EDUCATION, TOURISM, INNOVATION AND SMALL BUSINESS COMMITTEE

Members present:

Mr SJ Stewart MP (Chair)
Miss VM Barton MP
Mr MA Boothman MP
Mr LL Millar MP
Mr BM Saunders MP
Mr RA Williams MP

Staff present:

Ms S Cawcutt (Research Director)
Ms M Coorey (Principal Research Officer)

PUBLIC HEARING—INQUIRY INTO THE WORKERS' COMPENSATION AND REHABILITATION (NATIONAL INJURY INSURANCE SCHEME) AMENDMENT BILL 2016

TRANSCRIPT OF PROCEEDINGS

MONDAY, 18 JULY 2016

Brisbane

MONDAY, 18 JULY 2016

Committee met at 9.38 am

CHAIR: I declare open the committee's public hearing into the Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016. I would like to introduce the members of the Education, Tourism, Innovation and Small Business Committee. I am Scott Stewart, the member for Townsville and chair of the committee. The other committee members are Miss Verity Barton, the member for Broadwater and deputy chair; Mr Mark Boothman, the member for Albert; Mr Rick Williams, the member for Pumicestone; Mr Bruce Saunders, the member for Maryborough; and Mr Lachlan Millar, the member for Gregory, who is replacing the member for Buderim today.

The hearing is being transcribed by Hansard and the transcript will be published on the committee's website. The hearing is also being broadcast live on the parliament's website. Those here today should note that the media might also be present, so it is possible that you may be filmed or photographed. Please turn off your mobile phones, or at least turn them to silent mode, if you have not done so already.

The committee's proceedings are proceedings of the Queensland parliament and are subject to its standing rules and orders. The purpose of the hearing is to hear more from invited witnesses about their views on the Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016. Could I remind witnesses to speak into the microphones, please.

NEVIN, Mr Bill, Chairperson, Association of Self-Insured Employers of Queensland

CHAIR: I welcome Mr Bill Nevin, from the Association of Self-Insured Employers of Queensland. We have allowed about 20 minutes to hear from you, Bill, including questions from the members. Bill, would you like to introduce yourself and start, please?

Mr Nevin: Thank you. I am attending today's forum as the chair of the Association of Self-Insured Employers of Queensland. Firstly, I would like to thank the committee for the opportunity to present today. Our association has all 28 current self-insured employers in Queensland as members of the association. Our association provided a brief submission to the inquiry and I have been asked to attend today as a result of that submission.

The introduction of the National Injury Insurance Scheme amendments is taking the Queensland scheme into uncharted waters. The addition of a long-tail lifetime care and support system into a short-tail claims system is counterintuitive and the philosophies, beliefs and principles of one system are different from the other. Our association members acknowledge that the amendments have stemmed from a long journey since 2011 from the Productivity Commission and do not wish to raise objection to the scheme itself. It acknowledges that, under the current eligibility requirements for a serious injury, there are only a small number of cases in the workers compensation environment that will be entitled to the additional benefits. For self-insured employers, it may be as little as one or two cases per year.

It is also recognised, though, that there will be significant increases in claims costs in the statutory and common law environments for the cases that will be extremely difficult to estimate with any accuracy at this time. Our association has raised concerns in particular about new section 232ZD, 'Additional payments if treatment, care and support damages insufficient'. Primarily, there are two reasons for the concern. The reassessment of a damages award is unusual and unprecedented. The finality of the damages award is a basic principle of the Queensland system, or a damages system. A worker who is not satisfied with the damages settlement has remedies within the current system for addressing a shortfall in any damages award.

New section 232ZD also notes that the decision in regard to the reassessment 'must have regard to the matters prescribed by regulation'. Primarily, we are saying, first of all, that it is potentially unprecedented but then, as the matters have not been prescribed, it is difficult to address the potential complexities of assessing the merits of a negotiated damages settlement, for example, some 10 years after a settlement has been made. That is the concern having regard to the principles of why you are looking towards a damages settlement.

The amendments appear to provide the worker with sufficient opportunity to have lifetime care and support. If they elect to seek lifetime care and support damages and the amount is not considered sufficient, they do not have to proceed with the damages settlement. There appears to be some

undertaking to say that they can proceed down the damages path. If they find that the damages path is not sufficient, or with too great a risk, they can continue within the statutory scheme. There would appear to be enough safeguards within the system to not then basically look towards a review of a damages settlement.

The implementation of such a section puts the future of damages settlements into a position of knowing that there is no risk to the damages settlement if you have an option of, 'It doesn't matter what the settlement is. In five or 10 years time you can have this settlement reassessed.' With a no-risk strategy, it will ultimately move to a lot of people settling cases on the basis that there is a reassessment and then the scheme will be faced with this reinitiating of claims that were long since thought settled, resolved and paid in their entirety. The scheme will basically have to bear those costs 20, 30, 40 years post.

The issue of bracket creep has been raised in our submission in regard to the eligibility criteria, as this is a potential long-term risk to the scheme. Although we have no evidence that that is on the agenda at this time, changes in eligibility criteria could extend the number of claims that fall within the system.

Overall, that is particularly what we have raised within our brief submission to the committee. However, there is a concern with just running through simple examples as to the intent of the system. Queensland has a fault based motor vehicle system. We have a worker who has had a serious motorbike accident on the way to work. The worker would meet the eligibility criteria. They would be referred to the NIIS motor vehicle system. They would look at the case and say, 'There is no fault on any party other than the worker,' and then that person would then be referred back to the NDIS system. This is an issue as to whether these types of cases should be best served under motor vehicle insurance and is the fault system something that needs to be addressed?

However, if you take the exact same worker travelling on a motorbike—and I would be loath to see that an employer would have people delivering parcels on a motorbike—and that person had the same accident where there was no fault attached, the worker would initially be thought to refer to the NIIS system. They would say, 'There is no fault,' and then the person would come back to the workers compensation system and the employer at that time, even though they have no fault and it is probably not within their circumstances to control the environment once the person is on the road. For us, we would see that there is some need to look at whether the fault Queensland system should respond to cases where there are motor vehicle accidents, especially where there is no fault on the part of all the parties in these circumstances.

In brief, that is my summary as to our concerns. There are a lot of things that need to come in regard to delving down into the detail. That obviously will be after the legislation has been passed in whatever form. No doubt, we would look to seek further participation with the office of industrial relations, WorkCover and the agency to provide assistance in discussing the technicalities and the procedures that follow.

CHAIR: Thanks very much, Bill. I now open it up for questions.

Miss BARTON: Thanks very much, Mr Chair, and thank you also, Bill, for stepping in earlier in the schedule, given that the Council of Unions was running a bit late. One of the things that you touched on in your opening statement was the additional cost that the scheme will bear. Has the association started to quantify what the initial costs might be in terms of potential premium increases for employers?

Mr Nevin: We have. Individually, our self-insured employers have looked at the issue. Initially, in these types of claims you are looking at very seriously injured workers and we bear the total cost of the claim. Initially, the claims do not change in the first year to three years. We do not see any additional costs, except for potentially a fee or a charge from the agency for managing the services. What we see the benefit of the NIIS is that we are garnering expertise and consistent expertise to provide to these people who have been seriously injured. Short term, we would pay all of what the NIIS would be paying. We would be paying for their treatment, their care. We would be looking at modifications. We have recently had a motor vehicle accident where we have made substantial modifications to the home. That is all under the statutory scheme. In that person's case, the further costs would come once we moved into a common law process, where we are looking to establish this further treatment ad infinitum for the life of the worker.

Where we have a straight statutory claim where there is no fault, clearly the Queensland system is about reaching maximum medical improvement, recognising the loss through a large lump sum—and the lump sums have increased substantially over the years—to recognise the fact that some people do not have a right to sue for damages. Those people would have their lump sum. Their claim would

come to an end. It is the costs from that date through for the rest of their life if there are no common law damages that becomes the additional cost in certain cases. Where a damages claim is lodged and when there is significant injury, such as those outlined, one would think there would be some responsibility on some party in regard to that loss. We are now adding the additional costs of treatment, care and support from 65 to an estimated date of death, which in itself is very difficult to comprehend as to how we are going to manage that in a damages claim environment.

In comparison to WorkCover, a small employer would basically see little to no effect on their premium. That would be on the basis that the smaller employers get paid just in regard to a set premium. Over time, that premium would slowly increase. A larger employer may still find no impact on their premium because of the $175,000 capping within the scheme for both statutory and common law costs, because we are looking at an area where the claims themselves would exceed $175,000 both from the statutory and in the common law environment. Whatever impact their premium has at this present time, I see little change in the new system, other than over time there will be a need to increase premiums generally to cover for the additional costs.

For self-insurers, if I can just add, each of the self-insured employers has some form of reinsurance, as required by the legislation. That reinsurance level is set at any figure potentially—from $500,000 to $1 million. The costs over those would be borne by the reinsurer. However, the system has been developed on a short-tail scheme—a payment to end the claim and a finalisation with the reinsurer as to moneys paid—but we now have a system that challenges that thought process in that we may have a situation in 50 years time where we are still considering how we recover money from the reinsurer.

