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PARLIAMENT OF NEW SOUTH WALES, LEGISLATIVE COUNCIL

STANDING COMMITTEE ON LAW & JUSTICE

PROCEEDINGS OF THE SEMINAR ON THE

- MOTOR ACCIDENTS SCHEME -
(LEGAL COSTS)

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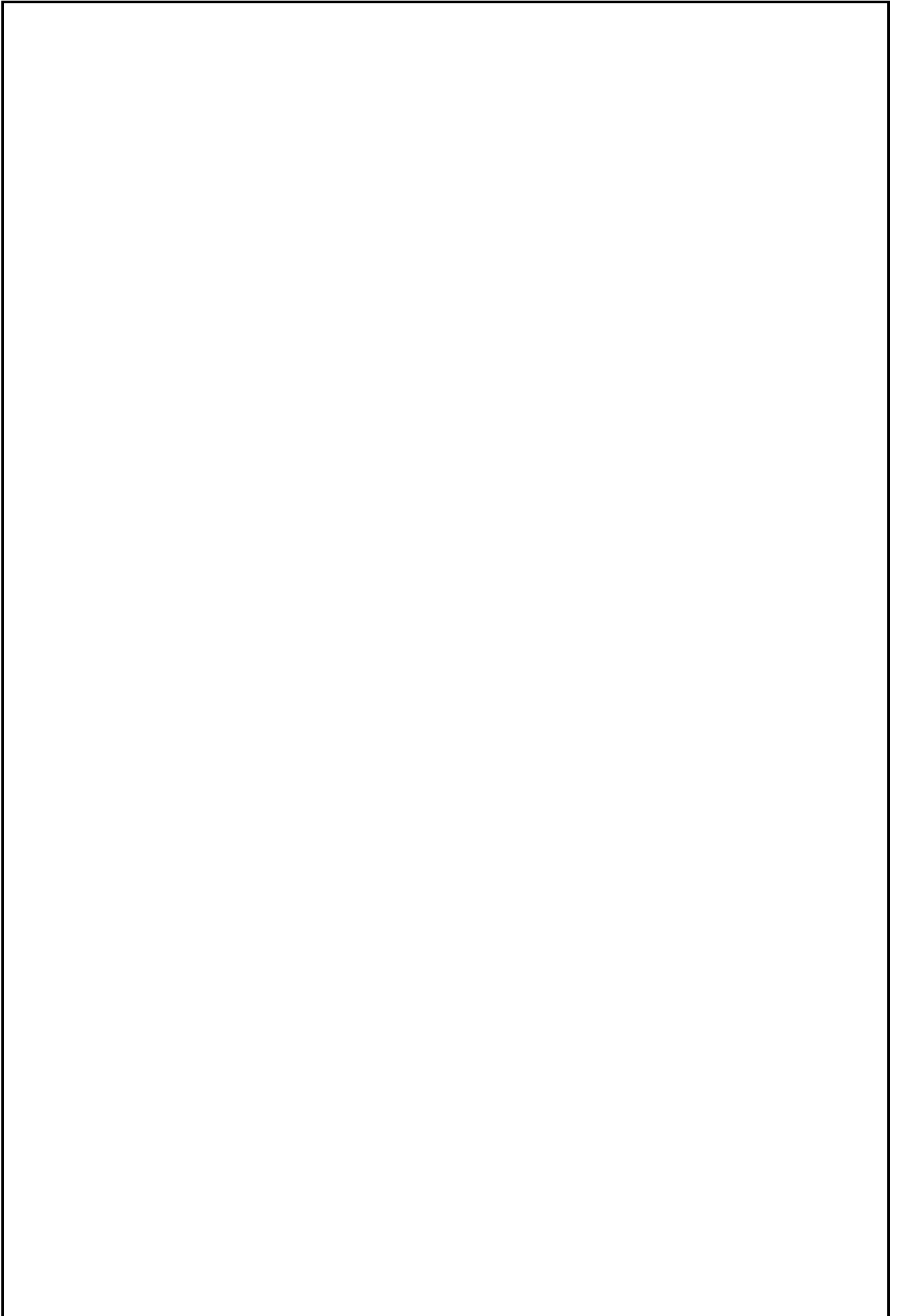
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Terms of Reference

- 1 That the Standing Committee on Law & Justice inquire into and report on the Motor Accidents Scheme and compulsory third party insurance, and in particular:
 - (a) examine and report on the role of insurers participating in the scheme;
 - (b) examine the accountability and oversight mechanisms of insurers and the Motor Accidents Authority under the scheme; and
 - (c) examine the concerns of insurees, levels of claims and compensation as well as legal fees and other such matters as the Committee finds appropriate.
- 2 That the Committee obtain such expert advice as may be necessary to assist the Committee with its inquiry.
- 3 That the Government provides such resources as the Committee feels is necessary to undertake the inquiry.
- 4 That the Committee give a progress report within twelve months of the date that the House adopts this resolution.



Committee Membership

THE HON BRYAN VAUGHAN, MLC, AUSTRALIAN LABOR PARTY

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THE HON JANELLE SAFFIN, MLC, AUSTRALIAN LABOR PARTY

Committee Membership

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Chairman's Foreword

The terms of reference the Standing Committee on Law and Justice received from the Legislative Council in December 1995 specifically charged the Committee with the investigation of, amongst other matters, "legal fees" in the Motor Accidents Scheme.

The Committee's *Interim Report* of December 1996 contained a detailed discussion of Legal Costs and Dispute Resolution. The *Interim Report* identified Legal Costs as one of three outstanding issues on which the Committee would report its concluded views later this year.

The Committee has received a good deal of anecdotal evidence about increases in legal costs in the Motor Accidents Scheme. However, to date the Committee has not received any hard data. In fact there does not yet appear to be any such hard data available, particularly in relation to plaintiff legal costs. The Committee is therefore looking forward to receiving the results of the study being conducted by the Justice Research Centre, which is due to be finalised in October.

The seminar convened by the Committee on 5 May 1997 was useful on a number of levels. Firstly, it enabled the Committee to hear the views of a number of eminent speakers and participants on what is happening with legal costs in the Motor Accidents Scheme. Secondly, the seminar enabled the Committee, and those who were in attendance, to consider the policy framework of national competition policy and the *Legal Profession Reform Act 1993* in relation to possible reforms which may be proposed to address problems concerning increasing legal costs in the Motor Accidents Scheme.

To my knowledge this seminar is the first occasion on which the actual effect of the application of the Hilmer competition policy framework to the legal profession has been reviewed, anywhere in Australia. I hope that this report will therefore be of some interest, not only to those involved with the operation of the Motor Accidents Scheme in NSW, but also to policy makers with responsibilities for the regulation of the legal profession throughout the country.

On behalf of the Committee I would like to acknowledge the work of the

Committee's Senior Project Officer, Ms Vicki Mullen, who generated the idea of this seminar and saw it through to completion. A "Policy Issues/Reform Ideas" document prepared by Ms Mullen is included as Appendix Two to this report - I commend that document, particularly to all those who are interested in making a submission to the Committee dealing with this issue.

Lastly, I would like to thank all those who participated in the seminar, both those who spoke and those who listened. I have been struck during the course of this inquiry by the extent of the interest in the Motor Accidents Scheme and the generosity of busy people who are prepared to give of their time and expertise to assist the Committee with its task.

HON BRYAN VAUGHAN MLC
COMMITTEE CHAIRMAN

WELCOME AND OPENING REMARKS

THE HON BRYAN VAUGHAN, MLC
CHAIRMAN
STANDING COMMITTEE ON LAW AND JUSTICE

CHAIRMAN: Good Morning, ladies and gentlemen. This, of course, another is chapter in the saga of attempted reform of compulsory third party insurance in New South Wales.

The Standing Committee on Law and Justice of the Legislative Council currently has a broad reference to inquire into and report on the Motor Accidents Scheme in NSW. The third item of the terms of reference for this inquiry directs the Committee to examine the concerns of insurees, levels of claims and compensation as well as legal fees and other such matters as the Committee finds appropriate.

The Interim Report for this inquiry was tabled in December last year. One of the three issues that requires further detailed investigation in the wake of the Interim Report is that of legal costs and fees in the CTP Scheme in NSW. One of the major concerns that has been expressed during the course of this inquiry has been increasing cost pressures on the scheme generally, *which ultimately result in higher CTP premiums for the motoring public of NSW, and/or restrict the pool of funds available in the scheme for the fair and just compensation of the seriously and catastrophically injured motor accident victims.*

Over the course of the inquiry, the Committee has received a range of evidence and information from various individuals and organisations concerning the issue of CTP legal costs, through submissions, public hearings, roundtable discussions and informal discussions. The Committee has noted the various concerns and ideas that have been expressed, and is particularly concerned about anecdotal evidence that legal fees (both solicitors' and barristers' fees) charged and assessed as reasonable for motor accident cases are rising under the reforms that came into effect in 1994 under the *Legal Profession Reform Act 1993*. The Committee is also conscious of possible policy constraints on reforms in the context of national competition policy, and is anxious to draft final recommendations on this issue that are acceptable within the existing policy framework.

For this reason, the focus of this seminar is to receive further information regarding the true effects of the 1994 reforms, national competition policy as it relates to the CTP legal services market, and reform ideas to control any escalation in the cost of CTP legal services. This information, in combination with any supplementary submissions received by 30 June 1997, will directly influence recommendations that

the Committee will make on the this issue.

The Committee will also be closely considering the results of the empirical research that is being conducted by the Justice Research Centre into the effects of the 1994 reforms on the cost of CTP legal services. Such empirical and objective research is vital for the development of informed and acceptable recommendations.

DR JOHN TAMBLYN

AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION

DR TAMBLYN: Thank you, Mr Chairman. Good morning, ladies and gentlemen. I am pleased to have the opportunity to speak to you this morning. As I understand it, my task will be to try to set your discussion into the context of national competition policy. I am not an expert on your current debate, although I have been following it quite closely, so I will make some comments about national competition policy, deregulation of the legal profession, and how effective that is likely to be.

I might mention that my credentials are that I work quite closely with the Commission on the national competition policy reforms, and I was also one of the main drafters of the Trade Practices Commission's study of the legal profession.

Basically, what I want to cover today are about five points. I want to talk briefly about national competition policy and the legal profession. I want to talk about the so-called deregulation model for the legal profession - the one that has been tried in New South Wales. I will refer briefly to the kinds of problems that have been experienced with that model, including the ones in the context of your debate.

I will look at a light-handed regulatory model in dealing with those issues. To the extent that that model does not work or has been shown not to work, what are the heavy-handed regulatory options that are available? Then I will finish with a brief reference to how those two models, the light-handed and the heavy-handed, might sit under national competition policy.

This is all fairly familiar territory to you all, so I will not go into it in any great detail, but, basically, following the Hilmer committee of inquiry there were various COAG decisions on the Hilmer inquiry and, in particular, the introduction of the Competition Policy Reform Act.

There was a quite strong presumption in that policy framework towards deregulation and the promotion of competition, the rationale being that that effective competition is going to be much more efficient than regulation and also that certain regulation is impeding competition and adding its own costs and inefficiencies.

Basically, the Competition Policy Reform Act, which is part of the reforms, and the competition principles agreement put on State governments an obligation to review all of their legislation and regulations and, where the anti-competitive aspects of that

regulation could not be justified in terms of public benefit, those governments were to reform or remove those restrictions.

The reforms also apply the Trade Practices Act to the economy generally, including smaller unincorporated businesses and the professions. I do not think that is a particularly relevant point for your discussion, however; it is a question of what regulations should apply in professions such as the legal profession, rather than whether contraventions of the Trade Practices Act are involved.

I would also mention that there was a report to COAG in July 1996 on the very question of regulation of the legal profession. That report recommended that regulation of the legal profession should be the minimum necessary to support the public interest (and I will say a little bit more about that) and it also gave support for market-based approaches to pricing of legal services, such as those that have been introduced in New South Wales and such as those recommended by the Trade Practices Commission and the access to justice inquiry.

There is through that a flavour that the legal profession should be deregulated where possible and that competition is a more desirable way of regulating services such as legal services where that can be made to work. Now, let's look at how that has worked.

I want to reiterate for you the deregulated legal services model; the one New South Wales introduced a few years ago, on the lines recommended by the Trade Practices Commission and the access to justice inquiry. Basically, all of those models looked to deregulation of the rules governing the profession where those rules inhibit competition and do not have some offsetting public benefit attaching to them.

I think it is widely recognised - including by the Commission - that there is considerable potential for what is called market failure in the legal services market. This is because the services are very complex and the information available to the practitioner is more detailed and specialised than that available to most clients. In addition, many clients only use lawyers half a dozen times in their lives. So there is an asymmetry in the negotiating powers and in the knowledge of the client relative to the lawyer. That is seen as a problem in the market-place.

There is potential for the misuse of the superior knowledge and expertise of the lawyer, and we therefore see government regulations and ethical codes of conduct of the legal profession as measures to address the potential for market failure in the profession.

Nevertheless, the deregulated model says: Let's remove or reduce those rules to the extent that that is possible consistent with supporting the client and the public interest. Abolition of fee scales was one issue that was raised in that context. New South Wales took that on. It was felt that fee scales could have distorted competition. They were not well based on the costs of supplying legal services. They discouraged competition, particularly in the form of offering lower prices than the fee scales. It was felt that better information and fee disclosure at the client/lawyer point, and objective analysis of the costs and fees in the legal profession market, might well assist in overcoming the market failure.

A critical issue in that context was the provision of objective information on the cost of legal services, the fees for legal services applying in the market-place, and publication of that kind of data to inform lawyers themselves, to inform their clients, and of course to inform fee assessors and taxation officers of reasonable benchmark for charging for those services.

So the assumptions were to overcome the market failure and the information asymmetry as much as possible, to have discipline in the market-place by way of information about cost-based fees, and to promote legal services competition generally. Now that was the model; that was the thinking behind the reforms in New South Wales.

What's gone wrong? I know we have not got full objective analyses of these issues, but my information is what we are seeing reasonably effective competition at the big business end of the market - well informed business clients dealing with the legal profession - and I think they are getting competitive outcomes there.

We have seen recent studies indicating the effect of competition and deregulation in the conveyancing market. I think we are seeing gains in that sector also. It is put to me that on the defendant's side of the compulsory third party insurance market it may well be that the insurers who are operating on that side of the market are able to ensure that they get efficient, cost-effective services.

Thus competition appears to be working fairly well where there are well informed clients dealing with the profession. I have some information - and I recognise we have got to look at this more closely - that there may still be some remaining market failure problems preventing the market from operating effectively, where small clients are involved. They are not well informed, they don't use the legal profession very often, and they may not be adept at dealing with the profession. In the personal injury and compulsory third party plaintiff side of the market also competition appears not to be working effectively. I will say a little bit more about why competition and negotiations between clients and lawyers may not be working very effectively in that part of the market.

I have listed some possible causes of this market failure. I have mentioned already the information asymmetry between the two sides of the market. It has been suggested - and I think we need more information about this - that there has been a failure of the cost disclosure requirements. There is not enough cost information, and the right sort of cost information, being provided to clients at the interview stage by the profession.

You will be aware that the New South Wales model required disclosure of information on the basis of charging, the kinds of costs likely to be involved in the particular service being sought and regular information being provided about changes in the service itself (if the risks or approaches to court or other remedies change) and certainly about changes in the total cost of the service.

There is some suggestion that this information is not being provided, or is not being provided in sufficient detail, particularly in that small client end of the market.

You are all aware - and it has been adequately raised in the material before you - of the problem where insurance and the cost indemnity rule intervene between the client and the lawyer. If the client, having paid the insurance premium, has no direct personal interest in the fee, or if through the operation of the cost indemnity rule there is a very high likelihood that the defendant will pay the costs, it may be that the clients are not monitoring the cost of the service and taking much interest in that at all. Does the presence of third party insurance and the cost indemnity rule, both of which have very important public interest arguments for them, partly explain why the market does not discipline fees in this area? That is an issue before the Committee, and I think it is a very important one.

There is also a suggestion that the fee assessment and taxation arrangements that operate are being based on the escalating fees that are being seen in the market-place. In other words, what benchmarks are being used for fee assessment and taxation? If there is an escalation of these fees - and I realise that is an empirical point - are they simply being rolled through in the assessment and taxation procedures?

We have some issues to be considered here. Firstly, we do need some objective data and objective analysis on what is going on. I have made some suggestions, but these are not established facts. Also, I think if we have information in that data and analyses that the market is not working, we have to make a choice between what I call light-handed regulation and heavy-handed regulation, because, from a public policy point of view, if it is clear that rising costs and rising insurance premiums in this sector are simply not tolerable, then something must be done.

What needs to be done to make the deregulation and competitive market model work in this part of the market? I am not talking about the parts of the market which I have suggested are reasonably competitive, but the personal injury area does seem to be a problem.

