LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PUBLIC ACCOUNTS

(Reference: Annual and financial reports 2009-2010)

Members:

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

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 9 NOVEMBER 2010

Secretary to the committee:
Ms A Cullen (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 9.33 am.

Appearances:

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

Chief Minister's Department
Brighton, Ms Meg, Senior Manager, Office of Industrial Relations
Hudson, Ms Catherine, Deputy Chief Executive, Governance Division
Centenera, Ms Liesl, Director, Office of Industrial Relations
McAlary, Mr Luke, Director, Public Sector Management Group

Default Insurance Fund
Fletcher, Mr John, General Manager

ACT Long Service Leave Authority
Collins, Mr Phil, Registrar

THE CHAIR: I formally declare this public hearing of the Standing Committee on Public Accounts into the 2009-10 annual reports open. Today the committee is examining the 2009-10 annual report of the Chief Minister's Department with regard to the industrial relations portfolio, including the annual reports of the Work Safety Council and the Default Insurance Fund, and will conclude with the 2009-10 annual report of the Long Service Leave Authority.

On behalf of the committee, I would like to thank the minister and all the relevant departmental and agency officials who are here today. Can I remind witnesses of the protections and obligations afforded by the parliamentary privilege card. I draw your attention to it. For the record, can you please confirm that you understand the privileges implication statement?

Ms Gallagher: Yes.

Ms Hudson: Yes.

THE CHAIR: Before we proceed to questions, minister, do you have an opening statement?

Ms Gallagher: No, thank you. I am happy, in the short time available, to go straight to questions.

THE CHAIR: In that case, on page 26, there is reference to "Respond to the Review of the Workers' Compensation Scheme". Presumably that is what led to the exposure draft which has just been released. On what basis did the Office of Industrial Relations first propose introducing a 15 per cent permanent impairment threshold in the workers compensation scheme?

Ms Gallagher: Ms Brighton has been leading this work for the government. In regard to the 15 per cent permanent impairment threshold, we are currently consulting on

matters around that exposure draft of that bill. I should say that the review of the workers compensation scheme has been more comprehensive than that. That is the next stage of work. The first pieces of work covered under that review have already been done and have passed through the Assembly. They primarily go to reducing red tape and lifting some of the administrative burden on employers, to improve the efficiency of the scheme.

The second part is the part we are looking at now, around the structure of the scheme itself, with a view to trying to ease some of the pressure on premiums and improve the access to entitlements for workers covered under the scheme. We think there is an imbalance at the moment. A focus on rehabilitation and return to work versus access to lump sum payments, versus access to payments to other stakeholders, has been significantly contributing to that imbalance. The exposure draft simply seeks to equalise that a little more. We are not doing anything that anyone else has not already done in this area.

I accept that it is controversial, particularly to plaintiff lawyers and to some unions. We are currently working through those concerns with them before finalising the bill for introduction to the Assembly.

THE CHAIR: How did you work out the 15 per cent as distinct from—

Ms Gallagher: Say, 10 per cent or eight per cent or nought per cent?

THE CHAIR: I am not quite sure what evidence you have to suggest that 15 per cent is appropriate.

Ms Brighton: As part of the body of work, when we were looking at increasing the scope and number of injuries that could be compensable within the statutory framework, in tandem with that, we looked at the common law regime. Across the country, jurisdictions either have no access to common law whatsoever or they have thresholds in place. We arrived at 15 per cent, as 15 per cent is the lowest in the country, with the exception of the Comcare scheme. The Comcare scheme, though, does not allow payments of statutory lump sums if you have got a whole personal impairment of less than 10 per cent.

What this scheme is proposing is that, if you have a whole person impairment of one per cent or more, you get access to a statutory lump sum and, in addition, if you have got 15 per cent or more whole person impairment, you would maintain access to common law. So 15 per cent, from a workers compensation scheme, is the lowest in the country for accessing common law. That is one of the key drivers.

THE CHAIR: You were talking about encouraging people to go back to work. Is that principally related to the amount of compensation they get or is it related more to the care they are given in rehabilitation? I was wondering what evidence you have got that changing this is actually going to get people back to work, vis-a-vis other things like—

Ms Gallagher: There is well established evidence to show that, the longer you stay off work, the harder it is to return to work. I think there are views around the workers

compensation arena in the ACT about people being encouraged not to return to work in order to maximise the potential payment they would get under the workers compensation scheme.

We know also, from evidence that has been collected over the years—and it is not easily shared because insurers collect this information and do not necessarily share it with everybody—people who receive lump sum payments, with no other support, are more likely to find it very difficult to get back into the workforce than if they had a daily or weekly monitoring of their condition, with the emphasis on rehabilitation and recovery and getting fit for work, as opposed to "here's $60,000 for your damaged shoulder; see you later". I think there is well established evidence around that.

We feel that the scheme is not necessarily focusing on that to the degree that we would want it to. I think there are examples where we see the opportunity of a large lump sum payment maybe disproportionate to the injury and not focusing on actually recovering that injury and getting those people back to work, which is what the scheme is about. The scheme is there as a workers compensation scheme.

The principle in the act is to encourage rehabilitation and return to work. We do not want anyone on long-term leave. The longer they are on leave, the harder it is to get back to work. This is the discussion we are certainly having with the insurers and the lawyers around what we are trying to do here. We are not trying to reduce anyone's entitlement. We are actually trying to increase the payments going to injured workers but provide some balance and some controls over a small number of very high-cost claims that are skewing the scheme overall.

When you look at the scheme, I think there are roughly 5,000 claims a year. And 4½ thousand are dealt with very quickly through the statutory process without a problem. The pressure comes—the pressure on premiums and, I think, on the scheme's performance overall—from 450 claims per year. They are the ones we are trying to manage through this legislative reform. I accept that there is some disagreement around that. We are trying to work through that with those stakeholders.

There is also furious agreement from a range of other stakeholders around these changes. Obviously, business sees them as very positive. The insurers see them as very positive. The plaintiff lawyers are less happy. Some of the unions have some concerns, which we are trying to talk to them about.

THE CHAIR: What consultation did you do in 2009-10 on this issue?

Ms Gallagher: On the threshold issue or on the compensation—

THE CHAIR: Specifically on the threshold but about the whole range of changes. In the last year that you are reporting on, did consultations take place?

Ms Brighton: We have been discussing with the Work Safety Council a range of improvements to workers compensation in the last year. We had a body of bills go through the Assembly that reflected that consultation. The body of work on consultation on common law and these changes that are designed to restore the

balance to the scheme—and that balance between fair compensation to workers and affordable premiums for employers—has been happening this year. It commenced with the release of an exposure draft bill.

THE CHAIR: When you say "this year", what sort of time frame do you mean?

Ms Hudson: In terms of the financial year, the Work Safety Council, the usual body that we would consult with, were not formed at the time that we were ready to consult. They had their first meeting on 22 October, and we were ready for that consultation at around the start of this financial year. We had other plenary sessions with some of those key stakeholders and consultation through those mechanisms.

Ms Gallagher: These are not new issues. The Work Safety Council and its forebears under different names have been lobbying governments and responding to discussions around workers compensation for years. These are not new issues. With respect to the CTP, which is looking at similar changes, I held a meeting with all of the stakeholders—I cannot recall when; maybe three months ago—to put these concepts in broad across the table, and we mentioned workers compensation at the time. We got a good feeling then, from what people were thinking. The insurers liked it; business liked it; unions did not like it and neither did plaintiff lawyers. And they were all around the table.

THE CHAIR: As you have just mentioned CTP, is one of the drivers behind this trying to align thresholds with CTP and workers comp? Is it coincidental or is that the plan?

Ms Gallagher: No, there are some synergies.

THE CHAIR: Who is driving the changes?