Miss BARTON: The explanatory notes talked about your association being part of the stakeholder reference group. Can you detail some of the processes of that and how it worked?

Mr Nevin: I am the recently appointed chair. We have had our executive meeting with the office of industrial relations as part of quarterly meetings in regard to any issue. In regard to this particular issue, we have been challenged by time frames and the need to push very complex documents through. We do not underestimate the amount of work that has been put into the documents. We were given a recent look at the draft prior to some additional amendments being made. It is not ideal. We would like further interaction. However, we understand the position that the office of industrial relations is in in trying to move through voluminous amounts of legislation and the complexity of this legislation.

CHAIR: Thanks, Bill. That is all we have time for today. Thank you for coming and thank you for swapping around that time for us and allowing us to get things moving. Thank you very much.

Mr Nevin: Thank you again for the opportunity.

MARTIN, Mr John, Research and Policy Officer, Queensland Council of Unions

CHAIR: John, we have allowed about 20 minutes to hear from you this morning, including questions from members. Would you like to introduce yourself and start, please?

Mr Martin: First of all, can I apologise for being late this morning. There was some confusion in terms of attendance, so my apologies for delaying you this morning. In terms of our submission, we would rely upon our written submission. I am assuming that the committee would have a copy of that. That was a letter dated 14 July and I would be happy to answer any questions that I am able to and, if I am unable to, I would be happy to take any questions on notice.

CHAIR: John, I ask you to do a brief five-minute summary of your submission. We have Lachlan Millar with us who has substituted in this morning, so he probably would not have had time this morning to read through that.

Mr Martin: Thank you. I have met Mr Millar before in another committee. First of all, the matter that is of most importance—and we have confined our submission to those matters that are of concern to us, because a number of the matters might be administrative in nature and probably do not require any comment one way or other—and our principal concern is to prevent the transfer of liability, and in the explanatory notes there is quite a good explanation of difficulties caused by the case Byrne. From our understanding, that would enable a principal, to use the neutral term, to contract out of their obligations in terms of workers compensation. That leads to a number of adverse consequences for employees or, to use the neutral term that the workers comp legislation does, workers. As it currently stands, any discussions about whether someone is an independent contractor or not is of no consequence in terms of the broader workplace health and safety legislation. We are supportive of this for the same reason, because otherwise you run the risk of people slipping through the cracks because of the arrangement that leads to their engagement, again to use that neutral term.

A number of those circumstances we would find questionable—that is, you obviously would have heard of the stories of people applying for jobs with regard to a job advertised in the employment column of a newspaper and then being told to find an ABN before they commence work. That is clearly demonstrative of an arrangement that is established to avoid an employment relationship and probably would not stand much scrutiny in a legal sense in any case. We see this amendment as an attempt to restore that set of circumstances whereas there is no incentive for a principal, whether they be employer or otherwise, to try to avoid their workers compensation obligations. It is for that reason that we are supportive of it.

The only other one that is probably worthy of note is the reliance on ordinary time earnings. Strangely enough, we have seen circumstances where that figure is actually reduced in Queensland but only marginally. That set of circumstances would lend itself to someone on workers compensation actually having their financial circumstances worsen. They are already presumably in an amount of stress in any case and there is a reliance on ordinary time earnings, which is an ABS stat which is derived from a survey, so there is the capacity for a margin of error in any case. We would also support that amendment because, again, that would protect injured workers and make sure they did not go backwards. Unless you have any other specific questions, I think that summarises our position.

CHAIR: Terrific. Thanks very much, John.

Miss BARTON: Thanks so much for coming in, John. I have a question firstly about the stakeholder reference group that the QCU was a part of in terms of the consultation and preparation of this bill. I just wondered if you could detail what role QCU had and how that had evolved and how the consultation process worked.

Mr Martin: I am just trying to—

Miss BARTON: I am happy for you to take it on notice as well. It is up to you.

Mr Martin: That might be appropriate, and I will explain why: there were two sets of meetings running concurrently.

Miss BARTON: Sorry, but can you just explain the two sets of meetings?

Mr Martin: Yes. The other was completely unrelated and it was in terms of a consultation about a new workers compensation medical certificate. Those two meetings about similar but not the same topics are a little confused in my own mind, so in order to answer you precisely I would prefer to put that in writing. Actually, there have been three of them, now that I think of it. I would be happy to put that to you in writing as to what meetings I attended and where they took place.

CHAIR: Thanks, John. Just to let you know, we would like those by Monday, the 25th. Is that okay?

Mr Martin: Yes, that should not be a problem. Do not take my being late today as being how I would normally conduct myself.

Miss BARTON: You sound like you are a very busy person and the minister is relying on you greatly.

Mr Martin: Over the last couple of weeks we have been very busy, yes.

Miss BARTON: I cannot imagine why. It is not like there has been anything of interest to the QCU, I am sure! I just wanted to touch on the existing scheme contrasting with the proposed new scheme and why you would think the existing scheme, which provides compensation for people who are injured at work, would not sufficiently provide for people who are injured at work.

Mr Martin: As far as I understand, the existing scheme will remain in place. With regard to the amendments that pertain to the National Injury Insurance Scheme, we would say that that is a good thing that there is now coverage of people—not necessarily workers but people—who suffer catastrophic injury regardless of whether that is at work or whether that is somewhere else and regardless of whether there is any fault from themselves or anyone else. They are now covered, so that is a good thing. The difficulty would have been if by the introduction of that scheme at a national level we somehow reduced the rights of injured workers. The changes to the existing scheme, as far as I understand it, are only to maintain the existing entitlements for injured workers and in particular to make sure that the right to sue a negligent employer at common law has been preserved, as far as I understand, as well as journey claims.

In terms of what was needed, I am in the hands of the parliamentary draftspersons for this. I am assuming they are doing what we hope they are doing because it is somewhat complex, but those basic entitlements or what we would consider fundamental entitlements have been preserved but dovetailed in such a way as to include the new NIIS. I am not sure it is correct to say that it is a new scheme. The existing scheme has been preserved and there is a new national scheme that will now run concurrently with the workers comp scheme. I understand that that has been done in such a way that no-one is losing their entitlements.

CHAIR: Thanks, John. As there are no further questions, thank you very much for coming in and thanks for swapping around your time.

Mr Martin: Again, my apologies for being late.

CHAIR: Just a reminder that responses to questions on notice are due by Monday of next week.

Mr Martin: Yes. Thank you.

CHAIR: Thank you, John.

JAMES, Ms Michelle, Queensland President, Australian Lawyers Alliance

CHAIR: Good morning, Michelle. Thank you very much for coming along. We have allowed about 20 minutes to hear from you, Michelle, including questions from members of the committee. I invite you to make an opening statement.

Ms James: Thank you, Chair. The ALA welcomes the chance to prepare a submission further to publication of the NIIS WorkCover bill and for the opportunity to attend today to deal with questions arising out of our submission. Further, we commend the very healthy stakeholder process that has been engaged in both for this bill and for the CTP iteration, which is of course now law. We applaud the sensible decision to have the workers compensation NIIS iteration mirror the scheme structure already adopted for CTP which supports consistency for those injured catastrophically in Queensland.

A couple of points from our submission are worth emphasising or reiterating. The first is that the impact on premiums of the introduction of coverage for the most catastrophically injured is next to nothing. It is just one cent on premiums that have already been the lowest in Australia for over a decade. The second is that the scheme design suggested involves no diminution of rights whatsoever. We commend the opt-out provisions and note that this will lead to a leaner scheme with potentially fewer participants for life and, most importantly, will preserve choice, dignity and self-determination for those most seriously injured in work accidents. It is worth remembering that even those who are eligible to opt out will choose to remain in the scheme and preservation of that choice is critical. I did not intend to make further submissions beyond that, Chair. However, I did hear you say that one of the committee members was not around earlier. I am happy to expand on my submissions if you prefer.

CHAIR: Yes, please. If you would expand on that, that would be great. Thank you, Ms James.

Ms James: Sure. Our submissions with respect to the WorkCover iteration are fairly brief. That is because, of course, we have already been through a very extensive stakeholder process, engagement and hearings through the CTP iteration and broadly the WorkCover scheme mirrors that, so, frankly, there is not a whole lot left to say other than to commend the decision to mirror the CTP scheme. There are some additional points that are peculiar to the workers compensation scheme, and I am happy to highlight those as in our submission and take questions.

Briefly with contributory negligence, we applaud the decision to mirror the CTP. Contributory negligence provisions are really to make a minor amendment that deals with damages that have been agreed between parties and not just awarded by the courts. With respect to contractual indemnities, the previous witness dealt with the Byrne decision. I am happy to expand on that, but really that was a decision of the former chief justice from 2012 that was arguably correct in law but expanded contractual indemnities in a way that the legislation probably did not intend to. This amendment really just takes the legislation back to how we all thought it was prior to that decision and we commend it for that reason. It has the potential if it is not amended to continue to place a heavy financial burden on the workers compensation scheme.

