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

WEDNESDAY, 12 OCTOBER 2011

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

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 9 August 2011

The committee met at 3.04 pm.

MORRISON, MR SIMON, Member, Personal Injuries and Compensation Committee, Law Council of Australia
PARMETER, MR NICK, Director, Civil Justice Division, Law Council of Australia

THE CHAIR: Good afternoon everybody, and welcome to this public hearing of the Standing Committee on Public Accounts inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011. On behalf of the committee, I would like to thank you, Mr Parmeter and Mr Morrison, for appearing here today on behalf of the Law Council of Australia. We have a privilege card which is in front of you. I would prefer not to read it out on the grounds that most of us here have heard it before. Can I ask whether you have read the privilege card?

Mr Morrison: We have, Madam Chair.

THE CHAIR: And you understand the privilege implications of it?

Mr Morrison: I do.

Mr Parmeter: Yes.

THE CHAIR: Can I remind witnesses of the protections and obligations afforded by parliamentary privilege. I have already drawn your attention to the statement. Can I remind you that the proceedings are being recorded by Hansard for transcription purposes and they are also being webstreamed and broadcast live. Before we proceed to questions, do you have an opening statement that you would like to make?

Mr Morrison: I do, Madam Chair. I had the good fortune three months ago to attend a legal convention in New York. Former President Bill Clinton spoke on the topic of tort reform. He spoke to a large group of lawyers about the role of lawyers on the issue of tort reform. He gave some sage advice. He said: "Governments don't need lawyers to come along and tell them there's a problem when reforms are needed. Governments know that. What lawyers would be well served doing is to actually talk to government about solutions." And that is our focus today, Madam Chair. You will hear lots of evidence, I expect, around problems associated with the proposal. We are here to talk about some solutions.

We would like to focus only on two issues in the terms of reference. Those two issues are the primary term of reference, which is the bill and its objectives, and term of reference No 5, the innovative and alternative scheme ideas.

If we could start with the bill, as we apprehend the bill and the explanatory memorandum, there are two underlying objectives. One is to facilitate earlier medical intervention and rehabilitation and the other is to control rising premiums. At the outset we want to say that our view is that there are three simple elements to very good, successful insurance scheme design. Those elements are a high level of flexibility, low disputation inside the scheme and a short tail.

The vehicle that has been nominated in this bill is the 15 per cent whole person

impairment threshold on non-economic loss. I want to touch very briefly on thresholds and then come to our solution. Our understanding of the history of thresholds in this country is that they were introduced in an effort to control rising costs in insurance schemes. We think there is a fundamental problem with an entry threshold into an insurance scheme as opposed to other control measures. The fundamental problem is that thresholds, by their nature, discriminate against people inside the scheme.

There is a problem with using impairment rating as a methodology for thresholds, in that impairment is not the true measure of loss for someone who is seeking to recover inside an insurance scheme. Disability is actually the measure. The nomination of a 15 per cent impairment level, of itself, has particular implications. Someone could well suffer a very high impairment rating—for example, a loss of a digit in a hand—but it is not that disabling; whereas someone could have a lower impairment rating—for example, a disc injury to a back—but it could be career ending. We have a fundamental difficulty around using impairment for that purpose.

We believe impairment thresholds do three things in insurance schemes. There is no question that they reduce cost, and that has been shown around the country. But they do two things that I think are unintended consequences. The first is that they drive up disputation. There tend to be more disputes. Can I use the Victorian model as an illustration in point. In the CTP scheme in Victoria, we have a 30 per cent entry threshold, coupled with a serious injury test. So the difficulty is that practically you have a trial before you even start the process to determine whether you meet the threshold. And we do not think that is a good thing for insurance schemes. More importantly, we think they distract the injured person from the treatment process, because all of their energy is actually expended on whether they do or do not qualify for a form of compensation.

We want to take you quickly to the options that we see that could solve this. We think that the solution we want to put to you ticks three important boxes. Firstly, we think that injured victims will get treatment sooner and claims will be finalised quicker. Secondly, we think that insurers can maintain good levels of profitability, which they need to do. Thirdly, politically, this solution will be more acceptable to voters.

The two components of our model that we want to talk to you about are, firstly, early treatment and rehabilitation. We think that the enactment of legislative provisions to incorporate what we call mitigation provisions into legislation will go a long way to helping this problem. I observed in some of the reports and evidence that there was a concern that the low take-up rate for treatment in the ACT scheme is, in part, attributable to lawyers dissuading clients from taking it up. I suggest that legislative changes should include mitigation provisions—and I will give you an example that is at play in another state. The act will prescribe that there is an obligation to mitigate one's loss. In other words, if an insurer makes treatment available and somebody elects not to take it up then there are consequences in terms of claims entitlement moving forward. It is a model used in the workers compensation scheme in Queensland, and I can report that it works very well.

