Standing Committee on Parliamentary Privilege and Ethics

Parliamentary privilege and seizure of documents by ICAC No. 2

Ordered to be printed 31 March 2004

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Council. Standing Committee on Parliamentary Privilege and Ethics
Report on parliamentary privilege and the seizure of documents by ICAC No. 2 / Legislative Council, Standing Committee on Parliamentary Privilege and Ethics. [Sydney, N.S.W.] : The Committee, 2004 – [viii] p. 60; 30 cm. (Report 28, March 2003 / Standing Committee on Parliamentary Privilege and Ethics)

Chair: Peter Primrose

"Ordered to be printed 31 March 2004".

ISBN 0 9752118 0 3

1. Legislative bodies—Privileges and immunities
2. New South Wales. Independent Commission Against Corruption.
I. Title
II. Primrose, Peter.
III. Series: New South Wales. Parliament. Legislative Council. Standing Committee on Parliamentary Privilege and Ethics. Report ; 28.

328.347 (DDC21)

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Terms of Reference

1. That the documents from the Independent Commission Against Corruption and Mr Breen relating to the disputed claim of privilege on certain documents seized from the parliamentary office of Mr Breen, tabled by the President on 24 February 2004, be referred to the Privileges Committee for inquiry and report.

2. That for the purposes of its inquiry the Committee have access to the privileged material in the custody of the Clerk.

3. That the Committee recommend to the House which of the disputed material falls within the scope of proceedings in Parliament, according to the resolution of the House of 4 December 2003.

These terms of reference were referred to the Committee by the Hon. Michael Egan, MLC

(*Minutes of the Proceedings of the Legislative Council*, No. 40, Wednesday 25 February 2004, item 10)

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Chair's Foreword

I am pleased to present the report of the Committee's second inquiry into parliamentary privilege and the seizure of documents by the ICAC.

This report should be read in the context of the Committee's December 2003 report entitled *Parliamentary privilege and seizure of documents by ICAC* (Report 25). That report addresses important questions concerning the powers of investigative bodies such as the ICAC to seize documents under search warrant in the light of the rights and immunities conferred by parliamentary privilege, and in particular Article 9 of the *Bill of Rights 1689*. The Committee's report found that privileged documents are immune from seizure and recommended procedures to be adopted for resolution of the matter at hand. Following the tabling of that report, the Legislative Council adopted procedures for the determination of which of the documents seized by ICAC fall within the scope of proceedings in Parliament. The documents were consequently examined and dealt with in accordance with the resolution of the House. This report deals with a dispute which has arisen as to the status of a small number of those documents. The Committee's findings and recommendations appear on pages 10 and 11.

I would like to thank my fellow Committee members for their constructive participation and contributions during the inquiry. I would also like to thank the Clerk of the Parliaments, Mr John Evans, and the Deputy Clerk and Clerk to the Committee, Ms Lynn Lovelock, for their invaluable advice and expertise during the inquiry, and direction of the research and drafting of the report. I would also like to thank the Committee secretariat, Mr David Blunt, Ms Velia Mignacca and Ms Janet Williams for their efforts.

The Hon Peter Primrose MLC
Chair

Summary of Recommendations

Finding 1 *Page 10*

That the documents contained in the suspension file, together with the 13 letters from computer files were retained by Mr Breen for purposes of or incidental to the transacting of parliamentary business.

Finding 2 *Page 10*

That having been retained for purposes of or incidental to the transacting of parliamentary business the documents fall within the scope of 'proceedings in Parliament" for the purposes of Article 9.

Recommendation *Page 11*

That the House uphold the claim of privilege by Mr Breen in relation to the suspension file and 13 letters from computer files disputed by the ICAC.

1. Background to the inquiry

1.1 On 3 October 2003 officers of the Independent Commission Against Corruption (ICAC) executed a search warrant at the Parliament House office of the Hon Peter Breen MLC. During the execution of the search warrant, the officers seized a quantity of documents, as well as two computer hard drives, and Mr Breen's laptop computer.

1.2 Issues arising from the execution of the search warrant, and the manner in which the seized material was subsequently handled, have been the subject of previous inquiry by this committee.[1] During the course of that inquiry the committee considered the nature and purpose of parliamentary privilege, and in particular the application of Article 9 of the Bill of Rights, and the nature of contempt of parliament. The committee also examined the question of appropriate protocols and procedures relating to the execution of search warrants and the protection of documents subject to parliamentary privilege.

1.3 The committee recommended the adoption of procedures to be followed in relation to determining whether documents seized by the ICAC were, in fact, subject to parliamentary privilege and thereby immune from seizure.[2] It also recommended procedures for the resolution of disputes concerning the status of documents for which privilege had been claimed.

1.4 The committee reported its findings and recommendations to the House on 3 December 2003. The following day the House adopted the committee's findings, although a subsequent amendment made later that day meant that any documents deemed to be subject to parliamentary privilege, rather than being returned immediately to the member concerned, were to be retained by the Clerk until the House otherwise decides, with a copy only being made available to the member.[3]

1.5 The resolution of the House required the ICAC to return the seized material to the President by 5.00 pm on Friday 5 December 2003, to be kept in the possession of the Clerk. The documents were to be examined in the joint presence of Mr Breen, the Clerk and a representative from the ICAC by 5.00 pm on Friday 19 December 2003, with the member and Clerk to identify material falling within the scope of proceedings in parliament. A list of material considered to be within the scope of proceedings in parliament was to be then provided to both Mr Breen and the ICAC, with any material identified as not being subject to privilege being made immediately available to the ICAC.

1.6 The ICAC was given a reasonable time to dispute the claim of privilege on any material, by informing the President of such in writing. In the event of a dispute the President was to immediately inform Mr Breen, and to inform the House at its next sitting. Under the terms of the resolution it was open to Mr Breen to provide written reasons in support of his claim.

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1 Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No. 25, dated December 2003.

2 Ibid., p. 44.

3 Legislative Council Minutes of Proceedings No. 38, 4 December 2003, item 20, pp 495-497; item 26, p. 503. The full text of the resolution is reproduced as Appendix 1

1.7 According to the resolution of the House of 4 December 2004, the seized material was returned to the President on 5 December 2003. The material was subsequently examined by Mr Breen, the Clerk and a representative of the ICAC. On 17 December 2003 all material not considered to be privileged was returned to the ICAC. On 19 January 2004 two lists of privileged documents prepared by the Clerk were provided to Mr Breen and the ICAC.

1.8 On 20 January 2004, the Commissioner of the ICAC wrote to the President, disputing the claim of privilege on certain documents (Appendix 2). Mr Breen responded on 10 February 2004, providing written reasons in support of his claim (Appendix 3). Under the resolution of the House of 4 December 2003, these letters were tabled in the House at its next sitting on 24 February 2004,[4] and the matter was set down for consideration as a matter of privilege the following day.

1.9 On Wednesday 25 February 2004, when the matter was called on, the Leader of the Government referred the disputed material to this committee, for recommendation as to which of the disputed material falls within the scope of proceedings in parliament, according to the resolution of the House of 4 December 2003.[5]

2. Dispute concerning status of documents

2.1 In their correspondence to the President on 20 January 2004 the ICAC dispute the claim of privilege in relation to a suspension file containing various correspondence regarding a motor vehicle accident case from 1998, and to certain other correspondence regarding the same case held electronically. The Commission argues that these documents were created as a result of Mr Breen acting as a private solicitor in the matter, and not in the course of his role as a member of Parliament. The Commission maintains "[t]hey were not created for the purpose of any "proceedings in Parliament" but rather for the purposes connected with litigation".[6]

2.2 On 10 February 2004 Mr Breen responded in writing to the President, confirming his claim for privilege in respect of the disputed documents. Mr Breen confirms that the documents do relate to a motor vehicle accident which occurred prior to his election to Parliament, and that he had acted and had continued to act as legal counsel for one of the litigants both before and following his election to Parliament. However, in his submission he maintains that he retained the file and documents, and continued to do legal work following his election "for the purpose of informing myself and in anticipation of debate in the House regarding the Motor Accidents Compensation Bill 1999 and amendments".[7]

2.3 Mr Breen also argues that while the debate on the Motor Accidents Compensation Bill 1999 occurred early in the case, he nonetheless maintained a watching brief on the implementation of the legislation as a member of the Standing Committee on Law and