First of all, we obviously have to make sure that the fee disclosure rules are actually applied and that they work in the way that the policy intended. That is an obvious starting point. I have already mentioned the need for objective data on the cost of

providing services; the fees that are required to cover those costs; and, to make that data and those analyses public, the profession needs to know, the clients need to know, the insurers need to know, and I am pretty sure the policy makers would like to know as well. So we need information.

I believe that assessors and taxation officers, should be basing their analyses on this objective data. At the moment, I am concerned that we do not have objective benchmarks that assessors and taxation officers can use. The analysis to which I and others have referred is critical to making that work.

There is a suggestion as to whether the plaintiff's costs should be assessable from the point of view of the insurer's or defendant's side of the market. I make no comment on that, but there is the point that clients have lesser incentive to monitor and be satisfied with the costs where insurers pick up the tab for the fee. Is there an argument for insurers to have some right of review of those costs? I think that is an issue worth looking at.

The last couple of points I deal with in the slide are the obvious need for the profession itself, through the Law Society, to look to lawyer training in these important matters, such as disclosure of information, and also, where appropriate, to look at discipline where there are serious breaches in this area. There is the very difficult area of client information and education about these matters, their rights to disclosure, the consequences of fee escalation (for example, the consequences for insurance premiums).

My point is that to make the deregulation model work - when I think that is by far the most preferable model and one which is in the interests of most involved - there has to be a cooperative effort by governments, by lawyers (who have a very keen interest, it seems to me, in making this type of market work and in avoiding heavy-handed regulation) and, of course, insurers and clients have an interest as well.

It seems to me that only after making the very best of efforts to make that deregulation model work in the way I suggested should we look to heavy-handed regulation. Direct regulation of itself can cause inefficiencies and costs. Nevertheless, having made a strong effort to make the deregulation/information disclosure model work, if it continues to fail in this segment of the market, it seems to me that unacceptable cost increases will require more heavy-handed regulation.

These are the kinds of issues that might be considered in that respect. First of all, it would seem we would need to return to a compulsory fee scale. My view would be that that fee scale would need to be based on the objective analysis of costs of providing given services in this area, not on prevailing market rates at the time. As an aside, I will mention that when direct regulation is applied to public utilities, regulated prices are normally based on “efficient costs”, not the costs that happen to be prevailing in any public utility at the time, but what is the most efficient cost for providing this service using best practice methods. That is the concept that I have in mind.

There is another interesting issue here as well. How is the data to be made available to work out these fee scales based on the efficient costs that I am talking about? In the public utility sector, where regulation is being introduced, the public utilities have a statutory obligation to provide requisite data on costs, revenue, and volume to the regulator. My suggestion is that, if we go to the heavy-handed regulation model, the profession must be required to provide that data so that the cost analyses can be done and the fee scales can be developed.

It would seem to me that the cost assessors and taxation officers would need to be required to apply that cost-based fee scale in their work. Any disclosure rules applicable to the market-place dealings between lawyers and clients would need to be enforced vigorously, and penalties would need to be available if they were not complied with.

Insurers could also be given the right of plaintiff cost review against the scale in this more heavy-handed model.

That seems to me to be the kind of regulatory model that needs to be thought about (or at least elements of it) if the light-handed regulation model cannot be made to work. I believe it can and I believe there needs to be a cooperative attitude by all parties involved, including the professions, in making sure that that cooperative information disclosure model does work and that we don't have unacceptable escalation in fees and premiums.

I would like to make just a few last comments on the implications of each of these regulatory models for compliance with the national competition policy. It seems to me that both models can be fitted within the competition policy obligations of the

New South Wales government. The deregulation model is consistent with what COAG and competition policy reform is looking for, and if it were to work, supported by the analyses and data to which I have referred, that would be a very good competition policy reform.

However, if the data and the market experience show that the information disclosure light-handed model cannot work, then it is quite acceptable to move to a more heavy-handed regulatory model, provided it can be shown that the market is genuinely failing in the absence of such regulation. If the market is not delivering the competitive outcomes that the New South Wales wants and COAG wants, it can be argued there is a market failure and regulation can be introduced to override the operation of the market where it can be shown that there are public benefits flowing from that regulation which more than exceed the cost of intervention.

That is all I have to say, except to repeat that I am here not as an advocate of regulation but as an advocate of competition and deregulation, and I would like to encourage you all, in your discussion today, to look for ways and means of making the information disclosure deregulation model work in this particular part of the market. Thank you for your time.

MR STEVE MARK

LEGAL SERVICES COMMISSIONER

MR MARK: Good morning. Today I would like to address some of the broader issues in relation to legal costs and then turn to some of the more specific issues. The information that I am going to be giving you today really spans the whole area of legal service delivery, not just the compulsory third party scheme, but I will try to bring it back to the CTP scheme as well.

The first thing I would like to mention is that in recent press articles there have been three things that I have been quoted as referring to. The first is rising costs, second, linking those rising costs in the legal market with deregulation, and thirdly the fact that many lawyers in my experience are not disclosing costs or are not giving quotes. All three of those things are, in the experience of my office, true. But that means they are truisms, because in my office we only get members of the public ringing my office to complain about lawyers; we have yet to open an office where people come to give their accolades about lawyers.

Over the last year just over 11,000 people either lodged written complaints or personal complaints, or made telephone complaints to my office, about legal professionals in NSW. Forty per cent of them had concerns relating to legal costs.

When I say that costs are going up, I must say that we have not done a survey on this point. I think that it is high time that an extremely detailed and in-depth survey was done about legal costs, because I think we would see, as John mentioned, differences in different parts of the market.

We would see that legal costs have gone up in certain areas and that they have gone down in others. Whether that means that generally costs have gone up or down for the consumer is another thing, because also, as John said, consumers of legal services only come into the market on a few occasions; they are not using legal services all the time.

So, perhaps if costs had gone up for them on one occasion, that is all they are concerned about - not that costs might have gone down in other areas. So I think we need a much broader information base in relation to costs.

Linking concerns expressed to me about rising costs with deregulation? Well, deregulation of the cost regime through elimination of scales and the setting up of

my office happened at the same time (July 1994), so all the statistics that I have can only be from the time of deregulation. So, I suspect that in that way everything I see is linked with deregulation. In a moment I will expand my reasons why I believe that deregulation has failed in relation to certain areas of consumer need, but has actually succeeded in others.

Also, as to lawyers not disclosing or giving quotes, it is important to realise that these are two separate issues. When I talk about access to information about the legal market, I am talking about quotes. In the absence of scale, legal consumers have no other information about the legal market other than by calling up lawyers and asking them for a quote.

Well, lots of lawyers have some difficulty in giving quotes, particularly in litigation including personal injuries, where lots of variables can exist. The problem is that if the consumer does not have access to price information, deregulation cannot succeed.

Disclosure seems in practice only to happen when you actually enter into a contract or enter into an agreement with your practitioner. It is a different issue from giving quotes. However, I will use both terms, not interchangeably, I will try to make the distinction.

I mentioned that in our experience many lawyers are not disclosing their costs. I say that because we get a significant number of complaints - and I cannot yet quantify that number, although I will be able in the next couple of months to give a much better idea about non-disclosure. However, what I am seeing in my office is that many people lodge complaints against their lawyer because they don't get disclosure.

It is important to remember that disclosure requires three things. One, a global estimate of the total cost that the matter is going to attract. Secondly, the mechanism or means by which that global estimate is to be reached or determined. And, third, any notification of significant departures from the estimate. Those three different things are what disclosure requires and what the law requires. Disclosure must also be in writing.

A cost agreement is one form of disclosure - not the only one, but one form of

disclosure. We talk about cost agreements and disclosure as separate entities. In a sense, they can be, but in practice, most think about cost assessment when talking about disclosure.

Recently there was a survey done by the Justice Research Centre on conveyancing costs. I am sure you are all aware of that survey, which was done in 1995. It showed that 86 per cent of lawyers were disclosing costs in conveyancing matters. However, it also showed that only 43 of them were entering into cost agreements. I am not sure exactly what this means; I don't know whether what was termed disclosure in that survey was written disclosure as required by the Act. But, certainly, 43 per cent of people were not entering into cost agreements.

This is an area where there is the most intense direct competition, other than perhaps intending, as practised in the big end of town, as John mentioned. Conveyancing is an area where licensed conveyancers have entered the market, so we have direct competition in that area. It is also the area, we have got to realise, where the community believes there is not much in it. It is an area where the consumer thinks, "But for the fact that I don't have time, I would do my own conveyancing." I think that is a fairly commonly held belief in the community. It is not true, because if you look at the number of complaints that I get about conveyancing, and the number of notifications that Law Cover gets about conveyancing, there must be something in it.

But, at any rate, in conveyancing, the community thinks that the only marketable commodity is price. That is the only thing that people think they need to consider. And it is probably one of the few areas of the law where it is that simple.

I don't think many in the community realise that in law you are not buying a refrigerator or an orange or something that is directly related to price; you are actually buying access to expert information about a process. You are not even buying an outcome - but I will come back to that. So we have in that one survey that we have seen about conveyancing some indication about disclosure; and, even in that one, 43 per cent of people are entering cost agreements and 14 per cent are not disclosing at all.

When looking at the compulsory third party scheme in terms of disclosures, it becomes extremely difficult. When a person actually calls up for a quote from a

lawyer handling a personal injury matter, for example, it is very difficult for that person to get a quote. Many lawyers say, "Well, how long is a piece of string? It depends." Many lawyers would explain all of the variables that might apply in trying to give a quote in relation to that area of legal practice.

It really becomes extraordinarily confusing for the consumers if they do not have access to any price information. All they are being told is that it is too complicated for lawyers to quote estimates. Then the lawyer falls back on the only thing that the lawyer can comfortably deal with as a means of determining a global estimate, their hourly rate. An hourly rate can be fairly shocking if you are a consumer calling up and saying, "How much is my case going to cost?" and you are told it might be costing \$150, \$250 or \$300 an hour. It sounds like a lot of money, and you don't know how many hours it is going to take. So the consumer is not really given very much information, if any, in terms of what competition policy is directed at. There have got to be better ways of doing this. I will come back to that.

I now turn to the effect of deregulation. When deregulation occurred in 1994 I think that it was done with the best of intentions. The removal of scales was intended to drive down prices through increased competition. But this was based on a number of assumptions.

The first assumption is that there is actually a market in the legal industry. I am not sure that there is. Two factors that normally apply in determining a market are not present. Firstly, in the legal industry, there is a monopoly. The second is that there is not the perfect access to information that is required to make a market.

The second assumption, which again is a little bit difficult, is the availability of information on price. Because of the failure to deliver quotes - and many, many lawyers do not give quotes. Again I do not have figures on exactly who does and who does not give quotes as we have not yet conducted a survey. So the consumer does not have any price information until the consumer actually gets to the point of disclosure, and even in disclosure we are finding that they are not getting good information. Most of the disclosure that I see only gives the means of determining the global estimate, not what the global estimate actually is. And a lot of the cost agreements that I have seen do not mention at all the issue of how any significant departures from the global estimate. So many lawyers are not complying with the law. So I agree with John: we need a better education campaign about what

disclosure requires.

The third assumption about the market in the legal industry necessary to drive down prices through increased competition is the consumer's ability to negotiate. As has been mentioned by John, we have an historical power imbalance here. There is a belief that the legal profession has power and consumers still hold to that belief. Even though there is an increasingly demanding consumer push within our society, which in my view is not going to go away, there is still the belief that in law there is a big power imbalance.

Also, clients rarely go to a lawyer's office and throw rose petals around. They usually need a lawyer at a time in their life when a disaster has occurred to them. In relation to the compulsory third party scheme, they have had an accident. So something bad has happened to them, they are in trauma, and they are vulnerable.

In addition, many of the people who are involved with CTP are from non-English speaking backgrounds, and many of them simply lack the ability to negotiate. So the traditional power held by the legal profession vitiates against even those practitioners who really want to do a good job, and they are many of them out there, being able to communicate well with their clients because there is a barrier assumed by the client.

The other concern I have about competition policy is that it seems to me - and again this is not based upon anything other than my experience - that in the legal profession the main issue for the profession when considering competition is the number of lawyers. It is often that I hear lawyers say the biggest problem in the legal profession is that there are too many lawyers. If the number of lawyers is the only factor the profession considers in an effort drive down price, then I cannot see that there is ever going to be a positive outcome for the consumer.

I do not think that the number of lawyers is the major issue of competition within the profession, and I think that the profession needs to give a lot more thought about what it is that they are competing about. What is the product that they are delivering? It is my view, and my assumption or assertion for the legal profession, that what the legal profession is selling is not a product; it is not even an end result; it is not an outcome. The legal profession is selling a relationship between the lawyer and their clients, and that relationship is for the purpose of giving access to expert and professional advice in a process - not an outcome. The outcome usually

comes through someone else. It is usually a court or someone else delivering the outcome. The consumer does not understand this. The consumer does not see the distinction between process and outcome. The consumer gets very confused.

The lawyers may do an extremely good job for their clients, in giving them professional, expert access to the process, and the client may still get what they consider to be the wrong outcome, and they blame the lawyers. What creates this real problem for the legal profession is poor communication. I think that the legal profession needs a lot more education in communication skills to address this basic problem and to address it very early in the relationship that they have with their clients.

Another problem is that it seems to me that we really need to shift away from this absolute obsession with costs. I can understand why we have an obsession. We hear these phrases in the community all the time: 'the cost of justice'; 'the cost of access to justice'.

Justice is a subjective term, but the consumer considers justice in terms of what they "deserve", in terms of what they should get, that they should win. A lawyer is not necessarily delivering justice; a lawyer is delivering access to the legal system. There is a big difference between that access and what the consumer considers justice to be.

As long as we only focus on cost - the cost of the legal service to the consumer - without either defining what the service is, or determining what the product is, and separating that service from the outcome, without actually trying to address the issue of value, then the legal profession will always be on the back foot. It seems to me we have a real need and an opportunity now to start shifting the thinking in the legal profession away from pure costs (which we need to explore much better than we have) to value. What is the value added to each individual service that the legal profession actually provides?

It is in the context of value that the legal profession will be better able to raise the issue of pro bono work. The legal profession will also in this context be able to talk about the work that they do in legal aid, where much of the criminal legal system in Australia is supported by the legal profession through providing this service to the community. But this is not known by the community because there is no context

within which that role can be explained. I suggest we need to shift a bit more to value and away from pure cost as the only means of determining what the legal profession does.

It is I think, also important to note that there has been a different impact in the country compared with the city from the removal of scale. As I travel around the country and talk with regional law societies, for example, I hear many practitioners decrying the removal of scale. They often say, "Look, you have removed scale, and now it is terrible. It is only the big firms that demanded that you remove the scale because they all wanted to charge above scale. In the country we like scale simply because it gives us something to refer to or to relate to. We can show the scale to our clients and say, 'Look, I have to charge you that much'." It gives them an excuse, to some extent.

That might be anecdotal, and it might be a little flippancy, but that is what I am told by a number of practitioners in the country; they actually like scale. Surveys are showing that practitioners in the country are still using scale quite a bit, even in conveyancing. Even though they have moved significantly to set price charging, they still often use scale.

I think what we really need is a different approach. John said that it is unlikely that we would move back to scale. I think that is probably right. However, the reason behind this belief is not exactly right. The reason against moving back to some form of scale in legal service delivery is that it is inefficient. In many instances, it certainly is. Another concern about scale is that it becomes anti-competitive. Well, it may be anti-competitive, but it may be the least anti-competitive of all the processes that we have available to us. I cannot say.

One of the things that I can say is that if consumers do not have access to price information, deregulation cannot work. You cannot drive down prices through increased competition when the consumers don't know what the price is, what the market rate is, so that they could negotiate or put the quote into context, when they do get a quote.

It seems to me that we have a couple of options. One option would be for the legal profession to work out what it actually costs them to provide legal services. I think that lawyers must do a lot more work on transaction analysis so that they actually

can tell how much it costs them to deliver the service. Then the profession would be able to establish a pricing structure which would build in a profit margin. We still have a long way to go in the legal profession before it is widely known how much it costs practitioners to deliver the service.

Secondly, we might be able to go to all regional centres in New South Wales and find out what lawyers are presently charging. This might require legislation, or might be achieved through the compliance of the legal profession itself in asking lawyers what they do charge for certain matters. We could create, with the professional bodies, a list of categories, put it to the profession itself and find out what people are charging. Use the information obtained to come up with some band width market cost information for regional areas, so that it could be known how much it costs, for example, to run a compulsory third party action when you think the outcome might be \$100,000 in Albury as distinct from Newcastle.

So we would have regional band width cost information. Then, once that information is obtained, it should be widely published. What that would do is give consumers some access to information, at least to a range of prices available. Then, when they went to a particular practitioner, it would give encouragement to that practitioner to disclose or to quote. They would have an environment in which they could give a quote. I think this would facilitate quoting. We don't see that happening now. It would also give the lawyer some means of arguing why costs might differ between practitioners.