The second component to early treatment is really the culture inside the scheme, which I will come to in a moment. But in terms of a legislative solution, we would

urge you to consider mitigation provisions to solve that problem. The second component to the solution is around controlling premium level. In looking at scheme designs around the country, there are all sorts of models available. We believe that the government can achieve its purpose without the imposition of a discriminatory threshold by one or more of the following measures. Firstly, to contain costs, there are different models available. There are caps, there are thresholds, there are alternatives to thresholds which will reduce claims costs. I will speak to a couple of them.

A damages points scale in general damages is one that has been used in other states. The beauty of a damages points scale is that it overcomes the discrimination component of a threshold. It allows any claimant access, but they have to prove loss to be entitled to the compensation. It is a model that works in the Queensland CTP scheme and the early rehabilitation rate is somewhere in the order of 25 to 30 per cent in that state, against seven per cent here. So I suggest to you, Madam Chair, that as a model that works well.

Secondly, there is the imposition of election provisions as opposed to thresholds. What I mean by that is that someone involved in a scheme is offered a choice. If we take the ACT model as a good working point, if the objective is to get people into treatment early, one option available is to give them the election between taking up the treatment cost and moving into the claim straightaway. It is a model that is used, again, in the workers compensation system in Queensland. In 1995 the Queensland WorkCover scheme had an unfunded liability in the order of half a billion dollars, which was catastrophic at the time. The government sought to bring in a threshold. Politically, that was not acceptable to the voters and the government brought in an election system. Within three years, the claims frequency had dropped by 40 per cent. So I would suggest to you, Madam Chair, that elections do more than the job of thresholds but do not discriminate in the way that thresholds do.

Finally, there is a finely tuned what we call pre-court process. The 2008 amendments to the ACT legislation, from what I can gather, were largely modelled on the Queensland example. I believe, looking at the legislation, there is ample opportunity for that to be finetuned to both reduce time in claims finalisation and reduce cost. I will give you one working example. Former Chief Minister Stanhope in his paper referred to the resolution rate of claims following the 2008 amendments. He said that the claims resolution was something like 1,100 days pre amendments and 700-odd days post amendments. The concern was that the take-up rate of resolution in the compulsory conference system was not effective.

In Queensland, when we brought in a pre-court system with compulsory conferencing, in the first three years the resolution rate only peaked at 30 per cent. Following that three-year period, the high-water mark of resolution got to 80 per cent. So 80 per cent of cases had been resolved without lawyers litigating claims. Having worked in that system for over a decade inside a pre-court structure, what I can indicate to you, Madam Chair, is that the provisions take some time to kick in. Once they kick in, you will see exponential results.

I want to finish on the cultural issue. If you talk to other scheme operators around the country, you will find that the culture around which an insurance scheme operates is a really critical component. Legislation can do so much but culture is critical. I want to

refer to some evidence given to this inquiry on 6 October. I will quote from Mr McDonald's evidence at page 11 of the transcript. He was being questioned around the issue of the low take-up rate of early treatment in the ACT and he had this to say:

> 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.

Having worked in the scheme in Queensland, I can support Mr McDonald's comments. It is critical that there be a working relationship between the insurer and the accident victim and the lawyers representing them. We have a commission model in Queensland, being the Motor Accident Insurance Commission. A primary function of that commission is to actually ensure that the stakeholders in running these claims work properly together. I can report to you that, in a state that has done that for over a decade, a model like that has had enormous success.

I conclude with two recommendations only. Recommendation No 1 is that I would encourage the committee to consider forming a working team of appropriate experts in scheme design from all sectors to produce a model that works and will be politically acceptable. Secondly, once a design is built, build a platform akin to a motor accident commission to ensure that all the stakeholders in the scheme work to the best advantage of the scheme itself.

THE CHAIR: Thank you, Mr Morrison. That was certainly very interesting. I do not know that I have kept good enough notes to ask all the questions I should ask. I noted one area that I was not quite sure of. You talked about election provisions. If I have just had an accident, exactly what happens? I go and see the insurer and say: "Treat me, please. I've had an accident." My other option is that I do not talk to the insurer. I go and talk to my friendly local lawyer and say, "I'm in your hands." Is that basically the election?

Mr Morrison: Yes. I will give you an example of it working in a scheme in the country at the moment. It is operative in the Queensland workers compensation scheme. The worker gets a choice between a lump sum impairment payment and proceeding to common law. The objective behind the election is that, as opposed to a threshold which arbitrarily kicks people out, an election gives them the choice. The model that I would actually recommend for this scheme is not an election system but one that fixes the cultural problem so that the injured victim can get into treatment quickly whilst still getting through a claims system.

THE CHAIR: You talked about fixing the cultural differences and about different

percentages in the ACT and Queensland of people going into early treatment. It is hard to fix culture usually with legislation.

