LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: Inquiry into the Motor Accident Injuries Bill 2018—exposure draft)

Members:

MRS G JONES (Chair)
MS B CODY (Deputy Chair)
MR M PETTERSSON

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 20 NOVEMBER 2018

Secretary to the committee:
Mr A Snedden (Ph: 620 50199)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 3.01 pm.

READ, MS ROSALIND, Senior Legal Officer, CFMEU ACT Branch
HISCOX, MR MICHAEL, Executive Officer, CFMEU ACT Branch

THE CHAIR: I declare open this third public hearing of the Standing Committee on Justice and Community Safety's inquiry into the exposure draft of the Motor Accident Injuries Bill 2018, referred to the committee on 20 September 2018. The committee has, to date, received a total of 75 written submissions on the reference, all of which are published on the committee's website. Today the committee will be hearing from three witnesses: the CFMEU; Slater and Gordon lawyers; and Maliganis Edwards Johnson lawyers. On behalf of the committee, I thank witnesses for making the time to appear today.

Proceedings are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live.

We will move to the first witnesses today, Mr Michael Hiscox and Ms Rosalind Read from the CFMEU. Thank you for being here. I remind you of the protections and obligations afforded by parliamentary privilege and draw your attention to the pink privilege statement before you on the table. Please confirm for the record that you understand the implications of the statement.

Ms Read: I understand them.

Mr Hiscox: I understand them.

THE CHAIR: Thank you. Before we proceed to questions from the committee, would either of you like to make a brief opening statement?

Ms Read: Yes. I am the Senior Legal Officer with the CFMEU ACT Branch. I am making a statement on behalf of the branch. We thank the committee for the opportunity to present today and note that we have filed a written submission. Obviously, we rely on the matters raised in that. Today we are just going to emphasise some of those particular points.

The first issue we want to raise with the committee is our concern in relation to income replacement benefits, which we say are unfair to workers in the way that they are structured in the act. In particular, we say that this arises out of the application of the caps in clauses 97 and 98 of the bill.

To illustrate this, I have prepared an example of a trade qualified formworker. A formworker is a person who is qualified as a carpenter. If we take the example of a trade qualified formworker employed under an enterprise agreement made with the CFMEU and that person is performing an ordinary week's work with a moderate amount of regular overtime, for the purpose of the example hypothesised perhaps at five hours regularly on a Sunday, which is, we say, probably a very moderate amount of overtime, having regard to normal patterns of work in the construction industry, that person would earn approximately $2,303 gross per week. That is about the middle

of the range for rates under the formwork agreement. The person I am talking about would be a permanent employee with no casual loading or anything of that nature applied.

If we take the formula in clause 98 of the bill in relation to the second injury period—that is, after the first 13 weeks—it is our view that the formworker would expect to be paid significantly less than 80 per cent of his pre-injury earnings. We say that this is because of two factors. The first is the cap on pre-injury income at $2,250 per week in clause 98; the second is the application of the post-injury earning capacity deductions.

We are concerned that the bill allows the insurer to assess post-injury earning capacity without actually taking into account whether the injured person does, in fact, earn income. There is no obligation on an injured person's pre-injury employer to provide them with modified duties. In fact, many injured people in this context will lose their employment because they have no capacity to perform the inherent requirements of their job. For many workers, particularly manual workers, we are concerned that the idea that they could return to work at a percentage of their income is nonsense. They might be assessed, for example, as having 30 per cent of their earning capacity but without having access to the 30 per cent of their pre-injury work.

If we take that example and the insurer assesses the formworker as having 30 per cent earning capacity, we would see the following. His pre-injury earnings, which I have said are $2,303 a week, would be first capped at $2,250, so he loses $53 a week. Then the amount that is assessed, but not necessarily his actual earning capacity, would be deducted, so he would lose another $690 a week if we are assuming a 30 per cent capacity. That gives an amount of $1,559 a week. After we have done those deductions, the 80 per cent factor set out in clause 98 of the act is applied to give an actual income replacement benefit of about $1,247 a week, which is only 53 per cent of the person's pre-injury earning capacity. In the first 13 weeks, the bill applies a factor of 95 per cent for a person in that situation, so they would only be getting about 65 per cent of their pre-injury earnings, assuming those variables.

We are very concerned that the bill only protects the earning capacity at 100 per cent for people who are earning less than $800 a week. The federal minimum wage at the moment is $719 a week and the federal minimum wage for a construction worker is $795.58. Essentially only the very lowest paid people in society would be protected by this bill.

We say that these facts are not isolated to formworkers but would play out for construction workers industry wide who have very similar rates of pay and patterns of work. We are concerned that our members, in particular, often live week by week on their pay cheque. The construction industry is a very transient industry where people often do not have the capacity to build a savings space which would allow them to accommodate reductions in their income at a time when they are particularly vulnerable as a result of being injured in a motor vehicle accident.

We also note that there are some workers compensation schemes with similar caps; for example, paying 80 per cent of pre-injury earnings after defined periods of injury. Our experience of those in other jurisdictions leads us to be concerned about this. We also say that those are quite distinguishable from this situation, particularly because,

under workers compensation schemes, there is always an employer who is obliged to provide modified duties to the injured person such that if they are assessed as having the capacity for work, they are in fact able to perform that work and earn that income. Under this bill, the insurer assesses the worker's capacity but there is no obligation to make sure that they have access to the work which would allow them to earn the income relevant to that capacity. That is one reason why this is different from the workers compensation scheme even though the structure of the bill is very similar.

The other thing is that in other jurisdictions where there are those caps on pre-injury earnings in the workers compensation schemes—for example, earnings payable at 80 per cent after 13 weeks or that type of thing—the practice of the union is to bargain with employers for top-up pay to ensure that the injured worker is not disadvantaged as a result of their injury. So while the insurer may only pay 80 per cent of the earnings, as a result of bargaining with the union the employer will pay the gap, the 20 per cent, so that the injured worker in fact does not suffer a detriment as a result of their injury.

That is a feature of most CFMEU agreements. It is also a feature of a large number of modern awards, which specify that employers are to pay accident top-up pay for defined periods. We say that there is an understanding that it is not appropriate in the employment sphere for workers to suffer a detriment merely because they have been injured in a workplace accident. To our minds, it would be inappropriate for a compensation scheme for motor vehicle injuries to be less beneficial in that way.

The next issue we want to touch upon is access to representation, which we draw out in our submission. We are very concerned that, under the bill, injured people will not have access to appropriate legal representation and will be expected to navigate what appears to us to be a very complex scheme at a time when they are particularly vulnerable and unlikely be able to develop the capacity to do that.

We are concerned that the bill also gives insurers a legislative right to speak directly to injured people even if they do obtain legal representation. We say that this is deeply concerning to us. If a person has nominated that they desire to be represented, they should be dealt with through their representative and the representative should not be stepped around and ignored in the way which clause 377 of the bill appears to allow.

While we understand the desire to reduce legal costs, which is proposed in the scheme, we are concerned by that because we say that it assumes that the costs of legal representation are wasted or unwarranted costs. It is our view that ensuring that vulnerable people have access to appropriate representation is actually an essential component of any properly functioning insurance scheme and that the costs of legal representation are actually the costs of providing appropriate support to injured workers and others. So the union does not support those parts of the scheme that would limit an injured person's access to legal representation when that representation is obviously justifiable on equitable grounds.

Michael, do you want to add anything?

Mr Hiscox: The only other issue I want to raise is that the union has significant concerns with the whole citizens jury process. In our view, it is fundamentally

unrepresentative, particularly for people who work in our industry, in construction, given that most often they will have to work on a Saturday, which would make them unavailable to participate. But it is also likely that many shiftworkers in general would be excluded from participating in a process like that, given that they often have to work on Saturdays and Sundays. And the remuneration given through the jury process would not be sufficient to make up what they would have received from participating in that process. Our view is that the premise upon which that was based—that the jury was meant to be representative—was flawed.

THE CHAIR: Thank you very much, Mr Hiscox and Ms Read, for your important submission of information there. From your experience, can you tell me how long the defined periods that have accident top-up pay in a worker injury situation are generally?

Ms Read: That varies by industry. In the construction industry award the standard at the moment is 26 weeks, but in, for example, the timber industry award, which is another award I am familiar with, it is 52 weeks. There is no set standard.

THE CHAIR: It depends a bit on the negotiation process, I guess.

Ms Read: Yes.

THE CHAIR: Also, when a workers comp matter gives someone 80 per cent of their income plus a top-up, is that 80 per cent actually 80 per cent?

Ms Read: I would need to take that on notice. I have not looked at that recently.

THE CHAIR: In the calculations you described to us before, where you actually end up on 50-something per cent, that is not an unexpected situation. I am just wondering if that is different under workers comp.

Ms Read: Our concern is with the overall effect for the worker, that it is not to their detriment, regardless of what the source of the income is insofar as some of it is coming from the insurer and some is coming from the employer. The top-up works to make sure they are not worse off. I would have to take it on notice.

THE CHAIR: Has the union essentially been operating in an environment where you have tried to make up that gap through your negotiations?