Ms Gallagher: I think the pressure is the same in both schemes. The pressure is on premiums. The focus is not necessarily on return to work or return to health in relation to CTP, and this is an attempt to balance that out.

MR HARGREAVES: Minister, I am interested in knowing the influence, if you like, of any possible inconsistency between the regime in New South Wales and here, particularly in relation to companies who have jobs on both sides of the border, using the same employee to produce the work on both sides of the border. If there is an inconsistency with New South Wales, what is it, and how consistent with New South Wales will we be at the end of the day?

Ms Brighton: New South Wales and the ACT do share model law provisions which are designed to protect employers and provide certainty to workers about what jurisdictions they are covered in. Those laws have been in place for a number of years and there has been a growing body of case law. Through negotiations between Chief Minister's Department and WorkCover New South Wales earlier this year, they have instructed insurers in New South Wales to follow the case law in the application of those legal provisions, like the ACT insurers already do. So what we have now is a much greater alignment with how that legislation is interpreted and over time we should see greater clarity for employers.

The heads of workers compensation have just recently agreed to the updating and release of new guidance material to accompany the interpretation of those legal provisions. The ACT is leading in the production of that material and once that is available to employers that will provide much greater clarity and certainty about where coverage should be taken.

MR HARGREAVES: My understanding—and please correct this because I suspect it needs correcting—is that generally across New South Wales, not only just across the border, it is about a capped scheme and we operate under a common law principle here. Is there a conflict? Clearly, there is a conflict between the two; otherwise you would not be producing the legislation. But what will be the impact if it does not go?

Ms Brighton: The ACT proposal is quite different from New South Wales. What we have at the moment is that the ACT becomes the jurisdiction. Particularly where there is discrepancy about what jurisdiction those workers are attached to, the ACT is the jurisdiction those workers move into for coverage because of our unlimited common law environment. Where we have alignment with New South Wales, we are proposing a 15 per cent threshold, like New South Wales. But, critically, in the ACT we are proposing that workers will maintain access to unlimited common law in this jurisdiction. Unlike New South Wales, when you go into the common law regime, all you get access to is economic loss.

MR HARGREAVES: Does that mean there is no pain and suffering at all in New South Wales?

Ms Brighton: In New South Wales, there is a statutory limit on pain and suffering, and it is not compensable through the common law regime. It is an allocated amount, based on your level of injury.

MR HARGREAVES: What about the ACT then?

Ms Brighton: In the ACT scheme, if you have got a whole person impairment of 15 per cent or more, you are in unlimited common law damages, which gives you economic loss as well as pain and suffering.

MR HARGREAVES: So the issue really for those people who are a bit upset about it is just the 15 per cent and below?

Ms Brighton: With the 15 per cent and below, we are also proposing to increase the maximum statutory compensation that a worker is entitled to. The current maximum loss for a single loss is $126,000 and we are proposing to increase that to $220,000. So that is a very significant increase. And part of that significant increase is a recognition of the imposition of a threshold.

MRS DUNNE: Is it not the case, Ms Brighton, that we are actually talking about 14.99 per cent of $220,000, because once you get over 15 per cent—so it is not actually $220,000; it is 15 per cent?

Ms Brighton: Yes, 15 per cent of $220,000. And that is how it works across all the

jurisdictions in the country.

MRS DUNNE: So it is not really $220,000.

Ms Brighton: The maximum available has increased to $220,000. But if you look at New South Wales—

MRS DUNNE: But you will only get 15 per cent?

Ms Brighton: Fifteen per cent, and unlike New South Wales, where they have a very complex formula, and if you were at 14 per cent in New South Wales, you do not get 14 per cent of their maximum; you get less than 14 per cent of their maximum. So we have done a scale looking at what you would receive here in the ACT versus New South Wales, and workers at the lower end of our injury scale will be better off than they would be if they were over the border.

MR HARGREAVES: Madam Chair, this is a very complicated exercise, and I can tell by the fact that you have got knit one, purl two on your brow. Can I ask, with the minister's permission, Ms Brighton to give us an example of how that would actually play itself out, and using hypothetical numbers. Would that be possible?

Ms Brighton: If you amputated your little finger, under the new framework, you would receive five per cent whole person impairment, and that is $11,000. In New South Wales, five per cent is $6,875. So their formula is quite different in the application of their lump sums.

MRS DUNNE: If I were, say, a construction worker who amputated their little finger but in my spare time I played the violin or were in a band or—

Ms Gallagher: A neurosurgeon is one that comes up.

MRS DUNNE: No, but the thing is that I might play in a band on Saturday nights; it is not my main source of income. Do I get any compensation for the enjoyment I can no longer achieve because I have amputated my finger and I now cannot play the guitar, violin or whatever?

Ms Brighton: There are two elements to that, Mrs Dunne. Given that amputations come up quite regularly as examples, I looked at the history of amputations in this jurisdiction. I think my recollection is that in the last four years we have had something like six amputations. So in four years and roughly 16,000 injuries, we have had about six amputations. So the likelihood of that is at the absolute extreme. In terms of someone who does have an injury like that, and that is not compensable at common law, the statutory scheme still responds to that. The statutory scheme focuses on return to health, return to work. With respect to the impact of that injury, the insurers are instructed and required to work constructively to help that worker get back to the totality of life and health. So in terms of rehabilitating them back to their pre-injury state, that is what the role of the insurer is to do.

MRS DUNNE: But I would like to draw the distinction between what one does for an income and what one does in the rest of one's life. To what extent is there motivation

or any compelling feature that requires the insurer to take into account that this person may have had another life outside his or her work?

Ms Brighton: I think the Institute of Actuaries and those actuaries who are predominant in this area of workers compensation, compensation schemes and health schemes would contend that no monetary compensation in any order, regardless of the severity of the injury, would ever restore someone to the totality of life and that, in fact, the monetary compensation tends to result in worse health, worse social and worse financial outcomes for injured persons. That is some research done by PricewaterhouseCoopers a number of years ago.

MRS DUNNE: Could you provide that to the committee?

Ms Brighton: It is supported academically. The Productivity Commission report goes to that detail as well. But the statutory scheme does not provide additional compensation for one's inability to participate in activities of life. It does not provide monetary compensation directly, but it does provide an intense effort in order to restore that person to the totality of their life.

MR HARGREAVES: Can I ask you to provide a possible further example? To be quite frank, the loss of a little finger is something that most people can get over, particularly in the workplace, unless you happen to be a clarinettist. I should declare an interest. I was the director of rehabilitation at the hospital for many years; so I do know a little about this. However, I would be interested in seeing what the difference in the regimes would be in New South Wales, currently and as proposed, if a construction worker were to lose a hand.

Ms Brighton: I do not have the figures for hands, but I do have the figures for thumbs, and thumbs are more important than any other digit that you have on your hand. If you are injured in our scheme if this proposal were continued, you would have a 22 per cent whole person impairment, which is a lump sum of $48,000. Under the New South Wales scheme, it would be $35,000.

In both schemes you would get access to the common law environment. But in the New South Wales scheme you would only get access to economic loss, which is a given in our scheme because it is a statutory entitlement. In the ACT scheme under this proposal, that would move you into the common law regime where you would have access, if you chose to and if there was negligence on behalf of your employer, to pursue common law whereby you would get access to a range of damages.

MR HARGREAVES: How does that improve the current situation?

Ms Brighton: What it does to the current situation is that we have a range of workers who do not get any access to statutory lump sum entitlements because their injuries are not part of our schedule 1 table of losses. If you have arthritis as a result of your work-related injury, and that arthritis is permanent, there is no statutory compensation available to you today.

If you have a lumbar disc protrusion, there is no compensation from the statutory scheme available to you today. So the totality of the package is designed to enable

more workers with their injuries to be able to access a statutory lump sum scheme like they do across the country.

