LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PUBLIC ACCOUNTS

(Reference: Inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011)

Members:

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

TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 6 OCTOBER 2011

Secretary to the committee:
Dr A Cullen (Ph: 6205 0142)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

Privilege statement

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Amended 9 August 2011

The committee met at 2.03 pm.

BARR, MR ANDREW, Deputy Chief Minister, Treasurer, Minister for Economic Development, Minister for Education and Training and Minister for Tourism, Sport and Recreation
SMITHIES, MS MEGAN, Under Treasurer, Treasury Directorate
BROUGHTON, MR ROGER, Executive Director, Economic and Investment Division, Treasury Directorate
McDONALD, MR TOM, Director, Economic and Investment Division, Legal and Insurance Policy, Treasury Directorate

THE CHAIR: Good afternoon everyone and welcome to this public hearing of the Standing Committee on Public Accounts into the Road Transport (Third-Party Insurance) Amendment Bill 2011. On behalf of the committee, I would like to thank you, Treasurer and various officials from Treasury Directorate, for appearing today. I am sure, as I have seen you all here before in this context, you have all seen your privileges card and I will spare you listening to me read it out to you. But can I just ask that you—and you have to say yes—understand the implications of the statement in the privileges card provided by the secretary.

MR HARGREAVES: This is not the one you get from the Council on the Ageing, Madam Chair?

THE CHAIR: No.

MR HARGREAVES: That gives you discounts at restaurants and things like that, that privileges card. No?

THE CHAIR: No, I am afraid not.

MR HARGREAVES: It is a different one altogether.

THE CHAIR: Can I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the coloured card provided, the privileges statement for you on the table. Can you confirm you understand the privilege implications of the statement?

Mr Barr: Yes.

THE CHAIR: Can I also remind witnesses that proceedings are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live. Before we proceed to questions from the committee, Treasurer, would you like to make an opening statement?

Mr Barr: Thank you, Madam Chair, I would. I will briefly read into the record an opening statement. I again thank the committee for the opportunity to appear today. The Road Transport (Third-Party Insurance) Amendment Bill 2011, the CTP bill, has two main objectives: to better health outcomes for those injured in road crashes and to reduce the costs to the community of CTP premiums.

The changes proposed to awards for non-economic losses are designed to meet the objectives by encouraging those suffering relatively minor injuries to seek early treatment and rehabilitation. The bill builds on previous reforms established under the 2008 CTP act to encourage early treatment and provide some more rigour around award payments.

There is overwhelming evidence that early access to treatment after accidents improves health outcomes with quicker recovery. Quality of life is improved and it is improved more quickly. I think we would all agree that that is a worthy outcome. Early treatment benefits individuals in the community through lower medical costs and increased productivity and I think these, in their own right, are highly desirable policy objectives. Undoubtedly motorists will benefit through reduced insurance costs.

The current system, unfortunately, provides incentives towards maximising lump sum payments and away from rehabilitation. At its most basic, the current scheme trades money for quality of life and it is this that the government seeks to change. Injured Canberrans deserve better than a system that prolongs their waiting. They deserve a system that emphasises rehabilitation and restored quality of life and appropriate compensation. I think ACT households and businesses deserve better than a system that practically guarantees the highest insurance premiums in the country. And they deserve relief from these significant cost pressures. So, having made that formal statement, I am very happy to take questions.

THE CHAIR: Thank you. I will start. This is not quite where I was going to start but, given what you have just said, how much do you think insurance premiums are going to go down if you make these changes?

Mr Barr: This is a matter that the Under Treasurer may be able to provide some detailed advice on.

Ms Smithies: Sure. It is actually difficult to predict how much future CTP insurance premiums will reduce by. There are a number of drivers of those CTP premiums. Obviously there are issues around wage inflation and superimposed inflation—increases above wage inflation. There are issues around the frequency of accidents and then there are issues around award payments. So there are a complex set of issues that go to determining the premium set.

There is no doubt, though, in our mind that this will put downward pressure on the increase in premiums. So the rate of growth in the premiums will no doubt slow and, hopefully, they will reduce but we would not have a figure that we would be putting on that actual—in comparison, all else being equal—reduction in premiums.

THE CHAIR: Given you have not got a figure, how are you going to know that this actually was a success and did reduce premiums?

Ms Smithies: There are a couple of objectives in the scheme. One of the objectives in the scheme is actually those early return-to-health outcomes.

THE CHAIR: I accept all of those but the Treasurer specifically spoke about reducing compensation costs.

Ms Smithies: Yes.

THE CHAIR: How will you know that you have actually succeeded in that aim, as distinct from the—

Ms Smithies: Sorry, reducing the premiums, all else being equal? Yes, or reducing the growth in premiums, one or other of them.

THE CHAIR: One or other, yes.

Ms Smithies: Yes, you can only look at this in terms of the historical increase in premiums. Certainly anything that would maintain the premium or reduce the premium would demonstrate exactly that. Anything that reduced the current rate and growth in premiums that we have seen is another way that we will measure it. What is our current rate of growth or the rate of growth in the last three years? Is it less than that? Is it actually negative in terms of the premiums now being levied?

I guess it is probably also fair to say that we do get a fair amount of disaggregated data in relation to the scheme. So we do understand the issues of the number of claims and superimposed inflation and wage growth et cetera. Certainly from a regulator's perspective, we can take a look at what is actually happening in those premiums.

Having said that, though, these are insurance premiums which have long-tail claims as well. We are still dealing with significant and catastrophic injuries from the past as well and they will need to be worked their way through. So any improvement in premiums will have to be judged in the relative long run as well.

THE CHAIR: Mr Hargreaves.

MR HARGREAVES: Yes, thanks very much, Madam Chair. On the question of a reduction in premiums, I notice you said the increase will no doubt slow. I would be interested in your views, and possibly the minister's views too, on what impact any competition might have in the slowing down of an increase. There is no such thing as a reduction in charges for premiums. Anybody that thinks there is going to be an instant reduction in the premiums is fooling themselves. I know that from my own conversations with insurers.

A slowing down of it, I think, is the target, and I applaud that. I would be interested in knowing how we are going to ensure some competition by the introduction of this legislation, because from my conversations with the insurers they are saying: "Blow this for a joke. It is too small a pool. We do not want to know." So I would be interested in your views on that and where you see the role of the government as the rate-setting approver.

At the moment, because we have got the NRMA as the only insurer, the government actually approves their rate when they have a rate increase. What role will the government have in approving any increases from the marketplace, given there will be a number of players in it? We will change the scenery completely.

THE CHAIR: If there is a number.

Ms Smithies: Yes.

MR HARGREAVES: It is my question, Madam Chair. Settle down. You will not get old waiting for the next question.

THE CHAIR: Yes.

Ms Smithies: It was long, but I will start and then—

MR HARGREAVES: I can do it briefly if you like. I can do it again.

Ms Smithies: Okay, I will kick off and then maybe Roger Broughton can continue with some of the detail. But on the issue of competition, what we are being told in relation to competition is that obviously, with any insurance business, it is the pricing of risk which is in issue. And the more stable, the more predictable that we can make the incidents within the pool, that allows an insurer to be able to come in and, relatively, appropriately price-risk. So the legislation itself, in terms of the way it has looked at the non-economic losses side of the scheme, should actually introduce a whole lot more predictability and stability into an insurer being able to price-risk properly or appropriately.

The other major component in relation to this is that the insurers largely operate off legislative certainty and administrative certainty. So the legislative changes that are being proposed are very similar to those in the other jurisdictions that these insurers are used to working in. They will be familiar with the legislative environment, which again provides them certainty or sovereign certainty in a sense.

Secondly, in administration they will understand how they price the risk in comparison to how the system actually works, how the regulation actually works, because the legislation is aligned. There are two positives in terms of being able to attract other insurers into the market. Roger, do you want to add to that?

Mr Broughton: Yes, I would be happy to.

MR HARGREAVES: Excuse me for a minute. Roger, I understand retirement is in the wind.

Ms Smithies: Only once this is passed.

Mr Broughton: Yes. I had better be very careful with my answer then. It might be sooner than we thought but—

MR HARGREAVES: Uncle Johnno knows everything.

Mr Broughton: What I was going to do was just describe briefly the regulator's role. We get a submission for a premium value from NRMA, and if there were more than one insurer we would get submissions from them as well. The regulator's role is to convince himself or herself—and in this case, it is the head of the Treasury—that the

premium submission is a fair price but also a price which will ensure that the insurer does not suffer so badly that they become bankrupt as we look forward. We have got to make sure that the premium sits within a band that guarantees they will be around to pay claims when they fall due but is not overpriced at the same time. And we do that with the help of CTP actuaries who go right through all of the data that we have got available from NRMA. And we would get the same data from other insurers as well.

So the process in relation to the competition will be that the submissions coming from the different insurers will be pitched at different prices. Provided the regulator gives them the tick, when you come to register your vehicle in future you will have a choice between, hopefully, at least three insurers and they will have different prices quoted on your registration slip, which will be the agreed price.