4 Ibid., No.39, 24 February 2004, item 10, p. 523.

5 Ibid., No.40, 25 February 2004, item 10, p. 544.

6 Correspondence from Mr John Pritchard, Solicitor to the Commission to the President, dated 20 January 2004.

7 Submission from Mr Breen to the President, dated 10 February 2004, p. 1.

Justice, which was given an ongoing role of oversighting the Motor Accident Authority. In his submission he details various debates in the House and hearings of the Committee where he had used the case, as well as documents arising from the case to inform himself in relation to the operation of the Motor Accident Authority. In particular he states:

> Privilege attaches to the file, in my opinion, both in the purpose for which the file was intended to be used when I brought it into the Parliament and in the way I actually used it. The dominant purpose was always to assist me to articulate the issues involved when motor vehicle accidents are litigated in the courts. I was opposed to litigation as a way of resolving motor vehicle accident claims and the … file reminded me of the problems and directed my thinking towards the need for a statutory authority.[8]

2.4 The submission also details other debates in relation to legislation before the House,[9] as well as a question put to the Attorney General in October 2003, where the information in the file was used to inform his speech.[10]

2.5 At its meeting on 5 March 2004, the committee resolved to invite further submissions from both the ICAC and Mr Breen in relation to the committee's terms of reference. These submissions were received by the committee on 8 March (Appendix 4) and 10 March 2004 (Appendix 5), respectively.

2.6 The ICAC maintains that the material in dispute was collected for and used for civil litigation. In the Commission's opinion, the primary purpose for which the material was collected by and provided to Mr Breen was for the purposes connected with such litigation. They argue that the fact that Mr Breen may have used some of the knowledge he gained as a result of acting in the matter to better inform himself in parliamentary debates does not qualify the actual file and documents as "proceeding in parliament" for the purposes of Article 9. They conclude that the question whether any part of such material is subsequently used in proceedings in Parliament is immaterial, citing Erskine May's Parliamentary Practice (21st edition) at pp 132 –133 and *R v Grassby* (1992) 55 A Crim R 419.

2.7 In his submission to this committee, Mr Breen agrees with the ICAC that the file was created for the purposes connected with litigation. However, he argues that the purpose for which a document is created is only one of two related criteria to be considered in deciding whether the document is covered by parliamentary privilege. In the present case he argues that rather than the purpose for which a document was created being the deciding factor, the test should be the purpose for which it was retained. He cites the submission from the Clerk of the Parliaments to this committee during its inquiry into the execution of a search warrant on his parliamentary offices[11], as well as evidence to this committee from Mr Skehill, Solicitor, in the same inquiry,[12] and argues that in applying the same principles which were applied in December 2003, when this committee found that

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8 Ibid., p. 2.

9 Specifically, the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002*, and the *Courts Legislation Further Amendment Bill 2002*.

10 Submission from Mr Breen to the President, dated 10 February 2004, p. 2.

11 Submission, dated 7 November 2003, p. 9.

12 Evidence, 10 November 2003, p. 19.

the ICAC had no authority to seize from Mr Breen's parliamentary offices material within the scope of proceedings in Parliament, the documents in the present case must necessarily fall within the scope of proceedings in Parliament.

3. Parliamentary privilege, Article 9 and proceedings in parliament[13]

3.1 Parliamentary privilege refers to the powers and immunities possessed by individual Houses of Parliament, their members and other participants in parliamentary proceedings, without which they could not perform their functions. These powers and immunities have been recognised at law as necessary to enable parliament to perform its functions (of legislating, debate and scrutiny of the executive) free from undue and oppressive challenge or interference from outside bodies. Of most relevance to this inquiry is the immunity of freedom of speech in parliament.

3.2 The immunity of freedom of speech in parliament is declared in Article 9 of the *Bill of Rights 1689*[14]: "That the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of Parliament." The immunity enhances deliberative democracy and responsible government by ensuring that members and other participants in parliamentary proceedings (such as witnesses giving evidence to parliamentary committees) can speak freely, without fear that what they say will later be held against them in court, or that they will be the subject of threat or reprisals from the executive.

3.3 In order for actions or material to be protected by Article 9 they must fall within the scope of "proceedings in parliament." The term includes not only the formal transaction of business in a House of Parliament or a parliamentary committee (such as debating, moving motions, asking and answering questions, the giving of evidence by witnesses and the tabling of documents) but also matters sufficiently connected with, or ancillary to, the transaction of such business. The term has never been comprehensively and exhaustively interpreted by the courts. However, section 16(2) of the *Parliamentary Privileges Act 1987 (Cth)* goes some way towards clarifying the meaning of the term, providing that:

> For the purposes of the provisions of Article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, 'proceedings in Parliament' means all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
>
> (a) the giving of evidence before a House or a committee and evidence so given;
>
> (b) the presentation or submission of a document to a House or a committee;
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

13 For a more detailed discussion of these issues see: Standing Committee on Parliamentary Privilege and Ethics, Report No 25, *Parliamentary privilege and seizure of documents by ICAC*, December 2003, pp 4-17.

14 Which applies in NSW by virtue of the *Imperial Acts Application Act 1969 (NSW)*.

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.[15]

4. Relevant tests to be applied to determine the status of the documents

4.1 In order to determine whether or not the documents in question fall within the scope of "proceedings in Parliament", the Committee has sought to identify appropriate tests to apply to the documents. In developing such tests the Committee drew upon a range of relevant judicial and parliamentary authorities.

4.2 The overarching requirement for material to fall within the scope of "proceedings in parliament" is for there to be a clear link established between the matters and the transaction of parliamentary business:

- In its wider sense 'proceedings in Parliament' has been used to include matters connected with, or ancillary to, the formal transaction of business.[16]
- [Article 9 applies to] activities which have a close formal link with the business to be transacted in the House or in a select committee.[17]
- … one should have regard to not mere reasonable possibilities but to the immediate intentions of the actor … and to the degree of proximity between that transaction and proceedings that are taking place or are about to take place or have just taken place in the House.[18]

4.3 The clearest link arises where documents have been brought into existence for the purposes of or incidental to the transaction of parliamentary business:

> [For privilege to apply] you would have to show that there is some link between the documents and some proceedings in Parliament, or at least some strong potential link ….[19]
>
> … If it is predominantly for the purpose of proceedings in Parliament, it is protected.[20]

4.4 However, a link may also be effectively established by the use or retention of the documents for the purposes of or incidental to the transaction of parliamentary business:

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15 The definition of "proceedings in Parliament" in section 16(2) of the *Parliamentary Privileges Act 1987 (Cth)* is particularly important for the purposes of this inquiry: as outlined above the resolution of the House 4 December 2003 specifically required the material in question to be examined to ascertain which of it fell within the scope of "proceedings of Parliament" as defined in section 16(2).

16 Quoted in *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114 at 123.

17 D McGee(Clerk of the New Zealand Parliament), *Parliamentary Practice in New Zealand*, 2nd ed., 1994, p. 475.

18 S. A. De Smith, "Parliamentary Privilege and the Bill of Rights" (1958) 21 *Modern Law Review* 465 at 480.

19 Harry Evans (Clerk of the Australian Senate), *Evidence*, 10 November 2003, p. 3.

20 Ibid.

> Privilege may be attracted by the retention of a document for a relevant purpose, but that is because the retention for such a purpose is itself an act forming part of the proceedings.[21]

4.5 The Committee does not accept the contention of the ICAC that the use of material, created for a purpose other than the transaction of parliamentary business, is immaterial to the issue of whether it falls within the scope of "proceedings in parliament." The ICAC's view relies upon a passage from the 21st edition of *Erskine May*[22] and the decision of Allen J in the matter of R v *Grassby*.[23] However, these references are concerned with the position of the constituent in sending material to a member, rather then the use or retention of material by a member. In the *Grassby* case, the member who was sent the material in question did not have any intention to use the material and there was not even a remote connection between the provision of the document to the member and any actual or potential proceedings in parliament. Furthermore, in the words of the Clerk of the Australian Senate, *Grassby* relies on "a collection of judgments some of which are mutually contradictory and one of which was expressly repudiated by the *Parliamentary Privileges Act 1987*" and "cannot be taken to be an authoritative exposition of the immunity of freedom of speech in Parliament."[24] The passage relied upon from *Erskine May* has also been criticised by the Clerk of the Australian Senate as not justified by the authorities upon which it is purportedly based.[25]

4.6 The retention of documents is directly relevant to the documents the subject of this inquiry. This issue was considered in detail by the Queensland Court of Appeal, in the matter of *O'Chee v Rowley*.[26] The Court found that the retention of a document was "an act done … for the purposes of or incidental to the transacting of [parliamentary business]." The reasoning of the court involved both an objective assessment of the cogency of the claim that the documents in question were retained for "proceedings in parliament" and reliance on the evidence of the senator as to his subjective intention in retaining the documents. In view of the significance of this decision for the matter at hand, the reasoning of the court is extracted below:

> … Bringing documents into existence for such purposes [ie purposes of or incidental to the transacting of any business of a House]; or for those purposes, collecting or assembling them; or coming into possession of them are therefore capable of amounting to 'proceedings in Parliament'…[27]
>
> …if documents like these came into the possession of Senator O'Chee and he retained them with a view to using them, or the information they contain, for the

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21 *In the matter of the Board of Inquiry into Disability Services* [2002] ACTSC 28 at para 22.