Mr Morrison: I agree.

THE CHAIR: Unfortunately, from our point of view. Do you have any idea of how the culture actually can be changed in the ACT?

Mr Morrison: I can only speak from my own experiences, which I am happy to do. We had a significant cultural problem in Queensland in our workers compensation system. Normally, what it requires first is a crisis. In other words, something is going wrong in the scheme. The second thing is that it requires goodwill. I can speak to the workers comp model in Queensland where the crisis we had was that there was a flaw in the drafting of our legislation that enabled workers to bypass the reforms, because of a drafting error, which would have been a short-term victory. As the lawyers representing those workers, we realised that that was not in the interest of the scheme. So we went to the scheme operator and we cooperated with them to close the loophole. So it will require that type of behaviour.

When I look at our CTP scheme, which came really after our workers comp scheme in Queensland, the introduction of a commission to sit over the top really performed that function to help the stakeholders. So the job of the Motor Accident Insurance Commission is to make sure that the insurers, the lawyers and the rehab providers actually work together in the way that they run the scheme.

THE CHAIR: When the government were giving evidence last week, one of the things I gleaned from that was that obviously they are hoping that the cost of CTP will come down as a result of this. It seemed they thought that the major way this was going to come down was in fact by our scheme being the same as in New South Wales, because we are an island inside New South Wales. From an insurance company point of view, to be cheaper you had to be the same as everyone else. Do you think that is a reasonable proposition or is there scope for doing more innovative things?

Mr Morrison: I do not share that view. My view is that, to improve your premium issue, go back to the elements of what makes a scheme really work well for the benefit of everybody. A criticism that I am hearing about the New South Wales scheme is that the major beneficiary of the scheme is the insurers. The point I want to make is that you go into the design elements of a scheme which will help you do it. I have brought along the actuarial results from the Queensland CTP scheme for the June quarter, which give some valuable insight into how you can reduce premium levels. In the comparison of state premiums across the country, we have quite a low premium level. There is scheme design which contributes to that, in my view.

Mr Parmeter: I want to add to Simon's comment. Having reviewed the transcript of the evidence given by Treasury officials, it seems that the committee may be operating under a misapprehension that the ACT, with this legislation, will be heading towards some sort of national consensus on common law restrictions. I am happy to table a document that I have prepared in response to that particular issue, along with a number of others. In fact, there are only two other jurisdictions which apply whole

person impairment thresholds—Victoria and New South Wales. Obviously, from Simon's discussion, one does not apply in Queensland. There is no threshold in the other jurisdictions. So I think that needs to be put on the record.

THE CHAIR: Could you give a copy of that to the secretary; I am sure that would be very helpful to us.

MR HARGREAVES: Mr Morrison, you talked about mitigation procedures and a damages points scale. Would you like to give us an explanation of those two processes?

Mr Morrison: Certainly, Mr Hargreaves. Let us deal with mitigation first. A good illustration is our workers compensation in Queensland. So enacted into the statute is a statutory obligation on the part of a worker to cooperate reasonably with the insurer in the provision of treatment and rehabilitation. If they refuse to cooperate reasonably then the consequence in the statute is that when it comes time to determine their entitlement to eventual damages, a court can take into account the fact that they did not cooperate. I can tell you practically that inside the Queensland scheme the element of trust with the insurer was the key issue. Once the lawyers and their clients were comfortable in that arrangement, they willingly took it up.

MR HARGREAVES: Mr Morrison, on this point—and we will come to the damages points scale in a minute—you quoted quite often your experience with the workers compensation legislation in Queensland but you did not mention that these mitigation procedures are in the third party. Are they in it?

Mr Morrison: I am not certain. I think they are but I am not certain.

MR HARGREAVES: Would you be able to find out?

Mr Morrison: I would be able to find out.

MR HARGREAVES: I am conscious of making sure that we are comparing apples with apples here. I do not want to compare a compulsory third-party scheme to a workers compensation scheme and then find that the workers compensation scheme and the CTP scheme in that jurisdiction are in fact not the same. I would be a little bit worried about that. If they are then that makes the case much stronger.

Mr Morrison: I would be very confident that the concept around the statute enactment will apply whether it is workers compensation or public liability.

MR HARGREAVES: You might get that checked out.

Mr Morrison: I am happy to do that.

MR HARGREAVES: How does your damages points scale work?

Mr Morrison: The idea around restricting general damages is to curb cost in a scheme. A criticism that was levelled against the judiciary historically was that there was no ceiling to what a court might award in relation to general damages. So a

damages points scale came in as part of the reforms in 2003, off the back of the Civil Liability Act, as you may recall at the time. It codifies the effects of particular injuries inside a scheme and gives it a points scale rating. The commercial effect was that it reduced the level of general damages. The criticism levelled at the time of that reform was that it would cause significant hardship. In fairness to the provisions, what it has demonstrated is that it has attacked the issue of concern over the level of payments made.