One of the biggest problems that I think solicitors have at present occurs when someone calls up and says, "How much will it cost me to run a particular action?" is the myriad of different variables. To try to explain them all requires that the practitioner spend two hours explaining the legal process, the legal system, what will happen if the other side takes a particular action, et cetera. That is just too hard. This availability of band width cost information would give the legal profession a bit of context within which to offer some procedural information.

The other possible option, if we are not going to move to band width information, would be to have an independent body determine reasonable costs. This could be done under the regulatory model through either assessment or determination of a maximum-minimum system. There is some material in your discussion papers that goes to that option. I don't wish to give a particular opinion on it, but it is an option.

In finishing, there are a couple of comments that I want to make about a few issues, so that we will have a lively debate when we open up for discussion.

Firstly, I am concerned about “no-win-no-fee” advertising. I think we have a problem in several areas with “no-win-no-fee” advertising. The first area is that some solicitors are advertising “no-win-no-fee” without any other information or qualification.

We at my office feel, when we see that sort of advertisement, that it means if the client loses, the solicitor is going to pick up the whole of the tab, including disbursements and the other side's costs. If the solicitor does not mean that, the solicitor should state that in the advertisement. So that a problem exists in the way that the advertisements are being structured.

The second problem is: does this form of advertising increase the propensity for people to litigate small claims rather than to try to mediate them? I do not have any statistics on this, but my gut feeling is that it could encourage that result unless practitioners are going to be schooled, trained and more philosophically in tune with trying to mediate small claims. This could be achieved either through regulation within the court or by increased understanding within the profession, because mediation in small claims is certainly going to be a lot more cost effective, in my view, than litigation.

Conditional cost agreements. Are they increasing costs? I don't know. It is a really interesting question. I do not have any statistics on this whatsoever. It seems to me that in the very few complaints that I have had about conditional cost agreements, the 25 per cent uplift, particularly in respect of small claims, is blowing out costs.

I do think, however, there is also a small tendency in this area for practitioners to merge the conditional cost agreement with what might be called contingency agreements. I am seeing a few agreements nowadays that look like they are moving more towards contingency agreements than to conditional cost agreements, and that worries me.

It also might mean - and there have been concerns raised with me in relation to the Bar in this area - that cost agreements may have increased costs due to the fact

that in the past many of the costs of the barrister would have been subsumed in the daily fee. Now with the cost agreement, sometimes an hourly rate is charged as well as a daily fee, and there might be some doubling up of costs there, particularly in compulsory third party actions.

Finally, I think that for the future of the legal profession, particularly in relation to compulsory third party schemes and defending itself against further regulation, requires two comments. I think that the legal profession really has to better understand its role as a member of the service delivery industry. I do not think generally it does so. Individuals certainly do. But, generally, the profession does not see itself in that light.

I think that in the future we will see fewer adversarial advocates. I think we will see far more problem-solving lawyers, because I think that is what the community is going to demand of lawyers. And, if a practitioner is going to be a problem solver as well as a lawyer, they may have a conflict. That conflict is one of both law and philosophy.

I think that the philosophical survival of the legal profession requires that we address this challenge positively, and not be defensive. If we can work together to explore ways of delivering good service to the consumer, I think that the issue of fees themselves will sort itself out in the way that the deregulated market was designed to do. But this cannot happen unless people have access to information, and they have trust. At the moment they have neither. It is those two things that we need to work towards. Thank you very much.

MR PATRICK FAIR

PRESIDENT
LAW SOCIETY OF NEW SOUTH WALES

MR FAIR: I propose to make some introductory comments, to respond to some of the points made by the earlier speakers, and then to work through some of the discussion points that are before the Committee.

By way of introductory remarks, can I say that the legal profession agrees wholeheartedly with Dr Tamblyn's view that, of course, what we are here to do is to make it work, and that the primary objective of the discussion must be to get to a workable solution for an affordable compensation system for the people of New South Wales. In that context, the role that lawyers play in the assessment of damages and delivering services to the community is a very important one, and one which the lawyers in particular aspire to do well and to do in the provision of good service to the community.

With that in mind, I want to make a few points about the context of the discussion that seems to have been set. As Dr Tamblyn said, the position is highly preliminary. The position could be that solicitors are charging too much. Perhaps the fees are going in this direction. Perhaps deregulation has not worked. There is not enough information. Those are all phrases that Dr Tamblyn used. Occasionally he slipped into saying, "But, if the market continues to fail, or if the market does not work," implying that was about to happen, as if there was some information before us that that will happen. Just as the point he was making was that it may have.

I highlight that because the discussion of the last two speakers seems to have the flavour that we actually know what is going on in the market-place and we do feel that deregulation has had a negative effect on the current cost system. That is not the case. The first step in this discussion on reform ought to be to come to some objective view about what has happened in the market-place.

To illustrate the force of that, you might be surprised to learn that if you actually look at the number of complaints made against the legal profession, in terms of the number of solicitors complained about at any one time, it is less than 10 per cent in any one year. The information we do have on fee disclosure conducted by the Justice Research Centre on conveyancing shows 86 per cent compliance with fee disclosure. That was some time ago, when introducing the new scheme.

So assumptions now that instances of failure to disclose and instances of failure to set reasonable fees which come before the disciplinary bodies in the profession indicate a widespread malaise which should lead to the broad policy reform of the relatively new system, it seems to me, are ill informed and ill judged.

With those comments in mind I want to then say something about scale fees. It seems to me that the harsh option discussed by Dr Tamblyn is the scale fees option. Basically, he was suggesting that we go back to a system of some independent determination of legal costs having regard to some surveying of market costs, and then to give that to cost assessors, and then to force that on the legal profession.

When we had legal costs set by the scale, the consequences were that the legal profession was criticised for being a privileged service provider in the community because the profession was entitled to these high fees set by scale and they should be made subject to the market like everybody else. Now we find, having had the fee scale dropped, the consumer lobby takes the quite contrary position and says, "Oh, my goodness! We don't have reference points. We don't have forced ceilings. We don't have some security that lawyers might have reference to. With that in mind, we will try to reintroduce scale, because we now criticise the profession for being at large in the market-place."

The difficulties with any scale, including recommended scales, are many and varied. In some cases the consumers can be charged too much, because the solicitor, seeing an easy matter, can easily refer to a scale and say, "I am entitled to charge this, so I will charge this," even though the service provided might be worth less.

On the other hand, many cases are more complex and more difficult, and the scale sometimes can force the fee down unfairly.

Scale fees distort the market. In that way, they distort the relationship between the solicitor and the client because they distort what is done or might be done according to the way that rewards might be set for specific items. Scale fees also support a huge bureaucratic edifice. You must reference individual items of work not relevant to the actual performance of the service for the client, to this artificial scale, this bureaucracy of survey and assessment and reference.

I think the profession is well rid of scales, particularly because scales introduce a direct politicisation of the fees which the profession can recover. They do not serve the community. People would do well to remember the discussions which took place leading to the abolition of scales and not be in haste about a return to that mechanism.

All that having been said, we have a relatively new system in New South Wales. The thrust of the Law Society's submission is that this system needs to settle down. We need to do some study about what really is happening in the market-place. We need to have some objective evidence, rather than these collections of feelings and anecdotes, driven by a range of sectional interests. Instead, we should make some legitimate assessment of whether or not the market can and does operate properly.

I might make the point that all that has been said so far today about the complexity of a client dealing with a solicitor, not knowing what the solicitor is going to do, perhaps being in need of a solicitor in a difficult situation, being unsure what sorts of services will be provided - all of those factors are common to every service industry. There is nothing remarkable or complex about the fact that a solicitor has in his or her gift the responsibility to analyse and give advice about difficult matters which are not always possible to anticipate at the start. That is the nature of what you do when you engage a builder. It is what you do when you engage a plumber. Just about any service provider is in that situation. And yet those services providers operate in a competitive market, and consumers over time learn how to anticipate the questions that should be asked and control the costs as they might be incurred.

In the context of the legal profession, I think deregulation is leading to a change in the way that solicitors relate to clients and the clients relate to solicitors, and time must be allowed for that relationship to grow and for the parties to become better adapted to an environment where fees are not set or regulated. In that context, as an aside, I might say that in the conveyancing area, which is a complex area, the most common story I have heard from my regional members is that they are gradually stopping their fee discounting and explaining to the client, "Look, I am not going to do work that is uneconomic, I am going to explain to you how complex this is, and I am going to tell you why it is worth paying me something that I can live on, and I am going to do the work on that basis or not at all."

That, to me, shows that the education issue is working in the market-place and that it is a natural consequence of this process. There is no reason why exactly that learning process should not be taking place in this CTP market, and I believe it is.

So, with those preliminary comments, I would like to move to the Law Society's submission. Mr Chairman, the Law Society has a written submission which is being finalised. It will be tabled. What I propose to do is move through some of the

specific comments that have been made the subject of the Committee's consideration.

The Law Society, of course, will be reserving its position in relation some of the policy issues, having regard to the other issues that are raised today and the information that might be found by the Justice Research Centre arising from the Motor Accidents Authority studies. The other thing is that we will be interested in some of the suggestions that are being made about collecting information about prices in the market-place. We might wish to amend our submissions having regard to that aspect as well.

The first, and important, thing to understand is that when talking about legal costs in compulsory third party matters you are not just talking about solicitors' fees; you are talking about barristers' fees and court fees, including the fees which the courts charge for arbitration, which in the District Court is provided by solicitors. I understand that the fee paid to the solicitors in the District Court is actually less than the court is making out of its charges for the provision of those arbitration services.

There are medico-legal expenses that are significant, as there are with expert reports. The miscellaneous service fees, including location fees, conduct money and service fees and the like all make up a significant component of legal costs. So it is wrong to be focusing on solicitors' costs solely and saying, "This is the most significant element." There are very significant charges here which, to some extent, form an absolute minimum in the cost of running a compulsory third party matter. Even a small compulsory third party matter, once commenced, will incur this level of costs. The work that the solicitor does on top of that is far more variable than the minimum cost set by these fixed so-called legal charges. So the increase in legal costs could be affected by an increase in any one of those components.

All the fees are now paid by the unsuccessful party, with a minimal contribution from the plaintiff. There may have been increases in legal costs, but these increases do not relate to professional legal fees. That is the view of the Law Society. We just do not know whether legal fees have in fact increased. Anecdotal complaints arising out of the Legal Service Commissioner's office about higher fees are perhaps the least reliable sources of information possible. You could not conceive a more unreliable source of information about the direction of legal fees than asking the Legal Services Commissioner, it seems to me.

On the issue of the assessment of costs by commercial cost assessors who may be personal injury lawyers, and whether that gives rise to a conflict of interest, the Law Society supports the commercial cost assessors who are also experienced personal injury lawyers. Regarding the conflict of interest which may exist for cost assessors, the Law Society would point out that the Supreme Court is in charge of appointing those cost assessors, and the court is responsible for the training of prospective cost assessors. People selected to work as cost assessors should have both legal training and relevant practical experience in litigation.

There is a national conflict in the interests of cost assessors, but that is no more say than is affecting arbitrators who adjudicate matters, and they do so in matters involving greater quantum and complexity. Also, if an actual rather than notional conflict of interest does arise, then section 206(2) of the Legal Profession Act requires the cost assessor, as soon as practicable, to refer the matter to another cost assessor. In this context, particularly when talking about assessing fees, if there was a party who had an absolute conflict of interest, it would be the Legal Services Commissioner who would be involved with protecting one party as against the other.

On the issue of the extra cost of commercial cost assessors, particularly where an hourly rate is charged, the Law Society would say that the cost of using commercial cost assessors should be no greater, and probably considerably less, than the cost of a busy practitioner in relation to a very specialised aspect of a matter, and simply that a fair fee ought to be payable for that task.

In relation to no-win-no-fee advertising and the increasing propensity to litigate claims, the Law Society would point out that section 79A of the Motor Accidents Act has removed that propensity by the provision of an increased threshold and the lowering of damages generally. It is the view of the Law Society that section 79A has had a substantial impact in reducing the number of claims before the courts.

In relation to conditional cost agreements and the 25 per cent premium payable in circumstances where the risk of losing is minimal, the Law Society would say that the conditional cost agreements, as amended by section 186 of the Legal Profession Act, cannot provide that costs be determined as a proportion of or varied according to the amount recovered in proceedings. Accordingly, they have not gone the way that some deregulators would have taken us. Were an agreement to

contravene section 188, it would not be unenforceable.

In our experience, this 25 per cent uplift is not imposed where it is not reasonable to do so, and many practitioners do not require this payment at all in compulsory third party matters. However, it is important to recognise that when the profession is taking a significant risk there should be reward for that risk. The fact that this provision is listed in the Act at all shows the lack of commitment that the legislators had to properly deregulate the market.

In relation to the question of whether there has been a general failure by the 1994 reforms to affect policy objectives, that is, whether or not they have failed to increase competition, we would say that there is no real evidence to substantiate the assertion that there has not been an increase in competition. The Law Society's view is that the number of suppliers of legal services has probably increased over the period; that there has been increased knowledge and skill, especially in the 339 accredited specialists in personal injury law at the moment; that the efforts of the Law Society to educate the public and the profession about this area has been effective; and, if anything, there is a highly competitive market.

The serious onus in the competitive market rests with the consumer, of course. The consumer must ring round the solicitors and ask the terms on which that solicitor may or may not work. That is happening. The profession is regularly getting calls asking for quotes. The profession does all it can to assist people to find solicitors with expertise. The specialist accreditation web site, as you might know, enables the consumers to find accredited specialists in certain areas in their areas so that they can choose between them, or perhaps contact them and get a price. It is the experience of the community assistance department that people ring up and ask for alternative solicitors before engagement. So we believe that there is a competitive market, not just at the top end, and that it is having its impact on all practitioners.

As to the relationship between the defendant and the plaintiff lawyers' fees, we would say that there is no real relationship between the fees and that you should not be making a comparison between them. The work that is done on an individual matter by the defendant and the plaintiff is substantially different. In most cases, the insurers have negotiated tender agreements with their solicitors and do have some cost savings arising from that arrangement, but that can be because of the volume of work which is place and the system that is in place between insurers and lawyers - an opportunity which the plaintiff's solicitor does not have. The fact of the matter is that analysing, preparing and presenting the plaintiff's case is quite a different matter and involves quite a different quality of work than that involved in the defendant in pleading against the case that is presented.

In relation to lack of consumer vested interest in the fees charged where party/party costs are met by insurers, it is certainly correct in some cases and is the result of the provisions of the Legal Profession Act relating to costs and approximates the position of injured workers relating to their costs of workers compensation

proceedings. There are effectively no client/solicitor costs.

The question of whether the plaintiff has a vested interest in the fees charged is only relevant in determining whether a safeguard mechanism exists to keep legal fees low, in the case where the plaintiff is successful. However, aggrieved unsuccessful defendants, usually insurers, can already use the more reliable safeguard of subjecting the costs thus payable to an independent cost assessor under section 202 or 208A of the Legal Profession Act. Under the Act the assessor decides, amongst other things, whether the fees charged are reasonable. So that is the kind of statutory back-stop for the situation where you might say that the plaintiff has been persuaded that he has no interest in the fees charged. That provision of the Act operates.

I might say as an aside that I recall from the policy discussion, without moving to this form of assessment, that it was the generally held view that the fact that in many cases the plaintiffs who were successful received 40 and maybe 60 per cent of their costs under the scale system was grossly unfair and unjust. It was the intention of moving to a more market-based system which required the losing party to pay a fairer proportion of the actual costs suffered by the plaintiff bringing the claim, to increase the justice.

What might be said here is that we have two elements in play. The first is a debate about whether or not legal fees are in fact rising. We don't know about that. As to the second, I think we could say with some confidence that this system was intended to have the defendant pay a larger proportion of the real costs of the plaintiff. That was intended. It is disappointing now to have people complaining that that has actually increased our costs. That was known at the time the legislation was introduced and it was an anticipated result to some extent.

As to the application of competition policy in compulsory third party and the legal services market, whether there have been effective policy outcomes, and whether the fees for CTP services are rising, the submission of the Society is that we do not accept that the fees themselves are rising, and without some further information we think the discussion should pause and really look at what is happening in the market-place and then move forward from there.

I now move on to item 3, national competition policy and regulation of CTP legal services: (a) is about there being an imperfect market. Our submission is that the market for CTP services is in fact more highly skilled and trained by virtue of the Law Society initiatives to which I have already referred. In relation to (b), views on acceptable methods of regulating or controlling fees for CTP legal services in the context of national competition policy, and the particular nature of the CTP legal services market, we would remind the Committee that it should be recalled that the system of assessing costs on the basis of court scales in a regulated market comprising fees was determined in 1994 to be inequitable, highly bureaucratic and quite expensive. The alternative system has to some extent remedied many of the difficulties experienced with that system.

In relation to fee disclosure and accountability, our submission is that section 208A of the Legal Profession Act contains provisions for assessors to consider the appropriateness of any cost agreement. Limited right exists for appeal of the assessment as to matters of law only. So that assessment is quick and quite final. The unsuccessful party assumes the vested interest which otherwise the claimant would have in respect of those fees - unless the claimant himself is unsuccessful, in which case this vested interest would very much be to the fore.