Ms Read: Yes.

THE CHAIR: There is nobody to negotiate on behalf of these injured people.

Ms Read: There is not, and it is not something that the union would have the capacity to negotiate for in enterprise agreements because of the restrictions on the content of enterprise agreements. We could not, for example, negotiate for CTP top-up insurance in our EBAs, because that is not a matter relating to the employment.

THE CHAIR: That is exactly right. The comparison between the schemes is really interesting from our perspective, but also the different nature of the situation means

that we wonder why we would enter into an agreement when we know from the outset that people are not going to necessarily have enough to live on.

Ms Read: There is that, and there is also the concern that, as these deficiencies become more apparent, people are more likely to feel the need to obtain private income protection insurance to deal with those situations, which will probably increase the cost of premiums overall. We also negotiate for income protection insurance premiums to be paid by employers in our enterprise agreements, but those are for defined situations—

THE CHAIR: Which are workplace related.

Ms Read This would massively expand the number of situations that we would be expecting to cover.

Mr Hiscox: If people are forced to take private insurance with regard to CTP, that will inevitably exclude the people that are most vulnerable and who will probably most require the insurance if they are ever in that situation.

THE CHAIR: I have asked many of the people who have appeared before us, many of the different bodies, to state very clearly for the record which system you would choose if you had to choose between the current system and the proposed system.

Ms Read: I think that we would choose the current system. We think that it provides people with more flexibility in relation to their choice of how they deal with their injury and the capacity to be properly advised about those choices.

MS CODY: The proposed system is, in itself, lacking some benefits for people. Do you think there is work to be done on the proposed system to make it a bit better?

Ms Read: We have said in our submission that we believe that there are efficiencies that could be found in the proposed system, for example, in the area of early access to treatment and that kind of thing. But it is our view, as we noted in our written submission, that that does not justify this kind of wholesale rewriting of the system.

MS CODY: In your submission you refer to the most suitable avenues for an external review of matters. Could you expand on that? You have said that the proposed scheme does not identify a source of external review but leaves it to the Attorney-General to designate the external reviewer.

Ms Read: Yes, and that worries us. The external review is critical to the functioning of the scheme and the fairness of it, and it is not clear who it would be. I think we have said in the submission that we think that the Magistrates Court is the appropriate location for external review, because it at least has some experience in matters of this kind. We do not believe that ACAT would be the appropriate jurisdiction.

MS CODY: In your opening statement you mentioned access to representation and you said that clause 377, in your words, steps around legal representation. Can you just expand on that?

Ms Read: Yes. Clause 377 allows an insurer to bypass a represented person's representative. It specifically says that the insurer can deal directly with the injured person, which is fine and appropriate except that if somebody feels so vulnerable and uncertain of their position vis-a-vis the insurer, and they have chosen to be represented, that election to be represented should be respected.

In directly dealing with an injured person there is the capacity for manipulating that person or perhaps pushing them into choices about their insurance and their claim that they would not necessarily make. That is essentially exactly why they have chosen to be represented. It is completely inappropriate in that situation, where someone has a representative on the record, that the representative should not be part of every conversation between that injured person and the insurer.

MS CODY: We heard evidence yesterday that when people are injured in motor vehicle accidents, as you have just stated, they are very vulnerable, and they are often on relatively large amounts of pain relief, which I guess could make it a bit—

THE CHAIR: It is hard to negotiate when you are on Endone.

Ms Read: Yes, I think that is the case. There may be a desire to resolve these things quickly, but that is not always in the interests of an injured person and they will not necessarily understand that or be able to resist the pressure from the insurer in relation to those types of questions without the assistance from their representative. It is one thing to be advised about your rights, but it is another thing to have somebody there in the room with you or on the phone with you saying, "No, actually my client does not have to agree with you on that position; they have a right to choose something else." That is really why people choose to have a lawyer: to protect them from any kind of pressure to make a choice that they do not want to make.

MR PETTERSSON: Do you have any concerns that these changes to CTP would create a slippery slope for changes to workers compensation?

Ms Read: Yes, we are very concerned about that. We are very concerned that it would create a lower standard in relation to workers compensation. We are particularly concerned about limiting the rights to common-law damages, which are currently available in workers compensation. We are concerned that insurance companies will latch on to this idea and put pressure on the territory government in relation to the workers compensation sphere.

MR PETTERSSON: Has this occurred in other jurisdictions?

Ms Read: I know that there are similar schemes in other jurisdictions. I am not aware if one has followed from the other necessarily.

Mr Hiscox: I am not sure of the specific timings in other schemes. I believe that in New South Wales they have a similar operation for both workers comp and their compulsory third-party insurance. I suppose that what would be concerning is, if this scheme was to be successful, there would be the likelihood that two people could have substantially the same injuries but one happens via a motor vehicle accident and one happens at work. These two people would be entitled to significantly different

compensation. I imagine that over time it would almost be inevitable that that would be seen by some—

THE CHAIR: As an excuse.

Mr Hiscox: People would look at that situation and say that these should be harmonised or that these should be brought into line. Unfortunately, when those things are often brought into line, it is usually to the detriment of working people and those things are brought downwards, not upwards. That would be our concern.

THE CHAIR: You mentioned the citizens jury process. We have had quite a lot of criticism of how it was run. Various people have talked about the way in which feedback was taken into account or not taken into account, and the set-up. You have said that the cohort that you represent was effectively discriminated against in the selection process, but would you really have wanted to participate in this process?

Mr Hiscox: We were not intimately involved with the citizens jury. It is not something where we have sort of stepped through each step along the way, I suppose, more as a—

THE CHAIR: As a general rule.

Mr Hiscox: general principle. I view it as: we have a citizens jury and that is the Assembly. The Assembly is the body that has been elected by everyone in the ACT to make these sorts of decisions. I think that is the appropriate place for these decisions to be made, to be debated and to be discussed, similar to the forum we are having now. I think that the concept of a citizens jury, by its nature, is often going to be difficult—people do not have the time to devote to these difficult topics to consider them in a fuller sense.

THE CHAIR: Yes. I guess that deliberative democracy is a whole different thing to representative democracy. I guess it was used in this instance, but we are sitting here on this committee trying to understand—certainly I am—how the heck we ended up here in the first place with a scheme that it seems there are very few supporters for and that could be legislated for early next year.

Anyway, if you have not been involved in the process, my understanding of it is that not only were there the three weekend get-togethers but also there was a panel of experts, some of whom felt that their views were not being included in the design process. Then they were presented with options to choose from. Then the citizens jury themselves were presented with these options to choose from. So largely the power may have rested with the person writing the design options or with the people writing the design options. Certainly, there were some people on the citizens jury who did not want to be involved in the process as a result. I wondered whether you had any—

Ms Read: We do not have any specific insight into that, except for the general information which seems to have leaked out of the citizens jury by, for example, people making statements to this committee and other public sources, which seem to be consistent with what you have said. The concern is that the jury was led by the convenors to particular conclusions and that they were provided with huge amounts of

information that was difficult for them to assimilate in that process. One of our concerns, as Michael said, is that we just do not see how it can possibly have been representative of the broad swathe of Canberrans, particularly blue-collar workers, just because of the way that it was structured.

Also, our overriding concern is that it is not really consistent with the principle of one vote, one value. One of the terms of reference for this inquiry is: is this proposed scheme consistent with the outcome of the citizens jury? It almost becomes circular, because why should the outcome of the citizens jury be more significant than my vote or the vote of any of the other CFMEU members who live in the ACT?

THE CHAIR: I guess that particular point of reference is a bit circular and does leave us in a somewhat awkward position, given that we are here to represent the broader community, not the citizens jury.

Ms Read: Yes.

THE CHAIR: I think I accept all of your criticisms.

MS CODY: I briefly want to touch on another point you raised in your submission. It relates to fraudulent behaviour. You said:

> We strongly support any measures that strengthen integrity and reduce fraudulent behaviour.

You go on to state:

> However, we are not aware of evidence that these are issues of major significance in the current scheme.

Have you looked at that or is that just an inherent—

Ms Read: My basic understanding is that one of the indicators of fraudulent behaviour is if there is a sudden increase in the number of claims or the pattern of claims. My basic understanding is that the pattern of claims and the number of claims in the ACT have been consistent over the last five or so years. That is not indicative of a rash of fraudulent behaviour that would need attention. But that is really the limit of our understanding in relation to that.

MS CODY: In your opening statement you referred to the cost of CTP in general and in your submission you make reference to "a value for money and efficient system". Do you think that the introduction of the proposed scheme would reduce CTP insurance levies?

Ms Read: Obviously, we do not have any modelling on that, but what we understand has occurred in other states is that, although the initial costs go down, they do gradually come up such that, over the longer term, it does not result in greater value for money for the people buying the insurance policies.

MR PETTERSSON: Do you have any comment on the use of WPI as a measure for

access to common-law rights?

Mr Hiscox: Fundamentally, I think our view is that it is an inappropriate measure, partly because there are a lot of factors that are not considered in WPI. One of the examples that has been suggested is that it does not necessarily consider the type of work that you undertake and, as a result of that, what your lost income might be as a result of your injury.