MR HARGREAVES: Does this points scale talk about specific injuries or the effect of those injuries on impairment?

Mr Morrison: It talks about specific injuries. I would be happy to make a copy available to you, Mr Hargreaves.

MR HARGREAVES: That would be helpful. I am trying to get my head around some of the examples that we played with last week. You mentioned the loss of a digit, for example. The loss of a digit for one employment category is just unfortunate. To a concert violinist, on the other hand, it is another story altogether.

Mr Morrison: Correct.

MR HARGREAVES: So whilst their quality of life is a bit mixed because you are missing a finger, the actual impairment of your livelihood, your economic loss, is significant. I am wondering whether this points scale has any allowance in there for that.

Mr Morrison: It does not deal with the disability issue per se. I have only seen one scale in this country that actually attempted to do that. It was the Victorian disability and handicapped scales, back in 1989, where they attempted to come up with a formula that looked at impairment on the one hand and occupational overtones on the other, to produce an outcome.

Mr Parmeter: They do apply a narrative test under the Workcover scheme in Victoria, which allows you to assess the subjective impact of an injury on a person's life.

MR HARGREAVES: Who does the assessment?

Mr Parmeter: That is done by a court—

Mr Morrison: It is a creature of statute, so it is a definition within a statute, determined by a court.

MR HARGREAVES: So it is still a legal process?

Mr Morrison: Yes, and that was our criticism of the Victorian model. If you are trying to cut costs in the scheme and lower disputation, a narrative test does not fit in with that.

MR HARGREAVES: It seems to me that there is a focus on the need to cut costs,

but I am more concerned that there is a focus on that, instead of having a focus on trying to get people rehabilitated. I will not actually say "rehabilitated"; I do not like that word. These people need to be recovered. It seems to me that our accent ought to be on the way in which people get their lives back together again. While cost is an issue, it should take second place to that. But it does not seem to be the case in the conversations around these changes. Is that your experience in other jurisdictions?

Mr Morrison: Most of the inquiries I have given evidence in revolved around cost concerns inside the scheme. I agree with you that if the attention was actually focused on the treatment issues, you might—

MR HARGREAVES: If people stop worrying about the depth of their pocket and the length of their arms, we might have a different issue on our hands, and if other people stopped looking inside other people's pockets, we might have a different view on life as well.

MR SMYTH: On page 1 of your first submission, under "purpose", you say that the provisions of the bill are "largely inimical or unrelated to most of its stated objectives". If they are hostile to the objectives, in your opinion what will be the effect of the bill if it is passed?

Mr Morrison: I might let Nick speak to the submission.

Mr Parmeter: We have addressed the points raised in the terms of reference and really tried to assess the bill and its likely impact against each of those objectives listed in the terms of reference. First and foremost, we could not see anything in the bill which directly addressed medical treatment and rehabilitation. I understand the argument that has been put that if you removed the incentive to not seek treatment, people will be encouraged to focus more on that area of the scheme.

We do not think that this legislation is going to achieve that result. The experience in other jurisdictions really bears that out. I understand that there has been reference to the statistics coming out of the New South Wales scheme, with the improvement in access to medical care and treatment. It is very difficult to assess that data, particularly in light of the fact that there has been a significant restructure of the way that payments are issued. For instance, the former insurance minister in New South Wales used to regularly state that there had been a real increase in the level of non-economic loss payments to people who had received compensation under the scheme, following the 1999 changes. In fact, that was largely due to the fact that there had been a removal of all of the claims below a certain level, due to the threshold, and as a result the average size of the non-economic loss payment looked larger. A similar story could be told in relation to the proportion for medical care and treatment. So we regard that as a fairly spurious justification for a threshold in this instance. Certainly, the discount rate does not help either.

In relation to the other issues, again, there does not seem to be anything in this bill which encourages speedy resolution of claims. Those issues were meant to be addressed under the 2008 reforms and to some extent we understand they are working. I think the argument and the position put by the ACT Law Society and the Australian Lawyers Alliance is that those reforms need to be given more time to be assessed for

their effectiveness. I understand there is a review presently which hopefully this committee will benefit from before the end of this inquiry.

On the issue of introducing competition, we have indicated we accept that is something that the government is trying to achieve by way of this bill. We are not sure if it will be successful; neither is the government, according to its own evidence. But it is something that we perceive as a genuine attempt to encourage other insurers to enter the market. Our argument is that we do not think you necessarily need to go to these lengths to make the ACT an attractive place for other insurers. It is also not necessarily apparent that you need competition in order to bring down premiums. There might be other ways of doing that. Certainly, we would be happy to speak to a few of those issues.

The final issue is promoting measures directed at eliminating or reducing causes of motor crashes. I cannot really see anything in the legislation that is going to make ACT roads safer or to encourage safer driving.