So, at least to some extent, the problems being discussed have been anticipated in the Act, and there are provisions there that are intended to make it work. Perhaps the discussion should be focusing on those provisions and on why it is being asserted, without any factual basis, that they are not working.

In relation to the question of whether solicitors are properly disclosing fees, the Society's submission is that there is no substantial evidence to the effect that CTP plaintiff lawyers are not properly disclosing their fees. We would expect, out of the number of solicitors that we have, that there may on occasion be failures to disclose fees, but the Committee should be reminded that the provisions in the Act provide substantial penalties to be visited upon the solicitor who fails to do so; that it can be

professional misconduct in some circumstances not to disclose the fees; and if a client challenges your account and you fail to disclose fees, you pay all the costs of that assessment.

The solicitors are subject to substantial incentives, and I believe the message has been taken by the Society to the profession that this formalised engagement procedure is of great positive benefit to the profession, and the profession is learning that and has been embracing it. I must also say that the fact that solicitors must disclose their fees upfront does increase competition substantially and does give clients an already statutory enforceable ability to see exactly what their engagement terms are and to compare those as between solicitors.

Item (c) under this heading of discussion points is the issue: To whom should fee disclosure be made in CTP cases, where the plaintiff is successful in up to 95 per cent of cases? There is the question of whether there should be some accountability direct to CTP insurers. The Law Society position on this is that indirect accountability of lawyers to insurance companies, where the insurance companies are the unsuccessful defendants, already exists under the Legal Profession Act provisions which exist for the review of fees.

Item (5) is market information about compulsory third party legal services and lack of plaintiff consumer powers. The Law Society's view is that the disclosure requirements in place under the Legal Profession Act are sufficient to protect consumers by ensuring that they are provided with the relevant information.

Consumers have more power against solicitors having regard to the statutory disclosure provisions than have consumers in just about any other service market.

There is no evidence to indicate that there is a lack of quality in services provided by legal practitioners in this State or lack of provision of information to consumers, or lack of choice of supplier of services. Furthermore, under the case management systems introduced in the District and Supreme Courts there are case monitoring systems that review individual matters at regular intervals and that highlight any shortcomings that might be apparent. Provisions exist in the market not only in terms of engagement but also in terms of the conduct of matters before the court and in respect of the service being provided.

The paper asks for some comments about specialist accreditation programs. Mr Chairman, I think I have already said something about that, but I might say that consideration of many accredited specialists in personal injury work shows that they come from all areas of practice, large firms and small firms. They come from all areas of the State. They are subject to a rigorous assessment system, and the specialist accreditation system surveys of client satisfaction show an extremely high degree of satisfaction with the performance of those solicitors in giving services to their clients.

Finally, Mr Chairman, the paper deals with reform ideas. The Law Society had made some comments about those. That I think I will leave to the paper which we will table.

Might I say in conclusion that the main point that we wish to make to the Committee is that when you move to deregulation there must be friction, and there must be a learning process by both the community and the profession. I think that the evidence that is in fact before the Committee is that the profession has been adjusting and learning well and that the process of developing the market in this area is under way and has many positive attributes which were intended by the legislative draftsman.

It would be disappointing in the extreme if anecdotal evidence, pressure to keep the costs of insurance down, and general dissatisfaction arising from a number of small instances were to drive the debate over what could be a very positive scheme. Instead, we should pause at this stage to evaluate what the real situation is and to work on real information to come up with what should be a system that works for the whole community.

MR DAVID BOWEN

ASSISTANT DIRECTOR
LEGISLATION AND POLICY
ATTORNEY GENERAL'S DEPARTMENT

MR BOWEN: Mr Chairman, honourable members, ladies and gentlemen. I want to take a few moments this morning firstly to outline the objectives of the Legal Profession Reform Act, secondly to make some comments upon the factors that I think have influenced whether or not those objectives have been met, although I do not intend to draw any conclusions on that point, and thirdly to put forward some other options that might be considered in either reforming the system or looking at alternatives.

Firstly, I would like to put my comments into context, particularly in the light of the discussion about the interplay between the Legal Profession Reform Act and the competition policy reforms. I think it is important to note that the Legal Profession Reform Act in New South Wales predated a number of papers that have subsequently come to inform discussion about competition policy.

In particular, it predates the Trade Practices Commission report; it predates the access to justice report; it predates the COAG reference and the report of the COAG working group on legal profession reform; and it obviously predates the Competition Policy Reform Act. So, using these later documents to examine the Legal Profession Reform Act in New South Wales may be at times misleading because the reform Act of 1993 was quite unique in Australia at that time in applying competition policy to a profession.

The other point that I would wish to make about the context of it is that while we are looking at the whole issue of cost reforms it is important also to remember that the Legal Profession Reform Act made significant reforms to admission and practice rules and also to the whole complaints system.

While we can today look at the impact of different cost reforms, when you are looking at this question you have to bear in mind that it was part of a much wider package.

There were four changes introduced to the system of legal costs in the 1993 Act. I would reinforce the point that Patrick made, that when I am talking about costs I am not talking about just the fees that the solicitors or barristers charge their clients. In the Legal Profession Act, costs are defined to include all of the disbursements that usually are passed on to the client; and, outside the Legal Profession Act, costs also

include the court costs and the other costs that are payable in bringing litigation.

The four changes that were introduced were first a change to the basis of determining party/party costs, second, the deregulation of costs with the disclosure and cost agreement provisions, third, the introduction of contingency fees, and fourth was the system of assessment. They are also all inter-related, but I will deal with them separately. But also, because there has been quite a bit of focus already on the issue of deregulation of costs, I will cut down on my comments there.

The objective to change the party/party costs - and Patrick has already mentioned this - was to provide a successful plaintiff with an award to cover all of the costs that that person reasonably incurred. The background to this was that the system as it previously operated, and probably developed over about 20 years, meant that the successful litigants were getting only a proportion of costs which they had to pay on to their legal practitioner. This came in for quite a lot of criticism from plaintiffs who were in this position. They were getting an award to compensate them for the loss that they had incurred, and then they found themselves paying out quite a bit more to their practitioner than they could ever get back from the other side.

This whole issue was the subject of an examination by the Legal Fees and Costs Board. Mr Chairman, I refer you to the report to the Attorney General from the board in 1992, which was in fact tabled in Parliament, on taxation of bills of costs. In that they quoted from a number of sources. As usual, one of the more interesting quotes was from Mr Justice Rogers of the Commercial Division of the Supreme Court, focusing perhaps on commercial matters but drawing it out into its application into personal injury litigation.

I will read it out:

"In the course of the last twenty or thirty years the incomplete indemnity provided by party and party costs came to satisfy less and less of the actual costs. There is now a yawning gap between costs recovered by a successful party from the other party on a party and party taxation..... The effects may be financially disastrous to a party successful in the outcome of the litigation. Ironically, the successful party may finish off in penury while the financially better off opponent continues to flourish."

He then went on to refer to what was considered to be a rule of thumb in the profession whereby, in commercial matters, you might only recover about 40 per cent, while in personal injury it was about 60 per cent. So, one of the objectives was to overcome this. If you take the 60 per cent of the rule of thumb and apply it to CTP matters, and if you take that as a benchmark of the costs payable by insurers to successful plaintiffs pre the Legal Profession Reform Act, then you would expect cost to be about 175 per cent, notwithstanding any other changes introduced by the cost assessment system.

Division on this point draws into question the whole issue of the application of the costs indemnity rule, and whether we should have a rule; and, if so, how it should operate in New South Wales. If we are going to look at this seriously, one of the interesting documents that should inform us is this recent report from the Australian Law Reform Commission on cost shifting "Who pays for Litigation?", published in August 1995.

The report strongly comes out in favour of retaining the costs indemnity rule, for reasons which I think are well articulated in the report. If we don't have the costs indemnity rule, we are just going down the path of the US system where no rule applies. I am sure neither insurers nor lawyers would be in favour of that. What it does look at are some possibilities of partial application of the costs indemnity rule, with exceptions. The exceptions proposed in the report relate to public interest and hardship matters. There is also an exception that was seriously examined in 1993, although, for reasons mentioned by Patrick, I don't think it really has merit, but the suggestion was that you may limit the successful party by reference to the amount of costs payable by the unsuccessful party to their lawyers, to ensure some equality of costs in terms of representation before the courts.

On this issue of the costs indemnity rule, there is one other matter that was raised in this report and which I wish to raise. I think it is most important in light of the recent changes to legal aid. That is the position of unrepresented litigants before the court. The report makes the point and recommendation (with which I strongly agree) that there needs to be a right for unrepresented litigants to get their costs.

I think, in the court system, we are facing a dramatic reduction in legal aid, and in particular I expect no aid at all in civil matters, and a corresponding increase in the number of unrepresented litigants. We should be looking to make sure that the litigant unrepresented in court can successfully recover costs.

The second reform that I mentioned was the deregulation of fees, by which I mean the removal of the scales, the introduction of fee agreements, and the introduction of disclosure requirements. I think this issue was fairly well covered this morning in that it was recognised the objective was to create a competitive and informed market for legal services.

The background to this was that the scale system was not operating very well. Maximum scales had come to be applied as the usual fee that was charged. The scale was in existence, and this was the fee that was actually charged to the client, rather than being the maximum, as a sort of protection. What this meant was that clients were nearly always left in the dark about the costs of services. It was thought that by removing the scales, in conjunction with a system designed to put information into the hands of the consumer, we could create a competitive environment in which solicitors and barristers were competing for clients through fees, and in which consumers had a real choice about the price/service combination, so that they could choose the sort of service that fitted their needs and the price that they could afford to pay.

I do not really know whether this has been a failure or a success. I think that the jury is still out. I do think that, only three years into the operation of this legislation, it is still too early to determine whether or not it has been a success or failure. I certainly would not be inclined to say, "Let's throw it all out and start again." I would much more favour identifying where there had been particular failures and addressed those within the parameters of the system.

Certainly, one area that has been identified by virtually everybody and on which there is agreement by everybody who has taken part in this debate, is that there needs to be much more information available to consumers on comparative fees. In fact, when the system was put into place it was envisaged that sort of thing would occur. It did not happen at the time. It did not happen later on, because when the Access To Justice Committee came out and endorsed the cost system that applied in New South Wales, its recommendations were picked up by the former Commonwealth government, which indicated in its justice statement that it would be providing funding to the Australian Bureau of Statistics to undertake a survey and provide legal cost information to the public.

That has not happened, and I think we are now at the point in New South Wales where we need to look at better mechanisms to collect and provide to the general community information on legal costs. It is not the responsibility of government to do that through the Attorney General's Department or the like but I would suggest through the professional associations, working in conjunction with the Legal Services Commissioner.

Disclosure? I don't know whether the rates of failure to disclose are high or low, or whether there are many or not many practitioners failing to disclose. Patrick and Steve have argued the case on this. What I think is that there are sufficient penalties in the Act for failure to disclose.

Steve has already foreshadowed that he will start to make greater use of those penalty provisions to force a cultural change, not just to educate and inform the profession about cultural change.

In terms of the reintroduction of scale rates, I think in this debate it is important to note that there was, even at the time of the 1993 Act, an acceptance by government that scale rates were necessary in some areas, and scale rates were in fact retained

in workers compensation, they were retained in the area of probate, and they were retained in the area of costs on default judgments and enforcement of judgments.

The public interest arguments in favour of retaining scales in those areas varied from area to area. It is not an issue on which I wish to comment further, other than to say that if scales are re-introduced they would need to be much more exacting in their determination and relation to the cost of the delivery of the service than they ever were in the past.

The third major reform in the costs area was the introduction of contingency fees. I agree with the comments made by earlier speakers, that it is very hard to assess exactly what the impact of contingency fees or conditional fee agreements have been. There have been suggestions that they are used in circumstances where a client is always going to get an award and so it is just an extra bonus in the pocket of the practitioner. That is something that perhaps needs to be looked at. Whether or not that is true, I think there should be a disincentive to it operating in those sorts of areas where liability is not in issue but the level of damages is.

If that is done, I think there is a role for conditional fee agreements or contingency fees in that they provide access to the court system for some people in circumstances where, in the absence of such an arrangement, they simply would be kept out of the legal system or out of pursuing their rights because of the costs of litigation involved.

Finally, the reforms of the assessment system are really the pivot on which the rest of the reforms either fail or succeed. In a market-based system, the fees that are charged by practitioners must be reasonable. In that circumstance, there must be an accessible and cheap mechanism by which the client can have that issue determined.

The previous taxation system was extremely rigid, it was archaic, and it was extremely complex. In party/party matters it required the preparation of very detailed bills of costs. I do not know the evidence on this - the other lawyers here would know better than I do - but the figures that were quoted to me were that, depending upon the level of the bill, it was often necessary to engage a cost consultant, who might charge between 5 and 10 per cent of the total cost simply to prepare a bill for taxation. So we certainly had a system that was far too difficult for both practitioners and clients to use.

The assessment system is much better. It is much more accessible. Also, it is much quicker. I would say to people who are now starting to point out failures in the system, do so with the idea of improving it, but certainly don't go back to the taxation system. It was not uncommon for taxation to have delays of up to 18 months before matters could be taxed. The general time period for assessment is now running between two to four months, and there are very few matters that fall outside that time frame in terms of getting to conclusion.

The assessment system is also a necessary corollary to a system in which you no longer have scales. It is fine to have a taxation system and taxation officers, who are officers of the court, applying scale rates, but once you move away from scales and you move towards a determination of the market rate and the reasonable fee, you need to have people who are making that determination against a background of some personal knowledge and experience in working in that sort of area that informs their approach.

I think too often it is thought that assessment of legal costs can be done mechanically and very efficiently. Again I would quote from this report of the Legal Fees and Costs Board where it recommended a change away from taxation officers to a system of assessment by part-time practitioners appointed through the Supreme Court. They said:

"The primary problem.....is the decision making process itself. The Board is of the opinion that the current system relies on a body of public servants, on the whole who are not practising solicitors and often are only occupying the position of a taxing officer in a transitory capacity, have little or no experience in the commercial world of running a practice and little or no knowledge of the intricacies of the day-to-day activities of a solicitor's

office..... "

They also go on to say that:

"The level of costs is not something that can be determined with scientific precision; it is an exercise of experience and judgment. "

That is the background to the cost assessment system. It was the acceptance of those sorts of views that led to the Legal Profession Reform Bill being introduced. There are certainly areas where the current system is going to be improved. In the area of taxation, I would suggest - and again this is based on anecdotal evidence - there is too much inconsistency between one assessor and another. The way to overcome that is to provide better training to assessors. There may be improvements made, perhaps, by looking at some sort of cheaper and more accessible appeal mechanism; perhaps a panel of senior assessors who can overview the whole system, provide much better guidance and, when mistakes are made, correct them quickly on appeal without the need to have party/party matters go back into the original court where the costs order was made.

The final point that I would make to the Committee is that the Legal Profession Reform Act has an inbuilt review mechanism. It requires the Attorney to review the operation of all of the reforms that were introduced by the Act. Unfortunately, the way that the review clauses are drafted is prohibits undertaking the review until four years after the date of assent, which is after 17 November this year.

I know, from my discussions with the current Attorney, that he is quite keen that the problems not only in the CTP area but those in the operation of the whole system be reviewed, and that we review the cost system against the objectives as they were then, to see firstly whether those objectives still represent a good articulation of the public interest; and, if they do, how the system may be brought more into line with meeting those objectives.

Regardless of what the Committee finds, that review will take place. But I think there is good opportunity to focus on how the system has operated in a very

particular area such as CTP and to feed the conclusions from this review into that much broader review of the Act that will take place next year. Thank you, Mr Chairman.

Ms SUSAN PATTISON

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Ms PATTISON: Good morning, Mr Chairman and honourable members, ladies and gentlemen. I have to say that I agree with both sides of the debate. I think that a lot of the difficulty that has arisen in relation to the reforms has related to a lack of information as much within the profession as within the public.

It is very difficult in that the legal profession often encounters frequent and strong criticism, both of its work practices and legal fees, and often without very much of an empirical basis. Everyone here today have, of course, qualified their comments on the basis that they are largely anecdotal. I think a lot of the criticisms of the 1994 reforms come back to the procedural limits within the Act itself and in relation to funding that has been given to the system.

I also think that the reforms were based on several fundamental assumptions which may or may not turn out to be correct. The first was that it was assumed that there was a market for legal services within the technical meaning of the term, when the profession - certainly outside the CBD - had very little experience in setting fees and not very much experience in monitoring the fees of other practitioners. Added to this was the almost complete ignorance of members of the public in relation to what constituted market rates for legal services.

There was also the assumption that scales acted to maximise fees, rather than to act as a control on them. There was also the assumption that it was possible and appropriate in all the circumstances for legal practitioners and their clients to negotiate on an even bargaining ground to enter into cost agreements.