Someone who is predominantly office-based who has an injury to their shoulder or something like that might be able to continue working throughout the rest of their working life. If they worked in a predominantly manual environment—for example, in construction—they might find it very difficult to go back to work and their earnings could be significantly reduced or almost eliminated entirely. So I imagine that WPI makes it very hard to incorporate those sorts of things into an assessment about what sorts of damages someone is entitled to. That is, I think, one of the pretty significant failings of the proposed system.

THE CHAIR: I think that is about all. Is there anything additional that you want to mention, while you are here, in regard to that?

Ms Read: No.

THE CHAIR: Thank you for appearing today. A transcript of today's proceedings will be forward to you and you can suggest any changes if anything has been misreported or misunderstood.

CARRICK, MR MARTIN, Practice Group Leader, Slater and Gordon

THE CHAIR: I welcome our second witness appearing today, Mr Martin Carrick of Slater and Gordon lawyers. Thank you for appearing today before our committee and thank you for your submission to the inquiry.

Mr Carrick: Thank you very much.

THE CHAIR: I remind you of the protections and obligations afforded by parliamentary privilege and ask you to look at the pink privilege statement on the table.

Mr Carrick: I have done that.

THE CHAIR: Can you state for the record that you understand the privilege implications?

Mr Carrick: I understand the privilege implications, thank you.

THE CHAIR: Thank you, Mr Carrick. Before we proceed to questions, do you have a brief opening statement that you would like to make?

Mr Carrick: I do have a brief few words to say. From my conversations with people, it appears that one of the main rationales for this proposed change is that at-fault drivers should get benefits. I want to say at the outset that those of us that are arguing against or resisting this new system do not have a problem with at-fault drivers getting some sort of benefit. I think we all understand the "there but for the grace of god" argument. But what we want to emphasise is that that can be done without doing such dramatic harm to the system we have now. It can be done without so dramatically reducing the benefits that are available to people in the current system.

I want to make a few comments about that particular point. First, I think you have heard, probably numerous times, that there is good evidence that probably 90 per cent of people will be excluded from common-law damages. But even for people who get through that difficult 10 per cent threshold, the system reduces their general damages really dramatically. I have done some calculations on that. I think that, in fairly close terms, someone who had a 15 per cent WPI would get $42,500 in general damages. But in a common-law system, someone with those sorts of injuries in the current system would get about $100,000. They are getting about 43 per cent of what they would get now.

Someone on 21 per cent whole person impairment would get precisely $64,000 from the proposed system. The sorts of damages that that person would be getting from a common-law court would be about $125,000. So they are getting something less than half of what they would otherwise get. And someone with a 30 per cent WPI is probably going to be losing over $100,000 in damages. They are getting less than half of what they would get from a common-law court. I want to emphasise the degree of reduction in the damages that are proposed in this new system. That is in the quality of life damages.

By the way, in the five to 10 per cent threshold for quality of life damages, or the quality of life damages that someone would get if there were no negligence involved—if there is no common law involved—there are also even more dramatic decreases. There is a really fundamental problem with this proposed system with the degree of reduction in those damages.

Also, as was said by the previous witnesses, there is a real concern about the reduction in income replacement damages as well. The "after 13 weeks, 80 per cent" threshold is bad enough. So many people live hand to mouth. That can fundamentally damage their ability just to keep making their mortgage payments and so on. But I think it also should be considered that the way the system works allows the insurer to determine what someone's post-injury earning capacity is.

This is really important. I know from experience, working against insurance companies for many years, that insurers will certainly determine that someone has a post-injury earning capacity. It is easy for them to do that; it is up to them. It is as decided by the insurer under this legislation, which I think is extraordinary. So they determine it and if that injured person cannot find that work—this was raised by the previous witness—it is still deducted. It is just the capacity under this system that allows for the deduction.

For instance, someone who is on $60,000 a year—just because an insurance person working for the company determines that they have a 50 per cent earning capacity—is going to be suffering a loss if they cannot find a job. And I can tell you from personal experience, working in this area, that it is difficult for people with injuries to find jobs; very difficult. Employers do not want to take them on. Someone with that 50 per cent earning capacity is going to be suffering a loss of about $692 per week in this system. That is someone on $60,000 a year.

Someone on $125,000 a year, where the $2,250 threshold kicks in, is going to be suffering if the insurer determines that they have a 50 per cent post-injury earning capacity. That person will suffer a $1,085 loss per week. So someone in those circumstances will not be able to keep—

THE CHAIR: A house.

Mr Carrick: paying their mortgage and paying for the basics of life. There is the potential, because of the amount of influence the insurer may have in this system, of these sorts of really unfair results.

This is my second important point. The first was reduction of damages. Secondly, putting injured people in the hands of insurers, as is being done in this system, is entirely inappropriate. Perhaps I am stating the obvious. If people take notice of what is coming out of the banking royal commission at the moment, I think that the form of insurers, in terms of being reasonable in dealing with claimants, is there for all to see. But this system goes such a long way down the track of putting injured people in the hands of insurers.

I will make a couple of quick comments about that. Clause 120 says that the relevant

insurer decides; so the insurer decides what medical treatment is reasonable and necessary. Wouldn't you think that someone's doctor, their treating doctor, should decide what medical treatment is reasonable and necessary? But under this system, the insurer does. I can tell you from experience that it is remarkable how often an insurer has a different view to the doctors providing treatment about what is reasonable and necessary medical treatment.

Also, I find it somewhat disturbing that in clause 119 the insurer does not have to pay for medical treatment if the treatment in care is paid under an arrangement for direct payment with a provider. What I see happening here is the potential introduction of the American system of managed care, where there is an arrangement directly between insurers and medical providers, and the injured person is simply subject to that arrangement. Of course, that arrangement is designed with medical providers offering themselves to insurers saying, "We can do this cheaper. We can cut out all of these costs that you have to pay."

As happens in America, you have people that are caught in the middle of this convenient arrangement between insurers and medical providers aimed at reducing the cost of care, and obviously people get less quality care in those circumstances. That is directly available; it is almost invited under this system.

I have real concerns, just briefly, about the idea that costs will be regulated and lawyers cannot recover costs. It is aimed, obviously, at cutting lawyers out of the system. Sure, you may say it is self-interest. But the previous witness was quite eloquent about this. People have a right to be represented. In circumstances where there is a statutory right to something and the insurer denies it, it is hard for me to understand why, if it is challenged, the insurer should not have to pay the costs of that challenge when they are proven to be wrong. That is just basic in a legal system.

These insurers will make decisions that are adverse to people. Those decisions should be able to be challenged in a proper forum. I know that is another issue that has been covered by other people. When, or if, the insurer is proved to be wrong, they should have pay the costs of it. That is not complex. I think that is fair and straightforward.

Another thing is that there will be this idea of a defined benefits information service, but lawyers cannot be involved in that. That raises the same concerns and suspicions about this being designed to suit insurers. The other one is clause 377, which was talked about before, that permits insurers to contact our clients directly. That is just inappropriate. They are the comments that I wanted to make at the outset. I obviously rely on the rest of my submission. Thank you.

THE CHAIR: Thank you, Mr Carrick. The first question is, as you have heard me ask before: if you had to choose between the current scheme and the proposed scheme, which would you choose?

Mr Carrick: No doubt I would choose the current scheme. I would add to that, though, that there should be a proper conversation about introducing a scheme that covers at-fault people.

THE CHAIR: Sure.

Mr Carrick: But that should not be done at the expense of the good scheme we have now.

THE CHAIR: We have heard that so many times, yes. I am certainly sitting here wondering how the heck we have ended up in this position, as I have said to a number of people. Tell me if you think I am wrong: the only group that I can see that is benefitting from this potential change of scheme, genuinely benefitting, is the insurers, who presented to us yesterday that this will even out their profits, that it makes life easier for them and that it does not make any difference to the average Joe who is sitting on the street. If somebody is at fault, now they will get a little bit of money thrown their way, but previously at least those who were not at fault were going to be properly compensated.

Mr Carrick: Yes.

THE CHAIR: Do you have any views on how on earth we ended up in this situation in the first place, a situation where there are laws that could be passed within months in the Assembly that might just leave a whole bunch of people out to dry with injuries and no capacity to earn an income?

Mr Carrick: Exactly. I cannot precisely tell you how it came to this. I have certain views about the citizens jury process. But I think that this has perhaps arisen from an ideological view about claimants and injuries. Somehow that has led to this fairly draconian piece of legislation, but I cannot—

THE CHAIR: I think most of us sitting here have certainly known people who have been through the current scheme and who have ended up with a lump sum payment, even though it was tough to get there. They have then been able to buy a house or imagine a future for themselves.

Mr Carrick: Yes, get on with their life and look after their own treatment. Just on your question about who is interested, who gets helped by this scheme, obviously the insurers are delighted by it. That would, I think, cause a little bit of suspicion amongst sensible people. I will just note the experience—I am sure you have been told this already—of the big changes made in New South Wales. They are not precisely the same as this but are the same type of thing as this. There is press out now indicating something like an $80 million shortfall in what is being paid out to claimants. Where has that $80 million gone? It has gone not to claimants but to insurance companies. I can see exactly the same thing happening here.