What you will find, and what the insurers have told us, is that the level of competition for the actual premium is probably going to remain within a relatively small band because the real area of competition is how they administer their schemes and whether they are really sharp in the way that they manage the administration costs, because they will all more or less face the same claim costs, the same frequency of claims and those sorts of things. What they will do as far as competition goes is bundle this product, the CTP product, with the other insurance products that they offer, and they will be able to discount, say, house insurance, comprehensive car insurance or whatever. So that is where a lot of the competition impact will come in.

MR HARGREAVES: At the moment what happens out there in punter-land is that the NRMA applies to the regulator for an increase. The regulator says, "That's a fair and reasonable price to pay for the risk that you're carrying and for the risk that the community is carrying." And it finds its way into that illustrious journal the *Canberra Times* as being an approved rate. How is that going to happen when you have a number of competing people asking you for a price? There will be three people in the marketplace, you hope, and each one of them will say to you, "Dear regulator, please approve this price." Are you going to be able to publish the fact that you have approved all of these three prices or are you just going to keep it within the industry?

Mr Broughton: We can certainly publish it, but what will happen is that when your registration certificate comes out, which is the point in time when you have to renew your CTP, the latest approved prices will appear on that for each of the approved insurers. So you get a registration certificate—and let us say the price is now $526. Against "NRMA" it might say, "This is your premium, $526." For insurer A it might be $515. For insurer B it might be $530, or whatever. So you will be able to tick the box.

MR HARGREAVES: So you will be able to look at this piece of paper and say, "I've got $500 to register my car and I've got $500 to get my CTP." Am I going to look at it and say, "No, I'm going to go for the dearer one; bugger it"? I do not think so. Isn't that an artificial way of actually controlling the marketplace?

Mr Broughton: That is right. There are a couple of things that happen. You might not necessarily take the cheapest one because the firm with the highest CTP premium might be offering something else in the market that you might be interested in. But let

us say that you do decide, "Why wouldn't I just tick the cheapest box?" Under the act a licensed insurer can come back on a quarterly basis, every three months, and seek a new approved premium. So if you are the most expensive one, the $530 one, you might come back in three months. Provided you can convince us that you can provide a lower premium without going into default, it will get approved and from then on the new regos will have your rate at something less than $530 and possibly the cheapest one.

MR HARGREAVES: Why wouldn't the regulator just set a maximum price and everybody else can fight for a lower price within that?

Mr Broughton: Because we do not want competition pushing prices down below where the scheme can survive. This was a problem many years ago in a number of jurisdictions.

MR HARGREAVES: Thank you for that. That makes sense. Could I ask a couple of questions of the Under Treasurer, minister, with your approval? You accused me of having a long question, Under Treasurer. Let me tell you, your answer actually made me look really brief. I would like to ask you to explain a couple of terms that you used.

Firstly, you said you were being told this was about the pricing of risk. We understand the concept of pricing of risk, but I am interested in who has been telling you about the pricing of risk. You said, "We are told that." Who has been telling you this? Is it actuaries; is it the industry? And while you are at it, because I want to be brief here, you talked about non-economic losses. I can understand the concept of economic losses in insurance parlance but I am blowed if I know what a non-economic loss is. So perhaps you could explain that to us.

Ms Smithies: Sure. In the context in which I was using the pricing of risk, the conversations have been had with the insurers, but the conversations also have been had with actuaries. Pricing of risk in a sense is a well-developed concept of insurance. Certainly the conversation has been had with various insurance companies. Your second question was around non-economic loss. It is more commonly called pain and suffering.

MR HARGREAVES: That is really where we are headed with the difference between the common law claims and capping of claims, is it not, because common law claims tend to put a very heavy accent on pain and suffering whereas the capping of it places a heavier accent on rehabilitation and return to work?

Ms Smithies: Certainly that is what the reforms are looking towards—bringing in place a test for the ability to access compensation for non-economic loss.

MR HARGREAVES: I understand. Thank you very much for that.

THE CHAIR: I will continue on this theme about competition. I must admit that I totally misunderstood what you were trying to do. You said that you thought the only area in which to move between the various insurers was on how good they did their admin, but given that you are proposing to significantly change how claims are made, I assumed that you were actually trying to reduce the claims pool so that insurance is

more profitable. So I am not really understanding this. If you thought admin was where they were competing, why do you need to even change the scheme? Why are you making these changes if admin is where the—

Ms Smithies: Administration in the sense of claims management. Certainly there are a lot of things that insurers can do to look to how they manage claims efficiently and bring in teams.

THE CHAIR: No, I understand that. But if that is where you think the insurance companies are going to be competing, why are we changing the scheme? The admin issues would be effectively the same regardless of whether it was the old scheme or the new scheme.

Ms Smithies: The objectives for changing the scheme are around health outcomes but they are also around trying to slow the increase in the premium. Certainly bringing in competition is a useful tool that we can use in relation to the second. Competition will provide a competitive environment around how insurers actually look to manage appropriately the claims that they are dealing with and the costs that they are incurring. It is not about trying to increase the profitability of an insurance company.

THE CHAIR: Do you have any reason to think that this new scheme will in fact lead to more entrants in the ACT's third-party market, given that we have been trying to do this for—you would know better than me—a long time?

Ms Smithies: I think that this gets the framework right. It gets the ingredients right to allow for competition. We cannot guarantee competition. Obviously each of the insurers will have their own appetite and will have their own reasons for entering the ACT market. But I do believe it gets the framework right to allow for competition.

Mr Broughton: Can I add to that answer? We have two insurers who are very well progressed towards setting up to enter our market, but they are waiting for this particular bill to pass through the Assembly.

THE CHAIR: Why are they waiting for it? What specifically do they think will make it better for them?

Mr Broughton: The rationale for the insurers who are not in the market who are interested in the passage of this particular bill is that at the moment they consider the ACT's scheme to be too volatile for them to be able to enter the market with a degree of comfort, given that they will have a share of a mere 260,000 vehicles. At the moment most of these insurers operate in both New South Wales and Queensland and they have a share of nine million vehicles. So this is a very small addition and they want the transition, if they come in here, to be as seamless as possible for them. So they do not want to spend a lot of money on new systems dealing with a new scheme and a scheme that is 100 per cent common law access; with that goes quite a degree of volatility in the size of the awards relating to the various claims.

THE CHAIR: Basically you are saying that for new entrants we have to have the same scheme as somewhere else so that they do not have any additional admin costs to set up?

Mr Broughton: That is pretty much the case, yes.

Ms Smithies: What Mr Broughton said was also around the issue about stability and predictability. So there are two sides to the argument.

THE CHAIR: We are a small scheme but we are not going to increase the size of the scheme by doing this. So that is not going to change.

MR HARGREAVES: I think we have strayed a bit from the reasons for the scheme. But I appreciate that and I am interested in the size of the pool. We might talk about that a little later, and whether we are talking about us being an actual pool of our own or whether we are going to be absorbed into New South Wales as a region, given that New South Wales has various regions. So we need to understand all of that when we are talking about going forward.

I am interested in the notion of the common law aspect where you can get a bucket of money for feeling a lot of pain and suffering. I know a lot of people have ripped the system off in the sense that they have taken the money and have not rehabilitated themselves. They have not got a better quality of life, they have not returned to work on time and they have not done all of these other things. It seems to me that with a capped system with an accent on rehabilitation we are seeing a social approach to the insurance marketplace. Minister, you might like to talk to us about what you see as being the benefits of having the accent shift from paying people off as opposed to getting them back to a healthy lifestyle.

Mr Barr: They certainly have been the benefits where this change has been made in other jurisdictions. Undoubtedly that is an area that the ACT system as it stands at the moment is not adequately addressing. So that would be a benefit of reform. The experience in other jurisdictions where this change has been made has been positive and certainly the sky has not fallen in in terms of the allegations that are often bandied about in advance of this reform. The ACT is perhaps one of the last places to come to this issue.

It would appear that this is the best way forward and that it is inevitable, if not in this Assembly then in one in the near future. The issue does not go away. Delaying making a decision does not alleviate the need for the change. So in my view and certainly in the view of those who have assessed the comparative operation in other parts of Australia of what has been proposed versus what we have in place at the moment, it is an inevitable reform whose time is long overdue in the ACT.

MR HARGREAVES: I notice you said we are a bit out of step with other jurisdictions. I understand we are actually stone motherless last in all of this stuff. In fact, the accent across the country has been on people's quality of life. It has not been on their pocket. I have to put on the record that I am coming at this from the perspective of having worked in rehabilitation for many years. I know the personal pain that people have gone through and I have seen the outcomes of it where people have been crippled for life but they have had 10,000 bucks in their pocket, to which I have replied, "Big bloody deal."

I am interested in whether or not there is a difference between New South Wales and ourselves. We have the Queanbeyan experience and we have the ACT experience. Whilst the premiums are different and may not be under the new regime, we are having an accent in New South Wales, as I understand it, on getting people back to work so that they are productive and getting a greater quality of life. Here we are having the common law approach and that is sort of up for grabs here; sometimes it works and sometimes it does not. Is there a difference in the expenditure on the return to work, return to health perspective? Is there money going into rehabilitation out of this? What is the comparison here?

Mr Broughton: I might ask Mr McDonald to talk about this. There is one study we are aware of that was done in New South Wales which compares pre and post-reform health outcomes which Mr McDonald might be able to elaborate on.