Lastly, I think there was an assumption that costs were straightforward and could be dealt with in a relatively administrative way, and that meant the provision of no reasons for decisions and no effective rights of appeal.

In relation to the effect of the 1994 reforms, I think that a lot of people would agree that costs appear to have risen. The reason for that is a lot less clear.

The first thing I would like to do is endorse the comments of a number of speakers in that costs are not limited to solicitors' costs but also to the costs of counsel and experts. In the context of compulsory third party matters, that of course means medical reports. I would have to say that I personally have noticed quite an increase in all of those things, i.e. experts' fees in particular and in some instances counsel's fees.

Interestingly enough, the majority of CTP bills that I and my colleagues in my company draw are still based largely on the old scales. It is also interesting to note that a lot of the objections we draw to CTP bills prepared by other costs consultants and solicitors are also often based on scale. So it is an interesting fact, as far as I have observed it, that a lot of CTP costs in terms of costs charged by solicitors, are still based on the old Supreme and District Court scales.

Why are costs increasing then? I think there are several factors here. Certainly, the scales that were in force immediately before deregulation represented a substantial increase over the previous scales. I was a member of the Legal Fees and Costs Board that was constituted immediately prior to deregulation. In 1992 we undertook a comprehensive review of the Supreme Court scale and, as best we could, tried to set fees that reflected a proper return for the solicitor and also protection for the consumers of legal services. We then reviewed that scale, and largely adopted it for the District Court.

Now, as I say, that scale did represent an increase over the previous scales in both those courts. I believe that some of the increases that the system is now seeing are as a result of the flow-on of those increases. How you quantify that without any kind of survey, I am not quite sure.

The other thing is, of course, that the fair and reasonable test as now applied to party/party costs is a different test from the previous one of necessary or proper. Interestingly enough, if you look at the old case law and how the old test of necessary or proper was applied by the courts both in England and in Australia, it was effectively to allow what was reasonable in any case. However, over time, I

think that test of necessary or proper became increasingly artificial and hidebound, to the extent that it really acted on an unfair basis in that successful litigants ended up subsidising unsuccessful defenders.

One example of that old party/party test of necessary or proper is that if a solicitor had a telephone call from the other side and then confirmed the contents of that call in writing, usually the second attendance was not allowed on the basis that it was considered unnecessary. This is even though, as a practitioner, it might have been actively negligent not to have so confirmed such an important call, particularly if it related to a settlement negotiation, et cetera.

I think the new test of fair and reasonable, certainly the part that the board initially recommended in its 1992 report, was to break away from that old case law and come back to a system that sensibly addressed proper and reasonable work that had to be done in prosecuting a claim party/party.

In relation to questions of whether perceptions of defendant or plaintiff assessors affect the ultimate adjudication, and consequently costs, it is very difficult to address. I would say that I am aware that within the profession there are some perceptions that if you get a plaintiff assessor you probably get a better result. As to quantification of that, I am not entirely sure. I would, however, endorse Patrick Fair's remarks that the Act contains safeguards against those sorts of problems, and one would expect that assessors, being officers of the court, would act without obvious conflict.

The next thing I would like to talk about in relation to increases is what I see as one of the major problems, that is, the existing assessment procedure is opaque. By that I mean that you do not get any written reasons back, any marked bills, or any real feedback as to why a certain amount was found to be fair and reasonable by the Assessor, either solicitor and client or party/party. Also, because you have no reasons or findings, the rights of appeal set out in the Act at 208L and 208M are effectively unenforceable. It is virtually impossible to bring an appeal.

I would illustrate that by the fairly recent decision in the Supreme Court of Crook's case, which was a situation where an assessor did provide some information which was somewhat unclear as to something that might have affected his decision. The solicitor's appeal basically said that "We believe that these words by the assessor effectively meant that he had reduced our claim because of the fact that we are not located in Sydney but instead are located in regional New South Wales."

The solicitor had called upon the assessor in writing to explain the comment that he had made. He refused, as was his right under the Act. The court found that if the comment made by the assessor meant what everybody thought it might have, then indeed it was an error of law. However, this could not be established because there was no way of establishing what the assessor might have meant by what he said.

The next, and more interesting, problem was that even if the solicitors had established that there was an error of law, they were not able to successfully appeal because they were not able to establish to what extent that finding, if it had been made, had affected the actual determination made. So that illustrates the difficulty.

The next thing that I feel is the real problem is that, without any kinds of reasons or accountability, it is extremely difficult for assessors to do their jobs, it is extremely difficult for the profession both to know whether the fees they are charging are within the market range and, similarly, it is very difficult for the legal practitioner, when confronted with the possibility of advising their clients about party/party costs should the client be unsuccessful, to estimate in any way what those costs might be. That is because the new provisions under the 1994 reforms potentially introduced what is colloquially known as the location factor.

Previously, in relation to party/party costs and the scale, the amount of money that was able to be charged by the practitioner related solely to the work done and had no relationship to the practitioner's possible overheads and profit margins. However, the new part 11, in 208G, in relation to party/party costs, essentially appears to allow a differential rate of charge party/party depending on where the solicitor conducts his or her practice. This means that in a market like New South

Wales, where the hourly rates can really span from say \$130 to \$350 an hour for CTP work, it is extremely difficult for everybody to know what kinds of fees you may ultimately end up with.

In relation to conditional cost agreements, I believe that there has been no real education of either the profession or the public on what these agreements are intended to achieve. Again all my evidence is anecdotal, but I am aware of instances where conditional agreements are entered into where one might say that the actual risk of losing, whether on liability or quantum, is quite small. There are also difficulties when such agreements are entered into very close to trial. One might feel that the real risk should be properly known by that stage.

However, while it is easy to criticise such a system, there is also the reality that conditional agreements make it possible for persons who could not otherwise fund litigation to have access to the court system. In that sense, I think that the whole issue of conditional agreements has not been properly addressed. I am aware that most assessors probably do not regard conditional agreements as party/party. This means that if a client enters into a conditional agreement and is ultimately successful, the client possibly will not get back that extra 25 per cent success premium against the other side.

This really raises issues in relation to the policy concerns expressed prior to the 1994 reforms, which were that deregulation was to lessen the gap between party/party costs and solicitor/client costs, i.e. it was to lessen the subsidisation by the successful parties of non-successful parties. In a situation where conditional agreements were used but were not allowed party/party, the issue is raised about what that really means in relation to access to justice and the ultimate money that ends up in the hands of the successful plaintiff.

I think one difficulty in relation to conditional agreements is that there is no overall cap. Unlike a contingency agreement, which is expressed to be a percentage of the ultimate verdict, although that is found to be distasteful by many members of the public and the profession, in some ways you can say that at least it guarantees some form of result for the client. However, with the conditional agreement and the provision for the 25 per cent mark-up, this can actually represent quite a substantial proportion of a successful party's verdict if that verdict is relatively small and a lot of work has been done by the practitioners.

In relation to fee disclosure, I think I would probably agree with both Patrick Fair and Steve Mark. I believe that, basically, most practitioners are trying extremely hard to undertake disclosure. I think the biggest area of non-compliance is in relation to estimates. I think the reason that that has arisen is again my feeling that the profession was virtually thrown in at the deep end; it did not have very much experience of estimating costs, particularly in litigation; and areas where legal services did tend to be fixed fees, such as conveyancing, tend to be fairly regulated transactions where there does tend to be a certain amount of work done for a certain result. This is contrasted with litigation, where it is very difficult to estimate the costs, particularly as you have no control over what the other side may throw at you.

The only way that the estimated side of disclosure will be fulfilled is with more information being available to both the profession and public, perhaps along the lines of Steve Mark's suggestion of bands of costs which are indicative of certain sorts of matters.

The other difficulty with giving estimates in relation to disclosure, is that failure to give disclosure under section 177 of the Legal Profession Act, (which is the section that deals with both the obligation to give an estimate and the obligation to advise the client of any significant increase in that estimate) is dealt with differently under the Act than failure to give what I call primary disclosure, or 175 disclosure. Section 175 provides that a solicitor must indicate either a fixed fee or give the basis of calculation of the fees, plus advise the clients of their rights in relation to the review

of the costs and also advise the clients in relation to things such as trading terms - how often the solicitor is going to send the bill, and whether the solicitor is going to charge interest or not.

If a solicitor fails to give section 175 disclosure, under section 182 of the Act if the client disputes the fees the solicitor is unable to sue for the costs, but instead must go through the assessment process at the solicitor's own expense. Failure to give section 175 disclosure is capable of being professional misconduct, et cetera.

By distinction, via section 183 of the Act, a failure to give an estimate under s 177 is not treated such that it precludes the solicitor from suing for costs, although it is capable of being professional misconduct, et cetera. Straight away, I think the profession is confused by the different treatment of giving an estimate under 177 under the Act, as contrasted with a 175 disclosure.

I also feel that there has been a lot of confusion within the profession because of the wording of the transitional regulations under the Legal Profession Act. The transitional regulations effectively state that if a solicitor has a retainer already in existence prior to July 1994, the solicitor was not obliged to undertake disclosure and was not obliged to enter into a costs agreement, although the solicitor could do so if he or she wished.

Some assessors and some members of the profession have felt that effectively this means that there was no requirement to disclose in respect of a pre-existing retainer, even if the solicitor sought to increase his or her fees after July 1994. I don't believe that is the case. I believe that the regulation means exactly what it says, and if a solicitor does choose to change the basis of the retainer by a fee increase or whatever, that indeed must be disclosed if it occurs after July 1994.

However, as I say, I believe the wording of the transitional regulation has been extremely confusing, and I feel that a lot of practitioners may inadvertently have not disclosed estimates - not because they were deliberately ignoring the effect of the Act but because of the wording of those regulations.

The next area I would like to talk about is market information, the giving of reasons, and appeals. I believe that at present both sides of the market for legal services are seriously disadvantaged because of a lack of information. As I alluded to earlier, there are no reasons given. By that, I do not mean that simply the only acceptable course would be to provide lengthy written reasons for a determination. I actually feel that that would not be cost effective and would probably act to delay the fast resolution of assessments.

Having said that, under the old system often what would happen would be that a taxation officer would mark the bill of costs, which means there would literally be a series of crosses and ticks against various items in the bill and maybe a brief summation at the end as to why certain major categories of costs were not regarded as party/party. Often, that was enough for the parties to decide whether they were happy with the result and whether there was any reason to take it further.

The original 1992 report of the Legal Fees and Costs Board did recommend that the system of taxation be changed to assessment, because we believed the term "taxation" was confusing to the public and also to the profession to some extent. We also recommended that the taxation system be taken out of the court system and that it be put with active practitioners. I still believe that was the correct decision. I would agree with some comments made by Patrick, that taxing officers who were not in practice or had not been in practice for some time, were not necessary cognisant of the real reasons why a solicitor did certain things in certain matters.

Having said that, though, the recommendations of the Board were that there would be at least an appeal procedure that was quick and easy. Of course, that has not happened under this Act. The stated policy in relation to the 1994 reforms were ultimately to deter appeals because of their nuisance value. I would say that, having practised in this area for some time, I was not aware of any particular preponderance of nuisance appeals in relation to costs and the decisions made by taxing officers under the old system.

I believe that the determination of costs, like any other legal process, should be transparent and capable of scrutiny and, if necessary, appealed.

I think also that the 1994 reforms overlooked to some extent that costs can be a very complex issue, depending on the way the matter is being run, the particular issues that have arisen, and the costs involved. Certainly, the amount of legal costs can be very significant. I think some of the reforms look more towards the low end of the market rather than at larger matters.

To illustrate that, I refer to a present matter that I have where the legal costs claim in a personal injury matter, although not a compulsory third party matter are over \$400,000. Those costs are drawn on scale in relation to the solicitors fees, which are around about \$160,000. The balance of the costs are experts fees, which are considerable, and counsel's fees. When you are talking about these amounts of money, you really need to have a system under which justice can be seen to be done. That means information, reasons, and a way of changing the result if it does not appear to be fair.

The other difficulty with not receiving any kind of reason is that ultimately you end up with no precedents, no benchmarks, no authorities and no guidelines. In this sense, the assessors have tried to do the best that they can. However, they are limited by the legislative structure within which they operate. Certainly, there has been a decision of the Supreme Court of New South Wales that says effectively that if assessors step outside that framework, i.e. by giving reasons, they are probably stepping outside the code that has been set up by the 1994 reforms and are probably acting ultra vires the Act, i.e. they are acting without power. So you can't blame it on the assessors.

The difficulty is, though, that without that information, persons like myself have enormous difficulty in advising both the profession and the public in relation to what would be reasonable costs in any particular matter.

If I have difficulty with doing that, and I am a specialist, I really wonder how ordinary practitioners are expected to cope. The difficulties experienced by members of the public are obviously even greater.

In relation to possible solutions, I would endorse one of the comments made by David Bowen in relation to a panel of senior assessors or Master Assessors. The Legal Fees and Costs Board held a national conference in relation to costs and fee setting just prior to its demise. That was attended by every State and almost every Territory, from my recollection. It was a very interesting circumstance to see that New South Wales appeared to be the only State that had a fundamentally difficult problem in relation to the gap between solicitor/client costs and recovery party/party.

Although it cannot be stated empirically, I would have said that part of the reason that New South Wales had that problem and the other States and Territories did not is that New South Wales for some time has not had any kind of taxing master, unlike those other jurisdictions. A taxing master, of course, is a relatively senior member of the judiciary who specialises in costs and gives guidelines and guidance to both members of the profession and taxing officers undertaking their tasks.

Similarly, I feel that in New South Wales now, if there was some system of master assessors or senior assessors who gave guidance to the other assessors undertaking the process of assessment, this could only be a bonus. At present there are 34 assessors in New South Wales undertaking assessments. Some do a great volume of work; some, of course, do not do very much. It is very difficult to ensure consistency when you have such a group of people doing that work.

The other difficulty with the scheme, from my perspective, is that I think it has always been dogged by a lack of funding. In particular, the assessors have not been given particularly detailed training on the undertaking of their tasks, both in terms of the old case law and in relation to how to undertake their new tasks. I think it is a very big ask of the assessors without that back-up training and the provision of the necessary funds. I am aware that in some instances there have been arrangements for seminars on education, but these were dropped because of lack

of funding.

In relation to one of the suggestions in the issues paper of independent cost assessment, i.e. taking the assessment process away from assessors and from being administered by the Supreme Court and into some kind of separate body, I am not entirely sure that that would work. My difficulty is the difficulty that we had with the taxing system: the taxing officers were perceived as non-practitioners who applied artificial constraints in relation to determining costs. I believe that if it goes to a separate tribunal, there can be no guarantee that that will not happen again.

In relation to an insurer's right of review, which was raised by some of the speakers, I believe that at present the insurers do have a right of review in the sense that they do have the right to submit under section 202 claims for costs by successful parties to assessment. The main difficulty I have, as I have already alluded to, is that the result of that determination by an assessor is largely inexplicable and it gives no guidance to either party.

In relation to that, I should explain that an assessor, in a certificate of determination, is only obliged in relation to party/party costs (and solicitor client costs) to say what is the total quantum of costs found to be fair and reasonable. To their credit, the Cost Assessors Rule Committee, in guidelines for the assessors, have stated that if either party to an assessment requests some kind of breakdown of disbursements, i.e. the costs incurred on behalf of the successful party by the solicitor - and these costs, of course, are mainly counsel's fees, experts fees, court fees, et cetera - if there is a request for a breakdown, this should be given by a simple note which is attached to the certificate; i.e. it does not form part of the certificate but it is additional informal information provided.

I believe that far more information needs to be given than is provided under the regulations. In particular, I think if claims are made for costs on an hourly basis, there should be some indication as to what rates were found to be acceptable by the Assessor for solicitors and counsel; and, in relation to daily fees charged by counsel, similarly there should be an indication of what kind of rates and ranges

were found to be reasonable.

In relation to the idea about a compulsory third party scale and fixed costs within bands, in some ways that idea is attractive. Certainly, the old legal aid scheme allowed for a process not unlike that, where in relation to solicitor/client cases and legally assisted persons, there were bands of costs that were allowed depending on the amount of the verdict, and when the matter was actually resolved, with bands such as when certain things happened prior to a certain stage in the proceedings, on the morning of the hearing, and then with increments depending on how long the hearing went for.

However, any attempt to set up scales or bands has to be free of the previous criticisms about scales, which often were literally "set and forget"; i.e. sometimes the scale was set, it was not reviewed regularly, and it very quickly fell into disarray, it was not relevant to the profession and how it was charging, and so of course the profession where possible, solicitor/client contracted out of it. Any thought of going back to scales can only go hand in hand with some kind of consistent procedure as to how those scales would be set and how they would be reviewed on a regular basis.

Another issue that has not been fully addressed in relation to legal fees is that the legal profession has been encountering the same kinds of criticism as the banks are currently undergoing, which is that although they are businesses, and are therefore operating for profit, there is a strong community perception that the legal profession owes the community a service over and above the mere gathering in of profit.