MRS DUNNE: Can I ask the minister, philosophically, why is it an either/or situation? Ms Brighton used the term before that this was restoring the balance between fair compensation and premiums. Why is it an either/or situation that you can have access to a statutory lump sum for what has been portrayed as minor impairments or access to the common law system but not both? There is a threshold where you can have access to both—

Ms Gallagher: They have both.

MRS DUNNE: No, what is being proposed is that there is a threshold after which you would have access to both, but why do we need to impose a threshold? If it is okay for a 15 per cent impairment to give you access to both, why is it not okay at 10 per cent or five per cent?

Ms Gallagher: They are exactly the questions that have been thrown up during the consultation period that we are going through at the moment.

MRS DUNNE: But you have come to a conclusion—the government has come to a conclusion. Why did it come to that conclusion?

Ms Gallagher: What we have looked at is how to increase access to the statutory scheme for a range of workers, how to increase payments under the statutory scheme for a range of workers, how to provide a little more, I guess, certainty in the scheme, to provide some pressure on premium increases and to look at how we provide a fair and reasonable workers compensation scheme.

Now, there has to be some give in that. You cannot do all of those things and continue with the way the scheme is operating at the moment because of the highly litigious nature of some of the behaviour that goes on under workers compensation. We know, and we have heard lawyers say, that access to common law is the important issue here. We know that 97 per cent of matters that are pursued through common law are settled on the steps of the court on the morning of the hearing, often for sums that the insurers will argue are completely disproportionate to the injury. They settle because of the uncertainty of what is going to come out of the potential court hearing.

What we are trying to do is put in some positives in terms of access to the scheme, access to increased payments, and provide a little more certainty in terms of some easing on premiums. The employers will talk to you at length about that. I guess also that we are trying to control some of the behaviour that we see around workers compensation. You cannot do all of that and not put some restrictions on the scheme that exists at the moment.

These are matters that I have talked at length with the department about—why is it 15; what happens to the neurosurgeon who cuts off the top a finger? We always use amputations in these examples because they are the easy ones to think through. What happens to someone who is seen as having only a five per cent impairment but really for them it means that they cannot do their job anymore? How do other schemes deal

with those?

There are variations. In Victoria, they have another kind of layer to this, which I think is only recent. Do you want to talk about it? There is a committee that is established for these "what if" cases that are hard to manage within set parameters. There are positives and negatives with that, I think, but we have looked at this.

Ms Brighton: Victoria has a 30 per cent threshold for accessing common law but in tandem with that they have what they call a serious injury test, which is a narrative test. It looks at the impact of the injury on one's life. That was intended to capture the anomalous cases that sit just below the threshold.

Initially, that was working well in Victoria but what they have found in recent times is that injuries at that lower end of the impairment scale are starting to move into the common law environment. What the Productivity Commission found is that the thresholds based on these narrative tests or monetary thresholds do tend to erode over time, particularly ones on the narrative test. What they found is that they allow workers who have less serious injuries with less life impact to come into the common law regime. That would tend to erode any rigour or benefit that was brought about by the institution of a regime and a threshold in the first place.

That is what Victoria did. They have found some challenges a numbers of years on in the implementation of those provisions. The Productivity Commission in 2004 commented on the merits of such narrative tests.

Ms Gallagher: I am not saying that 15 per cent is the right number. I guess that the government has looked at a range of different parameters for workers compensation, and included in the bill is a test of 15 per cent. It is an exposure draft. My intention was to have it sit in the Assembly for a period of time and have all the discussions that we are going to have around it.

As I have said, from all the consultations I have done to date there is furious agreement around almost every aspect of the bill. The only area of disagreement is the 15 per cent impairment and the lawyers—plaintiff lawyers, I should say—do not like the clamp-down on advertising or the proposed changes around advertising.

MRS DUNNE: Can I just ask—

Ms Gallagher: Which bill are we talking about—the workers comp bill?

MRS DUNNE: Both.

MR HARGREAVES: There was something there about advertising and that has not really been explored. Would you like to tell us a bit more about that and then Mrs Dunne can go on with her question?

Ms Gallagher: It is an attempt to stop advertising that is essentially misleading around providing information to potential clients. I am referring to the ads that would say, "In order to access your workers compensation you must come to us," or, "In order to get the most out of workers compensation, come and see us." Because of the

statutory scheme, there is an element there that is misleading—that you must go to a lawyer in order to get your workers compensation. That is not true.

The lawyers have some views around that as well. I have said to them that that is not a do or die issue for us. It never has been. It is something that other jurisdictions are looking at. I have seen those ads. They are mostly on about 11.30 at night on the new TV channels but they are there. They do exist. We think some modification around some of the language might be required—not stopping them from advertising, just stopping them from saying those statements that would lead you to believe that you have to retain a lawyer.

MRS DUNNE: Last year at the 12th accident compensation seminar in Melbourne, you, Ms Brighton, gave a presentation. According to what I have been told, the presentation started with a discussion about what the workers compensation market looked like in the ACT at the moment, and it covered issues about the number of insurers, the fact that the lost time claims were stable, that the average claim size was stable, that the claim frequency was stable, and that over the last five years we had seen a three to 10 per cent reduction in premiums. What has changed between November 2009 and now that we need to have this change of policy?

Ms Brighton: All that is correct, and all that is still correct. We have seen premiums dropping in this jurisdiction over that last few years. The ACT has the highest premiums in the country, second only to South Australia—and that scheme is in financial crisis—despite those drops over the last few years. The core driver behind those high costs of premiums is what us technical folk would call the scheme design. It is that balance between the compensation environment and the affordability of premiums. In the current regime that we have, that is a key driver.

This proposal would bring about further reduced premiums for ACT employers, as well as maintaining compensation for workers and increasing access for a whole range of workers in the statutory framework.

MRS DUNNE: You say that we have got the second highest premiums. I saw a figure quoted in the letters page recently, somewhere like that, that said that our premiums were 0.5 per cent higher than the national average. That figure has been repeated to me a number of times recently. I was told that the ACT government had provided that figure. What is the differential in premiums between the ACT and other jurisdictions?

Ms Brighton: We can give you averages between the jurisdictions, but an average is only an average. If I give you a few industry samples, that might be a good idea. If you look at housing construction, here in the ACT the average price that someone in the housing construction industry would pay would be 7.55 per cent. If you are based in Queanbeyan, you are paying five per cent, and if you are in Western Australia—another privately underwritten jurisdiction—you are paying one per cent.

If you are in childcare services, you are paying, on average, 3.6 per cent here in the ACT. If you are based in Queanbeyan you are paying 2.45 per cent, and if you are in Western Australia you are paying, 1.71 per cent.

MRS DUNNE: What is the difference between the ACT and Western Australia?

Ms Brighton: It is the design of our scheme. That is showing that in a commercially privately underwritten jurisdiction, the capacity to drive premiums lower is much greater than schemes like Victoria or New South Wales have, where the government pays the insurer to offer products.

MRS DUNNE: We have a privately underwritten scheme here, so what are the material differences between the ACT and other privately underwritten jurisdictions?

Ms Brighton: The ACT is the only privately underwritten jurisdiction in the country with unlimited access to common law. It is the only privately underwritten jurisdiction that limits the types of injuries compensable through the statutory scheme. It is a jurisdiction that does not cut workers off from statutory benefits when they are not back at work. So they are some of the key things. But the Western Australian system has limited access to common law. It has a slightly higher threshold than what we are proposing, and it is a scheme that has a very intense focus on making sure it has got the right balance between the compensation of workers and affordability of premiums. Fundamentally, they are the key differences.

MRS DUNNE: How does it achieve that balance?

Ms Brighton: It is the statutory framework that drives that, which is the common law—

MRS DUNNE: What are the factors that drive it down?