Mr McDonald: To address your question bluntly, Mr Hargreaves, the comparative spend on medical and rehabilitation in New South Wales is 44 per cent of their scheme versus originally 18 per cent; it has now gone up to 22 per cent in the ACT scheme. That reflects the emphasis in that particular state on, to be frank, maintaining the dignity of a person who is injured in a road crash. To my way of thinking, it is actually about that. It is about respecting their needs and respecting them at the earliest possible time.

The original New South Wales study was a six-year study of musculoskeletal injury from 2000 to 2006 that was commissioned by the Motor Accident Authority. It showed that the folk who were engaged in the new scheme in New South Wales under that regime got better more quickly and had a better quality of life than those who had been injured under the 1998 scheme.

We can see from other studies that have been done—it is really quite interesting—of those who receive compensation, shall we say, those who are in the liability stream versus those who are not in the liability stream, if both of those sets of folks get into early intervention, treatment and rehabilitation straightaway or at an early stage, their rate of recovery over six months is identical, but once they are out of that particular framework then it can diverge—that is to say, a closely supervised regime. It is really quite interesting to see that if you put more of your available premium pool into that particular activity—that is to say, intervention, treatment, rehabilitation—you get better outcomes than you do if you just leave them to the four winds, which is—

MR HARGREAVES: The final question I have, and then over to you, Madam Chair, is about the cost of this rehabilitation. I think I am right on this but I wanted to test it with you guys as experts. Ms Smithies might be the expert here. I am a bit concerned that some people might think this is cost shifting from the insurance into the health system of people who get banged up and then they go into the rehabilitation system—shifting the cost from that sector, if you like, into the public health system. Am I correct in understanding that because these injuries are compensable there is no cost to the taxpayer in the public health system going forward over this, so it is only a sheer benefit? Am I correct there?

Mr Broughton: I will start by saying, yes, you are quite correct. But in fact the reforms we have got in place are probably going to reduce the cost on the public

health system because under the compensation focus the payments are made to the individuals, then they make a choice about whether they pay for their own health care or fall back onto the public health system. Often these lump sum payments are used for purposes other than rehabilitation.

MR HARGREAVES: Under that perspective, if you pay people some money to be rehabilitated because of their injury, then they front up to the hospital or the public health system, community health system, and say, "I need treatment," do we then say: "Hang on a second. The injury that you have was in fact compensable. You've actually been paid. So you get charged the full rate for this. You don't get the public patient status out of this." In other words, they do not get two bites of the cherry here. Am I right?

Mr Broughton: No, that is not correct because you can front up to the GP and be referred to a specialist and all those sorts of things without even mentioning the fact that this may have been from a vehicle accident or a compensable vehicle accident. Generally you are picked up through the system if you are subject to a current claim at the time. But once the claim has been settled and compensation has been paid you are just the same as everybody else on the street.

MR HARGREAVES: Maybe we need to have a bit of a look at that because what we are seeing are two bites of the cherry here.

THE CHAIR: That is probably a bit beyond this issue for today. You said, and I am sure we all agree, that people who have early treatment come out best. But in your speech you said that only seven per cent of claimants apply for the $5,000 early payment. What measures in the bill are actually going to encourage people to get early payment for medical expenses?

Mr Broughton: The bill is designed to focus people's priorities differently from what they currently are. If you are injured in a vehicle accident now you have got a couple of choices, assuming that somebody is at fault and you can identify that. Your choices are that you can go directly to the insurer—and we have only got one, the NRMA—and say, "I've been injured in an accident; I need help," et cetera, or you can go to a lawyer.

Frequently the legal approach to this is: "All right. We'll need to mount a case for compensation for you." So, rather than directing someone towards "let's get you fixed up and fixed up as quickly as possible and back to where you were", it is a case of "let's get you assessed so that we can work out what a reasonable claim is for this injury" and so there is an inherent delay in there. Sometimes, if you are trying to maximise your compensation, it is in your interest to delay your medical treatment.

So the way the bill works is to say that if you have a relatively minor injury—that is, less than the 15 per cent threshold—you will not be entitled to claim non-economic losses, so your chances of getting a fairly large lump sum payout for your injury are drastically reduced, more or less removed, and so you no longer have an incentive to hold off on medical treatment to try and maximise a payout. Your incentive is to utilise the scheme and get all the medical treatment you can possibly get.

THE CHAIR: What evidence do you have that people have actually said, "No, I prefer to be sick and go to a lawyer," rather than that they have been to the NRMA and have not got anywhere?

Mr Broughton: We cannot collect that information, obviously, because it is not a statistic that is out there. But—

THE CHAIR: But that is basically what you are saying people are doing, so I am asking you why you are saying it.

Mr Broughton: There is quite a lot of anecdotal evidence that that is what people are doing. Not everybody does it; I am not saying everybody. There is something like 30 per cent of claimants who do not get any allowance for non-economic losses and they are people who clearly have got relatively minor injuries who are satisfied with getting their medical bills paid and all that. I am not saying everybody does that. But 70 per cent of people do chase lump sum payments, so there are a lot of people out there who are interested in maximising their payouts through this scheme.

THE CHAIR: But there is nothing in the bill that specifically will encourage more people to get the $5,000 early payment?

Ms Smithies: I guess it is around removing a disincentive that is built into the system.

Mr Broughton: Ms Le Couteur, I am sorry, you are probably going to move on to something else.

THE CHAIR: I was, but if you have got something specifically on that rather than just the general—

Mr McDonald: This will only take a couple of seconds to say: in Queensland and New South Wales, for instance, the level of direct engagement with insurers by injured people is a lot higher than it is in the ACT. Particularly in Queensland, which was the basis for the initial stage of procedural reforms that we did in the 2008 legislation, the clear indication that I received there from the then president of the Australian Lawyers Alliance—so it was not from an anecdotal source; it was from the head of the plaintiff lawyers—was that once folks, even if they were represented, got into the insurer's early intervention treatment and rehabilitation system the lawyers were satisfied to trust the insurers to do that. That meant to say that between 25 and 35 per cent of people go direct to the insurer and of those who are represented a large proportion enter that particular program and structure, whereas in the ACT it did not seem to happen.

Since we have brought in the new legislation we have an uptake of four per cent in medical expense payouts, which is really not that significant, and a low uptake of the $5,000 payment, despite the fact that we know that incentivisation is a useful tool because every week in *The Chronicle* there is an aggregator or tout advertising that they will pay people up to $1,000 to put their CTP claims through them, and they are not a law firm.

THE CHAIR: Have you got any references for those various studies you are talking

about?

Mr McDonald: In relation to the direct uptake with insurers I would have to go back to the insurers themselves because that is where I got the information from.

THE CHAIR: I have seen the ads in *The Chronicle*.

Mr McDonald: Yes, from the aggregators yes. We euphemistically call them aggregators—

Mr Broughton: Were you referring to the health studies, the New South Wales—

THE CHAIR: Sorry?

Mr Broughton: Were you referring to the New South Wales studies or something else?

THE CHAIR: Really any; I was specifically thinking of the Queensland one but New South Wales as well—just in general. You are quoting a lot of evidence. If we can have enough references that we can see that, it would be vastly more useful than just saying that New South Wales said something because—

Ms Smithies: Can I just clarify that you mean references to the early health outcome achievements et cetera? Yes.

Mr Broughton: We can provide them and take that on notice.

MR HARGREAVES: In effect, where we have had the statements saying that in Queensland X happened or in New South Wales Y happens, we would like the proof of where they said it.

THE CHAIR: Yes. I am sure you have got it but we have not got it. Keeping on about the better focus on health outcomes, we have talked a lot about how there is going to be more proportionately spent on health, and I am sure that would be the case; but would there actually be more money spent on health outcomes or just more in proportion? They are different concepts. Why do you think there would be more actually spent on health? What in the bill would make that—

Mr Broughton: Yes. I think we expect more absolute dollars to be spent on health and obviously the proportion to go up as well. The reason is very much what I was saying before: the focus for people with minor injuries will be shifted from lump sum compensation to rehabilitation and medical care. If you want to get the maximum out of the scheme and you have got a minor injury, the way you will do that is to make sure you can get every bit of treatment that you can approved.

MR HARGREAVES: That is the fundamental tenet behind the legislation, isn't it, as I understand it to be?

Mr Broughton: That is correct.

Mr McDonald: Understanding, if I may intercede, that you also have unfettered access to common law in relation to lost wages and things of that nature. We are not talking about that aspect of it; we are talking about, as Ms Smithies has referred to, the disincentive part of it which then creates the incentive to get early treatment.

Ms Smithies: I just want to come back on something that Mr Hargreaves said. I do not want to appear a stickler for words but you mentioned the word "cap", Mr Hargreaves, and indeed a cap has quite a specific meaning in a lot of the other jurisdictions' schemes. What we are actually talking about is a threshold, not a cap. Sorry; I just wanted to come back and clarify that.

MR HARGREAVES: I appreciate that.

Ms Smithies: I assume you understood that but I just thought I would—

MR HARGREAVES: I did actually, and I thank you very much for rising to the bait, Ms Smithies, because I do understand that the way in which it is portrayed out in the media—

Ms Smithies: Yes.