22 *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21st edition, Butterworths, London, 1989, pp 132-133.

23 (1991) 55 A Crim R 419.

24 *Advices to the Senate Committee of Privileges from the Clerk of the Senate and Senior Counsel, March 1988 to April 2002*, August 2002, pp 74-75.

25 Ibid, p71.

26 *O'Chee v Rowley* (1997) 150 ALR 209. It should be noted that although this was a decision of the Queensland Court of Appeal, leave to appeal against the decision to the High Court was refused.

27 At p. 215.

> purpose of Senate questions or debate on a particular topic, then it can fairly be said that his procuring, obtaining or retaining possession of them were 'acts done … for purposes of or incidental to the transacting of business' of that House. Although 'acts done' is not specially apt to describe what happens when a possibly unsolicited document arrives through the mail or by some other forms of communication, a member who becomes aware that the document has arrived and elects to keep it for purposes of transacting business in the House, may properly be said to have done an 'act' or 'acts' for purposes of, or incidental to, the transacting of that business.[28]
>
> [privilege is attracted if] the member or his or her agent does some act with respect to it for the purposes of transacting business within the House….[29]
>
> …Some of the documents … bear dates from and after 3 July 1995 (which is after 19 June 1995 when the [relevant] 'business' … was last discussed …). The question may be posed of how such documents could attract privilege after that business had apparently ceased to be transacted. But, although a stage may be reached after which the preparation, receipt or retention of documents cease to be acts connected with or incidental to that or any other business being or to be transacted, it is evident that in many instances the line cannot automatically be drawn at the last occasion on which the matter was raised in the House. The possibility of further debate on the same subject in future may provide a reason for supposing that privilege continues to attach to documents received and retained or other acts done with the relevant.[30]
>
> The expression 'purposes' in section 16(2)(c) inevitably introduces an element of subjectivity or intention which, in terms of that provision, must have existed at the time the documents were prepared. If it is necessary to go further and find some independent basis or reason for concluding that they were so prepared, it is in my opinion enough to say that recording and compiling notes of information supplied and writing letters on a particular subject in anticipation of imminent discussion or debate on the same subject in the Senate is what one would normally expect a member of parliament to do before speaking on that topic in the House. Perhaps item 25 described as 'Internal memo from Diane to Senator O'Chee 6.6.95' may not precisely fit that description; but, if it was created or came into existence, as the senator swears, for purposes of transacting Senate business, there is no good reason for doubting that it too satisfies the requirements of s 162(c).[31]

4.7 Based upon these authorities, the Committee has applied the following tests to the documents in dispute to determine whether or not they fall within the scope of proceedings in parliament:

28 At p. 209.

29 Ibid.

30 At pp. 209-210.

31 At pp. 208-209.

(1) Were the documents **brought into existence** for the purposes of[32] or incidental to the transacting of business in a House or a committee?

☐ YES ⟶ falls within 'proceedings in Parliament'.[33]

☐ NO ⟶ move to question 2.

(2) Have the documents been **subsequently used** for the purposes of or incidental to the transacting of business in a House or a committee?

☐ YES ⟶ falls within 'proceedings in Parliament'.[34]

☐ NO ⟶ move to question 3.

(3) Have the documents been **retained** for the purposes of or incidental to the transacting of business in a House or a committee?

☐ YES ⟶ falls within 'proceedings in Parliament'.

☐ NO ⟶ does not fall within 'proceedings in Parliament'.

5. Analysis of the documents in question and their status

5.1 The documents in question are one suspension file and 13 letters from computer files. The suspension file consists of a collection of 30 documents relating to a motor vehicle accident on 27 July 1998 involving injuries to a particular person, which was the subject of civil litigation in which Mr Breen acted as solicitor for that person (for some time).[35] The 13 letters from computer files are concerned with the same civil litigation.

5.2 Having examined a detailed list of the documents in question and considered both the initial submissions to the President, and the subsequent submissions to the Committee, from the ICAC and Mr Breen, the Committee has applied the tests outlined above to the documents in question.

Were the documents brought into existence for the purposes of or incidental to the transacting of business in a House or a committee?

5.3 The answer to this question is no. The documents in question were not brought into existence for the purposes of or incidental to the transaction of parliamentary business. Mr Breen acknowledges this: "As the ICAC rightly points out… the file was created for purposes connected with litigation."[36]

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32 In this test, the expression 'for the purposes of' includes 'or predominantly for the purposes of'.

33 Because the *creation* of the document was 'an act done … for the purposes of or incidental to the transacting of the business of the House or of a committee'.

34 Because the *use* of the document was 'an act done in the course of, or for the purposes of or incidental to the transacting of the business of the House or of a committee'.

35 The suspension file also includes what appears to be one misfiled document, being a memorandum from another Member of the Legislative Council to his colleagues concerning leave of absence.

36 *Submission*, 10/3/2004, p 1.

Have the documents been subsequently used for the purposes of or incidental to the transacting of business in a House or a committee?

5.4 The answer to this question is that *some* of the documents in question do appear to have been used for the purposes of proceedings in the House or a committee.

5.5 Mr Breen has identified 3 occasions on which he referred to the case or used material in the suspension file in speeches or questions in the House:

> I also used material in the file for my speech to the House on the House on the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002*. I spoke to the bill on 20 November 2002 and in the speech I said:…
>
> I referred to the case a month earlier in debate on the *Courts Legislation Further Amendment Bill 2002*. In a speech dated 4 September 2002 I said:…
>
> This speech and my correspondence with the Chief Justice about the case prompted a question in the House on 23 October 2002. I asked the Attorney General the following question:…[37]

5.6 Although Mr Breen has not sought to identify specific documents within the suspension file which were used in these speeches and questions, there are a number of documents within the file which are readily identifiable with the relevant parliamentary proceedings.[38]

Have the documents been retained for the purposes of or incidental to the transacting of business in a House or a committee?

5.7 As outlined above, the retention of documents for the purposes of or incidental to the transacting of business in a House or a committee is "an act done in the course of, or for the purposes of or incidental to the transacting of business of a House or a committee".[39] It is therefore the act of retention which is critical to this test, rather than the nature of the documents themselves and the documents need to considered in the context in which they have been retained rather than being separated and dealt with individually.[40] In considering a claim that documents had been retained for the purposes of or incidental to the transacting of business in a House or a committee, it is necessary to consider both the cogency of the claim and the intention of Member in retaining the documents.

5.8 In relation to the cogency of Mr Breen's claim, Mr Breen has identified 3 speeches in the House concerning the *Motor Accidents Compensation Bill 1999*, and 3 committee hearings in relation to the review of the exercise of the functions of the Motor Accidents Authority

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37 *Letter* to the President, 10/2/2004, pp 2-3.

38 There are 8 identifiable items within the suspension file that appear to be directly relevant to and to have been used in these speeches and questions. These items include correspondence with the Chief Justice of NSW, the Attorney General and others about the decision making of judges and the availability of information about the success rate of appeals from decisions of District Court judges.

39 *O'Chee v Rowley* (1997) 150 ALR 209.