Mr Morrison: Mr Smyth, my answer to that question is that the underlying assumption I see in the bill is that taking away the general damages issue will steer people into treatment sooner. I think that was a fair assumption about 20 years ago in this country. We have seen in other states that by taking a different focus and actually having tight treatment and rehabilitation provisions in the legislation will actually get people into treatment, not a threshold.

MR SMYTH: Mr Parmeter, were you going to elaborate on other things?

Mr Parmeter: I think I was talking about the issue of whether or not you necessarily need other insurers to enter the market in order to bring premiums down. I was referring to the fact that there are schemes in Australia that do have a single insurer and it might be worth examining those examples, particularly in light of the fact that there is difficulty in bringing other insurers into the market—or apparent difficulty, anyway.

MR SMYTH: Can you tell us which states only have a single insurer?

Mr Morrison: Tasmania is one example. Queensland—not in CPT, but in workers compensation. Both of the schemes just nominated have rising solvency levels. I can tell you from the Queensland scheme that, with a monopoly insurer, what underpins the great success of that scheme financially is both the design framework of the scheme and the culture. I spoke half an hour ago to a lawyer in Hobart who is active in the CTP scheme in Tasmania and sought his advice in relation to why the Tasmanian scheme seems to work well, has low premium and one insurer. His advice was that it was largely cultural—that there is a culture within the scheme of early intervention, early resolution and claims get through the process quite well.

MR SMYTH: On page 3 of your submission, in the fourth paragraph, you make this statement:

> The people worst affected by this Bill will be retirees, stay at home parents, children, disabled or incapacitated people and the unemployed.

The sentence following that makes the case. Can you elaborate on how you see that?

Mr Parmeter: Obviously, when you are restricting access to damages but not economic loss, using a threshold, the people who are going to be worst affected are those that do not have any income, and those that do not have any income that they can declare or claim through any other process. Those people will obviously be worst affected by a scheme which restricts their right to claim damages for the pain and suffering that they have endured as a result of an accident.

MR HARGREAVES: How does that work? That does not cut it for me. Can you explain something to me? If a person is unemployed or they are not employed at all—they do not have to be unemployed; they can be pensioners or whatever—and they have a motor vehicle accident, it does not change their employment at the time but it does change their employment prospects at the time. Therefore that becomes an economic loss, doesn't it, so it is covered by this? So the fact that they are going to get something for pain and suffering is quite a separate issue. They are not actually getting detrimentally treated here because what you are talking about here really is the opportunity for economic loss presenting itself. They are going to be treated no differently from someone who does have employment and who suffers the same—

Mr Parmeter: The point that has been made—and I do take your point: it is a good one—in our submission and that we tried to make previously is to take, for example, a stay-at-home parent who employs themselves in a variety of different ways but they do not do so for recompense or money. They might be unable to perform any of the things that they used to be able to do around the house or whatever, or they might suffer significant restriction in terms of doing so. That, to your average person, would be considered a form of employment but it is not compensable through the system, unless you have some form of recognition that there are things that you lose that are not economic in value.

MR HARGREAVES: What you are suggesting, if I am hearing you correctly, is that what people are entitled to is a dollar amount to compensate them for that, and the basis on which that occurs is through pain and suffering. It seems to me that if pain and suffering is a feature then people are going to go that way. My experience of talking to people who have had motor vehicle accidents is that they have thought: "You ripper! I can get 10,000 bucks out of this. This is great." And they have; and there has been no attempt at ongoing rehabilitation, ongoing medical treatment, worrying about the fact that they might sustain an injury as a young person now and it is going to give them a good dose of arthritis later on. There is none of that. They think, "Beauty! Pain and suffering—I'll go for that." But what are we paying the money for pain and suffering for—just an inconvenience?

Mr Parmeter: No, it is more than inconvenience. I think it is a recognition that there is a loss of enjoyment of life that comes out of the fact that you have sustained a permanent or long-term injury. The issues that you have raised are very good ones. They are points that were raised by Mr Morrison in his evidence when he suggested that there are ultimately scheme designs which can address the very concerns that you have raised.

MR HARGREAVES: In that case wouldn't it be better to have those very people, if they say, "I do all of this work at home and I do voluntary work for somebody," classified so that they are required to have rehabilitation and are required to go through medical treatment? You do not have to give them a bucket of money for that, because that is not really going to achieve much. In reality, people are going to spend that money. They are not going to invest it in medical treatment going forward. They just do not. I should reveal to you, as I did earlier on, that I used to be the director of rehabilitation and aged care here in the ACT, so I know a bit about this. People take the money and buy themselves an appliance, a new car or whatever. What they do not do is go and engage an occupational therapist or a physiotherapist and get themselves back as close as they can. It seems to me that when we talk about people who are injured and we talk about their capacity to engage in work, whether it is paid or not, it is largely immaterial. If they show that they are engaged in a form of work, and it may be doing handiwork for a voluntary organisation, they should be covered in the same way that we are because we are employed. Isn't that really the issue?