THE CHAIR: Also, do you have any views on the idea of what seems to have occurred? The government gets together a bunch of people, has a pretend listen to them, gives them an option of two or three schemes—maybe four schemes—they can pick from, all of which will get the same outcome for the insurer, and then claims that there is some kind of consensus from a jury who have not had any choice, who have not been involved in the scheme design and who were not really listened to?

Mr Carrick: I do not want to disrespect anyone who was on the jury. They presumably did their best, but I can say this: the complexity in this scheme is really

significant. There is a lot of complexity. To understand how WPI thresholds work is not easy, even for people that have been practising in these schemes for some time.

The idea that the citizens jury had any idea what they were being led into in terms of the detail and the effects of this scheme I think is absurd. They just did not know. I do not blame them, but I think that someone who had a view about what the outcome should be at the end of the process has very cleverly led the citizens jury to that outcome and then put themselves in a position where they could claim that it was something that was done by the jury, that the jury decided.

THE CHAIR: Not only is it potentially damaging to our legislative process but also it is damaging to those individuals who have agreed to be involved, who have given up their freedom for a few days to try to help with the political process and who potentially have just been used.

MS CODY: Before I start, I declare for the record that I worked with Martin for a while prior to being elected to this place.

THE CHAIR: Hear, hear!

MS CODY: Mr Carrick, in your submission there are a couple of key lines that I would like to draw your attention to. You say that the scheme which is proposed in the Motor Accident Injuries Bill is not in the interests of not-at-fault injured people and is unfair. In your opening statement you mentioned a couple of key points about that statement.

Mr Carrick: In my opening statement I hit the big point: that people will get significantly less in damages, to the point where the idea of damages is defeated. Damages are meant to put you back in the position you were in before someone else's negligence harmed you. That idea has gone; that is thrown out. The problem is that it is thrown out to the extent that what may be offered to some people is not enough to keep body and soul together, and after five years they will end up in the social security system. It is unfair in all sorts of ways.

As I said, there is a reduction in general damages available for even those that cross the threshold, the potential problems of getting an insurer to pay the proper amount of wages and the proper medical treatment expenses, and then the fight people will have with insurers over that, over a protracted period of time, which I say in my submission is harmful to people. I see the psychological damage that people suffer from dealing with insurers. They are the big-ticket items. There are smaller things, like getting rid of gratuitous domestic assistance damages, which reduces what people are entitled to. There are a whole suite of things. I have tried to go for the bigger points.

MS CODY: You mentioned clause 119 in your opening statement.

Mr Carrick: Yes, that is right.

MS CODY: About substantial payments. Is that correct? Can you just refresh my memory?

Mr Carrick: Clause 119 says:

> Treatment and care benefits are not payable to a person injured in a motor accident in relation to the following:
>
> (a) treatment and care that an insurer has paid for under an arrangement for direct payment with the provider …

MS CODY: That is right, yes. The direct payment to the provider.

Mr Carrick: That may look a bit benign, but what I see is arrangements with medical providers and insurers doing a deal where the medical providers compete to get the work of the insurers and so offer cheaper medical treatment. That is a process where the injured person is not being looked after; the financial interests of the insurer are being looked after. So when someone says, "They are not giving me the proper care," they say, "Bad luck. We have paid for it. It is covered by the legislation. That is all that you are entitled to."

MS CODY: We have heard evidence that one of the reasons that the proposed scheme is a better scheme is to weed out fraud. Surely having direct providers would not necessarily weed out fraud?

Mr Carrick: First of all, it is hard to understand how the alleged existence of a large amount of fraud has anything to do with it. It is just not there. I am not saying that there has never been a fraud in the current system, but it should not be a driver of this sort of change because it is not that significant. Anyway, I have not seen any evidence—

THE CHAIR: At any rate, if you are going to take away people's rights to proper compensation to deal with the bad eggs—

Mr Carrick: Yes, exactly. Well put.

THE CHAIR: that is not a justification for taking away people's right to proper compensation.

Mr Carrick: Yes, I agree entirely.

MR PETTERSSON: Putting the question to you explicitly, we have heard evidence in this place that there are high levels of fraud in the ACT when it comes to insurance claims. That is not the case?

Mr Carrick: I am not aware of it. I am not sure where this evidence is. I would like to see it.

THE CHAIR: The only evidence we have been presented with is about the number of claims versus the number of injuries, and that was yesterday's hearing.

Mr Carrick: This is news to me. At some point I would be happy to have a look at, and get back to you about, some particular evidence of this supposed high level of fraud, but I certainly have not been exposed to that.

MR PETTERSSON: What activities are you aware of from insurance companies to prevent paying claims?

Mr Carrick: To prevent paying claims?

MR PETTERSSON: They say to combat fraud. In essence, they are activities that are to prevent paying a claim.

Mr Carrick: If I understand your question, day in and day out I see insurance companies refuse to pay things that they are meant to pay, and that the law requires them to pay. That is for a myriad of reasons, ranging from: "Sorry, something went wrong with the computer and we have not paid your client," through to: "We just do not accept the medical information that is there." Insurers rely on all sorts of reasons not to pay.

I do not know if I am addressing your question, but there are any number of reasons. For instance, there is the issue that I raised earlier about the insurer determining your post-injury earnings. This happens in the New South Wales workers comp system, by the way. The insurer simply says, "We think that you can work 20 hours a week. We have collected the documentation, we have reviewed it and we have decided that you can work X hours a week." It is perverse.

MR PETTERSSON: I specifically want to get to the anti-fraud activities that the insurance companies yesterday were talking about. They were quite vague on what they did. I was wondering if you could expand.

Mr Carrick: I did not hear the evidence yesterday, so it is a bit difficult for me to respond to it. I am sorry. I am happy to read it and get back to you, but I—

THE CHAIR: Perhaps you will take that on notice.

Mr Carrick: Yes, I will take it on notice. I was not able to listen to the evidence yesterday.

THE CHAIR: Do you want to clarify the question?

MR PETTERSSON: What activities do insurance companies undertake to prevent fraudulent claims or not?

THE CHAIR: As far as you know.

MR PETTERSSON: As far as you know.

Mr Carrick: One that I am aware of is that they surveil people. What you find there is that you are not dealing with a fraudulent claim; most often you are dealing with a matter of opinion about someone's capacity to do things because of their claimed injury. To see someone on film do something may or may not be demonstrative of how serious their injury is. It is a troubling area. That is one thing that insurers do to try to manage that sort of thing.

THE CHAIR: If there is anything you want to add on notice, Mr Carrick, we are more than happy to receive a response on notice as well.

Mr Carrick: Thank you.

MR PETTERSSON: In your submission you talk about assessments of WPI. It has been shown that WPI assessments can change with time. Do you know what would happen if someone was, under this proposal, assessed initially at under 10 per cent and then over time was to develop past that 10 per cent threshold?

Mr Carrick: My understanding is that that is bad luck: they have their assessment and that is the end of the matter. What happens routinely in matters I deal with where the WPI has been assessed is that people have an injury that progresses over time: an assessment at one point might be seven per cent, but two years later it could be 21 per cent. There is no doubt that it is troubling that people will be cut out of the system at five years and lose their opportunity, even though their injury may be deteriorating. It is a real problem. And the application of WPI thresholds generally is very arbitrary. It really is troubling.

THE CHAIR: Is there anything that you would like to add about the previous changes to CTP insurance being seen as incomplete? We have heard the argument put by some of those pushing for the change that there was unfinished business that had not been completed.

Mr Carrick: Again, I have not heard their evidence, so I am not quite sure what they mean by unfinished business, but I would comment on the provisions that were brought in to limit costs for small claims. They are difficult provisions to deal with and they are very difficult provisions to explain to clients, but they do cut out a lot of the litigation in smaller matters. Frankly, I accept that that is not a bad idea. I think that has limited legal costs in the system as it is now quite successfully. I do not think the current system is given enough credit for that part of it which manages that aspect.

MS CODY: I want to touch on something that we have heard evidence on and that previous witnesses spoke about: access to representation. Yesterday we heard evidence of a person in the current scheme being contacted by a call centre talking about insurance claims and talking about getting lawyers and so on. Although I also believe that it is important to have representation, is there a way that we can make sure that people are represented fairly and in the way that they want to be represented?

Mr Carrick: Are you referring to claims harvesting where people—

MS CODY: I think so, yes.

Mr Carrick: We are very happy for that to be excluded from the system by regulation or law that says that it is illegal. That should not happen. People get good representation by going to credible lawyers who have expertise in a particular area. There are plenty of provisions around for people to get redress if their lawyers are not doing the right thing by them. There is a system in place that allows them to deal with those very few lawyers that do not do the right thing. The vast majority of lawyers

work in their area of expertise and provide proper representation to their clients. That is their ethical duty and their motivation. To the extent that there are business that are trying to take over or steal clients, of course, we would like that shut down.