40 Mr Breen has also argued that the dividing up of the documents in the suspension file would be a "futile exercise": "Only the totality of the file, that is, all the documents viewed together, could be said to influence my thinking in anticipation of debate on the motor accidents legislation." *Submission*, 10/3/04, p 3.

and Motor Accidents Council, in which he has "used the … file to inform me…"[41] Mr Breen also states that he used the suspension file "to assist me to articulate the issues involved when motor vehicle accidents are litigated in the courts" and that "the … file reminded me of the problems and directed my thinking…"[42] The Committee accepts that Mr Breen has established an objective basis for his claim that the documents were retained for the purposes of or incidental to the transacting of business in a House or a committee.

5.9 In relation to Mr Breen's intention in retaining the documents, he has stated in his submission to this Committee that "the … documents were retained for the purpose of informing me about proceedings in Parliament and were used specifically for that purpose."[43] This is a clear and unequivocal statement as to Mr Breen's subjective intention in retaining the documents. The Committee accepts that Mr Breen would have been aware of the implications of making such a statement in a submission to the Legislative Council's Standing Committee on Parliamentary Privilege and Ethics.[44] The Committee accepts Mr Breen's statement that it was his intention to retain the documents in question for the purposes of or incidental to proceedings in a House or a committee.

5.10 The committee therefore finds:

Finding 1

That the documents contained in the suspension file, together with the 13 letters from computer files were retained by Mr Breen for purposes of or incidental to the transacting of parliamentary business.

Finding 2

That having been retained for purposes of or incidental to the transacting of parliamentary business the documents fall within the scope of 'proceedings in Parliament" for the purposes of Article 9.

41 *Letter* to the President, 10/2/2004, p 2.

42 Ibid.

43 *Submission*, 10/3/2004, p 3.

44 Including such a statement in a submission to the Committee may be seen as equivalent to the swearing of an affidavit by Senator O'Chee as relied upon in the case of *O'Chee v Rowley* (1997) 150 ALR 208-209.

5.11 The committee therefore recommends:

Recommendation

That the House uphold the claim of privilege by Mr Breen in relation to the suspension file and 13 letters from computer files disputed by the ICAC.

Appendix 1 Resolution of the House, dated 4 December 2003

Matter of privilege—Seizure of documents of Mr Breen by the Independent Commission Against Corruption

Resolution of the House (*Minutes of Proceedings of the Legislative Council* No. 38, Thursday 4 December 2003, item 20 and item 26.)

1. That this House acknowledges the role and function of the Independent Commission Against Corruption (referred to as the ICAC) is to investigate allegations of corrupt conduct of public officials, including Ministers of the Crown and members of Parliament.

2. That the functions of the ICAC in investigating corrupt conduct are subject to section 122 of the Independent Commission Against Corruption Act 1988, which provides:

> Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

3. That article 9 of the Bill of Rights 1689 is fundamental to the powers, rights and immunities of Parliament, and is recognised as the central parliamentary privilege – that is, the freedom of speech and debate in parliamentary forums, and the limitation of the uses which the courts of law and other extra-parliamentary bodies may make of evidence of parliamentary proceedings.

4. That the justification for the powers and immunities possessed by Houses of Parliament is that they are necessary for the Houses, their members, and officers, to function effectively, and that without them, members would be severely hampered in their ability to carry out their parliamentary duties, and the Houses would be unable to properly scrutinise the actions of the executive.

5. That representative democracy can flourish only when citizens can communicate freely with a member of Parliament and in the knowledge that the actions of members in the conduct of proceedings in Parliament will go unchallenged by outside interference or intimidation.

6. That proceedings in Parliament will inevitably be hindered, impeded or impaired if documents forming part of proceedings in Parliament are vulnerable to compulsory seizure.

7. That this House accepts and adopts the findings in the report of the Standing Committee on Parliamentary Privilege and Ethics, dated December 2003, that in executing a search warrant on the parliamentary office of Mr Breen on Friday 3 October 2003, the ICAC seized at least one document within the scope of proceedings in Parliament.

8. That this House acknowledges that the Standing Committee on Parliamentary Privilege and Ethics has been unable to reach an agreement with the ICAC in relation to the procedures which should be adopted to ensure that the privileges of this House are upheld concerning the documents seized in the execution of the search warrant.

9. That this House affirms that the House is the appropriate forum for resolution of issues of parliamentary privilege concerning documents and things seized by search warrant from the parliamentary office of Mr Breen.

10. That this House therefore resolves:

    (1) That all documents and things (referred to as material) seized from Mr Breen's parliamentary office on Friday 3 October 2003 be returned by the Independent Commission Against Corruption to the President of the Legislative Council by 5.00 pm on Friday 5 December 2003.

    (2) That, on return, the material be kept in the possession of the Clerk until the issue of parliamentary privilege is determined.

    (3) That by 5pm on Friday 19 December 2003, Mr Breen, the Clerk and a representative of the Independent Commission Against Corruption, jointly be present at the examination of the material, including electronic material already returned to the President and in the custody of the Clerk. Mr Breen and the Clerk will identify material which falls within the scope of proceedings in Parliament, that is:

All words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee and evidence so given,
(b) the presentation or submission of a document to a House or a committee,
(c) the preparation of a document for purposes of or incidental to the transacting of any such business, and
(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(4) That a list of material considered to be within the scope of proceedings in Parliament (referred to as privileged material) be prepared by the Clerk and provided to Mr Breen and the ICAC by 5pm on Friday 19 December 2003.

(5) That any material not listed as falling within the scope of proceedings in Parliament be immediately made available to the ICAC by the President.

(6) That the ICAC may, within a reasonable time, dispute any material considered to be privileged material in writing to the President of the Legislative Council, together with reasons for the dispute.

(7) That any privileged material not identified by the ICAC as being in dispute be returned to Mr Breen by the President.

(8) That the President immediately inform Mr Breen of any dispute, at which time Mr Breen may provide written reasons in support of his claim.

(9) That the President inform the House at its next sitting of any disputed claim, and table any documents provided by the ICAC or Mr Breen relating to the dispute.

(10) That the President will then set down consideration of the disputed privileged material as Business of the House on the Notice Paper for the next sitting day.

(11) That any material which the House determines as not within the scope of proceedings in Parliament be immediately made available to the ICAC by the President.

(12) That any material which the House determines as within the scope of proceedings in Parliament remain in the custody of the Clerk, until the House otherwise decides, with a copy to be made available to Mr Breen.

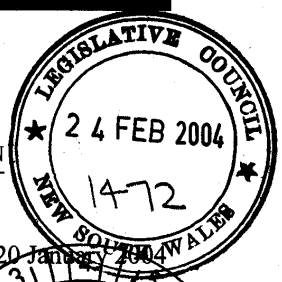
11. That this resolution be communicated by the President to the Commissioner of the Independent Commission Against Corruption.

Appendix 2 Letter from ICAC disputing claim of privilege, dated 20 January 2004

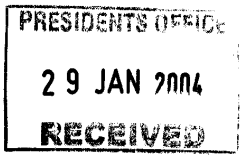
[redacted]

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION



20 January 2004



The Hon. Dr Meredith Burgmann
President of the Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Our Ref: E03/1390

Dear Dr Bergmann,

RE: DOCUMENTS SEIZED FROM THE PARLIAMENTARY OFFICE OF THE HON. PETER BREEN, MLC

Thank you for your letter dated 16 January.

I note that a claim of privilege has been made in relation to the following documents:

- E03/1390/3/66 – Suspension file for Ram containing various correspondence regarding Peter Ram – Motor Vehicle Accident on 27 July 1998.
- Letter 28/08/00 to Dr R. Adler regarding Peter Ram – Motor Vehicle Accident 27 July 1998.
- Letter 1/05/01 to the Manager of Access Rehabilitation regarding Peter Ram – Motor Vehicle Accident 27 July 1998.
- Letter 3/05/01 to Dr Adler regarding Peter Ram – Motor Vehicle Accident 27 July 1998.
- Letter authorising Peter J. Breen & Co., Solicitors, to receive a medical report of injuries received in motor vehicle accident (Ram matter).
- Letter 6/03/01 to the Registrar of Canterbury Public Hospital regarding Peter Ram – Motor Vehicle Accident 27 July 1998.
- Letter authorising Peter J. Breen & Co., Solicitors, to receive clinical notes of admission to Canterbury Hospital on 27 July 1998 (Ram matter).