Mr Morrison: I agree with the sentiment, Mr Hargreaves. A good illustration of that is the New South Wales scheme as it appeared 10 or 20 years ago. Most scheme operators around the country share the very concern that you raised—that is, people entering into the system for the wrong reason. I believe, however, that the way to address that concern is through another vehicle than that being proposed. The type of models that we want to put to you do that. It has been demonstrated in other schemes, and we think effectively.

MR SMYTH: The discount rate and the argument for 2.69 per cent rather than moving it from three to five per cent: would you like to elaborate on that?

Mr Parmeter: One of the things that appears to be lost in the discussion around discount rates is the fact that discount rates have emerged as a means of effectively taking account of the benefit a plaintiff receives as a result of the early receipt of future money. It is supposed to notionally take account of the fact that that person has the opportunity to invest the money in reasonably safe investments but should also take account of taxation on returns on that investment and likelihood of future inflation. The 2.65 per cent figure is something that an actuarial firm, Cumpston Sarjeant, came up with, which was done following an assessment of a whole range of different figures, including the level of inflation, the rate of taxation on investment and so on. It effectively found that the appropriate discount rate currently was about 2.65 per cent, taking account of all of those figures. The rate at the time that Todorovic and Waller was decided back in 1981 was about the same, having regard to the prevailing economic circumstances.

The other point that we tried to make is that raising the discount rate from three per cent to five per cent might seem like a pretty small deal. But the fact is that if you have a look at a lot of the literature on this, you go from three per cent to five per cent and a 20-year-old who is catastrophically injured will lose about 27 per cent of their payment for future care and treatment costs, which is a significant reduction. While other schemes have gone down that path, they have not done so on a principle basis. There is no scientific basis for selecting five per cent over three per cent or 2.65 per cent.

THE CHAIR: In current economic times it is not always obvious that you are going to get a five per cent return in the stock market.

Mr Parmeter: That is right.

MR SMYTH: Is it possible for that Cumpston Sarjeant report to be provided to the committee?

Mr Parmeter: Certainly. I am happy to table that. I will take it on notice, if possible.

MR SMYTH: That is fine. In the next paragraph on page 6 you talk about the impact of discount rates on the ability to buy into a no-fault scheme such as the New South Wales lifetime care scheme. Of course, the government is not proposing a lifetime care scheme in this bill. What is the opinion of the Law Council on the need for a lifetime scheme in the ACT? By including those that should receive a lifetime payment with those who should receive compensation for injury, does it have a distorting effect?

Mr Parmeter: Could you repeat the last part of the question?

MR SMYTH: In New South Wales, because you have access to a lifetime scheme, the payments are made and put aside immediately. Is there a distorting effect by including lifetime care payments within consideration of payments for those with injuries?

Mr Parmeter: I am not sure that I quite understand the question. I think what you are referring to is that in New South Wales, under the lifetime care and support scheme, the insurer is required to pay a contribution to fund that scheme, to account for the fact that the most catastrophically injured people are removed from the scheme. In that respect, I think you have to examine the annual reports of the lifetime care and support scheme very carefully to see whether or not the insurers' payments actually meet the cost of the scheme or whether it is substantially subsidised by the public purse. I think it is the latter but I would have to come back to you on that.

In relation to the point that has been made in the submission, one of the concerns about the lifetime care and support scheme is that once it was established it did not allow people who were already catastrophically injured to buy into the scheme. Subsequently they made the option available but so far no-one has been able to. The simple reason for that is because if someone does get a payout, a compensation payment for future care and treatment expenses, that is discounted by five per cent, which, as you know, brings the payment down by 27 per cent or thereabouts and they cannot afford to buy into the scheme. If, at some point in the future, the ACT government were to reach an agreement with the New South Wales government or decided to set up its own scheme to provide lifetime care and support for the most catastrophically injured, a discount rate of five per cent would make that difficult to achieve through the existing insurance system.

MR SMYTH: Should there be a lifetime care scheme in the ACT?

Mr Parmeter: That is a matter of policy. I have not really turned my mind to that. It

would be, for ACT residents, being an ACT resident myself, a good thing. Obviously, having that no-fault cover is good for everybody. But as to the extent to which it is viable, I just do not know.

MR SMYTH: If you have read the transcript of the government appearance, there is a report in the *Canberra Times* that said Canberra crash victims are avoiding medical treatment in an effort to maximise compensation payouts. I notice that in the second paragraph on page 2 of your submission you refer to a meta-study in 2010 which included whether there was a link between litigation and poor health. Can you elaborate on that? The study seems to say that the evidence is not there to support that contention.

Mr Parmeter: I have a copy of that report here, if the committee would like me to table it.