Again, like the previous witness, we commend the decision to place a floor under the compensation rate so that injured workers do not go backwards if the ordinary time earnings do go backwards in any particular year. The final part of our submission deals with some exclusions from coverage that I will highlight briefly. The first is: where workers are absent from their place of employment, the extension of the NIIS scheme for the catastrophically injured is not extended to those workers. We say that that proposal to exclude them from NIIS coverage should remain. It is really worth highlighting too that what we are looking at here is about 10 or 11 workers who are catastrophically injured in any one year. I do not have statistics on the number who are injured while they are absent from their place of employment, but my experience would tell me it would be very few. We may be looking at one or two every couple of years, so it is not a burden on the scheme to remove that exclusion.

Similarly for journey claims, again we note that people who are injured in a motor vehicle accident in a journey to or from work will, of course, be covered by the CTP iteration of NIIS, but there are other people who may be injured to or from work in a journey situation who are not covered by the CTP NIIS. The previous witness gave the example of somebody on a motorbike where no-one is at fault other than the injured worker. There might be a circumstance where a worker, for example, is fatigued from working long hours, perhaps in a mine. Queensland is a very decentralised state. If that person has an accident where there is no at-fault driver, another driver, they would not be covered by CTP. Again, I just remind the committee of the very small number of people we are talking about here and the fact that the scheme is very financially sound. We are looking at about one cent on premiums, from $1.20 to $1.21, to extend this coverage.

Finally, in terms of injuries caused by misconduct, the proposal is to remove this clause from the act altogether if the bill is passed as presently drafted. At the moment, if a worker is injured through serious and wilful misconduct, then usually they are excluded from claiming any workers compensation benefits unless one of two situations exist. One is that they have an impairment of 50 per cent or more. That is almost all catastrophic injuries in any event. Secondly, there is death. It has to be at the direction of their employer. We say that that exception should be kept in the present act. Again, I remind the committee of the very small numbers of people we are looking at here. I am happy to take questions, Chair.

Miss BARTON: Thank you very much for coming in, Michelle. I have a question with respect to the Byrne amendment. Particularly for the ALA, given your experience, do you support the retrospectivity of the amendment? If so, why? I am struggling to understand why it is fair for people who have entered into a contract in 2013 or 2014, with valid terms, to now be told that that particular term is no longer valid, given that it is a legally entered into contract with offer, acceptance and consideration. Retrospectivity is not normally considered a good thing. I wonder whether or not you support the retrospectivity of that particular amendment and, if so, why?

Ms James: The Byrne decision, as I say, really had the effect of expanding out what we all understood about previous indemnities and contracts. We need to understand why the workers compensation scheme exists. It exists to provide a safety net for those who are injured at work. What the Byrne decision sought to do was place an additional burden on the workers compensation scheme because of the particular way that a principal contractor had set up with a subcontractor. We do very much support the removal of that expanded understanding of the indemnity provisions and the restoration of what we previously understood the law to be, so that the additional financial burden of these particular clauses on the workers compensation scheme does not have the effect of impacting the benefits available to injured workers or the diminution of benefits that may be available under the NIIS part of the workers compensation scheme.

Miss BARTON: How is it fair to people who have entered into perfectly legal and valid contracts? I accept what you are saying with respect to contracts moving forward. I am not going to comment on whether or not I agree with you. How is it fair for people who have entered into valid contracts? The reason that I am asking you this is because of your profession and because you are probably in a better position than anyone to comment on the impact of retrospectivity on contractual terms. Again, I ask: why is it fair that a valid term in a valid contract that has been entered into on the basis of the provisions available should now, through legislation, be able to be retrospectively made void when people have, in good faith—both the contractor and the subcontractor—entered into a valid contract with all elements there as appropriate?

Ms James: The first thing I would say is, with reference to my experience as a plaintiff lawyer, I have never seen one of these contracts because I do not advise employers or principal contractors or subcontractors. That is the first point I would make. There may be other witnesses who are better placed to respond to your question.

That said, I would be very surprised if the contracts entered into are in any way different post the Byrne decision than they were before. The Byrne decision was somewhat of a surprise. It was the first time that a court had sought to sheet liability for the indemnity all the way back to WorkCover. I would be very surprised if, as a result of that, the contractual indemnities and the contracts entered into were different. Therefore, I am not sure that it is correct to say that post this decision all of the principal contractors and subcontractors were somehow ordering their affairs solely with reference to the Byrne decision. I would be surprised if that were the case.

Miss BARTON: Based on your experience as a plaintiff lawyer, what do you see are the risks of dissipation of sums and what that means for the scheme moving forward when people agree to a settlement and subsequently, down the line, for whatever reasons, that agreement has not been sufficient, and then going back into the scheme? What are the risks of that?

Ms James: The first thing to say is that, contrary to the views that have been expounded in some submissions and certainly when we looked at the CTP iteration, in my experience—and it is just my experience—the sums do not dissipate with any regularity. For many people who are catastrophically injured, there are trustee arrangements in place to make sure that the funds are properly managed throughout the lifetime of the individual concerned. That is not to say dissipation does not happen—of course it does in some situations—but it is certainly not the norm.

Presently we do not know the situation by which a worker who has entered NIIS and has dissipated any funds paid to them will be allowed to re-enter the scheme. The bill talks about regulations and the regulations are silent as to those conditions, at present. We do know, however, there is a five-year waiting period. However, the ALA absolutely supports the proposition of not allowing a worker to double dip. We absolutely support that.

As to your question about effect, the obvious effect is a financial one on the scheme. For that reason, we are strongly of the view that with the regulations, when promulgated and when dealing with the situation by which a re-entry is permitted, it should be very clear that those are only in the most exceptional circumstances and to prevent double dipping. The ALA welcomes, again, the opportunity to participate in the stakeholder consultation around what those regulations should look like.

CHAIR: There are no further questions. Thank you, Michelle, for coming in today and presenting. Thank you for providing that overview for us.

Ms James: Thank you, Chair.

BLACKWOOD, Mr Alan, Director, Policy and Innovation, Young People in Nursing Homes National Alliance, via teleconference

CHAIR: This is Scott Stewart, Chair of the Education and Tourism Committee. Alan, we have given you about 20 minutes, including questions from members. Would you like to introduce yourself and start, please?

Mr Blackwood: My name is Alan Blackwood. I am the policy director at the Young People in Nursing Homes National Alliance. We are a national organisation and we participated in the recent inquiry into the NIIS legislation.

I congratulate the Queensland government on the initiative to expand the NIIS with this bill. It demonstrates a strong commitment to the disability reform that is underway nationally. I want to highlight a couple of the key points in our submission. The first is the general alignment with the NIISQ. In her tabling speech the minister looked at the NIIS being a platform for other injury types to come in. We think it makes sense that there is as much consistency as possible between the two schemes. The options for injured people need to be as similar as possible across their life course. There are some areas in this bill that depart from the NIISQ legislation that we believe need to be realigned.

We think it is ultimately more important to align the provisions for people with catastrophic injuries within the NIIS than tie them to the particular cause of injury. Rehabilitation and lifetime support is the currency of the NIIS, not the cause of injury. One of the differences that we note is the process for review of decisions. In the NIIS there are internal reviews, and where people want to make external appeals they can do that at QCAT. This bill sets out a different pathway, so people go through the registrar to the Queensland Industrial Relations Commission.

We do not think it is likely that the Industrial Relations Commission will ever develop the intimate working knowledge of catastrophic injury that it would need and that QCAT would develop. With the relatively small number of injured people coming from workplace settings each year and the fact that the same staff working at NIISQ will be making these decisions across both schemes, it makes better sense to enable the same pathway for both sets of participants. QCAT could actually develop the scale that it needs to be an effective reviewer.

The other main point that we made in the submission that I wanted to draw attention to is in relation to the exclusions in the bill. Clearly these have been written in based on the minimum benchmarks for workplace accidents, which have not yet been agreed nationally but have been drafted. We actually think that, working towards a no-fault scheme, we should be looking to include as many people as possible in the scheme, not exclude them, because it actually undermines the integrity of it being a no-fault system. We think that not only should the current exclusions be removed—these are things around serious and wilful conduct, and also the type of worker that is eligible—but also those should be further expanded to provide the same kind of lifetime cover to people sustaining catastrophic injuries in workplace settings, such as volunteers, people on work trials and other types of people listed in our submission.

The move to create the NIIS, we believe, is more than just making adjustments to existing schemes—in this case the workers compensation scheme. The NIIS is a public health response to catastrophic injury in Queensland. We recognise that, by removing these exclusions, it will have a cost implication for employers but, as the minister said in her speech, ultimately the Queensland government has to underwrite the cost of injury. If people are not in the NIIS, they go on the NDIS and they would then seek recovery from the Queensland government. The government pays anyway. It would make better sense for the government to think about how best to manage the lifetime support of people. We think it is better to have people in the NIIS than out of the NIIS.