ALL CORRESPONDENCE TO GPO BOX 500 SYDNEY NSW 2001
TELEPHONE (02) 8281 5999 FACSIMILE (02) 9264 5364
www.icac.nsw.gov.au

- Letter 23/04/01 to Dr Peter Blum regarding Peter Ram – Motor Vehicle Accident 27 July 1998.
- Letter 10/04/01 to the Manager, Access Rehabilitation regarding Peter Ram – Motor Vehicle Accident 27 July 1998.
- Letter 24/04/01 to Dr R. Adler regarding Peter Ram – Motor Vehicle Accident 27 July 1998.
- Letter 9/04/01 to Dr Peter Blum regarding Peter Ram – Motor Vehicle Accident 27 July 1998.
- Letter 31/05/00 to Dr R. Adler regarding Peter Ram – Motor Vehicle Accident 27 July 1998.
- Letter 1/06/00 to Dr R. Adler regarding Peter Ram – Motor Vehicle Accident 27 July 1998.
- Letter 11/12/00 to Dr Adler regarding Peter Ram – Motor Vehicle Accident 27 July 1998.

The Commission disputes that these documents are privileged.

The Commission understands these documents relate to a motor vehicle accident in July 1998 and were created as a result of Mr Breen acting as Mr Ram's solicitor in that matter. They were not created for the purpose of any "proceedings in Parliament" but rather for purposes connected with litigation.

In accordance with paragraph 10(9) of the Resolution of the Legislative Council of 4 December 2003, I request that you inform the House at its next sitting of this disputed claim and table the relevant documents and, in accordance with paragraph 10(10) of the Resolution set down consideration of the dispute as Business of the House on the Notice Paper for the next sitting day.

Yours sincerely,

John Pritchard
Solicitor to the Commission

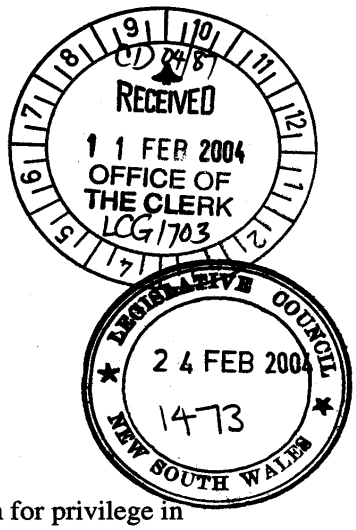
SEEN

Appendix 3 Submission from Mr Breen, dated 10 February 2004

Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Tel: (02) 9230 2883
(02) 9230 2111
Fax: (02) 9230 3568
DX 22 Sydney

The Hon. Peter Breen, M.L.C.
Reform the Legal System
www.lawquick.com.au



10 February 2004

The Hon. Dr. M. Burgmann MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

Dear Madam President,

I refer to your letter dated 5 February 2004 and confirm the claim for privilege in respect of the list of documents described in the ICAC letter.

The first document in the list is a suspension file and manila folder containing various documents including hard copies of all the other documents in the list. It is a file relating to a motor vehicle accident on 27 July 1998 involving injuries to Peter Ram. The file was retained by me from my former legal practice. I continued to do legal work on the file following my election to Parliament on 27 March 1999 for the purpose of informing myself and in anticipation of debate in the House regarding the Motor Accidents Compensation Bill 1999 and amendments.

Briefly, Mr Ram was parked at an intersection on his way to work when another car struck the rear of his car with such force that the impact broke the seat mountings in Mr. Ram's car and injured the vertebrae in his neck. He made a worker's compensation claim. He also sued for loss of earnings and damages in the District Court and was awarded $400,000 by an arbitrator. The insurance company responsible for payment of the verdict appealed to a District Court judge who overturned the arbitrator's award and dismissed the claim, awarding costs against Mr. Ram. The judge seemed to think Mr. Ram was a malingerer. An appeal to the Court of Appeal was eventually successful and Mr. Ram's award of $400,000 effectively reinstated.

Debate on the motor accidents compensation legislation took place in the early stages of the litigation, but I maintained a watching brief on the implementation of the legislation in my role as a member of the Law and Justice Committee's Motor Accident Authority oversight body. I handed the file to Pigott Stinson, Solicitors, in May 2001, and the litigation was finally resolved in December 2003. I enclose copies of the following parliamentary debates and hearings of the Law and Justice committee:

(i) Motor Accidents Compensation Bill 22 June 1999.
(ii) Motor Accidents Compensation Bill (in Committee) 29 June 1999.
(iii) Motor Accidents Compensation Bill (in Committee) 30 June 1999.
(iv) Law and Justice Committee Hearing 8 May 2000.
(v) Law and Justice Committee Hearing 11 December 2000.
(vi) Law and Justice Committee Hearing 17 December 2001.

I have highlighted those parts of the debates and hearings where I have used the Peter Ram file to inform me about the pluses and minuses of litigating a motor vehicle accident claim and the alternative of negotiation within the framework of a statutory authority. Privilege attaches to the file, in my opinion, both in the purpose for which the file was intended to be used when I brought it into the Parliament and in the way I actually used it. The dominant purpose was always to assist me to articulate the issues involved when motor vehicle accidents are litigated in the courts. I was opposed to litigation as a way of resolving motor vehicle accident claims and the Peter Ram file reminded me of the problems and directed my thinking towards the need for a statutory authority.

I also used material in the file for my speech to the House on the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002*. I spoke to the bill on 20 November 2002 and in the speech I said:

> Recently, I wrote to Chief Justice Spigelman and asserted that judges make decisions based on their personal interpretation of what the Government is doing, whether on sentencing, tort law reform or whatever the issue at hand might be. After all, judges are part of the Government. When they collect their pay each week it is a government cheque. They are the judicial arm of government as opposed to the legislative and executive arms.
>
> In my letter I told the Chief Justice that judges in New South Wales are not independent; they are merely an extension of the Executive Government. Needless to say, this letter provoked an immediate response from His Honour, who informed me in no uncertain terms, "I reject this proposition completely". I had complained to the Chief Justice that a District Court judge made a decision completely at odds with the facts of a case. I have related the details of that case to the House on a previous occasion, and I will not repeat them today.

I referred to the case a month earlier in debate on the *Courts Legislation Further Amendment Bill 2002*. In a speech dated 4 September 2002 I said:

> The last area I want to cover in the reach of the Courts Legislation Further Amendment Bill concerns the amendment to the Supreme Court Act which allows long and complex matters to be referred to arbitration. I note that the amendment has the support of the Chief Justice, but I wonder whether law consumers would agree that long and complex matters-indeed, any matters-ought to be referred to arbitration. My own experience is that arbitration is just one more costly step on the tortured path to justice in New South Wales, a path that only lawyers will tread with any satisfaction.
>
> Recently I had an extraordinary case which I brought to the attention of the Chief Justice by letter two days ago. In that case, Mr X was parked at an intersection near his home when another vehicle, driven by Mr Y, ploughed into the back of his vehicle. The impact was so severe it demolished the rear of Mr X's vehicle and his car seat broke off its mountings. Several vertebrae in his neck were damaged. Proceedings were commenced in the District Court. The defendant's insurer admitted liability and offered to settle for

> $200,000. An arbitrator subsequently awarded Mr X $400,000 and the insurance company then appealed this decision. A District Court judge decided that Mr X was a malingerer. The judge overturned the decision of the arbitrator, found for the defendant and awarded costs against Mr X.
>
> I am pleased that the Motor Accidents Authority now handles claims on behalf of motorists injured after 5 October 1999. The case I have referred to proves that the role of judges as protectors of citizens is a lost ideal in the New South Wales legal system. When the judiciary acts in this capricious way, it is simply acting as another branch of the Executive Government. I always advise people to follow the biblical imperative and settle their disputes before going to court. Mr X has been effectively ruined by the District Court judge's decision and the question of an appeal needs to be considered. To this end, I have asked the Chief Justice to advise me of the statistical success rate for appeals from a decision of a District Court judge. I look forward to obtaining those figures.

This speech and my correspondence with the Chief Justice about the case prompted a question in the House on 23 October 2002. I asked the Attorney General the following question:

> My question without notice is directed to the Treasurer, representing the Attorney General. Is the Attorney aware that no records are kept relating to the statistical success rate for appeals from a decision of a District Court or Supreme Court judge? Is the Attorney aware also that many law consumers, when faced with an adverse decision of a District Court or Supreme Court judge, would benefit from knowing their chances of running a successful appeal based on statistical records? Can the Attorney indicate whether he will consider recommending to the Chief Justice that records should be kept relating to the statistical success rate for appeals from the decision of a District Court or Supreme Court judge?