MR HARGREAVES: The media have grabbed this notion of a cap. I was going to pick the question that I was going to ask a little bit later on. They picked this notion of a cap in the amount of dollars that you are going to get back because of X, Y and Z, not understanding in fact that what we are talking about is transference of the money that you pay in your insurance premium from your pocket into a health outcome. As I understand the basic tenet of the legislational change, it is to say to you, the injured party, "We think the amount of money going into your pocket would be better spent in giving you a better quality of life going forward." So the notion of us saying, "We are going to cap the windfall that you are going to get because of your accident" is actually a misnomer out there in the public arena, yes? Thank you for that.

Mr McDonald: Yes. In fact we are transferring what is in reality an opportunity—

MR HARGREAVES: Yes.

Mr McDonald: an opportunity for something, for certainty of at least the mechanism, the structural mechanism, by which an outcome can be achieved; that is to say, better health.

MR HARGREAVES: Yes. I seem to remember that the reforms in the CTP act back in 2008 might have had a little something to do with that, about trying to change the accent into health outcomes—again, at that time, there was the same sort of resistance—because if I give you X number of dollars for your trouble and do not give you X number of dollars worth of value of service for your troubles and I advocate on your behalf I can take a slice of the action here; I cannot take a slice of the action of the health outcome but I can out of your cash.

Mr McDonald: Yes.

THE CHAIR: Moving on to another question, non-economic loss, page 2 of the explanatory statement talks about how non-economic loss damages are now largely an outdated measure arising from the time when an injured party was unlikely to have medical or rehabilitation facilities available to them. Clearly that is true in some cases, but it would seem to me it is not true in all cases, specifically in terms of a whole body of people for whom there are no rehabilitation or technological solutions to their problems. I am not quite sure why you are really saying that they are outdated given that for some people they are not.

Mr Broughton: The concept of compensating someone for injury dates back a couple of hundred years, at a time when medicine was not anywhere near as well established as it is now and, as a consequence, people just could not be fixed up. Even if you had something as simple as a broken leg, the chances were that you may never walk properly again, whereas that is most unusual in this day and age. There is no doubt that some people may be injured to the extent that all the medicine in the world will not put them back to where they were. But they are likely to be people seriously injured and are likely to be people above the threshold and therefore will still be entitled to non-economic losses. We are talking about relatively minor injuries—whiplashes, broken legs and things like that—which in nearly every case can be rectified back to close enough to normal.

MR HARGREAVES: Isn't it the case that hitherto you could have compensation for the ongoing costs of your acquired disability and an extra piece tacked on the top because you went through a painful experience—that the shock, the pain and all the rest of it was an item all on its own, which was a top-up that hitherto had nothing to do with your recovery or your adjustment? Some people have to have an adjustment; they do not have a recovery. What we are talking about in this scheme is making sure that people are paid sufficiently, we hope, to cover the adjustment and to cover the recovery—not just the fact that you got a bit of pain handed out at a given point in time. Is that right?

THE CHAIR: Not at all, he said.

MR HARGREAVES: No. That is why I am asking the question about—not at all. Mr Broughton or Mr McDonald, do you have a view?

Mr Broughton: It is the case that in the more severe injuries, generally speaking the awards include an allowance for non-economic loss as well as, usually, a very large payment for future medical care and future loss of income. Where the injury is quite severe, there probably is justification. Notwithstanding that you may need around-the-clock care for the rest of your life, you are not fully compensated; you will never be back to where you were and there is some justification for some sort of compensation. But in relatively minor injuries it seems unlikely that you need substantial compensation for non-economic losses, for the pain and suffering. The idea is to get people rehabilitated and—

MR HARGREAVES: So that $5,000—what percentage of people were you talking about? Was it seven?

Mr Broughton: Seven.

MR HARGREAVES: So we are talking about legislating for seven per cent of the claims?

Mr Broughton: No.

THE CHAIR: No; that was a different question, about early—

MR HARGREAVES: Hang on for a minute. It is my cricket bat. You are sitting on the sidelines in the bleachers at the minute. Please explain to me why our attention is on the $5,000 mark.

Mr Broughton: As part of the encouragement to get people thinking about rehabilitation, the 2008 act allows for people to go to the insurer and receive up to $5,000 worth of medical expenses paid even before there is any liability established.

Mr McDonald: The only person excluded is the at-fault driver, so it is a no-fault—

Mr Broughton: So you can start treatment virtually on day one, even before—

MR HARGREAVES: And that is seven per cent of the people?

Mr Broughton: Only seven per cent are taking up that offer. That is what concerns us.

MR HARGREAVES: I just wanted that on the record, because I think we skipped over that a bit and we needed that explanation.

THE CHAIR: Can I get back to my question. I am asking about permanent impairment. Why should there be nothing for permanent impairment? Suppose I lose the use of my finger or whatever it is. Permanent means permanent.

Mr Broughton: That is right. The loss of one finger would not put you above the 15 per cent threshold. What you would be entitled to is all the medical treatment that you can get that would help with that process. Obviously, unless you are extremely fortunate, the finger would not be fully replaced.

MR HARGREAVES: So you are talking about vocational rehabilitation, that kind of story?

Mr Broughton: Rehabilitation if necessary, yes.

MR HARGREAVES: If you are a violinist and you are missing a finger, it is a really big deal.

Mr McDonald: Then it is over 15 per cent.

THE CHAIR: Would that be over 15 per cent? I thought that—

Mr Broughton: No.

Mr McDonald: It could—

MR HARGREAVES: Yes, it would. You cannot even—

THE CHAIR: John, please.

Mr McDonald: It could well be, because, as you understand, chair, the law of torts operates on what is known as the eggshell skull principle. You take your plaintiff as you find her—or him, as the case may be.

THE CHAIR: In that case, I am totally misunderstanding the scheme. I thought that what you were talking about was that for 15 per cent you had medical guidelines that said that a finger is worth half a per cent or whatever, and the whole idea of the scheme was that we were not doing what you were saying, Mr McDonald—we had to have a 15 per cent threshold and there was a defined scheme for that. So if I happen to be world-famous violinist and I lose my finger, tough.

Mr McDonald: I thought you were speaking generally in terms of the general law of wrongs. When you have a compulsory statutory scheme, as we do, the obligation is to meet the return to health costs of those under that particular scheme. I apologise for misunderstanding your question. I was looking more broadly at the law of torts, Ms Le Couteur, not in terms of the scheme. I was anxious also to avoid the canard of the table of maims type thinking, which is ancient thinking about how much a toe is worth and how much an arm is worth, which is what used to happen in the past.

THE CHAIR: That may be ancient, and I am obviously misunderstanding it, but I thought that is what we were going back to. My understanding is that the scheme is based around 15 per cent whole person impairment, and that is based on the American medical guide to the evaluation of permanent impairment, which was developed by American doctors to communicate with each other. It is not based on the fact that I might have a particular need for my little finger or my little toe; it is effectively, as you were saying, Mr McDonald, that there is an amount of money per injury.

Mr Broughton: You are quite right. I think there has been a bit of confusion. You are quite right, Ms Le Couteur. It does not matter whether you are a violinist or what; you have either got a 15 per cent impairment or you have not. In the case of the world-famous violinist who has lost a finger—

THE CHAIR: Better not be injured in ACT.

Mr Broughton: They are entitled to any loss of income that is associated with this. Their finger will not get replaced and they will not get non-economic losses, but they will get a loss of income. If they are a very highly paid violinist, they will be compensated if they cannot play in the future.

Mr McDonald: That is what I was inexpertly trying to get to.

MR HARGREAVES: That is a very important point. It has been in the discussion, in the conversation out there, that a finger is a finger is a finger. But the loss of a finger to a violinist is considerably different from the loss of a finger to a footballer. The

effect on that person's 15—

Mr Barr: It depends which position the footballer plays.

MR HARGREAVES: I am not talking about Hawthorne, Mr Barr, where they use their fingers in all sorts of places that other people do not talk about. The thing is this: what is the 15 per cent actually attached to? Fifteen per cent of what? Fifteen per cent of your bodily function? Is it 15 per cent of your economic income? Fifteen per cent of what?

Ms Smithies: It says that the 15 per cent is the whole person impairment test based on, as you have suggested, the AMA 5 standards. It sets a threshold for the amount of the whole person that needs to be impaired before you are eligible to access non-economic loss. So you are right: you can have an impairment slightly under 15 per cent of whole body and you will not be able to access non-economic loss. It is worth while putting this in the context of other jurisdictions, though. This is not unusual in relation to other jurisdictions and other jurisdictions' schemes. This is actually, in a sense, taking what is a unique position of the ACT and bringing it in line with other jurisdictions.

THE CHAIR: Bringing it in line with other jurisdictions? South Australia has a scheme but it has a five per cent whole person impairment threshold. Why is 15 per cent applicable to us and five per cent to South Australia?

Mr McDonald: May I correct the record, Ms Le Couteur? The South Australian scheme operates on a points system. It is totally different from that which you have outlined. I think you were referring to the civil wrongs legislation in Victoria that relates to normal bodily injuries outside a compulsory framework. In South Australia they have a graded system, as Queensland does, where there are particular levels of compensation based upon where you get to on the scale. Rather than go into the details of it here, we could provide you with a description from the Motor Accident Commission in South Australia that would outline that for you.

