrow those down to concrete things we can put in the legislation.

MR SMYTH: The balance sheet on page 176 of volume 2 has cash and cash equivalents of $10.142 million and investments of $9.388 million. Is that related to the $19.5 million under the collapsed insurer fund or does it relate to the $10.1 million in the uninsured employer fund?

Mr Gotts: I will ask Mr Fletcher to answer that question.

MR SMYTH: Because if you have $19.5 million in cash and investments and $10.1 million in cash or cash equivalents, that is $29.6 million, but in your balance sheet you are only showing cash and investments of about $19.5 million—or is part of that held somewhere else?

Mr Fletcher: I am not sure. I might have to take that question on notice. Certainly the cash equivalents, page 176, of $10.1 million that appears in the report at page 149—I am not sure—

MR SMYTH: Although if you add 10.1 and 9.3 you get 19.5.

Mr Fletcher: Sorry, but I am not familiar enough with the financial side of the fund at this stage of my tenure in the position. I have to take that on notice. I apologise for that.

MR SMYTH: As a follow-up to that, on page 182 it says in note 2(i):

> Long-term investments for Collapsed Insurer Fund are held with the Public Trustee …

Where are the funds for the uninsured employer fund?

Mr Fletcher: I think they are held in the same area.

MR SMYTH: If you could give that your consideration, there is about $10 million floating around there somewhere.

Mr Fletcher: I will do that.

THE CHAIR: As there are no more questions, thank you very much for the first two-thirds of this hearing on industrial relations, the Default Insurance Fund and OH&S. We will now move on to the long service leave boards. Minister, do you have an opening statement on this?

Ms Gallagher: I am happy proceed to questions, thank you.

THE CHAIR: I will start with a question I started with, too early, about your investments.

Ms Gallagher: Are we looking at the cleaning report or construction?

THE CHAIR: I will find it precisely. Do you want to start, Mr Smyth?

MR SMYTH: On construction, on page 12, halfway through the paragraph, there is an issue where it says:

> … the Authority's wages and salaries expenses, including those of a long-time ACT Public Servant who was recruited to the Authority in June 2009. His substantial LSL and Annual Leave liabilities were transferred from his previous ACT Government Department to the Authority but no corresponding cash (asset) transfer took place.

Why was that?

Mr Collins: This is an issue that the board has identified. It is ACT government policy, as I understand it, that, when public servants transfer from one department to another, a cash transfer associated with their long service leave and annual leave entitlements is not transferred from one department to the other. In this case, because the authority is not funded by government, the issue becomes that the authority is essentially accepting a liability that was incurred elsewhere in a department.

MRS DUNNE: That is what happens when people have portable long service leave.

MR SMYTH: So what will happen here on, CEO of Chief Minister's Department, who is not transferring this cash to the Construction Industry Long Service Leave Board?

Mr Cappie-Wood: Given that it is long-held practice, it will continue until there is a new reform or review of this matter. Given also that we are trying to differentiate between internal within the public sector and the fact of having an external board, we just need to make sure that there is clarity around that differentiation.

MR SMYTH: So when is that likely to be resolved? I see CMD is sponsoring a study or an internal audit on this. When is that likely to be resolved?

Mr Gotts: As you correctly say, an audit was conducted of the governance arrangements between the public service and the long service leave authorities. While that audit went some way, it did more to raise questions than to answer them. The response since then was to establish a working group that comprises Treasury, CMD and the long service leave authorities. We are working through the sorts of issues you referred to in your earlier question about liabilities moving between agencies. Many of the policy aspects belong to Treasury rather than to CMD. Treasury are looking at the range of questions that have been asked, and we are working towards an answer.

MR SMYTH: Strictly speaking, the board is not a public service body, is it?

Mr Gotts: No, it is not. It employs public servants but it is not a public service body.

MR SMYTH: So from the point of view of CMD what is the way forward on this issue?

Mr Cappie-Wood: Until such time as we can continue to dig through with Treasury the implications and associations of past practice and the future arrangements and the opportunities for future arrangements, we will be bringing advice to government in

terms of what those options may be. We are looking to try and complete that fairly soon.

MR SMYTH: I note that the Solicitor-General provided legal advice. Is it possible for the committee to see a copy of that legal advice?

Ms Gallagher: We do not normally release legal advice.