THE CHAIR: Absolutely. Give it to the secretary.

Mr Parmeter: Sure. Responding to your query, I am mistaken in the date; it was 2009. I put that on the record; it is a report from 2009. It is a study which examined a number of previous studies into this issue and found fault with each one of them. Ultimately it concluded that there was no conclusive link between compensation or litigation and recovery outcomes. The point is that we would refute the government's evidence that this is something which is conclusive or is a concluded point of fact, because there are differing views about this. Certainly a number of these reports have been prepared by interests on either side of the spectrum.

MR HARGREAVES: I seem to remember that when that evidence was given by the government's employee, he actually said that he had anecdotal evidence of that. It would be unfortunate if people were to read the transcript of these proceedings thinking that the government had claimed to put something down as provable fact. As I understand it, you are saying that, notwithstanding any anecdotal evidence, there is no empirical evidence to sustain that view. Is that correct?

Mr Morrison: I do not think it was an unreasonable assumption 10 or 20 years ago. I come back to the statistics—

MR HARGREAVES: That is when I was doing it.

Mr Morrison: That is when I started in the law and it was alive and well then.

THE CHAIR: Let us move on to a new topic.

MR HARGREAVES: Hang on, Madam Chair. Let me—

THE CHAIR: Madam Chair would actually like the chance to ask a question.

MR HARGREAVES: She might do, too, but Mr Morrison is still answering a question, so give him the courtesy of allowing him to finish.

Mr Morrison: I will be extremely brief, Madam Chair.

THE CHAIR: Thank you, because I have a question.

MR HARGREAVES: You might do, but you might have to put it on notice also. Let Mr Morrison complete his answer please; otherwise we shall be accused of stopping people giving evidence, and I do not want to go down that path.

THE CHAIR: Which is what you are doing, Mr Hargreaves.

MR HARGREAVES: No.

Mr Morrison: Very briefly, Madam Chair, the statistical evidence shows that states that had strong rehabilitation and early treatment provisions in their legislation had improved take-up rates. We have seen statistically that that is as high as 35 per cent.

THE CHAIR: I want to ask questions about the use of appointed medical officers to determine injury, and therefore under the proposed schemes a person's right to general damages. Firstly, on the principle that we should be looking for a mechanism that allows for a definitive medical determination by a doctor rather than parties presenting competing medical evidence before a court, would you like to make any comments on that?

Mr Morrison: I would, Madam Chair. The first comment I would make is that the skill set of a medical practitioner is to determine impairment. The true measure of loss for somebody injured is not impairment; it is disability. That involves a range of considerations and that is why we have a court or a like system to determine those issues. In my respectful submission, it is quite wrong to impose upon a medical practitioner the obligation to determine loss because they are simply not skilled to do it.

THE CHAIR: I am not a lawyer but I understand that the nature of the power being exercised by the doctor is effectively deciding whether the accident victim can access general damages, and therefore they could be characterised as a judicial function and therefore the application of the boilermakers principle is relevant. Do you have a view on that and its applicability to the territory?

Mr Morrison: I do. I can think of other jurisdictions where tribunals have been set up where medical practitioners effectively have to determine points of law.

THE CHAIR: I understand that is basically what we are doing here.

Mr Morrison: The difficulty that imposes is that that invokes judicial review provisions. So in my home state of Queensland, it is not uncommon that a medical practitioner is put in a position to make a determination and administratively that triggers a review process through a court system. So it does not solve the problem in any event.

THE CHAIR: Again, I understand that alternatively the same provisions could give rise to an issue about the application of the Kable doctrine and the recent decision about the integrity of the court—

MR HARGREAVES: What is the Kable doctrine?

THE CHAIR: I am not a lawyer but Mr Morrison probably understands me.

MR HARGREAVES: I do not know what the Kable doctrine is.

Mr Morrison: I must confess that I am not familiar with the Kable doctrine. Mr Parmeter might be.

Mr Parmeter: I am afraid not.

THE CHAIR: Sorry.

MR HARGREAVES: The questioner does not know what it is and the answerers do not know what it is; okay.

MR SMYTH: So feel free to say whatever you want!

THE CHAIR: I will leave that one. The next question is about the substantial injustice test. My understanding is that these clauses are used typically in the context of validating an action which otherwise would be invalid, provided there is not a substantial injustice, such as under the Corporations Act or the Queensland IR legislation. In this case we have effectively been given a judicial discretion on the application of law that is somewhat different. I understand that this type of formulation was used in the New South Wales Dust and Disease Tribunal legislation. I am not sure what the current state of these provisions is but do you have a view on this issue and how it would be applied?

Mr Morrison: The only comment I could make is to point to the Victorian CTP scheme as an illustration, where to overcome the potential injustices by a numeric permanent impairment model, a narrative serious injury test was layered with that to provide some level of justice to those who would otherwise miss out. In theory, I think that is a sound proposition. In practice what we have learnt is that it just created another layer of litigation before we even get into the claims process.