THE CHAIR: That would be useful, yes. Yes; if you could do that.

MR HARGREAVES: What is the percentage in New South Wales, Mr McDonald?

Mr McDonald: Mr Hargreaves, it is 10 under the CTP scheme, but they use an older version of AMA. They use AMA 4. AMA 5 is a more subjective set of criteria, so the 15 equates in a broad sense.

MR HARGREAVES: In terms of AMA 4 and 5, I do not know if our secretary has got that. Do you have that detail? If not, we could ask these gentlemen to give it to us for your considerations later on. Would that be possible?

Mr McDonald: There is a copy of AMA 5 at the Canberra Hospital. It is a rather weighty tome.

MR HARGREAVES: I suspect that we are only interested in a bit of it—just a little bit of it.

Mr McDonald: Mr Hargreaves, there are many bits. Having, as you know—

MR HARGREAVES: We trust you, Mr McDonald, to be relevant.

Mr McDonald: I know you do, but having been a litigator in the US for many years and having had to deal with the AMA scale, in my day, of course—back when it was AMA 3, I might add—it was extremely voluminous.

MR HARGREAVES: That does not really help us a lot when we are trying to work out the difference between 5 and 4 with respect to this.

Mr McDonald: Oh; I can—

MR HARGREAVES: Can you do that?

Mr McDonald: Yes.

MR HARGREAVES: If you could do that, that would be helpful. What I am trying to get to is this. Ms Le Couteur started it off by saying, "Why five in South Australia?" We are sitting across the border from New South Wales. They are using 10; we are using 15. What I would like to see is some sort of justification for the difference. What I would like to see, in fact, and I think you will give it to us, is the fact that New South Wales will be obliged to catch up to us, not the other way around.

Mr Broughton: I think there are already moves afoot for that. In New South Wales the workers compensation scheme uses AMA 5 and 15 per cent as the threshold. It is my understanding that New South Wales are looking at bringing the two schemes into alignment, which will mean the same as what we are proposing here.

Mr McDonald: As is the civil law act in New South Wales, at 15 for normal—

MR HARGREAVES: That is very interesting.

THE CHAIR: That is interesting, yes.

Mr McDonald: And also our own workers compensation scheme uses AMA 5—and has done so, I believe, since 2005.

MR HARGREAVES: I think that has been missing in the conversation—that very point that you made.

Mr Broughton: It is a fairly recent move, Mr Hargreaves.

MR HARGREAVES: Okay.

Mr Broughton: They have recently appointed an oversighting body—over both of those two major insurance schemes. I think it has emanated from that.

MR HARGREAVES: Okay; very useful.

Mr Broughton: I might add that the benefit of being on the same scheme is that we can use the same panel of experts to make the assessments.

MR HARGREAVES: Yes.

THE CHAIR: The Law Society, in their submission, quote a passage of the AMA guide. It says:

> The Guides is not to be used for direct financial awards nor as the sole measure of disability. The Guides provides a standard medical assessment for impairment determination and may be used as a component in disability assessment.

It appears that this legislation is attempting to use it as the guide for direct financial reward and sole measure of disability, yet this is—

Ms Smithies: No, I do not think that is correct. The proposal is to use it as a threshold, not for direct compensation. It is a threshold issue: use AMA 5 as a guide to a threshold, but in terms of direct compensation for those who fall over the threshold, that will have nothing to do with the AMA guide and everything to do with the process that is currently underway, and that has been underway for many years, around negotiation and settlement.

THE CHAIR: But it is the gate keeper.

Ms Smithies: It is the gate keeper; that is right.

THE CHAIR: Whether you get considered or not.

Ms Smithies: That is right. I do not accept what the Law Society said around this.

Mr McDonald: In fact, it does not apply to financial issues at all. It is all about impairment.

THE CHAIR: I would have thought that impairment was one of the more important issues as to whether you were injured or not.

Mr McDonald: Yes, it is, but it is nothing to do with money.

MR HARGREAVES: It is not to do with livelihood necessarily.

Ms Smithies: No.

Mr McDonald: It is to do with impairment.

MR HARGREAVES: It is not to do with livelihood necessarily, is it? It is actually to do with quality of life. Quality of life picks up livelihood just as part of that. You can be a professional lawyer and still operate without your index finger, but if you happen to be a concert pianist in your hobbies, your quality of life is significantly impaired if you are missing your index finger.

THE CHAIR: Probably more problematical is that you have just got lower back pain from it. You can still do your job; you are just 15 per cent crabbier than you used to be before.

MR HARGREAVES: Or, in some Collingwood supporters, 30 per cent more.

Mr Barr: A sitting fortnight of the Assembly would achieve a similar outcome, Ms Le Couteur, but—

THE CHAIR: Yes.

MR HARGREAVES: Or even more—Collingwood football club has got more than 15 per cent impairment.

Ms Smithies: If we were proposing a scheme that said that, based on AMA 5, if you were 20 per cent impaired you got X, if you were 25 per cent impaired you got Y and if you were 30 per cent impaired you got Z, I think that you would start to get to the point where you were using the guidelines to determine financial outcome. That is not what we are doing. It is not what the legislation proposes.

Mr McDonald: I understand also that non-economic loss is an indeterminate thing. It is not something that is easily quantifiable at the start of any process. It is that which is awarded by a court. As far back as 1982, when the New South Wales Law Reform Commission was lamenting the lack of a reform which is that which we are trying to do today, they were saying how difficult judges were finding it in assessing non-economic loss.

Ms Smithies: To finish off on that, anything above the 15 per cent, as I said, and I reiterate it, is dealt with in the way that it has been dealt with and is dealt with today, which is an issue of a conversation between the crash victim and the insurer or legal representation—negotiation or settlement. None of that changes.

MR HARGREAVES: So we are only talking about the sub-15s, are we?

Ms Smithies: That is right.

THE CHAIR: When we are talking about whole body impairment, why don't we in some way combine physical and psychological injury? If I am 14 per cent physically injured but I am psychologically injured as well, am I not deserving as much consideration as if I was a bit more physically injured? Why can't we put the two together somehow? I am not quite sure exactly how you would do that—I am not claiming that I know how you add up psychological and physical—but I do not think it makes sense to ignore one.

Ms Smithies: It is not so much ignoring one as—

Mr McDonald: They are separated out, as you know, in relation to the bill. In a sense, it is to do with the integrity of the system and the stability of the risk. Without quizzing my New South Wales counterparts about the history of their scheme, that

appears to be why it was designed that particular way in New South Wales.

MR HARGREAVES: It is important, is it not, to understand that we are talking about motor vehicle accidents here, not a series of other types of life-changing events in one's life. Whilst Ms Le Couteur's point is quite valid, we are talking about the pricing of risk going on. What we are talking about is trying to address the pricing of risk carried by our community here.

THE CHAIR: The most obvious one is that some people who are in motor accidents decide they are not driving anymore or, even more than that, are not getting in a car anymore. I know people who have come to those conclusions. In today's society, that is a substantial inconvenience to their lives. That could be regarded as a fairly minor psychological impairment. They can still relate well to people; it is just cars that they do not relate well to. That would seem an obvious example.

MR HARGREAVES: That is covered by the rehabilitation component, is it not?

THE CHAIR: It is whether it can be added on so that you start getting into the non-economic loss, because that could lead to major social losses without necessarily economic losses.

Ms Smithies: The current test is 15 per cent whole body impaired for physical and 20 per cent—sorry.

Mr Broughton: It is 15 per cent psychological.

THE CHAIR: If you get 14 and 14, you are under. That is my point.

MR HARGREAVES: Is it not true, though, that as soon as you put a line somewhere someone is going to be on the wrong side of it?

Mr McDonald: That is true, Mr Hargreaves. I am afraid that is the price you pay for stabilising risk in a compulsory statutory environment.

THE CHAIR: I understand that the government has said that 33 per cent of the scheme costs are paid for non-economic loss and 19 per cent in legal fees. That is the current scheme, not the proposed scheme. You said that you would get these figures from the NRMA, but you have not provided any further information because you have said that they are commercial in confidence. My question is this: how do we actually rely on these figures? I am not sure how they can be quantified. My understanding is—I am not a lawyer but I have been told—that there has been no single Supreme Court decision under the 2008 act and therefore there have not been any formally itemised awards of damages. Settlements are always just round figures; the components are not agreed between the parties. At some point the amounts at each heads of damages are stated in claims, but they are never finally agreed to or settled. So how can we say that there are exact percentages for them? The solicitor-client costs also will always be confidential. So how can you say that you know what percentages there are?

Mr McDonald: Frankly, Ms Le Couteur, because we know what dollars are spent.

We get that information from NRMA. Our actuary then processes that information—that is to say, on the actual amounts that they spend on settlements.

THE CHAIR: Suppose I am a plaintiff and I got $100,000 from the NRMA. How does the NRMA know how much of that $100,000 I spent? Did I give $99,000 to my lawyer or did I spend $99,000 on my new wheelchair and whatever? That is my point. The NRMA knows how much it pays, but it does not know what it was for.