Ms Brighton: Fundamentally, the first port of call is the statutory framework. It is about how common law is dealt with, and it is about the access to benefits. The second element to that is about the licence regime for insurance companies, and then the third element is the regulation of the scheme. Fundamentally, the first and most important driver behind their scheme's performance is their statutory framework.

MRS DUNNE: Taking the hypothetical construction worker—my conflict of interest is that I have construction workers in my family—how would a construction worker or a childcare worker—childcare is a big employer in the ACT—be treated differently under the proposed ACT scheme and, say, the Western Australian scheme? How would their benefits differ? Are we actually comparing apples with apples? Do people in Western Australia get cut off from benefits after a particular period of time?

Ms Brighton: South Australia is the only jurisdiction in the country where they have a maximum benefit available. I cannot quite recall what that maximum is, but it is pretty significant in terms of the quantum. They look at the quantum of medical benefits a worker receives and the quantum of weekly benefits a worker receives. But at the fundamental level, the scheme under our proposal and the WA scheme in operation now are fundamentally similar.

THE CHAIR: So is WA an economy-of-scale thing, if they are fundamentally similar?

Ms Gallagher: No, because we do not have the WA scheme.

THE CHAIR: No.

Ms Gallagher: The WA scheme has got thresholds in place. We do not have them, so that is a difference.

MRS DUNNE: Ms Brighton just said that what we have got now and what WA have are fundamentally the same.

Ms Gallagher: No, the proposal—what the proposed bill sets out.

THE CHAIR: Does that mean you expect that we will be down to the Western Australian level of insurance premiums?

Ms Brighton: Over time, if this proposal in its totality is able to be accepted and supported, that, combined with further efforts by both the regulator and the Chief Minister's Department will continue to drive down rates. Whether we will be at one per cent—

MRS DUNNE: Will it drive down benefits to people?

Ms Brighton: No, we are proposing to increase the statutory lump sums available to injured workers.

MRS DUNNE: Yes, but at the same time the proposal is to close off courses of action for particular classes of people. So if you do not meet a threshold, you cannot go down that path. Are you asking us to legislate a set of rights which people in time may not thank us for? These are the questions that we have to ask.

Ms Gallagher: Of the 5,000 claims, 450 would fall into this category which would be affected, of which 80 per cent would be referred through the statutory scheme as opposed to access to common law. Therefore, potentially, hypothetically, some of those cases would not receive on the doorsteps of the court payments that they are getting now, which are lump sum payments—"Go away. See you later. We don't want anything more to do with you. That's the payment you get, and good luck with how you return to work."

That is what is happening at the moment for those people. Yes, this is the difficult discussion that this jurisdiction is going to struggle with now which other jurisdictions moved on back in early 2002-03. We chose not to follow this path at that point in time, but we did say we would monitor the scheme's performance over that period of time before making any other changes. That is what we are doing.

This is the second tranche in relation to reforms. There are more reforms coming. We have cut red tape. This proposes some changes to the design and structure of the scheme, then there will be further changes around making sure all the players in the workers compensation scheme are appropriately monitored and regulated.

THE CHAIR: Do I take it that most of the possible savings are going to come from benefits not paid to people rather than from savings in admin or legal fees? It sounds

like your potential savings are quite significant.

Ms Gallagher: Yes, in short. It changes. It is trying to equalise across the spectrum what is happening now, where we have a number—I say this in general—of relatively minor injuries for which people are getting very large lump sum payments versus extending access and upping statutory entitlements. We are trying to balance that out so that more workers across the spectrum get more, as opposed to a difficult handful of people who are getting large settlements comparative to the nature of the injuries, which is skewing the scheme.

THE CHAIR: I asked about admin and legal fees. You do not think those are significant? It is the quantum of benefits—

Ms Gallagher: Legal fees for insurers and for workers are a big part of the cost of this scheme. None of those fees are going to injured workers, so, yes, reducing the number of cases that actually go to the courts will have a reduction in terms of fees that are paid to lawyers to resolve these claims. Yes, that is part of it. I think that has to be seen as part of the concern around these changes. There are lawyers in this town making a lot of money out of workers compensation. This seeks to rebalance some of that. There is obviously some concern about that.

THE CHAIR: I take it from your answers that, in terms of working out the quantum of savings, lawyers' fees are pretty minor; it is mainly in benefits that you are expecting—

Ms Gallagher: No, they are not minor. I do not think they are minor at all.

Ms Brighton: The key savings that will come from this body of work are that, in every premium written in this town, the insurers have to take into consideration the unlimited common law environment. No matter what your claims experience as an employer has been, inherent in how your premium is written is a factor for that common law environment. That is a key element that, on a class of claims, will disappear in the future. In terms of how insurers write their business, they incorporate the risk profile into every single premium that is written here in the ACT. So that disappears.

The other costs that change are legal costs, which will decrease. We take claims out of a dispute environment in a common law regime and return them to a statutory scheme in tandem with new, alternative dispute resolution mechanisms which require compulsory pre-hearing settlement conferences and pre-hearing offers. We take these matters away from the steps of the court to a clear and constructive environment where the parties are required to make true and valid offers, and not string it out to the steps of the court. That in itself will shorten the exposure that workers have to the court environment, and that will also reduce fees.

If workers do not end up in that space of common law, no legal costs should be incurred. If legal costs are incurred, they are at a much lower level than what they are today. This is not the court making a determination on the impact of injuries and the compensation. This is negotiation between parties working out the level of compensation.

MRS DUNNE: What is to stop you doing that without limiting people's access to common law? What is to stop you putting in mediation mechanisms and still give people access to common law?

Ms Gallagher: What is the incentive, though, Vicki? In a way, we have got that now. We have got a statutory scheme which can deal with all cases, if you wanted, and we have got unlimited access to common law. By far the majority go through the statutory scheme, but we would say that the 450-odd that do not and access common law could be dealt with in the statutory scheme, but they are not because there is a choice. There is also the potential for large lump sum payments to be won on the steps of the court on the day. Some 97 per cent of them do not actually get to court. It is not the court determining the payments.

MRS DUNNE: Why do people settle on the steps?

THE CHAIR: Mrs Dunne, I think we need to move on to another issue.

Ms Gallagher: The insurers will tell you that they settle because of the uncertainty of what will come out of the court process. It is the nature of our courts that insurers see them as very generous. So they would rather cut their losses on the steps of the court, if every other attempt has failed. The representatives of the injured workers know that and use that to their own advantage. Of course, the lawyers will have a different view about why that happens. They will say it is a good outcome for their clients, and that may well be the case, in terms of access to lump sum payments. In terms of a good outcome for their clients in returning to work, I would question that, because I do not think the focus on lump sum payments is around a return to work. You lose that somewhere.

THE CHAIR: Mr Smyth.

MR SMYTH: In relation to the annual report itself, there is no data as to the progress of the claims. How many claims did we have in the financial year represented by the annual report? How many of them initially sought access to common law, and how many went through the courts?

Ms Centenera: The reason why that data is not in the annual report is that it is not ours; it is insurer data. In doing this body of work around the amendments that were in the exposure draft, we have sought statistics from the insurers on an in-confidence basis. Some of it is publicly available. Some of it is collected by the Office of Regulatory Services as part of their workers compensation function. But the reason why it is not recorded in the annual report—to go back to your question—is that it is not our data to tell. It is in the various insurer data, and I believe the—

MR SMYTH: But we do collect that data with private information removed.

Ms Centenera: Through the Office of Regulatory Services, and they do a report on the state of workers compensation, and that data is available through them. Given that we are not the regulator as well—we operate in the policy space—that is the appropriate place for that data to be reported. It would not be done as part of a

policy—

MRS DUNNE: So we should ask the Office of Regulatory Services for that information?