MR SMYTH: Only when it suits you. The Chief Minister has released legal advice before, when it was convenient. In fact, it was quite expeditious. He got it quite early one morning in a debate over Rhodium and the Assembly had it by lunchtime.

Ms Gallagher: I am quite happy to have a look at it, but, as I understand it, we do not normally release legal advice. I think you can see that a portion of it has been released, in the quotation marks that you refer to. I am happy to take some further advice on that if it will assist the committee.

MRS DUNNE: Mr Cappie-Wood, there must be the possibility of this elsewhere, where people are employed in the ACT public service and they transfer into an agency which has statutory arrangements. Has this happened before or is this unprecedented?

Mr Cappie-Wood: It is not unprecedented, I am told. It has not happened that often, but the question of accumulated liabilities, for want of a better term, is one where we have to make sure that we have it clear in future, because we want the flexibility to be able to have people in the public service move around reasonably freely. It is one that we have to take at a policy level. Hence, whilst it is not unprecedented, we have to make sure that the policy is clear, and that is the path that we are on at the moment.

MRS DUNNE: How long do you think it will be before this matter is resolved?

Mr Cappie-Wood: In the order of at least three to four months.

Ms Hudson: Page 59 of volume 1 does indicate that we had hoped that the task would be completed by the end of December 2009.

Mr Cappie-Wood: We are taking that into the new year.

Ms Hudson: I think it will be more likely around March.

MRS DUNNE: What are the factors resulting in that sort of extension of the project?

Ms Hudson: Probably the honest answer is the workload of OIR altogether, over the last period of time, and the number of bills that have been coming forward from this area over the last three months. Robert is the chair of this working group. We need focused attention on that, and we are hoping we will be able to do that in the next few months. I understand the work has started, but it is complex.

Mr Gotts: Where it is up to at the moment is that there have been meetings of the working group, between us, the authority and Treasury. There are more meetings

between now and the end of the year. We provided Treasury a list of questions that needed to be resolved. Treasury needed some time to go away and think about those. We will continue to push it forward.

MRS DUNNE: What are the issues that need to be resolved?

Mr Gotts: Some of them are practical and they relate to the Financial Management Act and how that operates. Mr Collins is the best person to talk about those. Other issues are more broader policy issues, and they relate to the extent to which the government would have any responsibility should a portable long service leave fund fail—not that any are showing any signs of that—but essentially to understand what the ramifications would be into the future, so asking a set of policy questions that came out of the audit that was conducted and getting an answer to those.

Ms Hudson: Also, which might not appear as interesting, some of the HR issues we want to sort through as part of the governance. It is what happens sometimes. It is like that dotted line on a diagram: you really need to sort out what the dotted line means, even for approving leave or situations like that.

MRS DUNNE: What are the HR issues?

Ms Hudson: Just normal HR delegation issues that sometimes end up coming to either Robert or me. We want to clarify them. There are financial issues and there are HR issues. So it is pretty well—

MRS DUNNE: I am sure Mr Collins is not going to be approving long service leave, because he would have to pay it out!

Mr Collins: There are a number of those practical issues that Mr Gotts has alluded to—the status of public servants that work for the board, that work for the authority—and issues associated with what services the authority is required to use from the ACT government and whether the authority has any discretion to use other services.

MR SMYTH: You mentioned the audit. Is that the audit by Protiviti?

Mr Collins: Yes.

MR SMYTH: Is that document publicly available?

Ms Hudson: That is an internal audit document. We actually initiated that and wanted an internal audit to look at these governance issues.

Ms Gallagher: I have not seen it. I am having a look at it.

MR SMYTH: Is there not a little hypocrisy in this in that we have just passed legislation which says the community sector must have portable long service leave, yet we have the conflict between the ACT government and an authority where they simply do not do it? Surely what is good for the goose is good for the gander.

Mr Cappie-Wood: I think there are ways of reviewing it. How do we look at this and

is there an appropriate alignment? How do we resolve the outstanding policy and operational issues in between?

Mr Collins: Can I make the point that, as public servants working for the authority, we enjoy the same benefits as public servants in any other part of the government. All those benefits, such as long service leave and leave, are afforded to us.

MRS DUNNE: You moved from one agency to another. Was provision made when you moved? You moved from one statutory authority to another.