It has been suggested in a number of submissions to this inquiry and to the previous inquiry that the NDIS is the fall-back option for people who are not eligible for the NIIS. However, the two schemes are not substitutable. As we point out in our submission, the NDIS does not fund rehabilitation services, which are critical for people recovering from injury. Not having access to rehabilitation will be a significant barrier to their recovery, as it would require them to fall back to the rationed health system, meaning that they will get an inferior rehabilitation pathway than those who are in the NIIS. Restricting access to recovery for this group by forcing them into the NDIS is likely to increase their long-term care costs, as people will not obtain the levels of independence that they would otherwise have with comprehensive rehabilitation. These additional costs will be met ultimately by the Queensland government, so excluding people from the NIIS is actually a false economy.

Overall, we recognise that it is a significant policy challenge for government to bring these various schemes together in building the NIIS but, as such, it is vital that there is some centralised leadership to ensure the dots are joined across the various schemes in the best interests of injured people and the

government long term. We see the minimal benchmarks for workplace accidents as just that: they are a minimum. We think that, given the Queensland government's significant commitment to the NIIS, it has the leadership capacity in this area to do better than just scrape across the line with this bill. Thanks.

CHAIR: Thank you, Alan. I will open it up for questions.

Miss BARTON: Thank you so much for making yourself available. I have a question with respect to sum dissipation and whether in your experience that serves to be a problem, particularly for young people who are catastrophically injured, in terms of the provision of lifetime care, treatment and support. Do you have any comments to make about the dissipation of lump sums?

Mr Blackwood: We only made a passing reference to it in this submission. We actually went into it in a lot more detail in our submission to the NIISQ legislation. In our experience, we have seen lump sums dissipate well before they were expected to and people struggle to get back on to publicly funded services. I think the people at Recover research have the data on this but, certainly in our experience working with injured people, lump sums generally do not last. They do not do the job that they are intended for.

Mr BOOTHMAN: I know that you said that you do not really have the data, but is there any way that you can work out the ratio of individuals who have had their funds dissipated? It is certainly something that is very concerning to us.

Mr Blackwood: Yes.

Mr BOOTHMAN: These individuals are put in these positions, whether it is through divorce et cetera. Is there any idea of what type of ratio you know of or that you have seen firsthand?

Mr Blackwood: We have only had direct experience with individuals, assisting them to try to get back on to disability services, or Centrelink. We have not kept statistics ourselves. I think the people at Recover research at Griffith University have done some research in this area. If you are after some hard data, I think they are probably the best people to approach on that.

Clearly, you will need some of those numbers to resolve this question. Certainly anecdotally, the uncertainty that it creates, where people have to make a sum last over a long period—often we have seen people who will short-fund themselves in order to make the settlement last, which means they go without and then make significant compromises that were never intended when they were awarded a lump sum to see them survive and be supported for life. Essentially, I think the Recover people are probably best to talk about that.

Mr WILLIAMS: Alan, you mentioned volunteers and placement workers. Can you elaborate on that for me, please?

Mr Blackwood: I am just thinking that the NIIS, ultimately, is supposed to be a no-fault scheme for people with catastrophic injuries. Regardless of the cause of the injury, the NIIS will provide a funding source for lifetime support. As we are on the way to developing that scheme, it just does not seem to be sensible policy to maintain exclusions for a workers compensation scheme that is not focused on catastrophic injury in this space. The way the heads of agreement works between the Commonwealth and the Queensland government is that anyone who is not in the NIIS will be funded ultimately by the Queensland government. They will pick up the tab for the cost of the people in the NDIS packages. That is obviously where they will get their support from. There is no monetary saving in excluding people.

Our thinking behind including people like volunteers, people on work trials, work for the dole—there is a long list in the minimal benchmarks of people who are excluded and they include people like partners in a business but actually working in the business, or board directors who are employed in companies—is that anyone who is injured in a workplace context needs to be included in this bill. Ultimately, the Queensland government has to pay for the injuries, so it would make sense that there is a greater level of control, consistency and certainty for people going through this scheme.

The other thing is that the NDIS does not, as I said in my opening statement, fund rehabilitation. People sustaining catastrophic injuries will need rehabilitation. To leave that out of their recovery as part of their lifetime support just does not seem to make any sense. The government will have to pay either way. We just think it would make sense to broaden the definition, only for catastrophic injury. I think you would probably have difficulty widening the scope of workers compensation insurance more generally, but I think, for the very small numbers of people who would pass through this threshold with a catastrophic injury, it makes sense to make the eligibility as broad as possible for anyone in the workplace.

We have workplaces these days where there are volunteers—a range of different people—who do not necessarily have a narrowly defined contract of employment with that employer. We also have workplaces that are different from the way they were years ago, even for things like having scheduled recess breaks. Obviously, there are some workplaces where there are tea-breaks and breaks, but there are certainly a lot of the workers working in places where there is no such thing. It is a lot more flexible. People go out for coffee and work in different ways. Ultimately, if our end policy goal is to have a comprehensive catastrophic injury insurance scheme for anyone sustaining that kind of injury in Queensland, we need to start including as many people as we can as early as we can, both for insurance and costs reasons as well as ensuring people get the support they need.

CHAIR: There are no further questions. Thanks, Alan, for joining us today and thanks for taking time out to present to us and to answer questions.

Mr Blackwood: Thanks, everyone.

ROOS, Ms Corlia, Director, Construction Policy, Master Builders Queensland

TEMBY, Mr Warwick, Executive Director, Housing Industry Association

CHAIR: Good morning. I welcome Ms Corlia Roos from Master Builders Queensland and Mr Warwick Temby from the HIA. We have about 20 minutes to hear from you both, including questions from our members. Corlia, would you like to introduce yourself and start, please, and then I will ask Mr Temby to make an opening statement after you. Thank you.

Ms Roos: Thank you very much for the opportunity to address the committee this morning. I might keep my opening statements just very short and hand over to you then, Chair, for questions from the committee.

CHAIR: We have a substitute member in today who probably has not had the opportunity to read through your submission. Would you like to give a quick overview of your submission?

Ms Roos: I am happy to do that. If you look at pages 1 and 2 of our submission you will find a summary of the total submission and then thereafter more detailed points as they are made. I wish to point out, first of all, that our submission is related to just one core element of the bill currently in front of the committee, and that relates specifically to the provisions set out in the explanatory notes as provisions aimed at reversing the Byrne decision. Our submission is totally limited to just that component of the bill in front of you.

I wish to then further point out that, to understand the Byrne decision and the proposed provisions to reverse that decision, it is important to understand the structure of the construction industry and how work is allocated on a construction site. What you will find in the submission in front of you—in part A of that submission, which starts on page 4—is a description of the organisation of work on a construction project, which highlights, first of all, the PCBU as assigned in the workplace health and safety legislation, then the principal contractor, who then in turn engages subcontractors who, in their turn, may also engage further subcontractors. This is the nature of our industry. It is not by choice; it is by design. That is the nature of how anything gets built, whether that be a multibillion dollar project or a house.

The importance of understanding that structure comes down to understanding the impact of the Byrne decision. If the committee would not mind just turning to page 7 of our submission? You will find a diagram there that illustrates the issue at hand. On that diagram you will find that structure of our sector, as I have explained—the principal contractor engaging with a number of entities underneath it. One may be a subcontractor, for instance—and in this example an electrical company—and the other may be another employer, for instance, a group training organisation, who in turn then employs other persons, or it may be a labour hire company who, in turn, employs other persons.

What you have there in the diagram is an indication of the types of claims under workers compensation or common law damages claims specifically for which the principal contractor will have no coverage under the existing WorkCover legislation. All of those red arrows on that diagram in front of you indicate that injuries to any one of those people on the principal contractor's site would not be covered by the principal's own WorkCover policy. The reason for that is a combination of the effect of the definition of 'employee' under the WorkCover act as well as deeming provisions of employees that had been removed from the act in 1997.

I wish to point out that the issue of the Byrne matter had to do with the liability of WorkCover to pay for a contractual indemnity that had been provided from the subcontractor to the principal contractor and that principal contractor then relying on WorkCover to cover that claim. In order to understand that—and I apologise; it is a very complex legal area, hence resorting to diagrams—if the committee members would like to turn to page 9 of our submission, that explains the effect of the Byrne decision and the cross-claims that are common in this area.

Again, I wish to point out that, at the root of this issue, is the fact that principal contractors and host employers, including group training organisations that employ apprentices specifically, are all excluded from WorkCover coverage. Hence we now have this very complex situation where, if an injured worker of a subcontractor on a site makes a common law damages claim against both his own employer and a principal contractor, that claim, as far as the principal contractor is concerned, sits outside of the principal contractor's, or host employer's, WorkCover policy.

If you look at the example on page 9, that flow chart explains how a claim process flows in general. It is very simplified. If the lawyers have a look at this, they will probably point out a couple of things that do not work quite as simplistically, but this is the easiest way to explain it. In essence, when both the principal contractor and the subcontractor are being sued under common law damages for an

injury, there will be an apportionment of negligence. The basis of that negligence goes back to a duty of care that is held both by the host employer and the actual employer, or the principal contractor and the actual employer.

We wish to point out that, under the legislation, the Work Health and Safety Act 2011, the principal contractors are almost always going to be in a position where they have a duty of care of every worker on their site. That means that, legislatively speaking, that duty of care is already established whereas under common law that duty would need to have to be established first. Because this duty is legislatively established, it puts principal contractors in a very specific position and that is that they almost always are going to be found to be contributing to the negligence that led to the injury.