Ms Centenera: Yes. They do it once yearly or twice yearly—

MR SMYTH: I just make the point that in regard to when you review the workers compensation scheme, surely that data is part of it. The number of claims, whether they are going up or down, must drive the policy. If it based on what is actually happening rather than ideology, it is not unreasonable to expect that data.

Just on a different topic, I notice in the grants section that UnionsACT got $98,000. That is on page 147, volume 1, Chief Minister's Department, annual report 2009-10. There was a grant of $94,636. I assume that is a grant, or did that go through some sort of process?

Ms Gallagher: This is an ongoing initiative that was funded several years ago.

MR SMYTH: How is it decided who is best to deliver safety liaison and education in the OH&S space?

Ms Gallagher: I have a feeling it came through a budget process a number of years ago. It is through the way that all of these things get determined.

MR SMYTH: How is that accounted for? What does UnionsACT do to earn this money?

Ms Centenera: UnionsACT each quarter provide a statement of activity where they say what they have done, who they have visited, what types of seminars they held, what types of advice and assistance they gave. That is provided with the invoice every quarter to the office.

MR SMYTH: What assessment is made of the effectiveness of that work?

Ms Centenera: Through the Work Safety Council there is a report back. Business groups as well as other members of the council give an indication of what impact that is having anecdotally. In terms of metrics, apart from attendance—

Ms Gallagher: There have not been any complaints.

MR SMYTH: I am sure. If I was getting $94,000, I would not be complaining either.

Ms Gallagher: It is not a lot of money when you think about it. It is less than one officer.

MR SMYTH: What review is made, minister, of the effectiveness of this ongoing program?

Ms Gallagher: It is the same as any other grant from the government to a community

organisation.

MR SMYTH: So can you table your review of the effectiveness?

Ms Gallagher: We do not review every grant to every community organisation, Brendan.

MR SMYTH: Well, it is the only grant in this class. It is the only grant that industrial relations policy makes.

Ms Gallagher: But if you look across government, we do not make every organisation that receives a small amount of money from government respond.

MR SMYTH: So it has never been reviewed?

Ms Gallagher: I have a feeling it has been in operation for three years—probably around three years. We will have to check that.

MR SMYTH: So how effective is it, minister?

Ms Gallagher: From my dealings with UnionsACT, it is very effective.

MR SMYTH: I am sure UnionsACT think it is effective but how much effect—

Ms Gallagher: But OH&S education and training is effective for everybody. It actually serves a purpose for industry, workers and unions in a cooperative kind of arrangement.

MR SMYTH: That is fine, but any organisation could provide that. How effective is the work that is being done? Have you ever measured whether or not it is value for money for the taxpayer of the ACT?

Ms Gallagher: I do not think there has been a specific review of this program.

MR SMYTH: Will you undertake such a review?

Ms Gallagher: I will have a look at it. As I said, there have been no complaints about it. All I have heard is good things around it, but I will ask around town again about what people—

THE CHAIR: Mrs Dunne?

Ms Gallagher: They did a lot of work on the national harmonisation of OH&S.

MRS DUNNE: I am glad you mentioned that.

MR SMYTH: On the national harmonisation, is New South Wales about to derail the national harmonisation?

Ms Gallagher: I do not know if there is one in my diary for workplace relations

ministers to meet this year, is there?

Ms Centenera: There is a tentative date.

Ms Gallagher: A tentative date. From my understanding and from discussions with other ministers, everyone remains committed to the national scheme. Obviously, New South Wales are negotiating or talking with the commonwealth about a couple of matters. Hopefully, there will be a resolution to that. That is not really in my scope to manage.

MR SMYTH: But it will not be a national scheme if New South Wales does not participate.

Ms Gallagher: It is like national health reform without WA, isn't it? You can still do it.

MR SMYTH: But it is not national. You might call it that, but that is not what it is.

Ms Gallagher: With the opportunity to come into the fold whenever you like.

MRS DUNNE: Could I revisit a question I asked you in the Assembly about harmonisation a little while ago. At the time, I referred to the comments by Mr Hargreaves. He is not here; I did not wait for him to go before I asked this question. Mr Hargreaves made some comments at about the time of the ALP national conference last year, which was in July or August, from memory, about his concerns about harmonisation. When I asked you about that in the Assembly, you said to me words to the effect that that was part of the ACT's bargaining or negotiating in putting forward the ACT's position in relation to what we wanted to see in the harmonised laws. Is it not the case that we had already agreed to harmonisation back in June last year and that Mr Hargreaves's comments at the national conference were after we all signed up to harmonisation?

Ms Gallagher: I would have to check the time line, Mrs Dunne.

MRS DUNNE: Could you?

Ms Gallagher: Yes. I think you can agree to harmonisation, and governments did agree that it would be preferable to have a national OH&S scheme for the country, and then work through the detail of that. Certainly, as minister, one of my first meetings was to tick off the last kind of detail of the harmonised scheme, which would have been when the ministerial arrangements changed. I would have to look at the timetable. I do not think there is any inconsistency with Mr Hargreaves's comments.

MRS DUNNE: What you are saying is that in May-June last year we signed up to the theory of it, but later in the year we signed up to the actuality?

Ms Gallagher: Yes, because you need to get everyone to agree that it is a good thing before you start working through the detail of that. Nothing is insurmountable in those discussions. So, yes, we agreed that a national OH&S scheme was preferable and then

we went through the work of putting together what everyone else, all jurisdictions, have got, working through areas of similarity, areas which were outside that, and they were the discussions. We did argue for third party prosecutions around the table, and were not supported by the majority. So that was defeated, and we accepted that as part of what you do towards moving to a national scheme.

THE CHAIR: Minister, you have said that you would have liked to pursue retaining private prosecutions as part of this. What work did the department do to support the ACT's position?

Ms Gallagher: There is a senior officers process, obviously, that runs alongside ministerial forums. So they would have known the ACT government's position on that and argued for it, as did Minister Hargreaves around the table at that forum. We have never had a third party prosecution that I am aware of, under our act.

THE CHAIR: What would be the situation if we did have one, given the potential changes? Between now and whenever we sign up, what would happen if one did—

Ms Gallagher: They could pursue it. It is there.

THE CHAIR: And then it would be stopped?

Ms Centenera: No, it would remain on foot, I think. Any actions started prior to the commencement of the national harmonised laws would remain on foot and would be resolved or settled or however it pans out. It would not be cut off by the commencement.

Ms Gallagher: But for new, once the harmonised laws come in—

THE CHAIR: Yes, obviously there would not be any—

Ms Gallagher: Yes, except there is access through the common law, which were the discussions we had years ago around whether to include third party prosecutions. I remember discussing this with unions, particularly, who wanted it. The fact that there had never been a third party prosecution, and there was access through the common law system, did give me some comfort when we lost it. Also, when we originally put it in, I put it in there to appease a stakeholder, as you do through trying to reform your legislation, to address a concern they had. It has not been used.

Ms Centenera: The other thing to mention is that the harmonised laws do provide you with a right—it is not a third party right to prosecution but a third party does have a right to request a review.

THE CHAIR: My understanding is the IR council's agreement was that individual jurisdictions were to make additional provisions to the model workplace health and safety laws, provided they did not compromise the central operations of the model legislation.

Ms Gallagher: Yes, and I guess that is—

THE CHAIR: Did the department look at private prosecutions and whether we could keep those under that provision, given that you have stated in the Assembly that you were in favour of keeping them?

Ms Centenera: The department has been looking at that, as we are looking at any area where the ACT law diverges. Under the national harmonised process, we do look at and see whether there is any negotiation around whether we can keep them, whether they can be kept in another space. If not, it goes into direct negotiation with the rest of the jurisdictions. In terms of third party right to prosecution, that is one of those that is viewed as central, as it is part of the prosecution process. So that is not one of the topics that is viewed as something on which jurisdictions can keep their own arrangements.