MS CODY: In your opening statement you mentioned that the income is determined by the insurer.

Mr Carrick: This is the post-injury amount. Well, all of it is.

MS CODY: Post-injury income?

Mr Carrick: Yes.

MS CODY: Is that the case now or is that the case in the proposed scheme? Or is it the case across the board?

Mr Carrick: At the moment a claimant is entitled to common-law damages, so ultimately a court would determine all of those things. But we negotiate with insurers and take into account post-injury income and post-injury earning ability. That is part of our negotiation in common-law damages.

MS CODY: But in the proposed scheme it would be an insurer?

Mr Carrick: That would be determined for the purpose of those benefits that go for the first five years. That figure will be determined, apparently, according to the act or the bill, by the insurer. Again, I would be very suspicious about that because of the insurer's motivation to minimise those things, not to maximise the post-injury earnings.

MR PETTERSSON: In your submission you said—and it was said in many others—that the current system is providing value for money and is competitive with other jurisdictions. Can you flesh out your claim for us?

Mr Carrick: I cannot give you chapter and verse on the comparisons of the costs of these systems, but I would say this: the ACT has the highest income per head of population in Australia and I cannot see why we should not have, with that, a good motor accident system that provides proper coverage for people. I am not aware of some sort of groundswell of people saying, "The premiums are too high; we need to change the system."

I think that, overall, people in Canberra, particularly if they understand this system—and unfortunately you do not get to understand it unless you become involved in an accident—are serviced with a really good system and, however it compares with other systems, it is in keeping with our community. We have an educated, relatively speaking high paid community; we should have a quality system to cover this insurance. And at the moment we do. Why it has to be destroyed is not clear to me.

THE CHAIR: Mr Carrick, are there any further statements you would like to make?

Mr Carrick: No. Thank you very much.

THE CHAIR: There being no more questions, we will conclude this part of our hearing. When available, a proof transcript will be forwarded to you to provide an opportunity to check the transcript and suggest any corrections. On behalf of the committee, I thank you for appearing today.

TRELOAR, MR JAMES, Partner, Maliganis Edwards Johnson
EDWARDS, MR CRAIG, Partner, Maliganis Edwards Johnson
EHSAN, MR HASSAN, Senior Associate, Maliganis Edwards Johnson

THE CHAIR: We will move to our third group of witnesses today, the representatives of Maliganis Edwards Johnson lawyers. Thank you for appearing today and being available for us to ask you questions. I remind you of the protections and obligations afforded by parliamentary privilege as set out on the pink privilege statement. When you understand the privilege implications of the statement, please confirm so for the record.

Mr Treloar: I have read the privilege statement and I agree to be bound by it.

Mr Ehsan: I agree to be bound by it too.

Mr Edwards: I agree to be bound by the requirements of the privilege statement.

THE CHAIR: Before we proceed to questions from the committee, do any of you have a brief opening statement?

Mr Treloar: I do.

THE CHAIR: Mr Treloar.

Mr Treloar: Thank you very much for allowing us to be here today and speak to the committee on this very important topic. I believe that the changes proposed in the draft bill, the exposure bill, are unjust, unfair and unnecessary. I have worked in the area of personal injury law for the past 20 years or so. I currently hold the position of partner at Maliganis Edwards Johnson, but for the first 14 years I acted as a lawyer with some of the larger defendant firms, acting for and giving advice to various insurance companies both here and in New South Wales.

THE CHAIR: So you bring a unique view.

Mr Treloar: As a result, I believe I have a unique perspective which I hope can assist the committee.

Compulsory third-party insurance is not a topic that stimulates much interest in the general community. Unless and until you are involved in a motor vehicle accident, most of us do not pay it much attention. But it becomes very important very quickly when you or someone you love is involved in a motor vehicle accident, the medical bills start to pile up and you cannot cover your wage.

Most of the clients I meet when they walk through my office door have a general understanding, but not a complete understanding, of their rights and obligations when they have been involved in a motor vehicle accident. It is comforting to them, and to me, to be able to tell them that we have the best system of CTP in Australia.

There are two main reasons for that. First, when an injured party is involved in a

motor vehicle accident that is not their fault, they are fully covered in terms of their losses, injury and damage. They are entitled to damages for non-economic loss, loss of amenities of life or loss of enjoyment of life, past and future out-of-pocket expenses, past and future economic loss, and past and future domestic care and assistance. Secondly, the scheme is fully funded. Insurers are making a profit and claimants are fully compensated. Suncorp would not have come into the market if they did not think that there was a profit to be made; they would not have stayed if they were not making a profit. The system that we have is fully funded, and claimants are properly compensated.

Initially I was not going to raise the issue of the citizens jury—it was not in my submissions—but you heard the compelling comments made by Bill Browne and by Mr Gary Francis, and I respectfully share their concerns over the way that the pilot jury was constituted and run.

A number of times during the public hearings into this exposure draft the question has been quite rightly asked: how did we get here? It is a good question.

In the lead-up to the August 2017 government communique that there would be an investigation into CTP change, the government involved an out-of-state company, democracyCo Pty Ltd, run through South Australia. Recruitment of jurors commenced in August, around that time, and initial attempts involved Australia Post selecting 6,000 households at random to which invites would be sent. Any individual in the household could respond, though, as you have heard already from Mr Francis, those involved most closely with the scheme were specifically excluded.

In order to constitute a jury representative of the community, democracyCo indicated—and this is recorded in the papers—that they required a five to eight per cent return rate on that 6,000 initial send-out. That would have resulted in approximately 300 to 480 initial expected responders. They received 76. That necessitated a last-minute rush to bolster the size of the jury pool, and another outside firm was engaged on a rush basis to assist democracyCo in recruiting prospective participants. A further 1,000 emails were sent out. Ultimately 114 people responded. From that number, the jury was whittled down to 50, and they were tasked with the important duty of reshaping the ACT's CTP system. How representative of the entire community the group was remains questionable, as the selection process was conducted behind closed doors.

Perhaps unsurprisingly, independent critical analysis followed. You may have read the paper by Dr Ron Levy from the Australian National University. He conducted an independent review of the pilot jury process. I have a copy of his report if it would assist the committee.

THE CHAIR: Yes. Are you able to table it?

Mr Treloar: I am able to table a copy, I believe.

THE CHAIR: Thank you.

Mr Treloar: He said:

> The close and ongoing involvement of expert decision-makers in the pilot citizens' jury's deliberation stages risked undermining the autonomy of jurors.
>
> … bias was evident in the official rhetoric surrounding the proceedings. The public framing of the compulsory third party insurance issue favoured abandoning the status quo option. Since this was one of the options jurors were tasked with considering, this framing undermined the objective of using citizens' juries to depoliticise contentious questions of reform …
>
> The ACT Government and democracyCo raised barriers to external scrutiny of, and democratic input into, the citizens' jury process.

By the time the final votes were cast, the number of jurors had been whittled down even further.

THE CHAIR: Because some people had left.

Mr Treloar: Some of the members were unwilling or unable to participate further; some disagreed with the jury process and they quit. Ultimately only a small fraction of the jurors who were initially chosen remained.

THE CHAIR: Do we know how many?

Mr Treloar: We were left with the situation where 39 jurors decided to dismantle the ACT's existing CTP insurance scheme.

I want to make it very clear that I have no criticism at all about any of the jury members; they did the best they could with the limited time and the limited information available to them.

How did we get here? That is part of the story of how we got here: through that process.

With that in mind, I would like to move on to considering the need for such radical wholesale change. The answer is, to my mind, that there is no justification for gutting the current scheme. It is simply bad policy. It is bad policy to reduce the rights of innocent road users to increase insurer profits, and from my perspective, that is exactly what will happen if this bill passes.

When the changes to the CTP scheme were first flagged, that was done via the your say website. On that website a number of rhetorical questions were raised, questions such as: "Did you know that not everyone involved in a motor vehicle accident is currently covered for their loss?"; "Did you know that it can take a few years to resolve a claim?"; and "Did you know that the ACT currently has some of the highest CTP premiums in Australia?" They were the three main rhetorical questions that came through, and I would like to debunk each one of those.

In relation to universal coverage, there is a very good policy reason why not everyone involved in a motor vehicle accident should be covered to the same level, having regard to the financial constraints. Under the current scheme, the innocent road user

receives fair compensation while the at-fault driver receives less: not none, but less. In terms of the at-fault driver, NRMA, IAG and Suncorp offer at-fault driver coverage currently at no cost when renewing your CTP policy. Currently, for at-fault coverage payments can be made up to $500,000, depending on the nature and severity of the at-fault driver's injuries. Under the existing legislation, CTP insurers are required already to pay up to $5,000 for immediate medical treatment expenses, medication and the like. That is without any determination of liability. So there are two ways already that at-fault drivers receive some payments.

Going to the claim time, the irony of the current situation is that one of the original criticisms levelled at the current scheme is the length of time it takes to resolve a claim. I say irony because under the proposed changes in the MAI draft exposure bill, some payments will be drip-fed for up to five years, with no ability to commute.