Mr Collins: In fact, it was a bit ironic. I moved from the department to ACTTAB. Because I was not a public servant per se in ACTTAB, I had to take my long service leave entitlement. When I moved from ACTTAB back into the department, it started again. Again, ACTTAB was a bit of an anomaly as well.

Mr Gotts: Agencies are expected to make provision for their liabilities. Your auditors recommend it. The auditors for the authority recommended that the authority make provision for its liabilities. The issue is really about understanding how to relate things between agencies rather than anything to do with the provisions for individuals.

Mr Collins: It is the transfers. Normally, when a public servant transfers from one department to another, because it is managed centrally, there is no issue. This was just a case where, because of the autonomy of the authority, it was identified as an issue.

MRS DUNNE: It is ironic that it is coming up in long service leave.

Ms Gallagher: I would imagine it is going to be resolved very quickly, whatever that may mean.

THE CHAIR: This is my third go on this. For the cleaning industry—on page 14, second paragraph—and for the construction industry—on page 15, the second paragraph also—Vanguard Investments is now the manager. For the cleaning industry, $3.5 million was transferred. For the construction industry, $39 million was transferred. My question relates to both. How was Vanguard selected? What emphasis did you put on ethical issues, in particular the ACT government's commitment to the UN's PRI?

Mr Collins: Vanguard very closely matched the profile of the investment plan as developed by the authority in conjunction with Treasury. That plan was approved by the former Treasurer in September last year. The process for the identification of Vanguard was a result of that plan. As I say, it met the profile. Vanguard was also being used by Treasury to manage an element of its portfolio.

A review of the best investment fund to manage that element of Treasury's portfolio was being undertaken at the time. We waited for the result of that review, which was completed in December last year. Vanguard was reselected as Treasury's investment fund manager for that part of its fund. We were able to leverage off Treasury's relationship with the fund to secure lower management fees. For that reason and the fact that it fitted the profile, the board selected Vanguard as its fund manager for both the construction and cleaning funds.

THE CHAIR: How, if at all, did you consider ethical issues? As I said, the ACT government has made a commitment to the UN principles for responsible investment. How were they considered in this decision?

Mr Collins: They were not specifically considered or identified by the board, but the board felt that, because Treasury was using that fund and a review, as I said, had just been undertaken and completed, it was in the best interests of the authority to use that fund which, as I say, had been selected by Treasury.

THE CHAIR: Is the authority happy with having a reasonable proportion of investments as equity investments? You have got about 26 per cent in equities. Are you happy with that?

Mr Collins: Yes, the authority is happy with that. As I say, that fits the profile of its investment plan, its investment strategy.

THE CHAIR: How did you determine your investment strategy? What criteria determined your investment strategy?

Mr Collins: An independent fund manager or financial adviser was engaged by the authority to prepare a plan, to prepare a strategy. Treasury's economic and investment branch was asked to examine that, to give their input into that. Based on that report and Treasury's comments, the board decided on that particular strategy as outlined in the report. I can go through it if you wish. The board then decided on that.

In accordance with the Financial Management Act, the board wrote to the Treasurer and requested approval for that particular investment strategy and that investment plan. As I say, that was approved by the former Treasurer in September 2008, I think. Essentially, as it is listed in the annual report, key things such as a passive management approach, a reduced percentage of equity investments and a number of other factors were taken into account in making that decision.

THE CHAIR: You are confident that there will not be any more issues in terms of negative returns? If there are, what happens to the concept of the authority's ability to pay its long service leave?

Mr Collins: I would like to say that I was confident but I do not have too much control over the financial markets. We have reduced the risk profile of our investments. Obviously we are at the mercy of the markets to a large extent. Certainly, by reducing that risk profile we have limited that downside risk.

Given the economic conditions and circumstances of the last six months or so, we are reasonably confident that we will return to normal, steady and long-term average returns which, as we have indicated in our investment strategy and our investment plan, is 3.5 per cent above CPI. Other funds, such as the future fund, have a slightly more aggressive profile. The board is very comfortable with a more conservative investment strategy. That goes to the heart of the issue. The board is not there to make a lot of money. The board is there to cover its liabilities and ensure workers' entitlements.

THE CHAIR: Given that, the obvious question is: why are you investing very conservatively? You are not there to make money.