The Peter Ram file is well represented in my contribution to proceedings in the House and before the Law and Justice Committee. This is the dominant purpose for which I retained the file following my election to the Parliament. For this reason, I hope you will consider a claim of parliamentary privilege over the documents in the file, and I ask that the House consider the claim at the earliest opportunity.

Yours sincerely,

PETER BREEN

Motor Accidents Compensation Bill.

The Hon. P. J. BREEN [6.13 p.m.]: I shall speak to the proposed amendments to the Motor Accidents Compensation Bill from two points of view. The first is that of a practising solicitor with some experience of common law damages claims; the second is that of law consumers. As a practising solicitor I say that, by and large, the legal profession has been carrying the can for the victims of motor accidents for many years. It is lawyers who have paid for medical reports, expert witnesses, court fees and all the expenses associated with bringing a case to court. For their sins, lawyers have been vilified and condemned, particularly by the insurance industry, for supposedly rorting the system and causing motorists to pay exorbitant premiums for third party motor vehicle insurance.

Page 1007

As a lawyer I say that the insurance industry could easily reduce the cost of green slips by the magical figure of $100 if the authorised third party insurers simply refrained from engaging in misleading, deceptive and sometimes sexist advertising. Why do the authorised insurers need to compete with each other in this way for customers when the Government could easily allocate the claims to the insurers on some kind of cab-rank principle? If the insurance industry were as forthcoming about the cost, integrity and transparency of its own operations as it is about the cost of legal services, we would all be much better informed.

According to a former chief executive officer of the Motor Accidents Authority, for every $2 paid in compensation to the victims of motor accidents, of the order of $8 is spent on administration costs. Those figures may be questioned, but one would think that a former CEO of the authority would have some knowledge of them. As a lawyer I wonder what is so wrong with the present scheme that was not apparent when the insurance industry agreed to take over the third party scheme from the Government. After all, prior to 1998 the scheme was publicly funded. My feeling is that the insurance people took on the risk of motor vehicle accident claims, with all the attendant costs and potential profitability, knowing they could come back for another bite of the cherry if the bottom line was not as favourable as they had anticipated.

Both the Law Society and the Bar Association point out that the most recent amendments to the legislation in 1995 have yet to take effect, and, when they do, premiums should drop if the insurance companies honour their commitments to the people of New South Wales. The President of the Law Society, Margaret Hole, said this morning that 18 months would be required for those 1995 amendments to take full effect. As the law presently stands, one needs to suffer 15 per cent disability to recover general damages, and the disability needs to continue for in excess of 12 months. According to figures circulated this week by the Bar Association, the number of claims has fallen by about 10 per cent since 1995, a significant decrease.

On the question of legal costs, which seems to be the most contentious aspect of the bill, all motor vehicle injury claims are now dealt with in the District court, where penalties apply if a claimant refuses a reasonable offer of settlement. Furthermore, case management systems in the District Court now mean that a case need not take more than 12 months to resolve. These are all recent changes that will reduce the number of claims and lower the costs of legal services. But the changes have not had sufficient time to be reflected in lower premiums.

Perhaps the most difficult area of motor vehicles accident compensation and the source of our present problems concerns soft tissue injuries, most notably to the back and neck. It is those claims that the 1995 amendments to the third party insurance legislation were designed to limit. To place the present situation operating in New South Wales in its proper context in terms of the east coast of Australia, a person receiving a soft tissue neck and back injury in Queensland would recover about $30,000, compared with about $15,000 in New South Wales, and nothing in Victoria.

The purpose of the proposed legislation is to bring the New South Wales scheme closer to the regime operating in Victoria. Insurance companies blame lawyers and judges for an increase in the size of small claims, describing an inflationary trend which cannot be sustained in the future. The Ernst and Young Review of the New South Wales Motor Accidents Scheme dated November 1998 said:

> The most likely explanation for inflation at this level is increasingly generous verdicts and settlements.

Speaking about the difficulty of assessing the lump sum compensation figure for future uncertain circumstances, the review said that the courts will err on the side of generosity to avoid the injustice of providing inadequate awards. To that observation I would add the qualification that it depends on which judge one is lucky or unlucky enough to have hear one's case. A judge who has trained as a defendant's lawyer will award a plaintiff a lot less

than one who has honed his skills - they are mostly men - as a plaintiff's lawyer. Indeed, in the course of considering this legislation I have been struck by the plaintiff lawyer lobby groups who use the term "punters" to describe their clients. At this point I should advance the argument of law consumers in support of the Motor Accidents Compensation Bill and the amendments I will move.

If law consumers really are punters in their dealings with the court system, that is a scandal. And it is a scandal that goes some way to explaining the disdain in which many people hold lawyers and the courts. Perhaps the biggest gamble that law consumers take when they become involved in court action is in being taken to the cleaners on legal costs. I am not talking only about their legal costs, which are burdensome enough, but the costs of the other party to the proceedings. Bear in mind that in this legislation and the proposed amendments there
Page 1008
is no question of liability. In the amendments proposed by the Government the question of liability is accepted by the insurance company. In cases in which liability is accepted, there should not be any question of asking people to pay the costs of insurance companies.

The claimant's case is, to use a card term, a lay down misère. We are not talking about whether the claimant will win, but how much he or she is entitled to recover in compensation for what may be massive injuries. There can be very little justification in those circumstances for ordering that the claimant pay the costs of the insurance company. Nevertheless, I acknowledge the practice of the courts in recent times to order the plaintiff to pay costs after a reasonable offer for settlement has been rejected. Although it is a practice I find offensive, I do not expect to turn back the tide of history. My concerns hinge on the fact that punters are completely at the mercy of the judges and lawyers as to what constitutes a reasonable offer.

If there is no question of liability, there should be no question of paying a penalty by way of the costs of the insurer if the offer is different to that determined by the court. Setting a cut-off point at $200,000 for the purposes of deciding when a claimant should not be liable for the costs of the insurance company is simply recognising that large claims are intrinsically more important than small claims. Where a claim for damages does not exceed $200,000 as specified in the certificate of assessment, the claimant is to pay the costs of the insurance company if the court verdict is for a lesser sum. Given that in reality the punter has little control over a stoush between lawyers, and there is no question of having to prove liability, my amendment will suggest a cap of $12,500 on the insurance company's fees.

One thing I am not suggesting is a cap on the claimant's legal costs. I expect that the operation of the new legislation will result in solicitors and barristers having little to do in motor vehicle accident claims. Apart from the legislation, market forces will ensure that motor vehicle accident claims go the same way as conveyancing, victims compensation claims and proceedings before various tribunals. Lawyers and courts are relentlessly pricing themselves out of the market for legal services. The August 1998 report of the Justice Research Centre on the Motor Accidents Scheme found that the amount paid by insurers to claimants for their legal costs have increased significantly since the introduction of so-called 1993 reforms to the Legal Profession Act.

Those reforms abolished most scales of costs and allowed solicitors and barristers to charge what they liked through dubious practices of time costing and cost agreements. I am pleased to support the principle in the legislation that introduces the notion of restricted fees for limited services. This is a welcome development for law consumers. Similar restrictions apply to medical professionals who are no less adept at making a buck out of the system. Recently in the course of litigation I was required to refer a husband and wife to a medical expert nominated by an insurance company. The appointment had to be cancelled the day before the scheduled time. I received a bill from the doctor for a massive $600, which he described as a late cancellation fee.

This kind of rorting by medical and legal professionals is an outrage. The new legislation will have a significant impact on such practices. I also want to deal with the amendment concerning parallel workers compensation claims. The bill does not address this issue, nor has the Government applied its mind to it. Once again, the problem is one for law consumers who have no idea what to do when they are injured on the road in the course of their employment, or whilst travelling to and from work.

As the law presently stands, the claimant must run both workers compensation and motor vehicle claims at the same time until the injury settles down and the extent of permanent impairment is known. Only then can a person make a properly informed decision about the appropriate forum for compensation. In the meantime, the person must be involved in two separate legal cases, pay double legal costs and, in effect, have two bob each way on the legal system.

I would like to address a point raised by the Hon. R. D. Dyer regarding the recommendations of the Standing Committee on Law and Justice. For the cost of $37, green slips could cover those at fault who are catastrophically injured; in other words, the proposed no-fault scheme. Such people now constitute something like 60 per cent of accident victims who are not covered by the bill or any other contemplated insurance scheme. One of the advantages of referring the bill to a committee for further investigation is to analyse possible solutions to this very serious problem. If it costs $37 to insure such people, there may be the prospect of a new scheme that would allow people the option of taking out that kind of cover.