In relation to that, the legal profession has certainly, from my perspective, tried to honour that perception in the community. I think the profession does not get much acknowledgment for things such as its pro bono work. I am also aware that in many CTP matters, if a solicitor is not successful on behalf of a client - this is, prior to the introduction of conditional fees - the solicitor often would not charge fees at all or would moderate the fees substantially.

The legal profession is one of the few professions that I can think of where somebody who does work in good faith is expected to moderate their fees or perhaps not charge at all. That is certainly not the case with, say, architects or the medical profession.

There are a few closing comments I would like to make in relation to deregulation. There are a number of issues that I think need further consideration and examination, particularly time costing. Although I have said that a great deal of the bills that I see in relation to third party or CTP matters are based on scale, it is also true that there are a percentage that are based on time costing, i.e. where the solicitor agrees to charge an hourly rate for work done.

I think the issues about time costing have not been fully investigated in Australia. It was essentially an American concept, which the American system has moved away from to some extent, mainly because it was perceived as not necessarily seen as giving value in terms of what Steve Mark was saying earlier. I think some of the difficulties with time costing are that time costing tends to encourage charging by way of minimum units, and commonly the unit is six minutes. That means that each task undertaken by the solicitor is charged on the basis of six minutes or more.

This means, for example, that if a telephone conversation is undertaken in three minutes, the solicitor charges for six; and if the solicitor does three phone calls, each taking three minutes, the solicitor charges three lots of six minimum units, i.e. 18 minutes. Obviously, the use of minimum units, particularly if applied to each and every separate attendance, can artificially inflate the amount of the hourly rate actually charged by the solicitor because it means that the solicitor is charging for more than the real time taken to do a task.

The other difficulty with time costing from a party/party point of view is that it is very difficult to prove or disprove that the time that was actually taken was taken reasonably without a detailed examination of the time costing records in conjunction with the solicitor's file. This has obvious implications in relation to the cost of assessment and the time that it takes.

The other thing is that there have been substantial judicial reservations expressed in Australia in relation to the use of time costing. The simple arguments are that charging on the basis of time does not necessarily encourage efficiency; rather, that it does the opposite. Also, my particular concern is that charging on the basis of time is not always a good relationship to the value of the task. This is because it is not necessarily related to output or what is actually done in the time, but simply a reference to the time taken. To be fair, I must also add that time costing can act the other way. I have certainly seen instances of very experienced practitioners taking very small amounts of time to undertake tasks so that the amounts that they charge for those tasks are extremely small.

The other issue I would like to address briefly relates to the location factor. As I have said before, the 1994 reforms effectively allowed for differential party/party costs. I think the policy decisions behind that have not been fully explored. As I mentioned earlier, I think there is an enormous range of hourly rates within the New South Wales market. I think it has not been properly addressed whether it is fair or even possible to try to reconcile the top and bottom ends of those markets, particularly within the context of litigation, where there are real concerns that with one party with a high-powered firm of large chargers, the fees become more the issue rather than the substantive issues that originally brought the parties to court.

In relation to counsels hourly rates and daily fees, again my only experience is anecdotal. I would say that towards the high end of the market I particularly see with counsel there does tend to be an increase in fees, and there also has been some development of a practice of charging a daily fee but in addition to that, charging an hourly fee. This, combined with a conditional uplift or success fee, can mean that in some instances senior counsel are charging between \$7,000 and

\$10,000 a day. I would say, though, that these tend to be in extremely complex matters involving significant damages.

In relation to a comment made about unrepresented litigants, I endorse those comments very strongly. I think that it is extremely unfair that litigants who choose to represent themselves are effectively, under the existing case law, not allowed anything for their time. I personally have been involved in a recent matter where the only way the ultimately successful litigants were able to conduct the case was to undertake a great deal of the work themselves and just use the solicitors for effectively advocacy and the finer points of document preparation.

It was not a compulsory third party matter, but I still believe that it was a valid example. The situation was that the principal of a company effectively worked for two years full-time on the matter, only to find that at the end very little of his own time could be claimed back in relation to costs against the other side.

I would also like to endorse the comments that, in terms of assessment, I believe it is a much faster process than taxation. Certainly, it is true that in the Supreme Court there often were delays of up to 18 months or more. Whether assessment is a cheaper system than taxation is very difficult to say. There is the obvious fact that assessors charge for their time, about \$175 an hour, whereas court officials do not. However, that does not mean that their time is free either; it was simply that it was not charged.

The other thing about the assessment procedure is that because it is document driven it can be expensive in the sense that it often takes more time to present detailed written submissions than to actually go along as a party to a face-to-face taxation and put your point of view. However, having said that, I think that a lot of the expense comes about by arguing everything in the alternative. Again, without reasons, precedents or guidelines, it is very difficult to know what an individual assessor will do.

In closing, I would endorse David Bowen's comments. I don't think the assessment procedure has been given a proper chance to achieve its objectives. I certainly believe that, with greater funding to allow both more education of the profession, the cost assessors and the public, and procedural reforms to allow for some form of reasons and proper rights of appeal, the system is more than capable of working. Thank you.

MR STEVE RIX

PUBLIC INTEREST ADVOCACY CENTRE

MR RIX: The Public Interest Advocacy Centre is a community based legal centre that deals in public interest matters, as the name implies. The issues that I want to address come out of the policy background paper that was attached to some documentation that we received from the Committee. Those three things are microeconomic reform and the compulsory third party legal services market, and the true nature (if there is such a thing) of the market for compulsory third party legal services; secondly, national competition policy and the regulation or control of fees for CTP legal services; and, thirdly, and briefly, market information regarding compulsory third party legal services and the lack of plaintiff or consumer power.

Let me start by saying that I agree that the whole question of legal costs is not confined to the question of legal fees. I have made a distinction in a short paper that I have prepared which will be provided to the Committee at a later date. The difference is between volumetric charges and legal fees. And by volumetric charges I mean that the whole question of legal costs is related as much to the quantum of litigation that occurs as it is to the price of any individual component of that litigation service. I would prefer, as a non-lawyer, to describe those things as volumetric issues.

In respect of legal fees, John Quiggin from the University of New England has provided a paper to the Committee which talks about a number of characteristics of perfect markets. It is possible to define the nature of any market - and the compulsory third party legal services market as well - by reference to those conditions, and they are generally well-known in the economics profession and their characteristics in the market are generally agreed upon within the economics profession, though there may be some changes in terminology from one economist to the other, which is hardly surprising.

In respect of the characteristic of perfect information, we have already heard, and each of us would know, that the perfect information does not exist in the legal services market; that is, the consumers do not have information about the services that the legal profession is providing, or the charges that they are to be subject to.

In fact, it would be my belief that generally consumers do not understand much about the law at all, and that is why they go to lawyers. They do not understand jurisdictional issues, the differences between categories of law, and what service a lawyer actually provides in the process.

The way in which the profession and society generally have attempted to overcome that market imperfection is through accreditation of practitioners in the legal services market. I want to raise here the issue of the "second best" problem in economics. I looked this up just to make sure that I recalled exactly what it meant, and I want to quote a definition of the second-best problem:

"It can be shown that if several of the conditions necessary for markets to attain allocative efficiency are not satisfied, then correcting just one of these sources of failure cannot be guaranteed to improve matters. It may make things worse, in the sense of moving the economy away from, rather than in the direction of, allocative efficiency. This is known as the second-best problem. There are no general rules which can be applied to all cases to decide whether correcting some, but not all, sources of market failure will make things better or worse in terms of efficiency criteria. Each case has to be considered in all of its particular circumstances. "

Essentially, what that is telling us from an economics perspective is that if the legal services market does not exhibit the features of a perfect market, and that there are frictions in that market, attempts to reduce those frictions by fixing one problem may in fact create greater problems. Let me outline how this might work.

Consider the accreditation solution to market failure resulting from consumers' lack of knowledge of the service which they are purchasing when price-setting occurs in a market-oriented fashion. The fact is that accreditation itself creates a market barrier constraint on competitive behaviour which may distort the market even where the services are bought and sold competitively.

For example, accreditation should work to ensure that consumers are purchasing services of a satisfactory quality, but it may also work to limit supply of the services, thus driving up price. It can also have a perverse effect - where over-supply results and there is a presumption of homogeneity in the service quality resulting in a demand that all service providers have access to the same basic level of remuneration.

The question of accreditation is not simply one that has been created to resolve market imperfection. There are also ethical considerations that must be borne in mind in respect of accreditation. Therefore, because of those arguments - which are somewhat technical I suppose - I have come to much the same position as Dr Tamblin: that regulation of the market is still an absolutely essential feature of the legal services market, and will be for some time. I basically endorse his position.

I want to go on and talk about national competition policy and the legal services market. The legislative review process will see 1,800 pieces of legislation reviewed by all governments over the next four years. They are being reviewed to remove provisions that restrict competition. One of the Acts to be reviewed is the Legal Professions Act 1987. The government, in its national competition legislative review policy statements, says:

"The determination of whether particular legislation 'restricts competition' and requires review has been left to each jurisdiction to determine. New South Wales has adopted a broad definition of the term 'legislation that restricts competition' consistent with its economic development priorities.

All New South Wales legislation has been examined to determine whether it established market entry barriers or sanctions or requires conduct which has the potential to restrict competitive behaviour in the market. The examination was also aimed at determining whether the costs of such legislation are not known, are unnecessarily high or may not be outweighed by public benefits.

Legislation that restricts competition to an extent where the costs of that restriction are not outweighed by public benefits has been nominated for further review and where necessary reform."

Each piece of legislation listed in the New South Wales government's policy statement on legislative review, it claims, has gone through that process. So there is a presumption that each of those pieces of legislation that is to be reviewed under the national competition policy contains a restriction on competition such that the costs are greater than the benefits.

It is interesting that the public interest test in respect of legislative review under national competition policy does not bear that name in any of the official documentation around national competition policy, neither in the competition principles agreement nor in any of the other documentation. What those documents talk about is the balance between public benefits and public costs.

The National Competition Council has actually produced a document on using the public interest in making assessments under national competition policy of whether the restrictions on competition should be removed or reduced, and it uses the term "public interest" without making reference to the fact that the term occurs in none of the official documentation or legislative instruments around national competition policy.

As I understand how the review process is to work, each agency that has responsibility for the specific pieces of legislation is to prepare a discussion or issues paper, circulate it to interested parties, and then make recommendations to government. The Cabinet Office has an oversight function in New South Wales, and the National Competition Council has the oversight function at the national level. But, bear in mind that while all this is proceeding, the provisions of the Subordinate Legislation Act continue to apply. David has already spoken about the review of various Acts which is to occur later this year.

The review of those Acts is occurring, as I understand it - and I hope someone can correct me on this - in isolation from, because of timing constraints that they have, the reviews which will occur under national competition policy. That will not apply to all pieces of legislation, but it certainly applies to some and, as I understand it, it applies to the Legal Profession Act.

The legislative review process being undertaken starts with the premise that the barriers to entry which exist in the legislation are working such that the public costs outweigh the public benefits and that therefore we should assume that the legislation will be amended to further open up the industry to competition. However, from my experience of what is happening, such conclusions may be premature. The reason is, of course, that an invitation for public input opens up the possibility that government will be convinced of the need to retain the restrictions on competition in the public interest. Clause 1(3) of the competition principles agreement stipulates certain matters that must be considered in the public interest test.

Incidentally, the National Competition Council has stated that it "does not see a requirement for governments to conduct a formal assessment of the public interest in the terms of subclause 1(3) where the net benefit to the community from a reform measure is clear." Further, given that each jurisdiction has the power to list those pieces of legislation for review which it considers appropriate, mutual recognition - which has been achieved in a number of cases - may be jeopardised. In addition, it is interesting that the Motor Accidents Act 1988 is also scheduled for review in 1996-97. It is clear that that Act contains restrictions on entry to a competitive market in that insurers need to be registered.

I have spoken very briefly, but I will leave it there.

HON JOHN HANNAFORD MLC

SHADOW ATTORNEY GENERAL

HON JOHN HANNAFORD: Bryan, my colleagues, ladies and gentlemen. I understand that you are running behind schedule and that you are yet to have your round table discussions, so I will try to confine my remarks to just a few minutes so that you can get on with what I believe to be the main feature of your discussion, that is, on where things are going.

I was asked to look at the Legal Profession Reform Act and what was expected of it, particularly as far as the focus of the Committee's inquiries is concerned, that is motor accidents. The bottom line of the aims of the legislation was to achieve a better informed consumer. That was expected to lead to greater competition and, hopefully, less confrontation between consumer and legal practitioner and less disputation over costs. David Bowen outlined for you some of those changes. Let me look at what we were hoping would come from those particular changes.

We have to go back to the Law Reform Commission's report and the survey that emanated from that report. What we saw was that a lot of the confrontation complaints related to costs. Those complains were arising, in the main, from a lack of adequate, upfront information from the practitioner to the client about costs, how they were to be calculated, and what were the payment expectations.

The other aspect that came out of the report was litigation matters and the clear difference between party/party costs and solicitor/client costs. The client had no real understanding of that and as to why it should occur. The client took the view, "I am a wronged party, I have had to sue, I have got to go into court, I have got to pay costs to get my legal rights, so why don't I get my costs paid when I have had to go through that trauma to enforce my rights?" Most practitioners, from my recollection, would say to a client who was facing litigation, "Expect, if you win, to get about 40 per cent of those costs back." Therefore you have got real problems. If you are after \$10,000 and you have to spend \$10,000 to get it, and you win, you will still be \$6,000 out of pocket. The aim of the reform was to try to address that.

The concept of reasonable costs, therefore, was introduced. The expectation was that the party that loses would have to pay the other side's reasonable costs, that we would get away from the scale in that regard. That meant that parties to litigation would have to expect that the other party would not be subsidising their litigation; that, if you were the loser, you would have to pay more in legal costs. That was something that was recognised upfront. As far as the motor accident industry is concerned, that concept was clearly going to have an impact. If you were a defendant who wanted to litigate, and you lost, you would have to pay the reasonable costs of the other side.

What was also advocated at that time was a greater concentration on other dispute resolution procedures, particularly mediation, to try to avoid the need to go into litigation upfront. Again, that was one of the other issues dealt with at that particular time. Also highlighted within the framework of this legislation relating to resolution of disputes over costs was a different mechanism, with the focus again being on mediation and trying to resolve disputation over costs with a minimum of expense.

As part of the package, not only were we wanting to achieve a better informed consumer but we wanted to remove some of the restrictions on service delivery. As far as this particular inquiry was concerned, one of those restrictions was the ability to negotiate fees and to have what are known as contingency fees. One argument at the time was to have an allowance of a 200 per cent uplift, with others advocating a 100 per cent uplift, on fees that could be negotiated. The legislation resolved a 25 per cent uplift.

Part of the program, however, was to recognise that even though you had a 25 per cent uplift, there was still to be a reasonable fee, and that the 25 per cent had to be reasonably justified within the framework of the agreement. You would not have a reasonable justification in negotiating a 25 per cent uplift in a matter where there was no real risk; that is, if liability was admitted and there was only the issue of how much you obtained, you would have difficulty justifying a 25 per cent uplift.

In fact, one might well argue that you would have been acting fraudulently against your client in negotiating a 25 per cent uplift if there was no risk involved, because the 25 per cent is not an amount that has to be paid by the other party to litigation; the 25 per cent actually comes out of the client's share of the take.

Therefore, I have some difficulties in comprehending the argument that has come from the insurers that the contingency fee has in fact generated an increase in fees payable by the insurers. It should not, because the 25 per cent has come out of the client's share of the take. It could, however, encourage more litigation in that people who might not have previously sued now might be prepared to sue because a solicitor is prepared to take on the matter because he has an expectation of a share of the take at the end of the day. Now, that might have generated more litigation.

The judgment on that is: should people in fact be allowed to exercise their legal rights by going to a solicitor who is prepared to act in the matter (when previously he would not) because he was able to get some more money, or should you leave costs as a weapon available to a defendant to drive a person away from pursuing their legal rights? The intention behind the legislation was to say: if people have legal rights, they should be allowed to exercise those legal rights; they should be able to get legal services to be able to exercise those legal rights; and, instead of having the American style of contingency arrangement, there would be a modified contingency arrangement which would allow people to get to exercise their rights. That was part of the background to the contingency issue.

In terms of how this has gone, yes, I have recognised that some people have argued that there has been an increase in litigation as a consequence of this reform. In one respect, one might well say so be it. If that means that people are able to gain access to their rights, then that is part of the structure of our legal system. If, however, it has generated more costs in some areas, that indicates a need to look at the administration of the system. If you have got a 25 per cent uplift issue to be addressed, should you try to deal with the issue of liability upfront, very early and very quickly?

The 25 per cent uplift may well be an uplift on the costs having regard to that

particular issue, and once the liability question is out of the way then the other becomes a routine matter, but recognising also that part of the 25 per cent uplift was taken into account, particularly in motor vehicle accident matters, because a number of practitioners were acting as bankers in this particular area. I was aware of some legal firms carrying, at varying times, between half a million and a million dollars worth of disbursements, most of which were medical costs in connection with these matters, and a 25 per cent uplift in fees was at least a modicum of remuneration to them for carrying those particular disbursements. Perhaps there is a need, in terms of administration, to look at that particular area.