Ms Gallagher: But we are looking at it in relation to asbestos, for example, where we have quite rigorous asbestos arrangements that are not followed around the country. We would like to keep those in place, so we are looking at ways to protect those arrangements. So there is an example of where we are using it.

MR SMYTH: What else has to be done to make ACT law compatible with the national framework?

Ms Gallagher: We will be bringing forward some legislation in the autumn sittings.

MRS DUNNE: What are the substantial areas of change?

Ms Centenera: They are actually quite similar. Because the ACT had the most recently updated set of work safety legislation, and because we were aware of national harmonisation being on the horizon, the two pieces of legislation are quite similar. Where they diverge is in the third party right to prosecution. We are working on the model regulations at the moment. They are not released, and their release is anticipated towards the end of the year. We expect, although they are not finalised, that there may be a degree of divergence there. So at the regulation and at the code of practice level, there may be a further level of difference. There is also the reduction in penalties from seven years to five years. We had a higher maximum penalty than other jurisdictions, so that is—

MRS DUNNE: For?

Ms Centenera: For persons convicted of recklessness or gross negligence.

THE CHAIR: What support did the OIR provide for the ACT public service enterprise agreement negotiations?

Ms Gallagher: They managed them.

THE CHAIR: Okay.

Ms Gallagher: Public sector clerical bargaining.

THE CHAIR: They were clerical/administrative but they were not the negotiators?

They were CMD executive?

Ms Gallagher: Yes. The Chief Minister's Department, through the Office of Industrial Relations and public sector management, managed the bargaining. They led the bargaining on behalf of the government.

THE CHAIR: How much has it cost us to do the government's side of the bargaining?

Ms Gallagher: It is essentially the staff time, the staff in public sector management. There were some consultancies awarded for some specific pieces of work. I do not know whether we have got an exact figure on how much it cost.

THE CHAIR: When you are negotiating on one-year agreements, do you consider the cost of the negotiations?

Ms Gallagher: We did not want a one-year agreement. We wanted a three-year agreement. It was not ever going to be accepted by the unions and non-bargaining groups we were negotiating with. Because we were offering 2.25 per cent at the time, there was no way the employees were going to lock in for three years at that rate. In terms of trying to protect our budget and to get out with the minimum cost to our budget that we could in the short term, we took a one-year option.

Essentially, the employees' representatives did not believe our budget would be in trouble in two years time. They accepted it was struggling this financial year but they wanted to ensure that they had opportunities to re-prosecute all their arguments if the budget were to recover sooner. We do not want to have one-year agreements. In a sense, we are having them all go through the certification process now and then we will have to start the bargaining again.

THE CHAIR: Mr McAlary was going to answer about costs.

Mr McAlary: As the minister said, there was a small team within the public sector management group which managed the bargaining process in terms of the negotiations on the core elements of the agreement. When it came to the specific agency matters, they were handled at the agency level. There was some consultancy support during the process.

I do not have the figures in front of me but they are in the material in the annual report. It is the usual practice in terms of bringing that particular support on board as we come up to each bargaining round rather than holding that capacity within the public sector management group on an ongoing basis.

THE CHAIR: You do not have an idea how much it actually cost? Will you take that on notice?

Mr McAlary: Certainly we can take that on notice.

THE CHAIR: Mr Smyth has two very short questions.

MR SMYTH: The equal pay case for the social and community sectors is due when?

Ms Gallagher: I am not sure we have a date on that. The longer the better, with my Treasurer's hat on. With my Treasurer's hat on, I would not mind if it takes a bit longer. Understanding community sector pay, I think it is good that this has come around. It is certainly before the commission at the moment—Fair Work Australia. I was talking in the old language. We expect a decision in the first half of next year.

MR SMYTH: For every per cent increase that is awarded, what does that mean in real terms to the ACT?

Ms Gallagher: I am not sure about a per cent increase. We have done some work on the Queensland case. They had huge increases, between 18 and 50 per cent. This is modelled on that case. So we expect a similar outcome. We are planning for a similar outcome. It is a little hard. We have done some work through Minister Burch's portfolio, mapping what is currently being paid in the ACT. There are a lot of organisations that are paying above award, which you would do if you wanted to retain staff.

It is a little hard to estimate how that would flow through because of the different and disparate arrangements that exist in the community sector. But we expect the potential risk will be, in terms of requirements for us to fund, in the millions of dollars for us. How we phase that in, how we pay it, is going to be determined by this case and any transitional arrangements that will be put in place.

MRS DUNNE: Do you have any idea of the order of magnitude of the millions of dollars—tens, twenties?

Ms Gallagher: I saw a figure of around $20 million.

MR SMYTH: Could we see that model?

Ms Gallagher: We are currently before Fair Work Australia as a party. I am not sure how much we can disclose. Whatever we can do to assist, we will.

THE CHAIR: I think this might be—

Ms Gallagher: What are you in a rush to get to, Ms Le Couteur?

THE CHAIR: I am conscious that we only have a quarter of an hour and we have two more items.

MR SMYTH: One of the highlights was that the Office of Industrial Relations supported the minister in taking a leading role in the workplace relations ministers council against the practice of sham contracting. What did taking this leading role involve and what was the outcome?

Ms Gallagher: The ACT has been leading the work in terms of lobbying other jurisdictions and the commonwealth to seriously address the practice of sham contracting around the country. This was really about the work that was being done

through the Office of Industrial Relations, assisted primarily by the CFMEU and the LHMU. Unsurprisingly, it was in those industries they believed, we understand, sham contract arrangements to be most prevalent.

We had done all of the policy work, provided papers, led senior officers discussions around sham contracting. This was all while you were on maternity leave. It continues now. The ACT officer involved was Robert Gotts. He is now working on the community sector SACS pay issue for us. It was his work and his officers' work that really put this issue on the table nationally and got the commonwealth to consider it as a serious issue. I have certainly had correspondence from other ministers, responding to the ACT's work, saying, "Yes, we agree; this needs to be dealt with." I think that is what that relates to.

MRS DUNNE: When you say that this needs to be dealt with, what is the next step?

Ms Centenera: It has two steps. One is on a practical basis because the ACT does not have its own labour inspectorate. It involves cooperation with commonwealth regulators, the Fair Work Ombudsman, even the tax office and the immigration office, superannuation regulators. The revenue from sham contracting is a big issue for them. There are discussions around better regulation and a better presence.

The other aspect, which is continuing, is that the ACT has taken the lead in developing options around the reform of division VI of the Fair Work Act. This is in the very early stages because it requires the agreement of other jurisdictions. It is looking at the provisions in there and seeing whether they could be strengthened in any way to further discourage the practice and assist with the prosecution of appropriate cases. We are looking at that. That is commonwealth legislation. That is something that will be a matter of negotiation.

MRS DUNNE: In a nutshell, what are the issues on which you are seeking to amend your act by working in this area of sham contracts?

Ms Centenera: One is that in the past prosecutions have proved to be quite difficult. It is a very hidden issue because it is not homogenous science, if you like. Sham contracting is not just employers trying to dud employees out of entitlements. There are also a group of employees or contractors who set themselves up so that they do not have to pay as much tax. They basically get more money out of the system.

There are very bona fide contractors and very bona fide businesses out there. We are being very careful not to affect them because they are important to the economy. What we are trying to target are those particular cases where it is a disguised employment relationship, basically. There are either disadvantaged employee groups that are being taken for a ride or there are people rorting the tax system or other systems. Because it is hidden, prosecutions tend to be quite difficult. There is the tightening of the legislation. That is one of the areas we are trying to address.