Motor Accidents Compensation Bill.

The Hon. P. J. BREEN [10.40 p.m.]: I move:

That the amendment be amended by adding:

(c) the claimant is liable to pay the costs if the amount of court awarded damages in respect of the claim does not exceed the amount of damages specified in the certificate of assessment, but the maximum amount that a claimant is liable to pay for the insurer's costs is $15,000 (or such other amount as is determined by the Authority by order published in the Gazette),

This is radical legislation. It changes the way we deal with motor vehicle accident injuries. It is important to protect consumers and to recognise that the ordinary citizen is likely to be exploited by insurance companies no less than he or she is at the mercy of doctors and lawyers. In the past few days honourable members have been presented with a number of green slip renewals which tell us how insurance companies operate. As a result of what is described as a change in policy, new green slip notices have been issued on the basis that New South Wales motorists do not have comprehensive vehicle insurance.

I received a notice from a Mr Burbidge. This notice has done the rounds of the table and a number of talk-back radio shows. The premium is $546. Mr Burbidge contacted the insurance company and asked why his premium was so high. He was informed that the real premium was $404, not $546. He had been billed at a higher amount on the basis of a change in policy at the insurance company. I received at least one other premium notice for something like $700 when the correct amount should have been about $570. This is the way insurance companies operate.

Page 1575

I am suggesting that insurance companies no longer give people the benefit of the doubt as they have in the past - and they were the words used by the insurance company to described the increased premium. History has shown, apparently, that drivers who do not have comprehensive insurance are greater risks than those who do have full cover. Consequently, insurance companies impose these premiums.

Insurance companies argue that the Motor Accidents Authority and, in particular, the Claims Assessment and Resolution Service [CARS], will treat people fairly, and that very likely there will be no leakage to the court system. That is what they expect will happen when the scheme is fully operational. Only time will tell whether the insurance companies are right, but the legislation gives them the opportunity to act in a sensible and ethical way, in particular towards the Claims Assessment and Resolution Service, which is designed along the lines of a body called the Insurance Enquiries Council [IEC]. This is an independent inquiries and disputes service operating in the insurance industry.

The IEC refers disputes to a panel for independent review and assessment. Importantly, for the purposes of this amendment, the IEC, which CARS is designed to imitate or mirror, is binding on the insurance company but not on the person making the claim. Few people exercise their right of appeal because the IEC makes sensible decisions. Similarly, it is to be hoped that the Motor Accident Authority will function in the same way as the IEC and, in particular, that the medical assessment procedure will operate fairly.

The amendment I have moved seeks to protect the consumer in the event that the claimant must pay the insurer's costs. I am seeking to introduce a new notion, but one that is modelled on existing provisions for legal aid clients, whereby the insurer's costs are capped at a figure I suggest is reasonable having regard to the fact that the insurance company has no right of appeal under the legislation. If it has no right of appeal, why should it spend a large amount of money on court costs? It seems to me that the provision of $15,000 for an insurance company to defend a claim in the District Court is reasonable. The provision protects law consumers, and it is on the basis of that protection that I move this amendment.

Motor Accidents Compensation Bill.

The Hon. P. J. BREEN [11.23 a.m.]: The amendment moved by the Hon. R. S. L. Jones suggests that a cap of $20,000 be put on the figure referred to in the Government's amendment. It seems that that figure is the only area in which there is disagreement about the amendment. I should like to address a couple of points particularly in relation to some of the issues raised by the Hon. I. M. Macdonald. The idea of a cap is based on two important principles. Firstly, the insurance company has admitted liability, so there is no reason for the insurance company to be involved in a long, drawn-out legal proceeding where there is no question of liability. So why should the insurance company brief Mallesons Stephen Jaques, or one of the other
Page 1701
expensive law firms - who charge several hundred dollars per hour - when there is no question of liability?

Secondly, the insurance company has no right of appeal under the legislation. I made the point last night - it was late, and it might have been difficult to comprehend - that the CARS body is based on a group called the Insurance Enquiries Council. That model is being mirrored in the legislation. CARS will operate in exactly the same way as the Insurance Enquiries Council is operating. Very few appeals are lodged from the Insurance Enquiries Council, because the council makes reasonable, rational decisions. It is to be hoped that CARS will do the same, and therefore there will be no need for it to consider this question of appeals.

The Hon. I. M. Macdonald made a big issue about the fact that there is no right of appeal for insurance companies under the present legislation. However, I suggest that for that reason insurance companies' costs ought to be capped. If those who draft the legislation have not seen fit to give insurance companies a right of appeal, why should that decision be diminished, cancelled or exploited by allowing them to run expensive legal cases? That does not make sense; it is irrational. It is inconsistent with the drafting of the legislation to exclude insurance companies from a right of appeal on the one hand, and give them unlimited costs if they want to fight a claimant or a plaintiff on the other.

The Hon. I. M. Macdonald expressed a concern that lawyers are likely to exploit the situation simply because the legal costs are being capped. A figure of $20,000 is a lot of money for those who are derisively called the punters to have to bear in mind simply because they want to go to court and appeal the CARS decision. Not only will they have to pay the insurance company's costs but they will also have to pay their own costs. It seems to me that if a reasonable person were faced with the prospect of paying an insurance company $20,000 in costs as well as paying his or her own lawyers that much and possibly more, he or she would seriously consider accepting the CARS decision.

If the CARS decision is reasonable, that person will not go to court. No-one wants to go to court unnecessarily. One never knows what the court will decide; it depends on the judge and how the judge feels. It also depends on one's lawyers. They might have a bad day and may not present the case very well. All these things are deterrents to people going to court. With regard to the figure of $20,000, up until the time I came to this place I had the carriage of 26 cases in the District Court.

The District Court now takes only a year to deal with these types of cases. In the present climate with case management, anyone who runs up more than $20,000 in expenses in a District Court case ought to be ashamed of himself. It is not a lot of money; it is a reasonable figure for any lawyer to run a case in the District Court for 12 months. If a law firm charges more than $20,000, it is charging too much. All I am suggesting in this amendment is that some cap be placed on what insurance companies can pay their lawyers to defend cases in which they have admitted liability. I commend the amendment to the Committee.

The Hon. J. J. DELLA BOSCA (Special Minister of State, and Assistant Treasurer) [11.28 a.m.]: As I foreshadowed last night, the Government would be prepared to withdraw so much of its current amendment as would prohibit the amendment moved by Reverend the Hon. F. J. Nile last night to be incorporated into the bill. I take the opportunity at this point to make a further contribution to debate on this question. Firstly, I should like to respond to some of the observations made by the Hon. P. J. Breen about the Insurance Enquiries Council.

I am happy that the honourable member sees the Insurance Enquiries Council as a parallel process to the Claims Assessment and Resolution Service [CARS] process. The Insurance Enquiries Council is an industry body that is funded and operated by insurers themselves; it is not a statutory framework that is envisaged as being provided for in the CARS process. Therefore, it is important to compare that organisation and the relative success which the Hon. P. J. Breen attributes to it with the structure that the Government proposes to put in place.

The Government is proposing the CARS system, which is a statutory system of systematic dispute resolution in

Motor Accidents Compensation Bill.

The Hon. P. J. BREEN [12.17 p.m.]: I refer to Reform the Legal System amendment No. 2 circulated on sheet C-021A. This amendment will allow law consumers injured on the road in a work-related accident, or injured while travelling to and from work, simply to notify the Motor Accidents Authority of their intention to make a claim. Once a workers compensation claim is resolved, or before the expiration of three years, an injured worker could pick up the motor vehicle accidents claim. A decision could then be made as to whether a lump sum workers compensation settlement or a motor vehicle accident claim is the appropriate remedy.

The current situation is that people who are injured on New South Wales roads whilst they are at work, or are injured in circumstances that give rise to what is called a journey claim, that is, travelling to and from work, may run parallel claims. They are advised by their lawyer, and correctly, that their workers compensation claim is the first remedy and that, after the workers compensation is determined and after their injuries have settled down, they can make an election as to whether or not they should also seek or receive a motor vehicle accident *settlement.*

A consequence of the present system is that injured people are involved in two sets of proceedings: one involving pursuit of their workers compensation rights, and the other involving pursuit of their rights as motor vehicle accident victims. Obviously, those people have the stresses and difficulties of running two separate cases. As a result they often have twice the amount of legal and medical expenses. The purpose of the amendment is simply to draw some kind of line in the sand against what is patently a waste of money - a waste of the insurance company's money, the insurer's money, and so on.