Mr Broughton: The legal costs that are quoted in those figures relate to the payments by NRMA directly to the lawyers of the victim, if you like. We have no information on what the claimant ultimately pays his or her lawyer. We do not have that information.

THE CHAIR: So you do not know if it is 19 per cent for legal fees. You only know that, of the money the NRMA paid, 19 per cent of that was paid directly to the lawyers but the actual legal fee amount could be—

Mr McDonald: It could be considerably more.

THE CHAIR: It could be different.

Mr McDonald: That is called party-party costs. A local law firm advertise honestly to their clients that the solicitor-client component of costs is between 50 and, I believe, 75 per cent higher than the party-party costs. They further go on to say that they may have to take that money out of their compensation.

MR HARGREAVES: That is part of the problem in getting the information Ms Le Couteur is trying to glean. It is part of the problem of having one insurer in the town, is it not? If we had more than one insurer in the town, you would be obliged to come up with a legislative regime so that everybody is on a level playing field here.

Mr Broughton: No. Because this is a payment between the claimant and his or her legal representative, it does not impinge upon the scheme. It is in addition—

MR HARGREAVES: What you are saying then is that it is totally irrelevant to the consideration of the legislation in that case.

Mr Broughton: No, not necessarily because—it is a very important point because, of the non-economic loss compensation that people are getting, not all of it goes to the claimant.

Ms Smithies: So in all likelihood the legal costs are understated and the non-economic losses—

Mr Broughton: Significantly, at least according to the flow—

Ms Smithies: are overstated.

Mr Broughton: That is right.

MR HARGREAVES: You are saying that the benefit to the actual client in terms of quality of life outcomes is guaranteed more so under this regime than under the previous regime, because of this very point—that you have not got a clue what slice of the cake the injured party is having to pay out for legal representation.

Ms Smithies: It is indeed unfortunate but the system—

MR HARGREAVES: You have a fair idea but you cannot actually in all cases prove it.

Ms Smithies: is incentivised that way.

Mr McDonald: We can only go on what lawyers advertise as to what they do.

MR HARGREAVES: Have you seen anything in their submissions? I have not looked at the absolute detail of all the submissions; some of them are in language that lawyers understand and I can only understand with an interpreter. Has there been very much in there about that very point—how much the legal profession stands to lose if this legislation goes on?

Mr McDonald: I do not believe so.

MR HARGREAVES: That is good enough, thank you, Mr McDonald.

Mr McDonald: I cannot recall seeing it in the submission and, frankly, it has not been a focus of our endeavours here. The focus of our endeavours has been on designing a legislative structure that does two things. It provides the structural health mechanism that brings people back to the best they can be, as far as possible, and, given that the two things that insurers need in order to enter a market are stability of risk and predictability of outcome, to align the insurance risk for 257,000 vehicles with that of nine million vehicles.

THE CHAIR: I would like to move on to some different issues—those raised by the scrutiny committee and the Human Rights Commission. One of the issues is the right to a fair trial and equality before the law. The human rights commissioner has raised a concern that limiting legal rights to compensation on the basis of impairment effectively discriminates against people. Section 8 of the Human Rights Act protects the right to equality before the law and particularly provides protection against laws which discriminate on the basis of disability. The bill appears to be creating a legal discrimination against those of a particular class or amount of disability. Could you explain why this is a proportionate limitation in the context of section 28 of the Human Rights Act?

Mr Broughton: I think the intention of the act was that people with disabilities not be discriminated against. The bill that you have in front of you is actually discriminating in favour of people with disabilities because it provides a greater entitlement for people who are more permanently disabled than others.

MR HARGREAVES: Would you perhaps entertain the comment by the scrutiny of bills committee, on which I sit—so I declare my interest here. It talks about anti-

discriminatory practices with respect to people with disabilities but it does not actually talk about whether it is positive discrimination or negative discrimination. So would you entertain the idea that this legislation in fact, if it is going to be labelled as discrimination, is in the positive and therefore that people with disabilities in this city are going to be treated better as a result of this?

Mr Broughton: I think you have just said what I said but far more eloquently, thank you.

MR HARGREAVES: No doubt about you, Mr Broughton!

THE CHAIR: Could we focus not on the people who are the over 15 per cent but the under 15 per cent? With what we no longer have, you could regard it as discrimination against those people. You have only answered half of my question. You have not addressed the situation of the under 15 per cent. Could you address that section?

Mr Broughton: You are back to saying that we essentially do not allow people with less than 15 per cent impairment to access non-economic loss.

THE CHAIR: My understanding is that there are significant limitations. They cannot go to court et cetera.

Mr Broughton: No. The only thing the act does differently from what we are doing now is to say that if they go to court or if they are settling with the insurer outside court, they are not entitled to non-economic losses. It does not prevent those people from having their day in court. They are entitled to put in claims for health costs, for loss of income and for all the other things that they might do. But they are not able to be awarded an amount for non-economic loss.

THE CHAIR: Looking at the non-economic loss, presumably that is going to impact particularly on people who are unemployed, particularly women, often parents with childcare duties or people looking after older people. There are quite a considerable class of people who will not be in a position where they are suffering direct economic loss; nonetheless they may potentially be suffering significant losses to their lives. How is this proportionate, again, in this context of section 28 of the Human Rights Act, given it is likely to impact more on young and unemployed people?

Mr Broughton: It is really diverting the issue away from what we are trying to achieve here, which is to encourage people not to go down the path of looking for lump sum settlements but to go down the path of getting their health rectified. All of these people, regardless of how impaired they are, are entitled under the arrangements to have proper healthcare costs funded through this scheme.

THE CHAIR: But what about if they have significant issues which are not economic issues?

MR HARGREAVES: Isn't it fair to allow these people to make a profit out of their accident? These people were travelling along and they had a certain lifestyle and all of a sudden they have a prang. What is wrong with them making a profit out of that?

THE CHAIR: What was wrong with them being compensated—

MR HARGREAVES: At the expense of everybody else.

Ms Smithies: And their health.

MR HARGREAVES: And their own health. What is wrong with that?

Ms Smithies: The idea of insurance from an economic perspective—

THE CHAIR: Their heath has already been injured by the accident.

MR HARGREAVES: As I understand the evidence given to us this afternoon, the point is that the accent is going to be on bringing these people back as quickly as they can so they can get on with their quality of life, and indeed improve it, if they are in the circumstances you have just described. But giving them a $10,000 payout is not going to help them at all.

Mr McDonald: The clear understanding needs to be—

THE CHAIR: The only people in the world $10,000 does not help.

MR HARGREAVES: No, I would argue that, in fact, for someone who has a poor economic situation, a lump sum of $10,000 may very well act to their detriment if it is not accompanied by proper and professional rehabilitation to put them in a position where they can improve their lifestyle anyway.

Mr McDonald: May I add two points to that. We need to comprehend and keep in our minds very clearly that the purpose of non-economic loss is not to compensate people for economic loss that they have not actually incurred, for a start. Mr Hargreaves, it is fortunate that you are here and you have been in the rehabilitation industry. The rights of indigent people, as you know, have been something that I have been involved in for all of my legal career. One of the things that you understand is that a person has only a certain amount of disposable moneys after whatever it is that they receive—statutory benefits or whatever. The painful truth is that if they receive a lump sum payment they tend to spend that money on the disposable portion of what they had before and not on something like rehabilitation. I know it is perverse but, regrettably, it is true, as you well know.

MR HARGREAVES: That is true.

THE CHAIR: Mr McDonald, I actually asked about section 28 of the Human Rights Act and how it fits in as proportionate with that. Would it be possible to go to that?

Mr McDonald: Ms Le Couteur, in order for me to do that in the level of detail, and with respect for the committee, may I take that on notice?

THE CHAIR: Yes, certainly. I would be interested in that answer.

Mr McDonald: I would be quite happy to, through the Under Treasurer, brief the government on that and I am sure the government would be in communication with you.

MR HARGREAVES: What may be helpful in that respect is to obtain a copy of the government's response to the scrutiny of bills committee report on that particular matter. You might find that there is a doorway through which you can go.

THE CHAIR: Appreciably, you may have already done—

Mr McDonald: Thank you. I am not blessed with having that particular document on my iPad today, Mr Hargreaves.

MR HARGREAVES: Yet.

Mr McDonald: Yet.

THE CHAIR: Again, can I talk about the discount rate. You are increasing the discount rate from three per cent to five per cent. This, of course, will have a greater impact on young people and more seriously injured people. Can you, again, in the context of section 28 of the Human Rights Act, explain how this is proportionate? If you wish you can take that on notice but either way can you explain it?

Mr Broughton: Yes, I think we will take that on notice.

Mr McDonald: It is an issue also of parity with other jurisdictions and around providing greater stability of risk. We are the only jurisdiction that goes on the Todorovic doctrine. Ms Le Couteur, as you know, the average discount rate is about five per cent. In some states, it is six. In Western Australia I believe it is even higher. But it was to do with risk and stability.

THE CHAIR: Being the same as other states is a different argument from the human rights side. Being the same as other states is an argument but it is a different argument.

Mr McDonald: I understand it to be a different argument and that is the reason why we wanted to take it on notice.