The other thing that we are trying to flush out, if you like, is to bring people forward and get them to bring prosecutions and report them to the regulators and have a bigger regulator presence monitoring the situation. The worst thing that these organisations do is undermine valid businesses that are operating perfectly, the ones that are paying

their workers comp, doing all the training, paying all the employee entitlements. They are being undercut by others who are engaging sham contractors so that they are able to cut their costs, compete for contracts better and gain a whole lot of advantage. That is why we are going down the path of trying to get the regulators to clamp down more in that space.

MRS DUNNE: This is something that is actually in the commonwealth's space?

Ms Gallagher: There are some things we can do locally. We have made some changes to our definition of "worker" under the Workers Compensation Act, for example, that has assisted there. We are talking with the LHMU and the CFMEU. They would like an audit tool implemented across ACT government contracts. It works in New South Wales. It has actually been done by the MBA, I think, in New South Wales. They have formulated an audit tool, which is a very quick and easy way of establishing whether it is a legitimate contracting arrangement or they are workers for the purposes of all of those other issues.

We are looking at that audit tool at the moment. I just need to discuss it more with industry, think about how it would work and also look at the impact of any additional costs. It is my understanding that, embedded in New South Wales, it is a low-cost, cheap, easy way to establish good process and to ensure that employers know that there is this tool that will out them if need be. They are a couple of things we are doing locally. I am also meeting with the ABCC—I thought it was "CCC"—the Building Construction Commissioner, I think, in—

MRS DUNNE: No, there is the ACCC and the ABCC.

Ms Gallagher: The ABCC—early December.

THE CHAIR: Unfortunately, we have run out of time for this part of our discussions. I think there will be some questions on notice, I am afraid, minister.

Ms Gallagher: Sure.

THE CHAIR: We now move on to the default insurance fund. Thank you all very much for your contributions. We just have seriously run out of time.

Ms Gallagher: No, that is fine.

THE CHAIR: My question on the default insurance fund is that I understand that at present employers just have to provide a certificate of currency to say they have met their workers compensation requirement. It just says they have met it; it does not actually say that they have met it for the number of employees they actually have. Is that an issue? Is DIF meeting workers compo claims because of employers who were—

Ms Gallagher: Underinsuring.

THE CHAIR: Yes, underinsuring. So they had their certificate, because they did have some insurance, but they underinsured.

Ms Centenera: The way it works is that insurers at the beginning of the insurance year estimate the number of employees they have got and then at the end of the insurance year they can adjust. That is perfectly fine.

Ms Gallagher: And they do.

Ms Centenera: And they do it. Where the default insurance fund comes in is where an employer took out no insurance at all or where the insurer has gone belly-up and there is a comp claim lodged after it has gone—insolvency or declared bankruptcy. That is where those are picked up. The underinsurance aspect is in terms of those who take out no insurance.

THE CHAIR: So if I were an employer and I took insurance out for 10 employees but I have actually got 20 and there is a claim—say there is a reasonably large claim so it becomes a bit obvious that I have underinsured—DIF will not be involved?

Ms Centenera: No. Where there is insurance, the insurer—

THE CHAIR: So what will happen? I insure 10 people but I have got—

MRS DUNNE: 15 people injured on the site.

THE CHAIR: I have got 15 people injured, so it is totally obvious that I have not paid my insurance.

Ms Centenera: What happens on a practical level is that they go to their insurer. The insurer has to pay, even if it is more than the number of employees who are on the policy. Then it is up to the insurer in terms of approaching the employer about how much they should have paid, should not have paid et cetera.

THE CHAIR: Okay.

MRS DUNNE: So that is something that is addressed retrospectively.

Ms Gallagher: Yes.

Ms Centenera: Yes.

MRS DUNNE: Do we have any indication as to whether that skews the cost of workers compensation?

Ms Centenera: That might be an insurer answer. I will have to take that on notice.

MRS DUNNE: Thank you.

MR SMYTH: Just on the collapsed insurance fund, the National Employers Mutual went into liquidation in 1990, yet there is still one claim 20 years later. Is there any indication as to when that claim will be settled?

Mr Fletcher: I would have to take that on notice. I do not know the details of that particular claim.

MR SMYTH: All right. And the same for HIH. There are six claims still open, which means, I think, you have resolved one in the last year. What is the likely time frame for the finalisation of those six?

Mr Fletcher: It will depend very much on the type of claim. There are some average periods that apply to trying to estimate how long it takes to resolve those claims, but it is very much dependent on the type of claim and how willing the claimant is to work with us, engage with us, and our lawyers.

MR SMYTH: The legal fees for the fund seem to have gone up from $0.374 million last year to $0.458 million this year. What is the reason for that increase?

Mr Fletcher: Can you give me a reference?

MR SMYTH: It is page 173. There might be a fault in your tables because it is very hard for somebody who is asked a question like this to do the comparison, unless, of course, they have had a couple of years of annual reports.

Ms Gallagher: I always listen to your ideas around how to improve an annual report.

Mr Fletcher: I see what you mean. I take your point that there is not a comparison. Is that right?

MR SMYTH: Yes. Why has it gone up? It has gone up almost a third, the cost.

Mr Fletcher: I think that just reflects the nature of the types of claims that we are trying to deal with. A number of claims—particularly those two that we have there which are for asbestos—involve more input from our lawyers. I can provide you some more detail about that, if you like, if you are not satisfied with that response.

MR SMYTH: Thank you. Just as a final comment, a number of the paragraphs are almost identical to last year. Only the dates have been changed. Does the work done by the fund not change at all?

Mr Fletcher: It is fairly uncomplicated.

MR SMYTH: So keep it simple by just using last year's.

Mr Fletcher: Yes, simple is the way to go. I think the report probably describes the way—

MRS DUNNE: Thank you for your candour.

Mr Fletcher: If there is something you would like to see, I would be happy to try and incorporate that.

MR SMYTH: All they seem to do each year is exactly the same thing they did last

year.

THE CHAIR: That is possibly even a good thing.

Mr Fletcher: It is simply management of those claims. There are 46 in the uninsured fund and six in the collapsed insurer fund, so it is not a particularly complicated process.

THE CHAIR: Thank you very much. As it is not a very complicated process, I am afraid we need to move on to the Long Service Leave Authority. I will continue on the sham contracting issue. What role is the authority taking in terms of looking at sham contracting and avoiding long service leave provisions? I particularly have in mind here some evidence that PAC had when we were inquiring into procurement. There were some fairly derisory comments made about the level of enforcement of long service leave being paid.

Mr Collins: We certainly look at the basis of employment. We ask an employer a number of questions associated with that—how they employ their worker, what is the nature of the relationship, does the worker have any control over their hours et cetera—a number of standard questions. If the employer maintains that they are a contractor and that they are employing subcontractors rather than employees, we essentially have to accept that. Certainly if the employees or the subcontractors do not raise the issue either, do not make a complaint and say, "We're actually employees rather than subcontractors," there is not much that the authority can do.

THE CHAIR: So you do not have a proactive role; you only ask people if someone makes a complaint? I am just not clear about that.

Mr Collins: No, we do have a proactive role. If we identify an employer that is not registered with us—and I will say that we have done a lot of work with Procurement Solutions in terms of the wording of the contract and the requirements of an employer that wins a government contract to provide a list of their subcontractors or other employers that they are using—through a site visit or information supplied to us by Procurement Solutions, anything like that, we will contact them. We will make them aware of their responsibilities under the legislation and then we will pursue the issue of whether the workers are either employees or subcontractors. So we do have a proactive role, as well as a reactive role, if I can put it like that.

THE CHAIR: If you think they are not non-compliant, what do you do then? You said you pursue them. How do you pursue them—legal?

Mr Collins: If we think they are non-compliant and we believe they should be registered with us, we will serve them a notice. If they ignore that notice or do not register them, we can take them to the ACT Civil and Administrative Tribunal. We have taken a number of employers to the ACAT for a number of issues, including non-registration. We can do that. I guess, if worse comes to worst, so to speak, we can go to the DPP. We have done that in the past as well. There is a compliance and enforcement regime in place.