An apportionment of negligence is then made by the courts. In the past, it typically would have been 75 per cent of negligence being attributed to the principal contractor and 25 per cent to the direct employer. On that basis then, the subcontractor will claim against the subcontractor's WorkCover policy and WorkCover would pay the 25 per cent. For the remaining 75 per cent, as we have already said, the principal contractor's WorkCover policy will not cover that claim, because it is not a direct employee being injured. WorkCover would then typically make a co-contribution claim against the principal contractor for the outstanding 75 per cent.

The principal contractor will then rely on a contractual indemnity clause, which are very widely used within the industry. Basically, what that says is that, when the construction project is set out at the start, the parties agree contractually that the subcontractor will carry all of the liability for any injuries to his or her workers. On that basis, should the principal contractor then be obliged to pay damages for an injury to the subcontractor's worker, the principal will ask the subcontractor to hold him indemnified against that claim. The principal contractor, therefore, relies on that contractual indemnity and pushes it back to the subcontractor and the subcontractor then will turn to WorkCover for coverage of that contractual liability claim. In the end, the net result of the Byrne decision is that WorkCover would end up paying 100 per cent of the claims.

As you can imagine, the prevalence of cross-claims in a situation like this involves numerous lawyers each representing the interests of employers, host employers, the insurance companies involved and WorkCover. It is a very lengthy process and it is a very costly process. Typically, injured employees who find themselves in this sphere of WorkCover will wait many, many months—if not years—to have their claim finalised and there would be a huge cost in terms of the legal processes that occurred during this process. Again, all of this is so because principal contractors and host employers are excluded from WorkCover coverage.

This issue has been a matter that Master Builders has prosecuted for many years. We have been asking that WorkCover look at its original intent and that is for injuries to workers to be covered under the WorkCover legislation. Our proposal, therefore, points out that at the root cause of issues like the Byrne decision and this attempt to reverse the Byrne decision lies the fact that principal contractors and host employers are excluded.

We also wish to point out that this is not just a construction industry issue; this would apply to any employer who finds himself in a position where he holds a WorkCover policy but he has persons on his site where he is the PCBU, or in his business, or in his factory, who are employed through a different entity. It also applies to all apprentices across Queensland who are employed through group training organisations. Whenever you have that one-arm's-length-removed worker-host employer situation, this would be the case.

For us, from a public policy perspective, there are construction sites in Queensland right now where we have a principal contractor who has a WorkCover policy, a subcontractor who has a WorkCover policy and an injured worker and all of those parties would be under the impression that any claims arising from injury to that worker would be covered by WorkCover and it is simply not the case. The parties revert to either contractual indemnities or they revert to public liability insurance to cover that risk, but it has become very messy and very costly indeed. The root problem goes back to those specific types of employers being excluded from WorkCover coverage. Thank you, chair.

CHAIR: Thank you. Mr Temby?

Mr Temby: Thank you, chair. I would like to thank you for the opportunity to provide some commentary on the bill. As with the Master Builders, our submission focuses exclusively on the contractual indemnity provisions in the bill rather than the NIIS specifics. Corlia has explained in some detail the complexities of the contractual arrangements in our industry and I am sure they are similar in other industries as well, but that is at the heart of this particular problem.

In HIA's view, the Byrne decision is the correct public policy decision. In our view, that decision does not need to be voided through these legislative changes. As Corlia mentioned, there is a very strong perception in the building industry, and particularly among the smaller end of the home building industry that I represent, who are numerically the largest share of businesses in the building industry, that, if I have a WorkCover policy, I am in the clear if somebody gets hurt. This bill will take away that perception and reality from thousands of businesses in the industry. Most businesses probably did not even realise that they were exposed, prior to the Byrne decision, for potential public liability claims in the circumstances that the bill is trying to overturn. In that position, they were relying on their perception that WorkCover would cover the issues for them.

I need to declare that HIA is a group training employer. We do not provide indemnities to our host employers. The specifics of this decision do not really impact on our operation, but I thought that I should declare that that is how we operate. It is an issue. The bill has the potential, because I understand that a number of group training organisations provide those sorts of contractual indemnities to their hosts, to make apprenticeships much less attractive to the hosts who hire through group training organisations. Apprenticeship numbers are already under significant threat in Queensland, as they are in other parts of the country, and every little thing like this does not help.

The other element that we are concerned about is the retrospective nature of some of these provisions. It is only if a decision has not been made by the court that the bill does not provide application. That seems grossly unfair where people entered into contractual arrangements sometimes two or three years ago in the expectation of a particular regulatory environment and risk-sharing environment only to have that overturned by this particular provision. It would be much fairer, if it were to apply at all, to have it apply for contracts entered into after a particular date rather than things that had not had a judicial decision by a particular date.

HIA's strong view is that the outcome of the Byrne decision should apply where, if any number of companies—and it is often more than two—are involved in the risk, or the responsibility for a workplace injury, if they all have WorkCover policies, then that policy should respond to that injured worker. HIA would argue against the claim in the explanatory memorandum that this simply seeks to restore the original intent of the workers compensation legislation. Our argument would be that the intent of the workers compensation legislation was a no-fault injury insurance scheme and that is not what this is.

There have been proposals floated to provide an optional cover for host employers and principal contractors and others who are not the direct employer of an injured worker. HIA is not wildly attracted to that particular option, mainly because there is just so much ignorance in the industry about the potential risk that people have. It would be a massive marketing undertaking and a constant marketing undertaking to make people aware that that policy was there.

HIA believes that the cover could be extended in WorkCover at fairly minimal cost. We noted in our submission that, three years ago when the workers compensation bill at the time was being reviewed by a parliamentary committee, the cost of providing cover was estimated to be between $10 million and $15 million and now for reasons that are entirely unclear the estimate is $40 million. I think the reality is that nobody knows, which is why we would recommend that, because of the complexities of this part of the bill and the unknown costs, there should be a thorough investigation of all of the issues associated with this, as the previous parliamentary committee recommended and which has not happened. Thank you.

CHAIR: Thank you, Warwick. Corlia, I have a question for you: we heard from an earlier witness today that all workers on a particular site are required to have an ABN to exempt the principal contractor from workers compensation liability. Are you aware of that practice happening on any work sites at all or with any contracts being awarded?

Ms Roos: I would think that that would probably be an example of a rogue employer trying to evade the legislative requirements applicable to employers. Certainly most Master Builders would not be condoning that type of activity amongst our membership. There have been numerous task forces set up. Only recently, we had another inquiry from this parliament into labour hire practices within the industry. The original information that was provided by the department to the Finance and Administration Committee that dealt with that labour hire inquiry indicated that labour hire arrangements were not that prevalent in our industry. Anecdotal evidence from our members is that it is a shrinking part of the business and that there are numerous labour hire employers who are exiting the market because of the lack of uptake. We do not foresee that to be a massive problem.

The department's own submission to the Finance and Administration Committee actually pointed out that there was no evidence on WorkCover and the department's information of systemic evasion of WorkCover obligations. I need to point out, as well, that in the context of the current provisions that we

are talking about, both the principal contractor and the subcontractor would have valid WorkCover policies, so that is not the issue at stake. The issue at stake is that those WorkCover policies would not cover the employee of a subcontractor. Subcontractors are legitimately engaged on building and construction sites. There is not a single thing being constructed in Queensland today that does not involve a subcontractor and a principal contractor. There is nothing illegal about that; that is the nature of the industry. I have explained that quite at length in our submission, just to make that point very clear. From that perspective, certainly what we are seeking is not some sort of avenue whereby employers can evade their obligations under WorkCover. It is quite the contrary. What we are asking for is to bring those principal contractors and host employers within the WorkCover net, so that they have proper protection for those injured employees' claims and that the injured employees have an assurance that when they are claiming they will end up having their claim paid because it falls within the WorkCover net.

CHAIR: Thank you. I open it up for further questions.

Miss BARTON: I have a couple of questions for you, Corlia. Thank you so much for coming in today. I am not sure whether or not you would have had a chance to have seen the departmental briefing that we had on this bill a couple of weeks ago. I have a couple of questions, but I wanted to start with the $40 million that the department says will be saved, effectively by WorkCover, and that is a saving for the scheme. It took a little while, but I think we eventually got the department to admit that effectively contractors are probably going to be liable for that. Given that Master Builders is the representative body in Queensland, are you able to detail what impact that is going to have on the industry and their ability to be able to do what it is that they do, which is build the infrastructure that Queensland needs?

Ms Roos: I think if we look at the impact of the proposed provisions, they have to be seen against the background of what is already happening in practice. In practice, the obligation of covering the common law damages claims of a person on your work site who is not your employee sits with the principal contractor. That obligation is dealt with in one of two ways: either through contractual indemnities it is pushed back to the employer of that employee or you have public liability insurance to cover you for that.

Our anecdotal evidence from our membership, having surveyed them in the short time frame that we had to prepare for these submissions, indicated that the excess claims for those types of injury claims against public liability would range from $50,000 to $250,000. We had one example of a company that had an excess payment of $400,000 for those claims to be covered. Our understanding from the insurance industry is that this is an area that they do not happily insure in and that they do charge a premium, both in terms of the premiums charge and the excesses charge.