THE CHAIR: We will hear more about the discount rate. It does not seem totally right. Medical panel findings: I understand that your policy is to get rid of the scenario that we have doctors versus doctors, and I can see the point of that.

Mr McDonald: Extremely expensive.

THE CHAIR: Yes. But I have been told that this is problematic for a number of legal reasons and that the bill is effectively creating a situation where executive action—this is a decision under an enactment—is determining the extent of legal rights and the interests of parties, which is, of course, a judicial function. What consideration have you given to the implications of this? Are you relying solely on the substantial injustice clause to overcome separation of powers issues and particularly the requirements of the boilermakers case and the subsequent High Court decisions?

Mr McDonald: Ms Le Couteur, as the only lawyer on the panel here today, that would require me to give a legal opinion, which I am not prepared to do. I would ask that we take that on notice and we will provide you with an answer on that. May I also—

THE CHAIR: That is probably an excellent answer given my legal knowledge also, Mr McDonald.

Mr McDonald: Yes, and I would like to be able to craft it, with the greatest respect, in a way that is comprehensible. The short answer I could have given to you is that we can rely upon the New South Wales Supreme Court decision that validates what MAA do. And that would not help the debate at all. This has actually been litigated in New South Wales and resolved in favour of the Motor Accidents Authority. I would prefer it if we could give you something in writing on that, obviously through the government.

THE CHAIR: That would be fine, Mr McDonald. I suspect that you will have the same response to the next question because they are very similar issues. The next part of this issue is the limitation on the right to a fair trial. Could you please talk us through your thinking on this and why you feel there is a proportionate limitation to the right to a fair trial and the right to have a person's rights and interests decided by a competent, independent, impartial and fair public hearing. I would like this discussion to be in the same context as before—section 28 of the Human Rights Act.

Mr McDonald: May I inquire if you are, with respect, relating this to the medical panel decision or englobo?

THE CHAIR: With my limited imagination, I was thinking more about the medical but I understand it is broader than medical. But yes, medical certainly is, in particular, one that I can understand.

Mr McDonald: I am happy to—

MR HARGREAVES: At its basic, what we are saying is that, if you have got two parties with differing views, the way in which it is normally settled is by an independent person, aka the courts. In this case we are saying, as I understand the legislation to be, that up to the 15 per cent you can elect to just cop it sweet and take it or if you do not like it you can go to court.

Mr McDonald: There are three levels—

MR HARGREAVES: In which case your right to have a judicial arbiter is not being removed at all. Am I right?

Mr McDonald: Yes. It goes to a basic issue. If I can use it humorously, there are too many doctors, lawyers and Indian chiefs. At the same time, judges are not medical professionals. They have expressed great difficulty in coming to these kinds of determinations. They have expressed high levels of frustration with competing medical experts. For the most part, I can say that having the structure that we have put

in place for the medical assessments where we have actually put in a three-tier review process is a far more equitable way of looking at it. In fact, it takes away a lot of uncertainty.

This issue, Ms Le Couteur, is, of course, before your time but it was raised in regard to the Civil Law (Wrongs) Act when that was a bill, because it was to do with medical experts, limiting medical experts back then. With the greatest respect, I have heard this argument before.

MR HARGREAVES: So what we are talking about, having a panel of medical experts, actually puts a degree of consistency into the independent thinking behind all this.

Mr McDonald: Yes.

MR HARGREAVES: Otherwise it is the subjective view of a particular medical practitioner who may or may not be qualified in rehabilitation medicine, and probably is not.

Mr McDonald: My area of litigation was complex commercial litigation, as you know, but I did have occasion to do appeals litigation in certain areas that impinged upon this. The worst case that I ever ran, I won. And the only reason I won it was a very simple reason. There were three psychiatrists and two clinical psychologists on my side of the aisle, and the same amount of medical-psychological horsepower on the other side of the aisle. And the only reason I won that case was that my chief witness was the head of the Harvard school of psychiatry and he had never testified in court before. I did not ask him the question, the judge asked him the question, and he told the judge the only reason he was testifying in this case was that it fascinated him. And that gave me the verdict and it cost the US government a fortune. I took away from that a determination that I should never allow that to happen again.

Mr Broughton: Could I just add that, either way, the medical assessment panel's decision is peer reviewed and the court has the power to set that aside if they think there is a severe injustice being done as a result of that.

Mr McDonald: Yes.

Mr Broughton: So there are some checkmarks, if you like.

Mr McDonald: Like I said, there are three tiers of analysis of review there.

MR HARGREAVES: These are open to these people who—we are not talking about the over 15 per centers, we are talking about the under 15 per centers—do not want to go down the $5,000 threshold?

Mr Broughton: Yes. And we are probably only talking about a very small cohort here because most of them are going to be clearly under 15.

MR HARGREAVES: Yes, but it is a right, is it not? It is a right that people can exercise if they want to? And what we are giving them, as I understand it by this

legislation, is clarity of the process. So I am—

Mr Broughton: Clarity of process and—

MR HARGREAVES: I am an ordinary, ignorant punter and I look at the process and I say, "Yes, I understand it."

Mr McDonald: Yes, clarity of process and exercising that opportunity. Understand that it is a right of action but an opportunity for compensation.

MR HARGREAVES: Yes.

THE CHAIR: I have a couple more questions relating to what the scrutiny committee said. Can I put those on notice?

MR HARGREAVES: Yes, that would be a good idea.

Mr McDonald: Please.

THE CHAIR: I think we are going to have the same sort of reply. In which case, I might start with the blinkingly obvious question. There were the reforms in 2008 and there was to be a review, which is almost finished. I believe that we will not report until we have seen some very preliminary stuff from it. But why are you making substantial changes to the third party legislation when we have not even reviewed the changes we made less than three years ago? Would it not make sense to wait and see what happened?

Ms Smithies: I think the answer to that is that, certainly while the 2008 reforms looked to be having some impact, medical expenses have only gone up from 18 per cent to 22 per cent. We are only seeing seven per cent of crash victims accessing the $5,000 early access to medical assistance, and motor vehicle compulsory premiums have gone up by $141 over that time. So I think it is fairly clear that there is more that needs to be done to actually get the system right and to get the incentives in the system right, both for health outcomes and for costs.

MR HARGREAVES: It would appear as though the costs to the citizen have risen exponentially greater than the amount of risk that has gone with it.

Mr McDonald: That is correct, to the tune of $141 for the average family car.

MR HARGREAVES: Which is, I would suggest, from the community's perspective, a damn good reason to have a look at this. To the very people that Ms Le Couteur talks about, the unemployed, the women at home with their children and who do not have a very large income, that $100 is meaningful. So they would be grateful for us looking into this particular process at this particular time, I would imagine.

Mr McDonald: Yes, that is what the community response to me is on a regular basis.

MR HARGREAVES: Thanks.

THE CHAIR: The former Treasurer advised the Assembly on 31 March this year—and this goes back to this question and the question we asked at the beginning about costs:

> … I have been seeking to provide members with an appropriate level of information.

That was about costs. She said:

> I accept that for members in this place that has been a deficit that we need to fix. At this point in time we have not reached agreement with the NRMA about the form of that information. There are some concerns from the insurer …

about it being commercially challenging, possibly. Treasurer, have you any update on the status of trying to provide more information for members on this?

Mr Barr: I am reasonably keen for that to occur. As I said at the outset, this reform is inevitable. It is just a matter of when it occurs and when someone plucks up the political courage to see through the usual interest groups, the rent-seeking campaigns that are made against these sorts of reforms. The more information that can be provided, the better. I am happy to facilitate as much as I can in relation to this.

THE CHAIR: So you will see whether you can find more information about the costs?

Mr Barr: Certainly, yes.

THE CHAIR: Thank you. The act provided that a review commence on 30 September this year. Has that review commenced?

Mr Barr: Yes.

THE CHAIR: And when will it be finished and expected to report?

Mr Barr: I will take some further advice on a report date but it is certainly underway.

THE CHAIR: Would you expect that this bill would be debated by the Assembly before the report is public?

Mr Barr: I would never begin to speculate on when the Assembly might do its job.

THE CHAIR: Would you—

Mr McDonald: I can assure you, Ms Le Couteur, we will get the report done as soon as we practically can.

THE CHAIR: Is that likely to be this year or is that—

Mr McDonald: I know politicians like to tie bureaucrats to particular parameters—

Ms Smithies: We are all looking at you, Tom.

Mr McDonald: Ms Le Couteur, you have been assiduous over the years in so doing. In fact, I have been the victim of your acuteness in the past.

MR HARGREAVES: Not cuteness, Mr McDonald!

Mr McDonald: Acuteness.

Mr Barr: Acuteness.

THE CHAIR: He did say that, yes.

MR HARGREAVES: I do beg your pardon, I misheard you.

Mr McDonald: In fact, I can give you the up-to-the-day position that we are in on that. Our actuary is awaiting the final numbers for September 2011 from NRMA. As soon as those numbers are in, then the firm can begin to crunch those numbers. I have also been in contact with a prominent academic in the public health space as well in case the actuary needs assistance in relation to the health outcomes portion of the review set by section 275, which I remind you was inserted by your predecessor, Dr Foskey.