CTP changes are not like a property damage claim. You do not have the situation where, if you have damage to your car, you go off and get three quotes and pick the middle quote. It takes time for the body to heal; it takes time for treatment to work. You heard the powerful submissions by Mr Francis yesterday. He has been told, four years down the track, by his own treating doctors, that his spinal fusion surgery may not lead to stabilisation until March next year. It takes time to run a claim like this.

Finally, I go to premium costs. This is a really important one. One of the most common criticisms levelled at the current scheme is that CTP premiums in the ACT are too high. I do not agree, and nor do any of the clients that I have ever spoken to. There are a couple of points I would like to make in relation to this.

I have already spoken about why I believe the ACT has the best scheme in Australia. It is fully funded and the claimants are properly covered. In March 2016 the actuaries Cumpston Sarjeant undertook a review of the current scheme pursuant to section 275 of the Road Transport (Third-Party Insurance) Act. The current Road Transport (Third-Party Insurance) Act has an inbuilt review mechanism pursuant to section 275. If you have not read that document, I believe, with great respect, that it is important that you do so, because the review is critical in understanding the financial viability of the scheme.

The result of that review showed that the ACT has some of the most affordable premiums in Australia when viewed as a proportion of the average weekly wage. The ABS figures that were published in February of this year indicate that the mean weekly wage in the ACT was $262 higher than in the rest of the country. Importantly, there was no financial imperative identified in that document for scheme change. If you have a look at page 13 of that document, you will see that it shows comparative CTP costings when viewed against the average weekly wage. We are very competitive in that regard.

The next section 275 review is due in March of next year. I do not see why there is such pressure to expedite the passage of this bill when it is so flawed and we have an independent review of the financial viability of the scheme coming up in March next year.

In my view, members of the committee, the gutting of the current scheme is

unnecessary. And to explain why it is unfair, I will pass over to my friend.

Mr Ehsan: Thank you for the opportunity to speak today on such an important topic. I agree with everything that James has had to say. I agree that changes to the current scheme are unjust, unfair and unnecessary. As a senior associate at Maliganis Edwards Johnson for approximately the past eight years, I have had the absolute privilege to represent everyday Canberrans who have been involved in motor vehicle accidents where their lives, through no fault of their own, have been turned upside down.

When we represent individuals, in effect we represent their families as well. I have been in the fortunate position to see the human effect of motor vehicle accidents. That is what I would like to focus on today. What will the proposed amendments to the current scheme mean from a human standpoint? What will be their effect on families? Currently in Canberra, Canberrans have access to all of their common-law rights without the need to meet any thresholds of personal impairment.

As we now know, clause 198 of this proposed bill suggests that a 10 per cent whole person impairment needs to be inserted and individuals who are injured in motor vehicle accidents cannot access their common-law rights until they meet that threshold. Such a threshold is very high and it is a fallacy to suggest that individuals who do not meet that threshold are either not injured or should not have access to their common-law rights.

At this point, I would like hand up to the committee three real-life examples from New South Wales that are addressed in my written submission, but I would like to address them in a different order. If I could have them tabled, I will take you through some of the examples.

MS CODY: Sure.

Mr Ehsan: They are collated. There is a copy for each member of the committee. They are identified as one, two and three in the top right hand corner.

MR PETTERSSON: You are making it easy for us.

MS CODY: We like that.

MR PETTERSSON: Thank you.

Mr Ehsan: As I have said, not only are these changes unfair, unjust or unnecessary. In fact, they are draconian and they seek to punish the innocent road user. The reality is that 90 per cent of innocent road users will be precluded from accessing their common-law rights if the exposure bill is passed in its current form. Could we consider that for one moment? As we look around in the room, if my maths are correct, there are nine of us in the room at the moment. Mr Carrick has left. There are no longer 10. If we are involved in motor vehicle accidents, the statistics show that none of us will be able to access our common-law rights. That is what the statistics show. That comes from the Ernst & Young report.

What does that mean for you; what does that mean for your families; what does that mean for your loved ones if you are unable to get back to where you were prior to the motor vehicle accident from a physical standpoint, emotional standpoint and, most importantly, from a financial standpoint?

Whole person impairments are measured using the American Medical Association guides to evaluation of permanent impairment. The authors themselves suggest that the guides are not reliable when it comes to determining fair entitlement to compensation. So I ask a rhetorical question: why, then, is this legislation suggesting that we use them? That being said, and coming to the point of my submissions this afternoon, I wanted to give some real life examples from New South Wales.

I turn to the first case study, which is identified in your copies as No 1 on the top right-hand corner. This concerns a lady in New South Wales who was involved in a head-on collision. For today's purposes we can refer to her as "Jenny". It is an easy name to remember. Unfortunately, Jenny suffered the followed injuries in her motor vehicle accident: a fracture to her left wrist, collapse of her urinary bladder, bowel and abdomen damage, and wrist scarring and abdomen scarring. Jenny is married with two children and lives in her own accommodation.

At the time of assessment, she was complaining of the following symptoms: restricted range of motion in the left hand with numbness in the top of her hand and stomach spasms, which are described as lasting 15 to 20 seconds. To correct the fracture in Jenny's hand, she underwent surgery. However, it was noted that she continues to have difficulty with supply to her radial nerve which, in many respects, explains the numbness in her left hand. Incredibly, Jenny's abdominal injury, which also required her to undergo surgery, was assessed at one per cent whole person impairment. In total, Jenny received a whole person impairment at six per cent.

Under the current system, Jenny would have access to all of her common-law rights. Under the proposed new scheme, that will not be the case. This cannot be right. We do not know, and it is unclear, how long it will take for Jenny either to get back to where she was prior to the motor vehicle accident or if she ever will do so. If Jenny is unable to access her common-law rights, she will be another individual who will, unfortunately, rely on the social security system.

The second case study concerns a gentleman who suffered the following injuries, and they are quite severe. For today's purposes we can refer him to a "John". John suffered the following, and they are quite extensive: deformity and scarring to this left breast; fracture of the left fourth, fifth and sixth ribs; fracture of his L2 vertebrae and lumbosacral spine; dislocation of his right toe and metatarsophalangeal joint; second right toe fracture of the proximal phalanges.

At the time of his assessment, John complained of the following symptoms: constant chest pain; pain in his ribs; constant pain in his lumbar spine, extending down to his right knee and right hip; reduced capacity to sit in one position for prolonged periods, particularly when he is driving; disturbed sleep; pain in his first toe when walking for prolonged periods; and constant pain in his second and third toes. Most importantly, he reported than when he lies to go to sleep and puts his blanket over his toes, he has constant pain from the blanket. Since the subject's accident, John's wife has

undertaken the majority of the domestic duties that he would otherwise be able to do or has difficulty now doing.

Notwithstanding the above injuries and the constant pain, John was assessed as having a whole person impairment of eight per cent. Again, if the exposure bill is legislated and passed, John will not have access in the territory to his common-law rights, including damages for the gratuitous care that he has received from his wife. This, again, cannot be right.

I come to the third and final case study. It is probably the best example of why 10 per cent is such a high standard. Again, for the purposes of simplicity, we can refer to case No 3 as "Michael". Unfortunately, Michael was involved in a serious motor vehicle accident and suffered a significant number of injuries, the most significant one being a traumatic brain injury. He also suffered from contusions to his lungs, various scarrings over his body, a fracture to his right femur, a fracture to his left femur, a fracture to his right tibia, injury to his right knee, laceration of his spleen, and soft tissue injuries through his thoracic and cervical spine. Incredibly, Michael's traumatic brain injury and contusions to his lungs were assessed at being zero per cent whole person impairment. The only aspect that was assessed at greater than zero was a tibia fracture at eight per cent and two per cent for his scarring.

I have to ask the rhetorical question: what does one individual have to do to reach a whole person impairment of 10 per cent? If a traumatic brain injury is assessed at zero, that is quite dangerous and quite concerning to us. The panel found that Michael's injury to his right knee was not caused by the accident. On page six of the third example, you will see a table that assessors have put together that lists all of Michael's injuries. Every other injury is assessed at zero apart from the fracture to his right tibia and the scarring.

As someone who has acted for, and acts for, hundreds of individuals who have been involved in motor vehicle accidents, we see injuries range from soft tissue injuries, broken bones, fractures, and internal injuries, and emotional injuries. As you can see, not even serious traumatic brain injuries will meet the 10 per cent threshold. Why do we have it? We cannot understand why the government wants to take away the rights of Canberrans, as opposed to protecting them, particularly in cases where individuals, out of no fault of their own, suffer significant life threatening and life changing injuries.

As James has already put forward, the initial advertised reasoning from the government for the purpose of abandoning the current scheme was to reduce the amount Canberrans pay for their CTP premiums and to allow for universal coverage, regardless of fault. There is no reason for bringing in a whole person impairment threshold of 10 per cent. It achieves no purpose other than to take away the common-law rights of innocent road users.