My submission to the committee today would be that the industry is already paying for the fact that they are excluded from WorkCover, because the external market is charging a premium price for that sort of coverage. The additional complication is that at the top end of town that cover will be available because you have sophisticated businesses that are engaging with their insurers in terms of the cover available. At the lower end of town and in the residential sector specifically, what we find is that our members are either wholly uninsured for this potential risk or they are underinsured. Worker-to worker-claims are typically excluded from standard covers, so what we did in preparation for this submission is actually reviewed four of the insurers' publicly available standard terms for public indemnity and all of them exclude the types of claims that we are currently discussing, the common law claims. For that reason, we have formed the view that, generally speaking, the industry is not sufficiently insured for this risk. The top end of town are and they are carrying quite a hefty burden in terms of having this insurance available to them. It is very expensive.

As to your question about the $40 million estimate provided in the explanatory notes, similar to what Warwick has said today, we have no understanding of where that figure comes from. In previous discussions in front of the Finance and Administration Committee, that figure was somewhere between $10 million and $15 million. What we are really talking about here is WorkCover's ability to make co-contribution claims from principal contractors. This is a source of revenue or income for WorkCover, because they are actually apportioning a part of what they are liable for back to a principal contractor or a host employer. In law they are able to do that. Under the Byrne decision, the common law position is that the direct employer of that employee is always 100 per cent liable for a claim under tort law. As co-tortfeasors, the employee still has the option to only sue his employer and if the employee decides to do just that, WorkCover will be 100 per cent liable for that claim. Even if he sues both employer and principal contractor, if for whatever reason the principal contractor is defaulting on that claim, then the employee can still reclaim the full 100 per cent of the damages from his direct employer. The Byrne

decision was 100 per cent correct in terms of applying common law tort law and that has not changed. There was no pre-Byrne decision that was somehow affected by that decision. We believe that is the reason why the decision was never appealed.

Mr SAUNDERS: You were talking about the top end of town and the bottom end of town. As an organisation, do you help your members get the cheaper rates of insurance and also on work sites? Some of the work sites I have been on, building a house or being there, are not what I would call following OHS to the letter of the law on those work sites. As an organisation, do you help your members with insurance and also to make sure that your members are across it and that the contractors and subcontractors follow the law of the land on the work sites, to minimise their insurance risk?

Ms Roos: I should declare that Master Builders has an insurance arm that does provide insurance to our members. In terms of our own policies, we actually do not follow the same strict exclusion rules that the other insurers or underwriters may be providing. We actually provide broader cover to our members, specifically because we have an awareness of the risk and we need to make our members aware of that risk.

Putting that aside, in terms of general awareness amongst the industry of the risk that you are carrying as a host employer or a principal contractor, that is an ongoing concern and an issue. Of course, we do our best in terms of educating our membership. Normally we insure in the midrange of our clients. That is where our market lies within the insurance industry. Our evidence from the membership is that there is certainly a lack of awareness that, even if they have a WorkCover policy, they can still be sued under common law damages and have no coverage under WorkCover for that.

Mr Temby: From HIA's perspective, we similarly provide insurance cover through a joint venture to our membership and it does provide cover for these contractual indemnities. One of the other advantages we see in not pursuing these particular amendments as a result of the Byrne decision is that it much better aligns the workers compensation legislation with the safety legislation. The safety legislation, as Corlia mentioned in her introduction, apportions responsibility across whoever is working on a particular site, and offsite as well. By having WorkCover exclusively respond to injured worker claims, WorkCover is then better able to apportion premium increases to responsible parties and manage the return to work journey for the injured worker that much better, as well. Yes, we do provide some protection to people, but as I mentioned and as Corlia has reinforced, there is an extraordinary level of ignorance in the industry about the exposure that people had prior to the Byrne decision.

CHAIR: We have time for one more question.

Miss BARTON: I have two quick questions and I would appreciate a quick response to both of them, so that I can get them both in. The Australian Lawyers Alliance, in their appearance before the committee today, indicated that they did not think retrospectivity was an issue because nobody would have entered into contracts subsequent to the Byrne decision that would include these terms. Therefore, retrospectivity would not be a concern because these terms would not be in many contracts. Are you able to comment—and I am happy for you to take it on notice if you need to provide more detail—on the prevalence of these kinds of terms within contracts in your respective industries?

Ms Roos: Our anecdotal evidence, without surveying the whole of the membership, is that they are widely used. I am not sure I understand the position taken by the Australian Lawyers Alliance, but my understanding is that post the Byrne decision there has indeed been an increase in the uptake of indemnity clauses to also cover the circumstances we are speaking of. I think they are widely used. As we have indicated in our submission, they will continue to be widely used because of the poor wording being proposed in the amendment. It is very technical and I will leave it to the committee members to go through that part of the submission, but I do not think these amendments will lead to indemnity clauses no longer being used in contracts by our members.

Mr Temby: I would only add that it is dangerous to assume that the community as a whole automatically assumes every court decision that has been made.

Miss BARTON: Finally, Corlia, in the departmental briefing the department indicated that they had not consulted with Master Builders. This is obviously, I would imagine, quite a concern and they had suggested that because they had consulted with other industry groups that was appropriate. Are you in a position to comment on the consultation or lack thereof with Master Builders and the impact that this will have on your industry, not having had a chance to say what the complex issues are during the preparation of this bill?

Ms Roos: As indicated in the submission as well, this is an extraordinarily complex area of law. It affects all of our members. It also affects industries outside of construction. We have not been consulted on the bill, on the drafting of the wording or on the bill itself, until it was posted on the

parliamentary website. To that extent, we have made inquiries from our brother and sister organisations, and I will let Warwick speak in terms of the extent to which the Byrne amendment was discussed during the consultation process. But our understanding is that those specific amendments were not discussed as part of the consultation on this bill.

Mr Temby: That is exactly right. There was consultation on the NIIS aspects of the bill, but absolutely none on the Byrne issue.

CHAIR: One last very quick question.

Mr SAUNDERS: Do you have any statistics on the accidents among people you look after in your building industry compared to those in the top end of town? I am trying to work out the insurance claims. Are there more accidents? What is the ratio of accidents on a workplace with the builders you look after compared to the top end of town, as you talked about, that is, builders on the big construction sites?

Mr Temby: There is not a great deal of reliable information available about that particular topic. The department has tried to gather some of that sort of information on specific types of injuries, but it is quite unknown. The perception is that there are fewer injuries on smaller detached house-kind of buildings than there is on larger projects, but it is very much a perception rather than factually based.

CHAIR: Just very quickly; we have about one minute left.

Ms Roos: I would agree with Warwick's statement there. I think the breakdown of statistics coming out of WorkCover does not allow us to draw that distinction between residential buildings and commercial buildings. That would be the traditional distinction within the industry. It is a statistic that would be hugely helpful to us as an industry, because of course more than one issue goes to that. However, I do not think that there is any evidence that it points one way or the other.

CHAIR: Thank you very much, Corlia and Warwick, for giving up your time and coming in today to present to the committee.

WILKINSON, Mr Daniel, Executive Manager, CTP Queensland, Suncorp Insurance

CHAIR: We welcome Mr Daniel Wilkinson from Suncorp Insurance. We have about 15 minutes to hear from you, Daniel, including questions from our members. So if you would like to introduce yourself and start, please?

Mr Wilkinson: Thank you, chair, and I thank the committee for having us here today. We really appreciate the opportunity to come here and speak to you and answer any questions that you have. I have been listening to the other witnesses today, so I am happy to give a bit of an overview of our submission, given that if you had not spent the weekend reading you might not have had a chance to read it just yet.

I am the executive manager of CTP in Queensland. Just to put that in context for today, my specialty is probably around compulsory third-party insurance and also the aspects of the bill that you are looking into, which refer to the National Injury Insurance Scheme. I am happy to take any questions that refer to insurance more generally, but I may need to take those on notice rather than answering them here for you today.

CHAIR: Would you like to give us an overview of the submission that you put in, please?

Mr Wilkinson: Certainly. The crux of our submission put to this inquiry is around the bill regarding workers compensation and the NIIS in particular. It reiterates some of the points that we made during the initial NIIS inquiry as it relates to motor vehicle accidents. Part of that was to reiterate our concern with the model that was selected. We have some concerns still lingering about the decision to go with a hybrid scheme, where there is still access to lump sum payments where fault can be attributed. Our opposition to such features of the scheme is certainly not about people having rights that we thought should have been taken away from them; it was more around the simplicity of what we saw in a very clear-cut scheme that sought to treat everyone exactly the same. The reason that we proposed such a model was that we believed that taking out a lot of those friction points of trying to work out who was at fault ultimately saves money and saves some of the friction points and friction costs that may occur between solicitors, insurers, the injured party themselves and care providers around who is at fault and who is going to pay. We firmly thought that, if you could remove some of those steps and just get someone entered straight into a rehabilitation and care scheme and have that scheme pay for it regardless of where that injury occurred, or who caused it, then that person, ultimately, at the end of the day would have a better outcome.