Mr Collins: We are not there to make money like a superannuation fund or a future fund. We are there to cover liabilities. Purely relying on fixed interest and cash rates would probably be too conservative and too limiting a factor in terms of an investment return. We do need an investment return on our funds to ensure we cover our liabilities. We have adopted what is a very conservative strategy, but it is not a totally conservative strategy. Most experts in the field would certainly advocate a certain exposure to equities rather than a total cash portfolio.

MR SMYTH: On that whole issue of investment and returns, minister, I note that on page 10 it talks about the newly constituted forum. Has that occurred?

Ms Gallagher: No, it has not occurred yet. In the last week I have received letters of nominations from the different groups represented on that board.

MR SMYTH: It is to come into operation on 1 January?

Ms Gallagher: Yes. They are in the process of being finalised. I think I got the employer and the union nominations last week.

MR SMYTH: At the bottom of page 9, it talks about the existing board of the construction industry having received its three-yearly actuarial study. The study says that the levy should be increased from one per cent to 1.5 per cent of wages. Have you made a determination on that yet or are you still waiting on the—

Ms Gallagher: As I understand it, that decision has not been made. It is under review.

MR SMYTH: What is the basis for the increase of 50 per cent?

Mr Collins: The basis is the actuarial calculations and the recommendations. Certainly the time that the report was done was pretty much at the height of the financial crisis. The actuary actually did a number of scenarios, including a mild downturn, a severe downturn and a business-as-usual type of scenarios. We agreed on a mild downturn scenario. On the basis of that, the actuary recommended an increase in the levy.

Again, in accordance with the legislation, the board passed that recommendation to the former minister. The minister responded, as indicated in the report, that, given the circumstances and the change in the board of the authority from 1 January, he wanted to discuss that with the new board and not make a decision at that time.

MRS DUNNE: What are the implications for the fund of not introducing it at the time the actuary suggested, which was the beginning of this current reporting period? Has any modelling been done on the impact that will have because of the delay in introducing a change in the levy?

Mr Collins: The impact certainly did not turn out to be what the actuary had forecast.

As I say, the report was done at the height of the financial crisis. Since that time, the negative returns have turned around and we have been having positive returns certainly for the last few months.

Also, the actuary, by nature, has a very conservative approach. His recommendation was that the assets exceed the liabilities by approximately 120 per cent. While the board passed that recommendation, there was a feeling that the current coverage was sufficient and certainly sufficient in the short term, again depending on how the economic conditions turned out. As I say, with the turnaround in the investment environment, the impact has not been substantial.

MRS DUNNE: How much notice will participants in the scheme get that their premiums will go up, if they go up?

Mr Collins: The authority consulted quite widely before it made its recommendation to the minister after receiving the actuarial report. We had a number of written and verbal discussions with the employers' representatives and the key bodies. Certainly they were aware of our intention. They are aware of the situation at the moment.

Again, depending on the minister's decision, once that decision has been made, we will inform the employers and we will proceed. We will give them as much notice as we can and certainly it will be a return period of three months. That is our intention.

MRS DUNNE: What do you mean by "a return period"?

Mr Collins: The employers have to provide a return to the authority and payment every quarter.

MRS DUNNE: There has been considerable discussion about the impacts of the portable long service leave scheme in the community sector. I think there is still a level of uncertainty about how it will bed down. The bedding down period has created, so far, imponderables. I am looking for some guidance on behalf of some members of the sector.

Employers are making provision for long service leave in their own sinking funds et cetera. They have not necessarily been making provision immediately someone starts with them. The general practice is that it might be three or five years later that they start making provision in anticipation that in another five or so years someone actually will call on those funds. They increase their provision later in the piece.

My understanding—correct me if I am wrong—is that provisions that are already made will stay in those organisations' funds and only new provisions will go into the scheme. Is that right?

Mr Collins: That is correct.

MRS DUNNE: If the company's or the organisation's practice is that they start making provision after they have had someone on their books for five years, now they have to start making provision from day one. If they have had someone on their books for, say, two or three years, when the scheme comes into operation on 1 July they will

have to start making provision for those people between their starting date and when they normally make provision. Where does that money go?

Mr Collins: From 1 July, the first payment or return is due in October. That will be for the period from July to September. They all have to make a payment based on the percentage of wages for that period. As you say, the period prior to that is a matter for the employer.