THE CHAIR: You get complaints from employees and unions about

non-compliance?

Mr Collins: We do.

THE CHAIR: What sort of numbers?

Mr Collins: They are very few.

THE CHAIR: Mr Smyth?

MR SMYTH: An ongoing issue that is not reported on in the report this year, minister, is the transfer of an officer's entitlements from a department to the Long Service Leave Authority. Has that been resolved?

Ms Gallagher: No.

MR SMYTH: It has not been resolved?

Ms Gallagher: It has not.

MR SMYTH: It is featured in your last two annual reports.

Ms Gallagher: I do not know why it has not been—

MR SMYTH: It is featured in your last two annual reports but it is actually not mentioned in this one.

Ms Gallagher: I do not know why it is not in this annual report.

Ms Centenera: This is a matter that is being handled by Treasury. I am conscious that they have already had their hearing; so I will give you the flavour of what they have told me in terms of the problem. I suppose that the way Treasury constructs their financial framework is that they try to make it as consistent across agencies as possible. Because of changes to cash management principles, if you have an employee whose leave balance transfers, the cash does not go with them. That is not how it happens.

That even happens actually for transfers in and out of the commonwealth. You get an employee's entitlement but there is no cash behind it. That is a very big issue for the Long Service Leave Authority because they are such a small agency. If they have somebody who has lots of long service leave and lots of annual leave going out or coming in, they will have to cover that cost.

The swings and roundabouts of having a very large organisation is not much of a reassurance. I suppose that the problem with the Long Service Leave Authority is symptomatic of quite a large issue. What would have to happen is that in each individual case—the Long Service Leave Authority would not be alone—you would have to consider whether there is enough reason to depart from your very set framework and your very set cash management principles to make it like that.

If the Long Service Leave Authority has that type of arrangement, there will be lots of other authorities that will be in that position. As an issue of fairness, they will have to be addressed too. It seems very simple on the face of it but it is actually quite a large problem to have to address because it just keeps adding up.

MR SMYTH: We were told it was more likely to be resolved around March 2010. At estimates this year we were told, I think, that we were very close to this resolution. That is five or six months ago now. Minister, when is this going to be resolved.

Ms Gallagher: As much as I would like to give you a date, Mr Smyth, I cannot give you a date other than to say that I am frustrated at how long it has taken to resolve this.

MR SMYTH: So is there a reason why it is not mentioned in this year's annual report? Is it just hoped that things would go away?

Ms Gallagher: I do not tell people what to put in their annual reports. They are not my reports. They are reports to me from the agencies. So I cannot really answer that one.

Mr Collins: That was my decision. It was an issue that I raised in the previous annual report. I am certainly aware of the issues associated with trying to resolve it. I was not trying to hide it. I just did not feel the need to repeat it in this year's annual report.

Ms Gallagher: Next year it will be in there as resolved under a paragraph heading.

MR SMYTH: I will bring the three previous annual reports and you can point out to me that it has been resolved—

Ms Gallagher: I do not think I will be giving you that commitment, though.

MR SMYTH: But seriously—

Ms Gallagher: I am a bit nervous about making that commitment.

MR SMYTH: how hard is it to resolve the entitlements of one public servant? We have in place a regime where business must resolve these issues by a set date—

Ms Gallagher: No, it is not about one.

MR SMYTH: but the government itself cannot resolve this issue for one public servant.

Ms Gallagher: It is not about one. Yes, there is one officer but I think there is a bigger picture that has been opened by this situation that needs to be resolved by Treasury.

MR SMYTH: Can you take on notice how many officers are affected and how many smaller agencies are affected and report back to the committee?

Ms Gallagher: My understanding is that there is one.

MR SMYTH: It is one for long service leave but didn't Ms Centenera just say that it could affect other small agencies?

Ms Gallagher: It could.

MR SMYTH: Perhaps that might be taken on notice and that information can be supplied—how many are affected by this.

Ms Gallagher: Yes.

MR SMYTH: It goes to management and the resolve of government. If you cannot resolve this after two or three years—

Ms Gallagher: We can resolve it. It has just taken too long.

THE CHAIR: Mrs Dunne, do you have a question—briefly, because we are running out of time?

MRS DUNNE: I could not let the opportunity go by. In relation to the community sector long service leave scheme, have all these areas of the community sector been identified and contacted? The last time we spoke to Mr Collins there was the feeling that you had probably got to 99 per cent of sectors but there were still some people who were borderline as to whether or not they are part of the scheme.

Mr Collins: We believe that we have contacted all relevant organisations. I would hesitate to give you a guarantee that we have contacted 100 per cent because there are a lot of very small organisations out there. But I believe that we have contacted and communicated with the overwhelming majority of community sector organisations.

MRS DUNNE: Have you communicated with all the organisations that you have identified as being caught up in the scheme?

Mr Collins: Yes, we have.

MRS DUNNE: How many is that now?

Mr Collins: We have 220 registered with us and we probably have about 10 to 15 organisations that we are still attempting to get registration details from. We have also distributed our first returns. We have a number of employers who have completed those returns and paid their levy. So the scheme is certainly up and running.

MRS DUNNE: How many of the 220 registered have paid their first quarter levies?

Mr Collins: We have had 54 of them complete their returns and 36 of those have paid, bearing in mind that the deadline for that is not yet up. So we are encouraged by the numbers.

MRS DUNNE: When was the deadline? I thought it had passed.

Mr Collins: The deadline was 16 November but I am looking at extending it to 30 November because I am aware that we have had some difficulties with email addresses. Not everyone has had a sufficient amount of time to complete their return.

MRS DUNNE: So you have 220 registered.

Mr Collins: Yes.

MRS DUNNE: Has the authority spent time with those 220 organisations about how they need to keep their books et cetera?

Mr Collins: Yes, we have. We have certainly communicated with them. We have given them guidelines and assistance on how to complete their returns and how to make their payments. We certainly have been proactive in communicating with them and giving them assistance as to what is required under the legislation.

MRS DUNNE: What arrangements are in place if you identify somebody next year who should have been in the scheme? What arrangements are there to start them in the scheme and are they liable for back payment?

Mr Collins: Yes, the legislation allows retrospective returns and payments. In fact, we can go back four years. Even after that time, if we identify an organisation that should have been paying the levy and should have been registered with us, we can take action. Certainly there are retrospective provisions available in the legislation. We do that on a regular basis with construction employers as well.

MRS DUNNE: How many employees are there registered with the authority?

Mr Collins: We are registering employees from the returns. So I cannot give you a figure on the number of employees. Certainly, it is a little early in the process to have that count. We will send a letter to all employees once the employer has registered with us and has completed their returns. But we have not got to that stage as yet.

MRS DUNNE: That was part of the process—that you would not actually register the employees until the first return?

Mr Collins: That is right. They are registered from the employer's return. Again, the legislation allows for that process.

MRS DUNNE: In that case, I will put the rest of these questions on notice in December.

Ms Gallagher: We look forward to them.

THE CHAIR: As we have actually gone past our scheduled time, I will close this public hearing. There are a number of admin matters. Answers to questions taken on notice at this hearing and supplementary questions are due to the committee secretariat by Friday, 14 January. In terms of getting supplementary questions from members, we have agreed that they will only be accepted within three working days from this public hearing.

MRS DUNNE: So we get three working days—

MR SMYTH: And they get two months.

THE CHAIR: It demonstrates our relative efficiency, I know, Mrs Dunne. On behalf of the committee, I would like to thank you, minister, for agreeing to stay here for a few extra minutes and, of course, all the departmental officials for attending today. We will forward you a proof transcript when it is available.

The committee adjourned at 11.08 am.