Some of the principles covered off in our submission refer to what we believe are good principles in insurance schemes. One of those is around social impacts, or ability to impact the communities that we operate our businesses in. That is underlying the position that we had taken around the NIIS and we are taking this opportunity to again not so much express or take it as another option to have a shot and say that we are unhappy with the decision, because we are not. As our submission says, this is really a great step forward. Previously, Queenslanders who were injured, particularly in motor vehicle accidents and who were at fault, were left to the mercy of the healthcare system and quite often had very poor outcomes compared to people who could prove fault and got compensation. We absolutely applaud both sides of the parliament for committing to it and getting it to happen. It is a great thing. Our submission points to some facts and says what we would like to see happen in the future.

With regard to the workers compensation scheme and its interaction with the NIIS, although we think that there are improvements that could be made within the NIIS itself, we think it far more important that the workers compensation scheme and its interaction with the NIIS, or how the NIIS applies to workers compensation, is consistent with how it applies with the motor vehicle scheme as well. Our rationale for adopting that position is the same as what we have taken with the NIIS to start with: if you can avoid some of those points of confusion, or potential points of friction, then you will ultimately reduce costs and make outcomes better for the person who is injured.

You heard today from a witness earlier who was talking about people who are included and who are not included. We would probably support some of those points raised. It is a bit of a false economy to assume that, if someone is excluded from the NIIS, someone is not going to have to pay for that person's care and support. Ultimately, the state, or the taxpayer at the federal level, is going to pay for that person's care and their health support. If it can be paid for up-front, that person gets a better outcome, which ultimately will cost people less. I think that is a brief summary of the submission. I am happy to take any questions from you.

CHAIR: Thanks, Daniel. I will open it up to questions.

Mr BOOTHMAN: Thank you, Daniel. It is nice to see you again. You seem to be a regular here with this NIIS. You probably heard Verity and I asking before about the dissipation of funds. My question to you is: what information does Suncorp have? Obviously, you are the leading insurer in this area.

What research has been done by Suncorp to state how many of these individuals have prematurely dissipated their funds before their life is up, so to speak? I am just curious. Do you have any information that you can share with the committee?

Mr Wilkinson: The very short answer is no, we do not, but I can give a reason we do not have information like that. First of all, the nature of CTP claims, certainly as they are now, is essentially on a common law basis where a person's damages are calculated. Once that is agreed by both parties, settlement is signed by both parties, which effectively cancels any relationship those parties have with regard to liability or any future interaction. Effectively, we give the person a lump sum of money. They go away and that is the last we hear of them.

Furthermore, we have had instances in the past where we have tried to do some research around how much of that money a person ends up with at the end of the day. We are still bound to contact that person by their legal representation. If they came to Suncorp directly and settled their claim, there is not generally any issue with us contacting them again to follow up. They could choose not to speak to us if they like, of course, but we could do that. If that person came to us initially with that claim with legal representation, then we are obliged to try to contact that person again via their legal representative. Not to say that it is always the case, but quite often we have the instance where either the legal representative does not want contact or we get the message back via the legal representation that that person does not want to give us the information or does not want to speak to us. It makes it very hard for us to do any kind of follow-up with regard to outcomes, or how that money was spent, or, in fact, how much money that person ended up with at the end of the day.

Mr BOOTHMAN: Obviously, you have dealt with this matter many times. What percentage would be tied up in legal fees for these injury claims? Do you have any figures that you could give us?

Mr Wilkinson: Not really. To put it very briefly, in terms of a CTP matter, there are effectively two areas of legal costs. There are costs incurred between us and the claimant's solicitor themselves. That is the cost of both of us from the claim. There are also then costs incurred between the injured person and their solicitor themselves. Whatever interaction they have incurs costs as well. We have some visibility of legal costs that are incurred between us and the legal representative, or the lawyer, because in many cases those costs are calculated by a third party, or a costs assessor and quite often are sanctioned or approved by a court or form part of the settlement agreement. They are quite visible, those costs. They can range. There is no set formula that would say that a $250,000 claim had $10,000. If it is a complex claim, it may have many thousands of dollars. If it is a simple one, it may not have many.

The part that we have no visibility of and do not understand at all is how much that solicitor charges their client at the end of the day. I guess the ALA or the likes of those would be better suited to answer the questions on what sort of levels they are. I know that the Motor Accident Insurance Commission has done some work in the past around asking claimants about how much they received at the end of the day, but I do not have those figures with me. I do not have access to what they are.

Mr BOOTHMAN: From reading these submissions, it appears that nobody has really done any real factual research on this matter, which I find rather concerning.

Mr Wilkinson: I think it is probably a frustration. I know that you have asked this question a number of times through this inquiry and the last one in trying to understand that. I think it is probably a point that might not get any clearer in the future as well. When we have lump sum payments and then that is the end of the relationship, we may not understand exactly how that is spent. To be honest, it might be a matter for government to say, 'Do you want to see that?' Maybe it is within someone's right to have that information kept private.

CHAIR: Any further questions? There being no further questions, thank you, Daniel, for coming in today.

Mr Wilkinson: Thank you.

HARRINGTON, Dr Ros, Recover Injury Research Centre

CHAIR: We welcome today Dr Ros Harrington from the Recover Injury Research Centre. We have about 20 minutes to hear from you, including questions from members. Dr Harrington, would you like to introduce yourself and start, please?

Dr Harrington: Thank very much and thank you for the opportunity to present. We did get this invitation quite late on Friday afternoon for Dr Kylie Burns, who is in New York at the moment. She did not receive it until late the next morning, on Saturday morning. I am sorry that it delayed our response to the invitation.

I want to go through the key points from our submission for the benefit of people who are new to this process. Some of you I have met in the previous inquiry around the MVA NIIS. The key points that we made in our submission were that we really welcome the introduction of the NIIS for people injured in workplace accidents. I think it is a very important area of reform. As an occupational therapy practitioner who has worked with people with very severe traumatic brain injuries in the community and within hospital settings, I can see that this reform is going to make a significant difference to the lives of some people who have acquired catastrophic injury and their families.

We strongly support a no-fault lifetime care and support scheme. This is a model that would be consistent with the majority of other schemes across Australia and meets the draft minimum standards, which do not allow for opt-out of the lump sum. Client satisfaction is quite high in other lifetime care and support schemes that do not include that provision to take lifetime care as a lump sum payment.

From our research into the Australian Administrative Appeals Tribunal cases where people are seeking to access disability support pension because their lump sum compensation for injury has been dissipated, we have found that there is definitely evidence of lump sum dissipation in work injury claims and that predominantly it is work injury claims that end up in front of the AAT, where they are appealing a preclusion period due to lump sum payment.

The provision to opt out and receive a lump sum compensation for lifetime care, from my perspective, certainly confounds the policy intent of the National Injury Insurance Scheme, which is to ensure consistency and certainty that care and support needs will be met over an individual's lifetime. A lump sum payment does not deliver this certainty. It delivers a sum of money that may—or may not—last a lifetime.

If a hybrid scheme is adopted—and given that is what has happened with the motor vehicle injury NIIS I can see the benefits of consistency across Queensland with its compensation and the MVA NIIS—and people are able to opt out by taking a lump sum, we feel that it is really important that, as far as possible, vehicle related and work related serious injuries are treated in the same way with some consistency across those two schemes. If a hybrid scheme is adopted, we really welcome the protections aimed at the prevention of lump sum dissipation that are built into the workers compensation NIIS bill, but we believe that there are further strengthenings of these protections.

I will just list those for you, which I listed at the end of our submission. We would recommend a significant reduction in the current discount rate for the lifetime care and support damages proportion of the overall settlement. I think that is currently at five per cent within motor vehicle legislation in Queensland. One of the previous presenters to the MVA NIIS inquiry highlighted that the discount rate can make it quite unrealistic—that someone's lifetime's care and support expenses will last their lifetime due to that deduction from the full settlement value of a discount, which is to take account of potential investment returns of investing that money over the long term. For people who have poor investment returns, there is certainly considerable risk that their lump sum will be dissipated, so considering decreasing that discount rate is recommended.

Any lump sum awarded for lifetime care and support costs be quarantined from reduction by legal fees—and I noted the question to the previous representative from Suncorp. In our research, deduction from a lump sum for legal and medical expenses on settlement constituted over 50 per cent in some cases. If you take into account what previous witnesses talked about in terms of the workers compensation legal practices that happen due to the nature of the legislation, the cost of all of those legal representations could certainly eat into that lump sum payment for lifetime care and support.

Currently, in the Legal Profession Act 2007, the amount that can be deducted from someone's lump sum compensation is up to 50 per cent. We would recommend that that lifetime care and support component of somebody's settlement be quarantined from the calculation of that figure. That would involve an amendment of that act. That would mean that legal fees would be capped as a percentage of the general damages and economic loss only, not of the lifetime care and support component of somebody's settlement.