MRS DUNNE: There will be people for whom they have not started to make provision because it had not been their employment practice to do so. What is going to happen with that backlog? Say someone has been on the books for three years and the normal company practice is not to start making provision until they have been there for five years, what happens to that backlog of provisioning?

Mr Collins: What happens is that if that person serves another two years with that employer within the scheme so that he has a five-year entitlement which straddles the start of the scheme, he is then able to make a claim. The claim is made on the employer. The employer has to pay for the three years prior to the start of the scheme and pays for the two years after the start of the scheme and the authority reimburses them for that two-year period after the start of the scheme. They have to find the money, as they would normally even if the scheme had not started.

MRS DUNNE: The scheme brings forward the time of the entitlement?

Mr Collins: No, it does not. The scheme only brings forward the time limit to after five years. If the person who is currently employed and has been with that employer, if their agreement is based on the 1976 act, the normal act, they are entitled to a benefit after seven years. Whether that seven years is six years before the start of the scheme and one year after or one year before the scheme and six years after is immaterial. The entitlement is there.

MRS DUNNE: If somebody starts employment on 1 July, they have a five-year entitlement?

Mr Collins: They have an entitlement under the scheme after five years.

MRS DUNNE: But the people who are continuing continue their current entitlement?

Mr Collins: That is right, under the 1976 act or EBA or similar industrial instrument under which they are employed.

MRS DUNNE: Say someone has been employed for three years and has an expectation of an entitlement after seven years but the employer has not started making that provision, what happens in that situation on day one of the scheme?

Mr Collins: Essentially nothing.

MRS DUNNE: They have to start making a provision and the first payment three months later for that person, even though that normally was not their practice?

Mr Collins: That is right.

MRS DUNNE: What they do about the three years is up to them, so long as they work that out?

Mr Collins: Yes. They will have to find that money if and when the employee serves the required amount of service and then makes a claim.

MRS DUNNE: They are responsible for the first three years of provisioning and they must commence provisioning three months after the commencement of the scheme, irrespective of how long that person has worked for them?

Mr Collins: That is correct.

Ms Gallagher: That is a change.

MRS DUNNE: Let me see whether I can get this perfectly clear. The provisioning for the three years that they may have already been employed goes to their fund, not the portable fund?

Mr Collins: That is right. They retain that liability. Obviously if they had been putting money away, they retain that asset or that money.

Can I add that I have attempted to explain all this in a couple of spreadsheets that I provided to the employers. We had a meeting some time ago, before the passage of the legislation. I did have a couple of spreadsheets to try to explain this. We also explained it in written form in an attributes of the scheme document. We have certainly tried to convey the requirements to the employers.

I accept that it is perhaps not an easy concept to easily grasp but that is what we have tried to do. Certainly I followed up on that meeting that we had. There were a couple of questions that I had to take on notice. Again, I have provided the employers with information in relation to those two questions.

MRS DUNNE: Thank you for that. I do appreciate it. It is complex. There are lots of small organisations. I am particularly mindful of community-based childcare centres which are run by parent boards and things like that. What work is going to be done to ensure that these organisations are up to speed and are able to make their provisioning in advance of the scheme coming into operation?

Ms Gallagher: I can start the answer. I met with ACTCOSS in the last 10 days or so, the last week and a half, and with the representative of a large community service. We are committed to do whatever it takes in terms of further information, consultation. ACTCOSS are very keen to work with all of their member organisations. We did discuss community-based childcare, particularly those small parent-run committees. There are still a few around. A few have recently changed and come under the auspices of the larger community provider, based on all the different requirements of modern day childcare.

MRS DUNNE: But there are still quite a few?

Ms Gallagher: Exactly. There are still a number. We are going to work directly with them to ensure that, by the time the scheme comes into operation, everyone is fully informed. The childcare sector has been very strong, particularly the community-based childcare sector, about seeing this change introduced. There was actually a recommendation from the community sector to the government to introduce this scheme. It has taken years of consultation.

I accept that it is very difficult to get an understood message to everybody because of the nature of the industry. Employers change and employees change all the time. It is hard but we will keep working away at it. This was a recommendation of the 2004 community sector task force. I think it was 2004. It may have been later; it may have been 2005. It is something that we have been working on for years.

THE CHAIR: I have a question which you could take on notice. Are there any other questions? No. On that note, I thank the minister and all your colleagues for your attendance. I declare this meeting closed.

The committee adjourned at 11 am.