The three examples given today show very significant and very serious injuries. Of course, not all motor vehicle accident cases are like that. But as you can see from the third example, most of the injuries were assessed at zero. It is of grave concern that introducing such a threshold will without a doubt exclude approximately 90 per cent of claimants, who could be all in this room, your families, your friends and your loved

ones. The proposed amendments by way of this exposure bill are unnecessary, unjust and unfair. On this note, I will pass on to Mr Edwards.

THE CHAIR: Mr Edwards, I should just let you know that we only have 10 minutes further for questions.

Mr Edwards: I have prepared beautiful notes.

THE CHAIR: We could read them if you want to table them or you could just give us the heart of the points that you were going to make.

Mr Edwards: Quite frankly, the great bulk of the points that I wanted to make to you have been put by colleagues or other members of the public who have already appeared at this committee, including some of the people yesterday. And I have had the privilege of listening to others today and watching the broadcast. I suspect a lot of what I want to say you have heard somewhere between two or three times and half a dozen times already. In circumstances where you would like me to push it through, I will refer to a few ad hoc points that I do not think have been made.

THE CHAIR: Thank you.

Mr Edwards: Again, thank you for inviting me to attend and to speak to this committee. I do not envy you your tasks.

One of the things that I would say is this. My position is, unfortunately, that I think I am the oldest of the people who has appeared in front of you, or close to it. That is not something that I am particularly pleased about, but it does open up this opportunity to say that I have been in practice in Canberra for 34 years. I have been continuously in practice for 34 years. During that time I have worked continuously in this field—and in some other fields, but the core of my practice has been advice to victims who have been injured through industrial accidents, public liability circumstances, motor vehicle accidents, negligence and so on.

During those 34 years, I can say to you that a constant theme has been this idea that we need to be looking over our shoulders to see when our magnificent common law based system of compensation in the ACT is going to be challenged, challenged again, and so on and so forth. It has been a constant theme. It has been as though there has been a cloud over that range of entitlements of our community throughout the great bulk of that time. There have been a couple of years here or there when there was silence on the topic and business got on, but it has been a constant theme. I do not think that has been pointed out to you before. That is one point I wanted to mention.

What is the significance of that? The significance is this. During the whole of those 34 years that I have been in practice—and, obviously, whatever the period was before I came into practice—the ACT has had either the highest level income or amongst the highest level incomes, on average, of any of the Australian states or territories. You have heard that from a number of friends, including my colleague Mr Treloar today. That has been a continuous process. We also have the most highly educated population. So we are dealing with a fairly sophisticated, well-educated and, by Australian standards, well-paid community. That forms the basis of it.

Notwithstanding that, my profession has constantly been told that the balance—and this is another constant, this concept of a balance—of the insurance companies making sufficient profit to remain here and providing compensation to the population is being eroded by judgements that are unacceptable. The position is that here we are still with a very viable system.

We are here with a very viable system because it works well. It does not work well just because of private lawyers; it works well because of the whole system that deals with this, from court staff to paramedics, doctors, the medical profession, the legal profession, the paralegal profession, educators and so on and so forth. We have this system in place. It is something that we can afford. We are not the dearest system in the Australia, but we have, clearly, the best benefits.

In circumstances where I want to be brief, I am not going to again go over all of the heads of damages that are open to us, other than just to list them, but in the ACT we do not have any impediment to a proper award, that is an unimpeded award, of compensation for general damages, for the pain and suffering of an individual. That does not just come out of the sky; that comes, ultimately, from judicial decision. But, of course, as you are aware, very few of these matters actually get to court. Indeed, as lawyers, we are trained to work in an effective way to compromise matters in the interest of our client and to enable the system to proceed. We simply could not have all of the matters proceed to a hearing. That is a problem that was dealt with yesterday by a colleague—Mrs Blumer, I believe, or perhaps Amy Burr—who dealt with this idea of the courts being swamped if every little issue was going to be challenged.

We have a successful system in terms of delivery of benefits and unimpeded but proper, realistic entitlements to general damages. We have a system, and Commissioner Kenneth Hayne from the royal commission referred to it as the capacity to get on with real life, where people in Canberra, in the community—whether they are students, mothers, office workers, industrial workers, white-collar workers, the aged or whoever—have this entitlement to a reasonable, but impeded, award of economic losses.

It is not open slather. It is not, as you were told yesterday by one of Suncorp's representatives, a pot of gold at the end of the rainbow or a matter of a lottery result. These things are properly assessed; they are ultimately testable if parties cannot reach agreement. In the ACT, under the current system that we have, people are entitled to a full measure of their economic losses—or very close to a full measure: three times the average wage—under the Civil Law (Wrongs) Act. These are things to be proud of. My friend Mr Treloar has touched on gratuitous care, treatment expenses, and interest on some of those components. We have a system that really should be lauded as something to be proud of rather than being something that is the subject of wolves wanting to tear it down.

That brings us back to one of the questions that you asked, Mrs Jones: who wants this? As to the answer to that, I only have suspicions, and I cannot comment, but it is not apparent who wanted this. It is not apparent who wants it. And the more people are informed about the failings of this particular act, the fewer people would actually agree to it, I would suggest. It is something to be upheld; it is not something to be

dragged down.

I have been asked to comment on a couple of points. I note that while I was sitting here today a couple of questions were asked by members of your committee about the issue of fraud. I think my colleague Mr Carrick made the comment that he is simply not aware of fraud being a problem here. I should say that the government is not aware of fraud being a problem here.

I would take you to answers that the current Chief Minister, Mr Andrew Barr, gave to questions put by Mr Alistair Coe, Leader of the Opposition, earlier this year. A question was put, and it was signed off on 3 July 2018, by Mr Barr, apparently: "What effect do instances of fraud currently have on premium prices in the ACT? What modelling has been undertaken? How will instances of fraud be considered?" Mr Barr's response was, presumably quite correctly, "No modelling has been undertaken by the regulator." That is not an oversight; it is just not an issue.

A further question was put by Mr Coe to the Chief Minister and was answered by the Chief Minister. Mr Coe said, "How many instances of fraud in relation to compulsory third-party insurance occurred in the ACT during …?" Then he listed 10 or 12 years, from 2007-08 through to 2017-18 and to date. Mr Barr said, "From the regulator's perspective, the trends in overall claims numbers do not indicate systemic fraud is currently occurring in the ACT, and insurers have also not informed the regulator about systemic fraud occurring."

In other words, it is a non-issue until the insurers are agitating for the destruction of this system. Then, all of a sudden—not by any act of genius, not by some great plan, but simply by adopting what they did in New South Wales—people argue, "Well, you have got a fraud problem." The fraud problem does not exist. It is a furphy.

Because it is such an august body that I am addressing I thought would I turn to JF Kennedy for a quote. This quote, often repeated, is on these lines: if a falsehood is stated and restated, and if it is left unchallenged, it will become the accepted wisdom. The accepted wisdom is that there is a fraud problem, except that there is no evidence of it and there is evidence against that proposition. I could go on and on about it.

THE CHAIR: Perhaps you had better let the committee members have at least one question.

Mr Edwards: Okay. I was also going to address the issue of defined benefits. Very briefly, it has been put to this committee that defined benefits are going to be paid for up to five years. That is something that you should strike from your minds, in my view.

Ernst & Young's own modelling of this indicated that treatment would last an average of just under 0.9 years; let us call it 10 months; that care itself would be provided for an average of 2.6 years, not five years; and that income replacement would, on average, be 1.75 years. When it is constantly drilled into you that, if you choose to support this bill, you are supporting a system that is going to be delivering these benefits for five years, reject that. You are to take that with a hefty grain of salt and look at the government's own actuary's figures.

I was disappointed to see Suncorp yesterday refer to these outcomes in the common-law settlements in the ACT as being pots of gold achieved at the end of the rainbow, lottery results, and so on and so forth. The beauty of our common-law system is that if it is unamended, if it is unfettered, real people—judges and real people, medical practitioners, lawyers and so on and so forth, those involved in the system—will be working towards getting people a fair result. A fair result for somebody with minor injuries might be a few thousand dollars or a few tens of thousands of dollars, and it goes on. It should be a fluid system. And if somebody requires, for the dignity of their life and their survival, a very substantial award of compensation, the system can deliver it up. The idea that the insurers should profit by driving out claims that are below a certain level, particularly the 10 per cent whole person impairment that my friend Hassan has spoken about, is just draconian. It is wicked.

The overall position with the insurers is unfortunate. The ACT returns rates on their capital that fall properly within the figures that insurers should achieve. Remember that this is a compulsory system with insurers; it is a captive market. When you have a captive market, the accepted position from an accounting point of view is that there will be a discount on what they receive. There is no discount to the insurers in the ACT. Indeed, they have been coming here in increasing numbers. The number of entities of insurers has grown from when I first went into practice. I practised with a monopoly insurer; then it became dual for a period, GIO and NRMA. And I have had the pleasure, I suppose, of dealing with four insurers in recent times. They are not here because they have a gun held to their corporate head; they are here to achieve profits. They are doing so, and they are doing so at levels that, even on their own estimates, fall well within the ranges that are nominated, that is seven to 11 or eight to 12 per cent. In reality, the figures are much greater. I refer you to the commentary of Commissioner Kenneth Hayne in relation to his royal commission into financial institutions in Australia.