We also highlight the need for consideration of the inclusion of funds management costs. I certainly would not want to be handed a multimillion dollar settlement and asked to manage that myself without significant financial advice. As a case in point, there was a Southport case in 2009 where a young boy received a $9.6 million personal injuries settlement awarded due to an injury at the school and $1.2 million of that settlement was attributed to trust management fees. You can see over the life of the claim that trust management fees can be significant and can significantly reduce the amount that is available for care and support. That was a case reported in the *Courier-Mail*. I can give you the details of that if you need them. The other thing to point out is that you can appoint a trustee manager, but the nature of the law is that people are entitled to use their compensation as they see fit. It is not an automatic protection against dissipation. There are certainly cases in the AAT review that we did where a person did have a trust manager and the trust manager was saying, 'You're using your funds. You're going to run out' and the person elected to self-manage their funds.

The final point that I would make is that the appointment and funding of an appropriately qualified case manager for each recipient of lifetime care and support costs to provide support in planning, organisation, coordination and expenditure of treatment and care and support services is recommended. There was a study in New South Wales where they found that access to case management for people after traumatic brain injury promoted independence and movement into independent living. When families were unsupported by case managers, that was much more difficult.

I would like to finish with a quote from one of the participants in my PhD research. In my PhD research I compared the experiences of people with severe traumatic brain injury from car accidents, their family members and their service providers in Queensland under our fault based CTP scheme and those in Victoria under the TA scheme, which is no fault and does not allow opt out with a lump sum payment. One of the Queensland service providers, who had a long history of involvement in providing brain injury services in the community to people with traumatic brain injury from both compensable and non-compensable causes, said that general disability support hours drop away. So community access and things like that can fall away, because people are worried—and they are right—that the funds do not usually last a lifetime. The expiry of funds is a really common problem.

Some trustees are families. They see it as a nest egg rather than something to live on, to have a lifestyle that is dependent on. In the previous inquiry into the MVA NIIS, service providers made the point that families may cease funding services to ensure the longevity of a lump sum. We see that it is really important that there is some sort of case management built into that longer-term management of funds to ensure that the individual is given the most opportunity to enhance their participation and their independence in the long term.

I would just like to make one other point. It is in reference to research in terms of dissipation and people dissipating. I think one of the things that was revealed in my research is that people know that lump sums can run out and if you are within social security preclusion periods when that occurs, you basically cannot access money for income or care and support. Families are faced with the decision of how to best manage those funds over the long term. I have certainly worked with people with catastrophic brain injury who live in residential Queensland Health facilities, because there is a provision within—or at the time there was provision—the funding parameters for Queensland Health that they would not have to pay any more than non-compensable people to live within those facilities. There was a Public Advocate report that highlighted that that is not the most appropriate environment for someone to live in in the long term, but you can understand why families use that option, because it ensures the longevity of funds so that the person has access to funding in the long term. It would be the same with aged care facilities. It is not the ideal environment for a young person with a disability, but it is an environment where funds will last. That contributes to the prevalence of the early dissipation of lump sum settlements after catastrophic injury. Thank you.

CHAIR: Thank you, Dr Harrington. I open it up to questions.

Mr WILLIAMS: With respect to legal fees, you mentioned the Legal Profession Act 2007. You said that it exceeded the 50 per cent rule.

Dr Harrington: This is a case that was reviewed in the Australian Administrative Appeals Tribunal and that was the cost incurred once settlement was received for both legal and medical expenses incurred before settlement and the person ended up with less than 50 per cent of their settlement. That was really problematic for that person, because 50 per cent of the settlement is taken to be income from the perspective of the Commonwealth for access to the disability support pension. It effectively disallowed them from being able to have access to the disability support pension.

Mr WILLIAMS: What percentage of cases would you say that would be the fact?

Dr Harrington: As highlighted by the previous witness, that is incredibly difficult to ascertain. As a brain injury researcher, we have certainly—and a lot of other brain injury researchers over time have—advocated for long-term tracking of the outcomes of people's brain injuries in Queensland and that has not been funded. We have no way of tracking people. Once they receive a lump sum, they are out of the system. Another member in my focus group said, that, basically four years after injury someone can be living at home and they are hidden from view. We do not know what is happening with them until they come into health care services in crisis, if their family support has fallen over, or if their funding has failed.

Mr BOOTHMAN: Thank you, Dr Ros. Thank you for your very thorough submission. I will follow on from the questions that I asked the Suncorp representative, Daniel. You have stated that what happens to these individuals with the dissipation of their funds is underresearched. Do you know what type of research has been done to come to the conclusions that you have outlined in your report? I am just curious about how you have come to these findings. It is something that is very dear to my heart, because I have an individual in my family who has suffered a life of having a severe disability. I am just curious where this information is coming from and how you have come about it.

Dr Harrington: Sure. I am very happy to provide that. I also would just like to highlight that Dr Kylie Burns was the principal author of this submission, because she is from a legal background and has a good knowledge of all the legal provisions within the legislation, which I am aware of but I am not an expert definitely in that area.

In terms of where do I get my evidence from to raise the concern about lump sum dissipation, if you look at the previous MVA NIIS inquiry, that was a concern voiced by many people who presented to the inquiry. There is no prevalence data on how often that occurs for the simple reason that we do not track people after they have received a lump sum compensation payment. The best level of evidence in terms of hard evidence of cases is Australian Administrative Appeals Tribunal data, which we submitted our analysis of to the previous inquiry, the MVA NIIS inquiry.

I would have to highlight that the Australian Administrative Appeals Tribunal level, where people are appealing to have a disability support pension awarded to them, is the third level of appeal. People have to appeal to Centrelink to have their disability support pension awarded. Then if that is not successful, they could, under the previous system, appeal to the social security appeals tribunal. That has been rolled into the AAT now. Then the third level of appeal was the Australian Administrative Appeals Tribunal. A small proportion of cases are reflected in the AAT data.

I think it is a very complex issue. It is complex because people know money is going to run out so they do whatever they can to make it last a lifetime, potentially to the detriment of the person who has the serious injury in terms of their participation and their opportunities in life.

For people who are running out of money, the time between appealing to Centrelink and actually getting to the level of an AAT appeal means some people may not continue down that pathway. Most of the AAT cases we reviewed did not include legal representation, which is an indication that people are pretty destitute by the time they get to that level of appeal. To actually be able to pull everything together to go to that level of appeal may be problematic for some people.

In terms of the evidence that I presented from my study, I interviewed people with brain injury and their families in Queensland and Victoria. That included 10 cases in Queensland and six cases in Victoria. It was qualitative research to understand how the system works. That is where you would use qualitative research as opposed to counting type research. You actually want to understand what processes are happening and what processes are affecting people.

I ran those interviews with the individuals and their families and then focus groups with service providers. There were 25 different service providers from disability and healthcare organisations across Victoria and Queensland, from metropolitan and regional areas.

Mr SAUNDERS: When we are talking about the funds running out—and you are talking about people with catastrophic brain injuries, for instance—normally they would have either the Public Trustee or a private trustee appointed?

Dr Harrington: Yes. One would hope so. That should happen in Queensland. I think the difference is between having a trustee appointed to manage a sum of money and having an entitlement to have your lifetime care funded on an ongoing basis over a lifetime. They are quite different scenarios. It depends on whether the amount that you have been awarded initially, where a trustee is managing the funds, is actually adequate to respond to your changes in care and support needs over time as a result of your injury. It also depends on how well those funds are managed and some factors outside

of people's control, like the global financial crisis. Even though there are protections in having a trustee manage funds, I do not think that is an automatic assurance that people's lifetime care and support needs will be met.

Mr SAUNDERS: I was not going to say that. I am talking about how we can get evidence. Surely we would have some evidence from the trustees who are looking after people who have had unfortunate accidents or injuries and we would be able to get some data from the trustees to say that X amount of dollars has not gone far enough or it has lasted or how many people have actually exhausted their payout.

That is the point I am making. Surely the trustees would have that evidence. I know of cases where people have had catastrophic accidents, but they have been quite capable of managing their own finances and the money has lasted. There could be some evidence with the trustees. Would there be evidence there at all?

Dr Harrington: I would think so. That is evidence that you would have to request from the Public Trustee. It is certainly evidence I have not been able to access. I agree, there would be people who benefit from a lump sum settlement and it does last their lifetime. It is just the cost of that lasting a lifetime for some people.

I think the other point that I really do have to make is that any evidence that we draw on from the past is with respect to settlements that have contributory negligence applied to them or may have contributory negligence applied to them. With the new provisions, which I really applaud, under the NIIS (Queensland) Act where people get their lifetime care and support damages without any contributory negligence applied is certainly a protection around dissipation. They are more likely to get the amount that they need to cover their lifetime care and support, but we have no idea whether that will last. There are lots of things outside of an individual's control that can eat into that amount of money.

CHAIR: If there are no further questions, thank you Dr Harrington for presenting to the committee, particularly at such short notice.

Dr Harrington: Thank you very much.

CHAIR: I thank all witnesses who have been appeared before our committee. Thank you to Hansard. The committee would appreciate it if any answers to questions taken on notice could be provided to the committee by the close of business on 25 July. I declare this hearing of the Education, Tourism, Innovation and Small Business Committee closed.

Committee adjourned at 11.49 am