If there is a decision made to reduce the contingency fee, then you need to look at mechanisms whereby doctors were paid for their services quickly, either through a fund or through the insurers, rather than to have the legal practitioners acting as bankers in this area. That is something that we did look at, but never got very far with. This Committee may be able to address that.

One issue relating to medico-legal costs that we started to work on but never got completed was in fact the cost of medical reports. I saw some instances of the report originally drafted costing \$25, but when it was found that it was needed for legal proceedings and would be handed in for legal proceedings the fee was \$750. When I spoke to people in the medical profession about this, they said, "Well, it is not uncommon for us to have to wait three to five years to get paid, and if we can't get paid then we want reasonable remuneration when we actually do get paid for the work that was done." There may be avenues for dealing with that particular issue by having a more speedy mechanism for payment. That might see a reduction in some of the charges.

So, those were some of the issues that were around at the time and that we looked at. We sought to start to address them through some of the changes in the Legal Profession Reform Act. It is early days, in my view, as to the outcome of some of those changes. Already, it has been identified that there is a need for some fine tuning. The government has fine tuned some of the provisions. I believe that there is more fine tuning that can occur, but no doubt that will come out of reports such as

HON JOHN HANNAFORD MLC
SHADOW ATTORNEY GENERAL

the reports that are being prepared by this Committee. Thank you, Mr Chairman.

ROUND TABLE DISCUSSIONS

VARIOUS PARTICIPANTS

CHAIRMAN: Ladies and gentlemen, as you will have observed, these proceedings are being recorded and reported. They will be transcribed, and the Committee intends to send a copy of the transcript to everyone present today. Miss Mullen ensures me that she has the names and addresses of everybody here, so you can expect some tome of the proceedings in the near future.

I would also like to remind you, before we start the round table proceedings, that these proceedings are not privileged. So, if you desire to defame someone or some thing, I suggest you be quite careful. I am sure some people have some burning questions that they would direct to some of our experts, or it could be that one of the experts has a question that he would ask of another of the experts.

Perhaps, to kick off, might I make the humble suggestion that the Bar might like to ask one of the experts a question. The Bar today is represented by the well-known Queen's Counsel Mr Brian Murray. Brian, is there a question that you would like to proffer?

MR BRIAN MURRAY QC (BAR COUNCIL): Thank you for the notice you gave me, Mr Chairman. My interest in coming today was really to listen, because the Bar obviously has an interest in the subject-matter. We have not formulated any position as such on the various subjects that were discussed. There is one aspect, however, which interests me. That is that there has been discussion on the question of whether the costs assessors are involved in some question of conflict of interests.

The notion that seems to be canvassed in the discussion and in the issues paper is that insurers, as they ultimately foot the bill, should have an interest or some say in the way in which the cost assessment is arrived at. That is a subject of considerable interest.

Speaking on behalf of the Bar as a whole, I can see no problem in the present system of costs assessors, appointed from within the profession, being the adjudicating body on questions of costs that are referred to costs assessors.

We have a system of mediation and arbitration under which members of the profession volunteer to bring their independent focus, in the case of arbitration, to mediation on the assessment of damages. I cannot see any argument that that same independence would not apply when the costs assessors bring their thoughts to the question of costs.

To give the insurer some input into that independent assessment seems to me to be giving one party on the record a say in a matter that really should be a matter for an entirely independent person. I simply offer that for comment.

CHAIRMAN: The discussion is open to anybody now.

MR TOM GOUDKAMP (LAW SOCIETY): I am more of a plaintiff's lawyer than a Law Society person, but it has been my experience that since the reforms and amendments to the Act in 1995 there has been a significant decrease in compulsory third party claims. The experience of my office is that the decrease has been of the order of about 70 to 80 per cent.

Some plaintiff lawyers do advertise, and were criticised for it, but I can tell you that the advertisements that we do are not very productive of new CTP work. The sort of work that you pick up from commercials and advertising is mainly workers compensation or public liability claims, and there are a lot of inquiries about medical negligence cases. But we have very few new CTP cases.

CHAIRMAN: I was interested to hear from, I think, Patrick Fair that in those instances where the District Court fees were in excess of the scale that was being used by the solicitor operating in that court on a CTP matter. Could I ask Susan whether that could be so.

MS SUSAN PATTISON: I am not entirely sure of the context in which he made that statement.

CHAIRMAN: I hope I am not verballing Patrick in his absence, but I think what he was suggesting was that the fees are so high that you have a situation where the court fees are higher than the plaintiff's solicitors and barristers fees. Could that be so?

Ms SUSAN PATTISON: I would have thought it would be unusual in the District Court, mainly because, even though there have been substantial increases in the court fees, and whereas previously a lot of documents could be filed without charge, now everything attracts some kind of charge on the basis of the user-pays principle. I suppose it could be possible in the situation where ultimately a great number of documents were filed but not a great deal of work was done in relation to that. But that would seem to be unusual.

DR ANDREW MORRISON SC (NSW BAR): Mr Chairman, perhaps I could clear that matter up. I think Patrick was in fact talking about arbitrations and his remark was in the context of the fee that is paid to the arbitrators, who are barristers or solicitors, who are paid in the District Court about \$590 per day in the Philadelphia-type arbitrations. The court charges litigants \$360 to have their matter sent to arbitration, that each arbitrator hears several matters per day, and it follows that the court is making more out of the arbitrations than they are in fact paying the arbitrators. It was in that context that I understood Patrick to be talking, and that is a matter which is the subject of negotiation at the moment between the legal professional bodies and the Attorney General in relation to the fees properly payable to arbitrators.

CHAIRMAN: Thank you so much for clarifying that point.

Ms VICKI MULLEN (LAW & JUSTICE COMMITTEE): I would like to open the discussion and invite comments on any of the ideas. If it is shown down the track that legal costs are actually rising under the reforms in the CTP area, the next question, obviously, is what is to be done about that and how you go about addressing that problem, if you could call it a problem. Does anybody have any ideas on some of the reform suggestions contained in the document that was

circulated, or on any other ideas of what could be done either to address the issue of controlling legal fees or on the issue of market information for plaintiffs?

Ms BABETTE SMITH (BAR ASSOCIATION): My job puts me in a position where I get an overview of what is happening in a very generalised sense, but I think it is an accurate one. On the subject of costs and fee agreements and fee disclosures, there is no doubt that the Bar in particular, as a section of the legal profession, has had to go on a very steep learning curve since the implementation of the reform Act of 1994. It was until that time always a referral professional. The whole notion of fee agreements and fee disclosure meant everyone has had to come to grips with some major changes. They have been very conscious of the penalties involved. Most of them have addressed the problems very seriously, but not always very effectively. That was part of the learning curve.

I think that everybody - at least in our section of the profession - does operate in something of a vacuum. The more information that is made available, the more helpful that would be. I cannot, of course, express a view with regard to the solicitors, but I do know that the great majority of the Bar is trying to comply with the Act, but they have had a hell of a lot to learn and most of them have come to grips with it fairly well. But there are some who still flounder because it is foreign to them and it required a substantial cultural change.

MR AUSTIN GABRIEL (INSURANCE COUNCIL OF AUSTRALIA): Tom Goudkamp mentioned about the amendments to the Motor Accidents Act. We do not know that there has been any substantial impact in reducing the number of claims going to the courts, but it is fair to say it is too early to come to that conclusion. In your particular practice, Tom, you may have had a 70 to 80 per cent drop in claims, but as at December 1996 compared with December 1995, there has been a fall of 11 per cent only in the number of claims. This is not by any means substantial. There is a 12-month impairment period and I believe those claims will be coming through very soon. So, at this stage we are looking at a 11 per cent, but when those claims start coming through I don't think we are going to see a substantial drop.

MR TOM GOUDKAMP: It depends on what you mean by a claim. A claim may just be putting in a claim form for some medical expenses or for some loss of income. Those claims may not go anywhere.

MR AUSTIN GABRIEL: No. They all come through.

MR TOM GOUDKAMP: Yes, the claim form has gone through. But you are not suggesting that those cases are being litigated, are you? Claimants are advised to put in claim forms, and they have to do that within six months of the date of the accident, but whether the claims go any further than just the insurance company paying some medical expenses is another matter.

MR AUSTIN GABRIEL: All things being equal, that would be the same situation as it was before 1995.

MR TOM GOUDKAMP: No. Before 1995 just about anyone who suffered an injury was entitled to damages for non-economic loss. That has changed the whole landscape.

MR AUSTIN GABRIEL: I don't think that that in itself will reduce the claim numbers.

MR TOM GOUDKAMP: It will certainly reduce significantly the claims where lawyers are involved and where legal expenses are going to be paid. I have no doubt about that.

MR AUSTIN GABRIEL: I think the lawyers have been telling people to come back after 12 months and then the claim will be put through.

MR TOM GOUDKAMP: That is true.

MR AUSTIN GABRIEL: Earlier this morning there was talk about there being no real hard or real information on the legal cost of claims. Perhaps I can go some way

towards dispelling the issue of anecdotal evidence. We did a random survey of files pre- and post- the 1 July 1994 amendments, being very particular on the methodology adopted to ensure that it is a random survey, not selective in any way or form.

We are looking at 500 files; at this stage we have completed about 126 files. We have prepared this for today's meeting. These are, I must emphasise, partial results from two insurers and we have got another 300 files to look at.

Minor claims, with no liability, no contributory negligence, no economic issues were involved in any disputes, et cetera, these are District Court one-day hearings: before 1 July 1994 the average plaintiff's legal costs were \$3,617; after 1 July 1994, \$10,150. Minor claims where economic loss was an issue: the average was \$7,334 before the 1994 amendments, compared with \$9,351. Arbitrations, one-day hearings, minor claims, no dispute on liability, contributory negligence or economic loss, average plaintiff's legal costs before 1/7/94 were \$4,736, and after 1/7/94 it was \$8,369. And for minor claims where economic loss was in dispute, the average was \$6,550 before 1/7/94, and \$8,782 after.

We are continuing with the sample, but these are clear instances where there is a distinct movement upwards, and all these claims have had the same consistency in that the medical, legal, et cetera, were there before and after. Do you want any further evidence of the impact that the reform Act is having on compulsory third party claims costs?

CHAIRMAN: Would you dare an attribution? What do you think that is due to?

MR AUSTIN GABRIEL: It is very attractive to litigate because of the high fees that are payable.

CHAIRMAN: But the fees seem to follow the attraction.

MR AUSTIN GABRIEL: I would say so, Mr Chairman.

HON HELEN SHAM-HO: I would like to come back to the lack of information about fees. I am a lawyer myself and I have heard so much about legal costs. How does a client or plaintiff go to any solicitor's office or an insurance company to find out whether the person should litigate or not, or how much it will cost to litigate? This is a myth, I think, somehow. Can anybody explain the whole process?

MR TOM GOUDKAMP: If I could answer that. The first thing is that when people come to see you, you don't think about litigation. You think about preparing a claim. There are in the District Court and Supreme Court now mechanisms in place which discourage litigation, particularly Practice Note 33 in the District Court Act, which requires a case to be almost ready for hearing before you can even litigate. Gone are the days when you used to litigate first and perhaps ask questions later or perhaps answer questions later.

In relation to advising clients, the general advice is that the arrangement will be subject to a fee agreement, but the costs follow the event. So, if the claim is successful, then the insurance company will have to pay the bulk of the fees. Most plaintiff solicitors that I know will carry all the disbursements and will not require any payment of legal fees until the successful conclusion of the case. And, if the case is lost, well then that is just bad luck for the lawyer.

HON HELEN SHAM-HO: I still have not got an answer on how to tell your client how much it is going to cost.

MR TOM GOUDKAMP: Well, you don't know how much it is going to cost, because you do not know whether you will get an insurance company that is going to be difficult. Some insurance companies are extraordinarily difficult and won't settle the most obvious cases, whereas other insurance companies are far more willing to come to the table and talk about early resolution of cases. So it is impossible to say at the outset.

MR BIM RAMRAKHA (GIO SOLICITOR): I would like to relate to Ms Pattison's comments that the fees have increased in the medical arena and also in counsel's fees. I see the bills of assessment costs that come across my desk. In the old days

if a solicitor went and talked to six of his client's doctors and only one supported him, he only got the costs of qualifying that one doctor. Now, it seems to me, there is no limit to the number of medical specialties you can have or to the number of doctors you can qualify.

It also seems to me, from those bills, that there is duplication in the sense that solicitors in this arena who are in the main accredited specialists are using barristers to draw up things like statements of claims and getting advice on evidence and advice on quantum. I blame the assessors because they have not had the benefit of having done taxation. If they had done taxation, they would be able to discern what was proper and reasonable. Those are some factors that I find have increased the costs enormously.

DR ANDREW MORRISON SC: If I could respond to that. The Rules of Court, both Supreme and District Court, provide that ordinarily only one medical specialist in each area can be qualified, except where there is some special reason that that ought to be allowed to be recovered upon assessment of damages. So it is expressly dealt with in the rules. There are substantial impediments in the way of parties who would seek to qualify a number of medical practitioners.

I am not sure that that is a practical problem, at least in everyday experience. There are occasional cases where there is a major issue and an unusual speciality and where additional practitioners have to be qualified, and there is provision for discretion in that area. But, otherwise, one specialist in each area is all that a party is likely to call, or to qualify, or to obtain costs for.

MR BIM RAMRAKHA: One assumes that the assessors know of those rules, Mr Chairman, but I am not sure that all of them are aware of that situation.

CHAIRMAN: I wonder if I might direct a question to Steve Mark. In an ideal world where your commission had the funding, would your commission see itself as a super-duper tax assessor?

MR MARK: The obvious comment I could make is that were there to be an ideal world there would be sufficient funding. I do not think that there is any dispute, from what I have heard this morning, about the fact that the old taxation system did not deliver to the community, to the profession or to anybody value for money.

The move to a new assessment system, I think, was based on very sound principles. It was based on the belief that we move from complexity to simplicity, that we move from strict regulated costs to a bit more flexibility about what is reasonable, and those two things are to be applauded.

The concerns that have been expressed have all been around whether or not it is actually working, whether or not people have access to information about what the decisions are, and whether or not the cost of the scheme is excessive. If any organisation, be it mine or any other, is going to get involved in this business, it seems to me that before that were to happen we would have to have answers to at least some of those questions.

To some extent, I would agree with several of the speakers who said this morning that before we can actually decide where we go to solve the problem, we have to be able to better define the problem. I agree with that. I think, however, that there has been a lot of avoidance of the fact that the problem has been fairly well defined by the community and by the various interests that have been represented in this room this morning. I think the only thing we lack is a commonality of views about what to do about the problem.

I really would like to see a bit more energy put into coming up with some solutions that are actually based on the needs of all the parties here. We have had a lot of views expressed, and, quite frankly, it does not seem that there is a great deal of divergence, except in certain areas. In particular, in the area of cost assessment, there seems to be quite a bit of convergence of views. One shared view is that we do not have enough information about what the costs actually are, and I think that is something that must be addressed. I have made some suggestions about how it might be addressed, and I could make other suggestions but I won't do so now.

Another area of general agreement - although not all parties addressed it - was that the transparency of the assessment system itself really needs to be addressed. We do not have enough information about what assessment is really all about. The third issue, which was really not dealt with by many speakers, except the previous Attorney General and now Opposition spokesperson, is the issue of mediation.

It seems to me that mediation in all these areas - although it is a term that seems to be bandied around like a tennis ball - is an incredibly important issue for us to direct energy towards in an effort to try to work out the effect of, for example, non-litigious resolution of these disputes. I think that there is a great deal of room for lawyers to play a part in that. This is not to say that they would be cut out of the system - nor should they be. So that is a long and rambling answer to avoid answering your question.

HON JOHN RYAN: Mr Chairman, I was wanting to put a question to Austin but perhaps also to Tom from the Law Society about Mr Hannaford's floated suggestion about confining the uplift factor to contingency costs, to just the question of determining liability, and after that proceeding, I guess, on a more routine basis. Would that represent some mitigation or reducing of costs of litigation in motor accident matters?

MR AUSTIN GABRIEL: Mr Chairman, we have not argued that the 25 per cent uplift has resulted in insurers' legal costs going up, but it has definitely encouraged more litigation. We have had instances where there was a clear-cut liability accepted by the insurer and the plaintiff's solicitor has even charged his client a 25 per cent uplift. We took the matter up with the ethics committee. But the insurers are doing everything to admit liability at the earliest opportunity, but somehow or another they are not having much success; people want to litigate their cases.

MR TOM GOUDKAMP: I think Mr Hannaford made a very good point about liability. What Austin said was complete and arrant nonsense about insurance companies making early admissions of liability, and he knows that. The point is that there are a lot of cases where liability is so clear-cut but you cannot get an admission out of an

insurance company until the six-month period has elapsed. That causes a lot of pressures on the injured person, particularly in relation to infants, who cannot lose if they are under a certain age; they only have to prove a scintilla of primary negligence by the driver of a car. A six-month delay in admitting liability can cause enormous strain on a family.