The recent New South Wales experience is that when the stated figures were around six to eight per cent, the real figures achieved were 19 per cent. In Queensland, after they had destroyed much of their common-law entitlements, the figures are up around 25 and 30 per cent. There is a real distinction between—I am looking to accurately refer to the terminology—the filed profits of the insurers as opposed to their actual profits. The differences are enormous.

We can afford a full and proper system in the ACT. We have a full and quite proper system in the ACT. It can be tweaked; it can be improved here and there. The system itself is not properly promoted, so people are not fully aware of their entitlements, in my view. We have a system that is demonstrably the best in Australia, and that should not be dragged down.

THE CHAIR: Thank you, Mr Edwards. I will have to draw you to a close there. We are already five minutes over time and the committee members would like to ask a few questions. You have 34 years of practice dealing with the various adaptations of the scheme that we have here. Do you have any idea who or what is driving this change?

Mr Edwards: I do. I am not able to establish what I am going to say. My comment is a political one and it is based on rumour. I think it is an ideological drive based perhaps on ego. I do not know. Who is calling for it? Who wants it? Who is going to benefit from it?

THE CHAIR: Indeed; in fact, we have had this jury process that was given limited options to choose from. Whose feedback may or may not have been taken into account by the people who drafted up the scheme options? Certainly, the more I hear about what has happened up to this point—I did not come back to this committee from maternity leave with a strong view either way—the more it raises lots of question marks about why we are here.

Mr Edwards: Yes.

MS CODY: In light of our time frame, I will try to keep my questions as brief as I can. You provided two submissions. I apologies; I am not sure which one I am referring to.

Mr Edwards: I should say that I do not have either in front of me.

MS CODY: That is okay. I am pretty sure that you will be able to answer this without them. There is a heading relating to proposed section 198 that states "No damages unless WPI at least 10 per cent." I know we have covered that quite extensively with some of the case studies you have provided. But you also state in the submission that no threshold should exist.

Mr Edwards: Exactly, no threshold should exist. No thresholds currently exist for general damages. It is a tool by which a range of distorted, unpredictable results come in. They are unfair. It is not necessary. The proof that it is not necessary is that we have a system in the ACT that has no thresholds on general damages.

If you are not injured, you do not get compensated for personal injury. If you are injured and if your injuries are modest, and other aspects might make your court claim reasonable—there may be some treatment expenses, some therapy expenses, a brief period of time off work and you have minor injuries—our system will deliver up an award to you, or to you and your family, that is commensurate with that level of injury or loss. That is achieved.

If somebody has reasonably significant injuries or losses but still does not make the whole person impairment level, they are entitled under our current system to a fair and proper result, something that will give them the capacity to sustain themselves, one would think, and the dignity of a proper settlement. My friend Hassan has already spoken to you about several examples of WPI.

MS CODY: The examples you have provided are from New South Wales?

Mr Edwards: That is correct, yes.

MS CODY: Do you know how many cases in the ACT currently meet the whole person impairment of 10 per cent.

Mr Edwards: Should I address you as "member" or—

MS CODY: Sorry?

Mr Edwards: How would you like me to address you?

THE CHAIR: Ms Cody.

MS CODY: Ms Cody, thank you.

Mr Edwards: Ms Cody, the position is that in my practice, just because of the number of years I have been there, I have dealt with a lot of matters. It is very rare for me to be dealing with whole person impairment matters because the system I am dealing with in the ACT quite properly does not require whole person impairment. But having said that, I would occasionally receive an expert medico-legal report from interstate medical practitioners who have been retained by insurers time and time and time again. Even though they are not asked to provide a whole person impairment, they will slip one in. The whole person impairments will typically be zero. They might be for people who have had what we would call persistent and painful injuries restricting their enjoyment of life in a whole range of ways; more than just modest claims.

We do not need whole person impairment. We do not have whole person impairment in the ACT. Our system works. It delivers up the best results in Australia. From the point of view of the comfort of the members of the committee, it delivers up proper ones, that is, not just at the high end of things or in the middle of things but, indeed, at the low end of things. You might well say to people, "Yes, you could pursue some modest amount but it is probably not worth your while," or "It is a matter for you as to whether it is worth your while." But the system will deliver a fluid range of outcomes rather than a distorted result based on what the medical practitioner said.

MR PETTERSSON: I will be very brief. Thank you for providing these medical assessments. I have never seen them before. They are very interesting. I had a question about them. I understand that you are not dealing with the independent medical assessments day to day. They are just in New South Wales. How often do they get challenged?

Mr Edwards: If I can clarify your question, how often are they changed by—

MR PETTERSSON: Challenged; so you get an independent medical assessment.

Mr Edwards: Yes.

MR PETTERSSON: How often does that get challenged either internally or externally?

Mr Edwards: The answer to your question is, I think, in part quite frequently. What happens, of course, is that if I am representing an accident victim who might have a range of injuries, including possibly some skeletal ones, neurological ones, scarring or

whatever—psychological—the idea is you obtain a range of reports, including appropriate expert reports.

Where the matter warrants it, in terms of the size of the claim, the insurers will have their own expert in that field. The whole idea is to have a bank of respected expert reports. There might be discussion between those experts and there might be some agreement. They call it hot tubbing. I think I have answered your question: how often are they challenged, how often are they changed? They are challenged in the sense that under the current system the parties have the opportunity to have their own say by having their own experts retained. In terms of a report being changed in the sense that the report is written and then it is modified, that would not occur.

MR PETTERSSON: I feel like you tended towards answering from the perspective of the ACT current system as opposed to the New South Wales system. Listening to that answer, I suspect that is the case.

Mr Treloar: I think the answer has to be that for New South Wales, we do not know.

MR PETTERSSON: Yes.

Mr Treloar: We do not practise in that jurisdiction. I cannot give you any anecdotal evidence in regard.

THE CHAIR: Fair enough, thank you.

Mr Treloar: For New South Wales.

MR PETTERSSON: Yes, that is fair enough, thank you.

MS CODY: I want to clarify something very quickly, Mr Treloar. In your opening statement you talked about a raft of different things. But you also mentioned something about no ability to commute. Do you mean commute as in the—

Mr Treloar: In terms of, if you are being drip-fed $100 per week for income replacement, and there is no dispute that you are not going to be able to work for the next two years, you cannot say to the insurer that rather than getting $100 per week for the next two years, can I please just have a $10,000—

MS CODY: The equivalent as a lump sum?

Mr Treloar: Exactly.

THE CHAIR: The new scheme does not allow for that?

Mr Treloar: No, to my knowledge, no. Could I quickly just raise two things, because they were raised before we sat down? In relation to fraud, just touching very quickly on—

THE CHAIR: Please be brief.

Mr Treloar: what Mr Edwards said, the thought of acting for a fraudulent claim is abhorrent to every practitioner in the ACT. The second thing, in terms of my perspective of having worked for both insurance companies and for claimants, insurance companies thrive on complexity. This is the most complex draft exposure bill I have ever seen. I have read part 2.4 three times now. I still do not fully understand it. It makes reference to a person who:

> (i) is not in paid work; but
>
> (ii) had been in paid work for at least 260 hours in the 52 weeks before the date of the motor accident …

What if they had been in paid work for 259 hours or something like that?

THE CHAIR: It seems a bit arbitrary, yes.

Mr Treloar: This is the kind of legislation that insurers just thrive on because it is so complex. Claimants go, "Well, I do not know what that means." I am a lawyer of 20 years; I do not know what it means. The claimant will not be able to come to us and ask us for help.

THE CHAIR: Before we conclude, I want to ask whether you are happy for the documents tabled to be published. They will be de-identified.

Mr Edwards: I think those two identities have been redacted.

THE CHAIR: Yes, with redactions. As a committee, we are totally able to have that conversation ourselves, but as far as those—

Mr Ehsan: In my submissions, I have tried to change the names, but they would need to be redacted more.

THE CHAIR: Yes, okay. Also, Mr Edwards, did you want to table your notes from your full statement that you wanted to make?

Mr Edwards: No, I am happy that I addressed the points I wanted to, I think.

THE CHAIR: Thank you.

Mr Edwards: One other one I would say is this: one change that I have seen in my time is that the NRMA used to operate in Canberra. They operated commercially in Canberra, they were an employer in Canberra. What you have got now with these insurers is basically the commercial equivalent of fly-in, fly-out. It is a major employer and it should not be discredited in that way, I think.

THE CHAIR: I thank you for your presence here today. In particular, I think that there probably will be questions we will put to you on notice as we have not really had a long period of time to ask you questions. When available, a proof transcript will be forwarded to you to check and to provide an opportunity to suggest any corrections.

That concludes our public hearings for today. If witnesses undertook to provide further information or took questions on notice during the course of the hearing, whilst the committee has not set a deadline, we would appreciate the responses within two weeks. I now close the hearing.

The committee adjourned at 4.45 pm.