THE CHAIR: Thank you.

MR HARGREAVES: For which we are all eternally grateful.

THE CHAIR: The former Treasurer—

Mr Barr: I do reflect on Dr Foskey more fondly in 2011 than I possibly did in 2006, 2007 and 2008.

MR HARGREAVES: But the memory lingers on.

Mr Barr: Indeed.

THE CHAIR: Talking about memories lingering on, the former Treasurer was quoted in the *Canberra Times* on 25 March as saying that the review that we have just been talking about was not going to tell us anything we do not already know. Is that your expectation also? And would that be why you are not saying that we definitely will have the review before we debate this in the Assembly or—

Ms Smithies: I am not sure that was what the Treasurer was saying.

MR HARGREAVES: Have you stopped belling your cat, minister?

THE CHAIR: Have you got a cat to bell?

MR HARGREAVES: Of course he does, ever since the weekend.

Mr Barr: That I would rely on a quote out of the *Canberra Times*—I will go back

and speak to the former Treasurer to ensure that that is an accurate reflection of what she said. But perhaps it is best if I leave it at that at this point in time.

MR HARGREAVES: It would not be appropriate for you to be presumptuous now and answer that.

Mr Barr: No, certainly not.

THE CHAIR: Is it possible that after the review you will think otherwise about some of the changes? The Law Society in its submission said that in its experience the 2008 act has actually substantially improved things in terms of treatment and rehabilitation of injured road users—

MR HARGREAVES: Is it possible? Is it possible?

Mr Barr: So the question is: is it—

THE CHAIR: and it is possible the lawyers are correct. It is possible that lawyers are correct.

MR HARGREAVES: Is it possible the sky will fall in on Thursday? Yes, of course it is.

Mr Barr: If the question is if the facts change would I change my mind, yes. But I would remain to be convinced that the facts will change.

Ms Smithies: If I can recap, premiums have gone up by $141 over the last two years. We have only got seven per cent accessing the $5,000 medical expenses. While they have increased, it has been marginal, so I think those speak for themselves. In terms of the outcome of the review, I think there is a particular challenge for the actuary in respect of this and that is that three years is not an awfully long time to assess these claims, particularly in an environment where what you have moving through the figures are some long tail and large claims as well. That will be a challenge for the actuary in terms of how the review is done and I think it is worth while saying that now.

Mr McDonald: Yes. I should also add that that was Mr Smyth's amendment.

Ms Smithies: Which one, Tom?

Mr McDonald: The three-year amendment.

MR HARGREAVES: He is a clever boy, isn't he?

THE CHAIR: Yes, it is a pity he is not here.

MR HARGREAVES: No, it is not.

THE CHAIR: In the government's information that is released about third-party claims it says that, since the changes, claim sizes to date under the revised legislation

are much lower than under the previous legislative regime and much of the reduction is attributable to reduction in legal costs. So is it possible that when you finish the review you will have a different view—because you have said that because—

Mr Barr: Are you fishing politically for me to say yes there?

MR HARGREAVES: A hypothetical will get us nowhere, Madam Chair.

THE CHAIR: You have said that the costs have gone up but it is not clear where the increase has been. The Law Society's joint submission suggests that once the information has been properly looked at it is not that the costs have gone up because the legal fees have gone up, and you have said that the costs have not gone up because of medical fees. I am not sure why the costs have gone up or how much they have gone up, but the premiums have gone up. Is it possible that once we do the review we will actually work out where the increase is and thus what else we should be doing?

Mr McDonald: Yes. We already have some information obviously as to why premiums have risen so significantly and what the components of that increase are in total. If I can get my technology working properly—

Mr Broughton: I can probably do it using the old technology.

Mr McDonald: Yes, thank you, Mr Broughton.

Ms Smithies: Much more efficient.

MR HARGREAVES: That is why we are giving it away, Roger.

Mr Barr: No. Given the significance of this day, I think using the Apple technology would be appropriate, Tom.

Mr McDonald: Perhaps I could look at both at the same time—

MR HARGREAVES: That is why the good lord gave you two eyes, Mr McDonald.

Mr McDonald: Yes, thank you. Increase in award payments: it is actually $144 on the average premium. The components of that are: 51 per cent equals increases award payments; 33 per cent equals superimposed inflation; 26 per cent equals movement in expected average weekly earnings; 20 per cent equals legal costs; and six per cent equals investment returns. Those are the components that we know that have made up the increase in premiums.

THE CHAIR: As Ms Smithies said at the beginning, a lot of those are going to impact on any scheme.

MR HARGREAVES: But does one drive the other?

THE CHAIR: Wages are not going to be impacted on by the third-party scheme.

Mr McDonald: Also awards have risen quite significantly.

THE CHAIR: Yes, absolutely, which is irrespective of the insurance scheme; this is the point.

Ms Smithies: Yes, and this is the point, Madam Chair—I think you are absolutely right—that in a policy sense what policy makers can do is concentrate on the things which they can control. So, given that wages and superimposed inflation of broader settings are what is moving through the economy, obviously prices will grow, wages will grow. We know this as pretty much a truth. So we will concentrate on the other parts of what makes up both the base of the scheme and the growth in the premium to try and control those.

THE CHAIR: The Insurance Council in their submission say that one of the problems, and I think you have really touched on it too, is that we have a range of different schemes between the different states and that what they would like to see is more similarity, harmonisation.

Mr Barr: Yes, they were banging on about that at the tax forum the other day, yes.

Ms Smithies: On everything.

Mr Barr: On everything, yes.

THE CHAIR: On everything, yes. Does this—

Mr Barr: Perhaps we can just abolish state and territory governments.

THE CHAIR: There are probably some advantages to that but that is possibly slightly bigger than this discussion. Is this a—

MR HARGREAVES: Redfern City Council comes to mind, minister—

Mr Barr: Comes to mind, yes.

MR HARGREAVES: A scary prospect, that.

THE CHAIR: Is this an issue, given that it is on the COAG reform agenda?

Mr Barr: Harmonisation? There was a fierce bidding war amongst state treasurers to go down this path, happily cheered along by hundreds of people at the tax forum. Yes, there will be more harmonisation; there has to be.

THE CHAIR: And is that the major reason why you have gone for the 15 per cent and 5 per cent—5 per cent discount and 15 per cent total permanent impairment—as the thresholds, simply harmonisation, or did you look at the equity issues behind them? The move from three to five per cent for some people, as I spoke about earlier, could be significant.

Mr McDonald: In terms of the 15 per cent, we looked at the equity. We looked at the outcomes of endless studies that showed improved health outcomes by streaming

injured crash victims into a particular regime—from Sydenham to Saskatchewan, to be blunt—and in every case the studies show a singular line of outcome, and that is better health outcomes, so long as you are able to channel people into a structured equitable mechanism by which they can return to health.

So the harmonisation issue is on the backburner in relation to the 15 per cent. It has slightly more relevance in relation to the discount rate, but really the Todorovic discount rate was set by the High Court in 1981 and it is a long time since then and the cost of living has changed and the whole economic structure of the nation has changed. We looked at all of those issues, those kinds of things, in terms of harmonisation. It is trite simply to say that was what we would be looking at.

But may I say that what this reform will do is broadly align the privately underwritten schemes in the ACT, New South Wales and Queensland in terms of practice and procedure. Already in the case of workers compensation where alignment is happening, experts—medical experts, rehabilitation experts—are able to be used in different states now. We are going to give full faith and credit to New South Wales medical experts in the ACT for the purposes of the assessment process, on the assumption that the legislation passes. All of this is designed to provide consistency of outcome.

THE CHAIR: We are running out of time and I actually still have quite a few more questions. I know that will surprise you.

Mr Barr: I look forward to receiving them all on notice then.

THE CHAIR: Yes. One of them specifically is that I have a note saying that your numbers added up to more than 100 per cent. So could we have those—

MR HARGREAVES: They are on the *Hansard* if we want to check them, as I understand it, through the press.

Mr Broughton: What Mr McDonald did not go on to say was that offsetting those increases has been a reduction in the number of claims. That has—

Mr McDonald: Twenty-seven per cent.

Mr Broughton: That has deducted 27 per cent and there has also been a reduction in other costs within the scheme which have contributed a 10 per cent reduction as well. So if you take those into account it does add up to—

MR HARGREAVES: The numbers that Mr McDonald quoted actually were considerably greater than 100 per cent if you add them up. I believe there to be an interconnectivity between some of the numbers.

Mr Broughton: Yes.

MR HARGREAVES: You might like to have a look at those numbers and then give us a reconciliation on that; that would be helpful.

THE CHAIR: Yes, take it on notice.

MR HARGREAVES: That would fix up, I think, the question which is—

Mr McDonald: My only excuse is that as a lawyer I only know how to add up.

MR HARGREAVES: I am sure you can tell that to the plaintiff lawyers, because they can add up. That is why they do not like this legislation.

THE CHAIR: I would just like to thank you all, Treasurer and officials of the Treasury Directorate, for appearing today. There will be questions on notice. As soon as possible we will send you a proof transcript so you can check for any issues. This public hearing is now adjourned.

The committee adjourned at 3.59 pm.