THE CHAIR: As you have obviously looked at the transcript of our last hearing, you are aware that we asked a number of questions about the application of the Human Rights Act to the provisions of the bill, all of which were taken on notice by the government. Do you have any views about how the two intersect?

Mr Morrison: I defer to Mr Parmeter on that issue.

Mr Parmeter: I have not looked very closely at it. I think you are referring to section 28 of the Human Rights Act.

THE CHAIR: Yes, and the scrutiny report also made some comments.

Mr Parmeter: In preparing for this, I did not get as far as reading the scrutiny of bills report or any comments by the human rights commissioner in the ACT. But I would

be happy to take the question on notice and provide you with some comments on that.

THE CHAIR: I would be very interested in that. One of the other things the government has asserted is they have information from the NRMA which breaks down the proportion of scheme costs and they have said they believe that in the order of 33 per cent of scheme costs are paid for non-economic loss and 19 per cent in legal fees. Do you have any idea about the accuracy of these figures? My understanding is that there have been no court-awarded damages since the 2008 changes. Do you have any idea how that breakdown could have been arrived at and how accurate it is likely to be?

Mr Morrison: Off the top of my head, no, but it is a question we could happily take on notice.

THE CHAIR: We asked the same question of the government.

Mr Parmeter: I think one of the difficulties with the scheme or the way that the reporting arrangements work under the scheme is that there is very little publicly available information due to commercial-in-confidence considerations. I understand that the ACT Law Society and others have been working very hard to try and access some of that information so that they themselves can assess the data and make some comment on it. Without being able to see it and just relying on comments by the Treasury officials, and I think the NRMA has been silent on it, I do not think we could say any more even on notice, to be honest with you.

Mr Morrison: The comment I can make conceptually about that is that in looking at other schemes around the country, there tends to be a correlation between increasing levels of disputation and legal costs inside schemes. When you look at the schemes that have the lowest level of legal cost, you see the greatest level of flexibility in terms of being able to resolve claims. That is information we would be very happy to give you on notice.

THE CHAIR: That would be interesting. Recently there has been a report that evidence received by the New South Wales law and justice committee showed—this was in the paper a few days ago—insurers in New South Wales operating under the proposed changes are making significant profits, around 24 per cent. I believe you referred to that in your submission. Would you like to make any comments about the appropriateness of the level of profits and how premiums are being used in New South Wales and what consequences this is having for both victims, injured people, and people who have the misfortune to pay insurance premiums?

Mr Morrison: I will make a general comment and I am sure Mr Parmeter will add to it. Insurers ought to be entitled to make a reasonable rate of return. That is the business that they are in. When schemes get into trouble, it is generally appropriate to have some reform measures to assist insurers. We do not disagree with those propositions. The issue comes when the balance between reasonable rate of return and compensation that should be paid inside the scheme falls out of whack. That is the space generally that gets left behind by governments. They are good at getting into the reform when it is needed but unfortunately that second part of the layer tends to fall away.

Mr Parmeter: This is an issue that may seem as though it has emerged very recently in New South Wales but this is something that I was involved in looking into as early as 2006, when it was very clear that the disparity between effectively what was being collected in terms of compulsory third-party premiums in New South Wales and the amount that was being paid out was becoming increasingly obvious. Due to the long-tailed nature of the scheme, while you could see in 2006 that the profits were in the range of 27 to 30 per cent in 1999-2000, it was argued at that time that the insurers were still coming to grips with the scheme and working out where their liabilities were going to lie in future years. So the mantra then is the same as it is now.

I can table another article that appeared in yesterday's *Canberra Times* referring to this issue and evidence given by the Insurance Council of Australia to the current inquiry that is going on in New South Wales before the New South Wales law and justice committee. Basically it indicates that insurers were unable to anticipate that claims were actually going to halve in New South Wales over that period. Unfortunately, it took them 12 years to realise this and it has not really emerged as a result of the insurance industry putting up their hand and saying, "These profits are unreasonable." While we cannot say what the experience of the insurance industry and third-party insurers in New South Wales is in the last two or three years, because that data is still becoming available, the assumption must be that those profits have not come down significantly. Certainly we know that until about 2006 insurers were claiming in the range of about 24 per cent.

THE CHAIR: We have run out of time. Thank you very much for appearing.

Mr Morrison: Madam Chair, there are two matters to follow up for Mr Hargreaves. Shall I provide that information through the secretary?

MR HARGREAVES: Yes please.

THE CHAIR: Thank you for appearing today on behalf of the Law Council of Australia. We will send you a copy of the proof transcript when it is available. There will be an opportunity to make any corrections you would like to suggest.

The committee adjourned at 4.02 pm.