The issue of liability in a lot of cases can be determined expeditiously and separately from the question of damages. You cannot assess damages until you know what the long-term prognosis for the injuries is going to be, but I would have thought it was in everybody's interests to determine liability quickly, while the facts of the accident are fresh in everybody's mind and before the road conditions may change, or whatever. This suggestion has been raised many times, but nothing seems to be done about it. Every now and again you might get an expedited hearing on liability in a major catastrophic injury case in the Supreme Court, but these days expedition means probably a delay of a year or two. So I think that is something that should be addressed.

And, once liability has been determined - with some finding of contributory negligence perhaps - then those cases normally settle, and the legal costs and the disbursements and so on can be drastically reduced. So that is a way of reducing the overall costs of the scheme.

HON JAN BURNSWOODS: Mr Chairman, I want to ask Austin a question on the figures that he gave. Austin, you ran through them fairly quickly, but, if I have got you correctly, in the first set that you gave there was something like a trebling of the costs, and in the second set there was something like a 25 per cent increase. I was wondering if you could elucidate any reasons for the variations in those increases.

MR AUSTIN GABRIEL: What I did say was that minor claims where no liability, contributory negligence or economic loss were issues, the average of the legal costs was \$3,617 before and \$10,150 after. Then we come down to minor claims with economic loss, liability, and contributory negligence being issues, and the average there was \$7,334 before and \$9,351 after.

HON JAN BURNSWOODS: But what I am getting at is that of those two examples, in the first one there was a trebling, and in the second one there was an increase of about 25 per cent. That is a massive variation in the increases, and I wondered if you could tell us something about the reasons for that variation.

MR AUSTIN GABRIEL: I have not seen the files myself. We have had the figures extracted by the people doing the survey. I do not have them ready for today. I shall certainly get that information and pass on to you the reasons for that change. Perhaps Isobel could add something to that.

MS ISOBEL HOLTHOUSE (NRMA INSURANCE): I have been involved in constructing this costs survey across five insurers, and I think I might be able to help with the answer to that. At this stage the survey is only half complete, and we are still waiting for figures from three of the other insurers.

I think that it is explicable by having a range. Austin took averages. The range depended very much on the verdicts. I suppose I could tell you about the damages. Let me take the District Court hearing, one-day matter, minor claims, no liability, no contributory negligence or economic loss issues. We have dealt so far with 14 matters before 1 July 1994 and only seven after, and the damages ranged from \$4,145 to \$28,000 beforehand compared with \$11,300 to \$48,000 after. The plaintiff's legal costs ranged from \$1,00 to \$8,500 before, compared with a range of \$8,700 to \$13,000 after.

So, the bigger the sample, the more impact it is going to have on those averages. You only need one expensive matter to throw the figures out. So I think we have to wait for the final results to get a better picture. There were a few obviously very substantial matters included in some of those figures.

MR TOM GOUDKAMP: But also, with those cases, it is not just a question of economic loss and so on. There are also causation issues which can protract cases. I wonder, if the cases were so simple, why they even went to court. If it was economic loss and liability, a causation, and also whether or not a case is going to get over the threshold, that can take up some time and be a matter of fairly major dispute.

MR DAVID BOWEN: Also it is not unexpected that the amount of costs would vary with the amount of the final award because, in the criteria in the legislation for the assessor, the outcome of the matter is a relevant consideration in determination of what the reasonable costs are in a party/party matter.

MR STEVE MARK: We are also aware of a number of practitioners in this area - and I am not suggesting that this is necessarily a bad thing; this is just the way things seem to be developing - when they are disclosing estimates of their costs, they link their estimates of costs directly with what they suspect the outcome will be. Now, that can be as dangerous as saying, "How long is a piece of string?" But, if they think that a particular injury might attract \$300,000 worth of damages, they say what their costs will be directly relevant to that amount, and they would say it might be \$30,000 - which is a complete guess - whereas if it was \$100,000 they might say it was \$15,000 - and again those are not correct figures. But they directly estimate their costs according to the amount that they think the plaintiff will achieve.

HON JAN BURNSWOODS: So there is a de facto contingency on cost?

MR STEVE MARK: There are two arguments that I have heard from the legal profession on this particular point. One is that it is fairly obvious that the more complicated a matter is, the more likely the larger the damages. That is not always the case but, for example, of you have a brain injury case it is going to be more complicated than the case of someone who has got a broken leg, and the medical advice will be different, the case is going to take more work, and there will be more carriage of disbursements, et cetera. So they think that there is a direct relationship.

The other argument is the interest in the work that they put into a case. I don't want to be too negative about the legal profession on this point, but if it is going to be the likelihood of a big outcome they are more likely to put more resources into that case than they would if the likelihood was a small outcome. I think that is directly relative to the connection between the two.

HON JOHN RYAN: Mr Chairman, I think the Insurance Council is to be commended for at least starting the research in that area. I don't know whether to ask this as a question, and probably put the Law Society on the spot, or simply make a comment. It seems to me that it is going to be a very powerful tool in terms of assisting the community and the Committee if the Law Society was going to do similar research. Otherwise, I think the research is going to be a bit one-sided. If what we have had reported to us today is to be indicative, it would be a very powerful piece of research to be left in the forum. I mean, is the Law Society planning to do something similar? What might even happen is that cooperative level of research done by both sides.

MR TOM GOUDKAMP: That is happening as we speak. Professor Wright is conducting such a survey at the moment.

CHAIRMAN: Professor Wright, did you want to say something on that?

PROFESSOR TED WRIGHT (JUSTICE RESEARCH CENTRE): There are surveys, starting today. It will, I hope, answer many of the empirical questions that have been adverted to today - questions about the extent to which contingent uplift fees are being used; gaps closing or not closing between party/party costs and solicitor/client costs; the extent to which legal professional costs are contributing to costs which may be rising or not; the medical costs component; and so on; including the issue of whether or not advertising of these arrangements is affecting the decisions of people on whether or not to make a claim.

Isobel Holthouse has already explained. If I might say with respect to the valiant efforts of the ICA, we just cannot get too excited about those numbers now, because, with the number of files on which those figures are based, it is only

hazarding a guess that they are of statistical significance. Now, if they hold up, as it were, it is a bit like starting the eve of election night and calling the election result. We will just see. My plea is to let us see about all these issues. Of course, we are counting very heavily on a strong cooperative response from the plaintiff side of the profession, and if we get it we will be in good shape.

Mr Chairman, can I pick up something that Steve Mark mentioned about mediation? On earlier occasions I have said that the Justice Research Centre is designing a study of civil process reforms in the County Court of Victoria. The County Court of Victoria has a compulsory mediation mechanism, whereas the New South Wales District Court is a "voluntary" arbitration jurisdiction. But the point about that research, when we get it off the ground, is that it will assess systematically the impact, among other things, of alternative dispute resolution regimes on costs of resolving claims.

I know that Steve is a very strong proponent of mediation. All I want to say is that it is obvious that settlements are cheaper than adjudication, but the relative comparisons are much wider than that. As to the issue of whether not assisted forms of dispute resolution are cheaper also than the current regime of negotiations which simply occur as a matter of course between litigants, American research is now coming down on the side of showing that the wonder tool of mediation actually has no impact on reducing either costs or delays. So the research still needs to be done.

THE HON HELEN SHAM-HO: When is this research going to be completed?

PROFESSOR TED WRIGHT: The study of assisted dispute resolution is just in the design stage now, so we are a year and a half off the results. The costs research, which we have all been waiting for most patiently, I hope will have results by October/November.

MR TOM GOUDKAMP: It is correct to say that you are looking at the defendant side as well?

PROFESSOR TED WRIGHT: Yes. In fact, the method involved looking at defendant costs and plaintiff costs in the same matters.

MR TOM GOUDKAMP: So you would be looking at disbursements, you would be looking, on the insurance side, at the cost of surveillance, perhaps?

PROFESSOR TED WRIGHT: Yes.

MR TOM GOUDKAMP: Investigators and so on?

PROFESSOR TED WRIGHT: Yes - experts, court fees, and so on.

MR TOM GOUDKAMP: The level of disbursements should not be under-estimated because, particularly in larger cases, an economic loss assessment can cost \$10,000, and an occupational therapist can cost \$5,000, an architect's report on home modification, \$5,000 or \$6,000. I mean, disbursements are extraordinary high, and they are carried by the plaintiff's solicitors in most cases.

HON JOHN RYAN: I might be a bit naive, but from my perspective - and I can't speak on behalf of the Committee - it is a bit like watching an interactive version of Star Wars. I have not actually been able to work out, with each side working out their research on either side, which side The Force is on. We are in a difficult position of watching the competitive level of research, or the competitive research projects. I am just wondering whether there was not an opportunity for some level of cooperation between the parties to give us something that might be a little bit less combative.

PROFESSOR TED WRIGHT: Can I just say that I am delighted by this warm embrace from the Law Society about someone other than the ICA doing this research. We are on record, first of all, as being an independent public research organisation, but I should also say that in addition to having the cooperation of the Law Society we have the cooperation of the insurers and indeed a substantial financial contribution from the NRMA for the costs of the research. I hope we are a neutral honest researcher.

Ms ISOBEL HOLTHOUSE: I am a bit concerned that we are looking at one study on a one-off basis. It would be very much more useful, for a long-term view of what impact legal costs have, whether they are plaintiffs or defendants' costs of expert witnesses and so forth, if there were some central body with which data could be lodged, having been collected, and that there be a monitoring of it carried out. This ties in very much with the shortcomings of the assessment scheme, in which there is very little information available either to the parties who are having a bill assessed or to anybody else who has an interest in seeing what impact costs have.

The Justice Research Centre study will be a one-off study. I accept everything that Professor Wright says. We have to start somewhere, and that is where we have started - looking at the costs that plaintiffs pay. I really believe that the Committee ought to be thinking very seriously about putting a sort of central data bank in place, if necessary, where all costs results can be lodged, so that from that conclusions can be drawn as to whether they are going up or down or whatever.

So I really urge the Committee to consider putting in place some sort of central authority, at least for collecting the information if not for enforcing particular areas of the legislation.

CHAIRMAN: I think the Law Society is in a specially advantageous position to do that. I am a bit prejudiced, but I think the Society could well and truly handle that and could examine counsels' fees as well. We have enough people up there - over 200 now - and there must be a few people in a room where such a topic of survey could be undertaken.

MR TOM GOUDKAMP: Yes.

Ms ISOBEL HOLTHOUSE: With all due respect, Mr Chairman, I am a member of that Society also. I must say it would be a bit like getting into bed with the enemy, but, anyway, whatever it takes!

CHAIRMAN: We have a representative of the Injured Persons Association.

MS JUDITH MARTY (INJURED PERSONS ASSOCIATION): I am The Force, Mr Ryan; I think I am the only consumer representative here. I guess my concern is that it would be truly amazing to the people in New South Wales who pay their CTP premiums each year in good faith to see that, really, this is something on which the relevant bodies cannot get their act together. At the risk of spawning yet another study, in answer to the comments of the Hon Helen Sham-Ho, what we are doing is going out to the people who have been through the experience - because we have just received funding to do a study - and basically asking those people what they needed to know and what they should have known, and how could they have better accessed the information they needed.

There are bodies around that should be providing help lines - and I don't mean just the sort of help line that is available at the moment from the insurance companies, the NRMA and the Law Society, which basically are directed to one thing. We need access to comprehensive help for those who are injured. One of the things we are hoping will come out of the study that we are undertaking, and which should be finished in the next six to eight months, are the real issues that need to be addressed.

I mean, with the billion-odd dollars that CTP is worth in New South Wales every year, it seems to us that there ought to be a better dissemination of those funds to injured people. We are basically getting along on a few thousand dollars a year to try to provide information to people, and we cannot provide them with all the information that they need. I wish the Committee luck. I think to have more transparency in accountability upfront is of the absolute essence.

CHAIRMAN: I think that is an ideal note on which to conclude these proceedings. I thank everybody for coming along today and giving us the benefit of their advice on this extremely important matter.

I want to thank John Tamblyn. Oft times at meetings of organisation it is said, "This man or this woman travelled further than anybody else." John Tamblyn came up today from Canberra specifically to be with us today, and I thank John very much for that.

I also invite and indeed encourage anybody here who wants to make a supplementary submission to the Committee on this issue to do so. I imagine the Bar, the Law Society and the ICA would want to do so. You are very welcome to do so. The closing date for such submissions is 30 June this year. Thank you very much.

DISCUSSIONS CONCLUDED

APPENDIX 1

SEMINAR PARTICIPANTS

SPEAKERS

Mr David Bowen	<i>Assistant Director, Legislation and Policy Attorney General's Department</i>
Mr Patrick Fair	<i>President, Law Society of New South Wales</i>
Hon John Hannaford MLC	<i>Leader of the Opposition, Shadow Attorney General New South Wales Legislative Council</i>
Mr Stephen Mark	<i>Legal Services Commissioner</i>
Ms Susan Pattison	<i>Costs Consultant, Pattison Hardman Pty Limited</i>
Mr Stephen Rix	<i>Public Interest Advocacy Centre</i>
Mr John Tamblyn	<i>Australian Competition and Consumer Commission</i>

PARTICIPANTS

Mr Martin Bell (Martin Bell & Associates)
Mr David Buckley (CIC)
Ms Sue Clark (Mutual Insurance (Australia) Limited)
Mr Salome David (NZI)
Mr Peter Forbes-Smith (Hunt & Hunt, Solicitors)
Ms Andrea Forsyth (Mercantile Mutual Insurance (australia) Limited)
Mr Austin Gabriel (Insurance Council of Australia, MAISC)
Mr Tom Goudkamp (Law Society of New South Wales)
Ms Narreda Grimley (FAI)
Mr Warren Harvey (Crestani Harvey, Solicitors)
Ms Catherine Henry (Australian Plaintiff Lawyers Association)
Ms Isobel Holthouse (NRMA Insurance)
Mr Victor Kelly (Abbott Tout, Solicitors)

Mr Peter Kennedy-Smith (Barrister)
Mr Bernard Lagan (Sydney Morning Herald)
Mr Geoff Lazar (Royal & Sun Alliance)
Ms Judith Marty (Injured Persons Association)
Mr Peter McCarthy (FAI)
Mr Peter McDonnell (NRMA Insurance)
Mr Denis Mockler (Stewart, Cuddy & Mockler, Solicitors)
Mr John Morgan (Allen Allen & Hemsley, Solicitors)
Dr Andrew Morrison (Senior Counsel)
Mr Brian Murray (Queen's Counsel)
Ms Robyn Norman (MMI)
Mr Doug Pearce (NRMA Insurance)
Ms Estelle Pearson (Trowbridge Consulting)
Mr David Piper (NRMA Insurance)
Ms Felicity Purdy (Australian Quadriplegic Association)
Mr Bim Ramrakha (GIO)
Ms Chris Seidel (Brain Injury Association)
Ms Babette Smith (NSW Bar Association)
Dr Tania Sourdin (Australian Law Reform Commission)
Ms Lisa Stewart (Zurich Australian Insurance Group)
Mr Sandy Templeton (Injured Persons Association)
Mr Tim Tunbridge (Office of the Protective Commissioner, NSW)
Mr Peter Utiger (Hunt & Hunt, Solicitors)
Ms Denise Ward (Brain Injury Association)
Professor Ted Wright (Justice Research Centre)

APPENDIX 2

BACKGROUND INFORMATION

- 1 PROGRAM AND 'POLICY ISSUES/REFORM IDEAS' DOCUMENT, AS COMPILED BY THE COMMITTEE SECRETARIAT, MARCH 1997
- 2 SECOND READING SPEECH TO THE LEGAL PROFESSION REFORM BILL 1993, THE HON J HANNAFORD, ATTORNEY GENERAL, NSWPD, 16/9/93, PP 3269-3280
- 3 *LEGAL PROFESSION ACT 1987 (NSW), PART 11 (LEGAL FEES AND OTHER COSTS)*
- 4 *LEGAL PROFESSION AMENDMENT ACT 1996 (NSW), SCHEDULE 2 (AMENDMENTS RELATING TO LEGAL FEES AND OTHER COSTS)*
- 5 *LEGAL PROFESSION ACT 1987 - REGULATION (REGULATING TO COSTS IN WORKERS COMPENSATION MATTERS), AS COMMENCED 1 OCTOBER 1996 (NSW GOVERNMENT GAZETTE 107, 20/9/96, PP 6417-6424)*
- 6 PROFESSOR JOHN QUIGGAN, PROFESSOR OF ECONOMICS, JAMES COOK UNIVERSITY, *SUBMISSION TO THE STANDING COMMITTEE ON LAW AND JUSTICE, 'THE HILMER PROCESS AND REGULATION OF THE LEGAL PROFESSION'*, 3 APRIL 1997