The Kennett Government in Victoria addressed the problem of parallel workers compensation and motor vehicle accident claims in the usual heavy-handed Kennett way. In November 1997 amendments were passed to both the workers compensation legislation and the motor vehicle accidents legislation to the effect that a person with a workers compensation claim had no parallel third party claim and vice versa. For example, if a taxidriver in Victoria is involved in an accident, and
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the passenger and taxidriver are both injured, one person claims under workers compensation legislation and the other claims under motor accidents legislation. I am not sufficiently familiar with the Victorian system to know how effective that is.

I suspect it is a bit confusing. But it cannot be more confusing than the situation we have in New South Wales. The Hon. Dr B. P. V. Pezzutti informs me that approximately one-third of people injured in motor vehicle accidents are either engaged in a journey to or from work or are involved in work: couriers, taxidrivers, truck drivers, et cetera. I am not suggesting that we need amendments that are as tough as those that were introduced in Victoria, but if we are serious about reducing the cost of green slips we ought to at least do the figures on what may be a vast and hidden expense for New South Wales motorists. On that basis I am grateful for the opportunity to speak to the amendment.

CORRECTED

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

Review of the exercise of functions of the Motor Accidents Authority and the Motor Accidents Council

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At Sydney on Monday, 8 May 2000

The Committee met at 10.00 a.m.

PRESENT

The Hon. R. D. Dyer (Chairman)

The Hon. P. Breen
The Hon. J. Hatzistergos
The Hon. J. F. Ryan

Transcript supplied and produced by C.A.T. Reporting Services Pty Limited

Law and Justice Monday, 8 May 2

RICHARD JOHN GRELLMAN, Chairperson, Motor Accidents Authority and Chairman, Motor Accidents Council, 45 Clarence Street, Sydney, sworn and examined, and

DAVID BOWEN, General Manager, Motor Accidents Authority, 580 George Street, Sydney, affirmed and examined:

CHAIR: Mr Grellman, what is your occupation?

Mr GRELLMAN: I am a chartered accountant.

CHAIR: Did you receive a summons issued under my hand in accordance with the Parliamentary Evidence Act 1901?

Mr GRELLMAN: I did.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr GRELLMAN: Yes.

CHAIR: Could you please briefly outline your qualifications and experience as they are relevant to the terms of reference of this inquiry.

Mr GRELLMAN: Primarily having served the Motor Accidents Authority as Chairman of the Board for the last five years and, as I mentioned earlier, currently chairing the Board and the Council.

CHAIR: You will be aware that the Motor Accidents Authority has made a written submission to the Committee in response to the material we forwarded to it. Is it your wish that that MAA submission be included as part of your sworn evidence?

Mr GRELLMAN: Yes, it is.

CHAIR: Mr Bowen, what is your occupation?

Mr BOWEN: Public servant.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Mr BOWEN: I did.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr BOWEN: I am.

relating to the AMA guidelines? Why does Chapter 4 of the MAA's guidelines specifically exclude the use of range of motion assessments for spinal impairment, while these assessments are permissible under the AMA's guides?

Would you outline for us, if you can, the decision making processes of the reference group which developed Chapter 4 of the Authority's guidelines, and the MAA Impairment Guidelines advisory committee, in relation to the matter I am raising, that is the excluding of range of motion assessments for spinal impairment?

Mr BOWEN: The American Medical Association Guidelines provides two alternative means of measuring spinal impairment, being either diagnostic related estimates or range of motion. The view of the reference group that looked at the spine was that diagnosis related estimates was by far the preferable means of doing it, because it was more accurate than range of motion, given that there can be a whole host of other impairments that can limit movement in the spine.

Perhaps a more important question was whether the range of movement should have been maintained as a means to flesh out the diagnostic related estimate, and I know, and I think this was also well discussed at the Impairment Seminars, that that was looked at in some detail.

I am simply going to have to rely upon the judgment of the experts when they looked at this, that it was preferable to go down the path of relying entirely upon the DRE methodology rather than range of motion, in that while being aware that there is an issue as to whether range of motion should be used to augment the first assessment, I would not want to second guess the experts who took the opposite view.

They seem to also be suggesting that range of motion was perhaps more of an historic overhang, because up until this last set of guides it was a method used - it is still used in those compensation schemes in Australia which rely on earlier editions of the AMA - so they thought perhaps because of that had been retained in the AMA for tradition, but that was clearly on the way out as being inferior to the diagnostic estimates.

Mr BREEN: One of the objectives of the legislation was to take these claims for whiplash injuries out of the schedule of injuries for the purposes of compensation. As a practitioner in the area my experience before this legislation was that if you had an accident in Queensland and it involved a whiplash injury, you might get $30,000; in New South Wales for the same injury you might get $15,000 and in Victoria you would get nothing. The object of the scheme, very broadly, was to take New South Wales closer to Victoria, rather than what was happening in Queensland. I am interested to know what has been the impact of the legislation in the context of whiplash injuries, given that there is no longer a claim for economic loss with whiplash injuries. Has that had any impact, or was that part of the $100 reduction that the Government says is the saving on premiums? Are whiplash injuries included in the calculation to determine that $100?

Mr BOWEN: The reduction in overall non-economic loss is included in that, and

certainly one of the areas that was expected to be a reduction in payment was for non-economic loss for whiplash injuries, bearing in mind there is no reduction at all for economic loss. To assist in fleshing out these impairment guidelines the Motor Accident Authority has now completed round about 70, and we are on our way to completing 100, case studies of completed files where non-economic loss payments have been made. That would show that without something additional, straight forward whiplash will not get over 10 per cent whole body impairment, and therefore a person presenting with just that injury will not get non-economic loss. With some additional complications or another impairment they may get over.

The costings for the new scheme assume that round about 10 per cent of claimants, about 1,800 claimants per year, will get greater than 10 per cent whole body impairment. Given that whiplash constitutes 38 per cent or 40 per cent of motor accident vehicle injuries, certainly it is clearly the case that the great majority of people presenting just with whiplash will not be getting over the 10 per cent whole body impairment. The case studies bear that out. I might add that the case studies show also that under the pre-existing scheme there was a huge range in non-economic loss payments, sometimes to the point of being unexplainable, not even on factors that one would think would relate to disability, such as age or restriction on the person.

Mr BREEN: This is under the old scheme?

Mr BOWEN: Under the old scheme. Part of the purpose of doing these case studies was to provide a case book for people as to matters where a fairly typical range of injuries was round about the 10 per cent mark, and secondly it was allowing the MAA to make comparisons between what people were previously getting for non-economic loss, their entitlement under the new scheme and how much they might get in the future. It is suggesting to us that there was a huge range of non-economic loss payments which may have had more to do with the level of representation a person had and their propensity to pursue litigation, rather than the level of impairment or disability they had.

Mr HATZISTERGOS: The level of preparation?

Mr BOWEN: Yes.

Mr BREEN: Can I conclude that line of argument with the question whether the $100 reduction in the premium is due to savings from whiplash injuries not being included, or is it due to the fact that lawyers' fees are no longer part of the payments? What specifically is the $100 and how has it been achieved?

Mr BOWEN: It is a combination of both of those, and other savings. In regard to the actual figures, I will have to take that on notice and get back to you, because I do not want to misestimate it. There is a significant component of it that comes from the reduction in overall non-economic loss. My recollection is that the new scheme seeks to reduce the total amount of non-economic loss payments by about $100 million, from about $280 million to about $180 million. I would wish to confirm those figures before

they are relied upon by the Committee, but that is indicative.

The other savings come from reduction in transaction costs, including legal and medical costs, partly by simplifying the process for the finalisation of a claim so that for small claims people do not need to have a lawyer, or the amounts that they are spending on legal costs are significantly reduced; and then otherwise from trying to reduce some of the litigation in the system, including in the larger claims by having a range of what currently litigated matters such as assessment of future treatment and the like determined through an assessment process so that those issues can be finalised earlier and they can promote earlier settlement of matters. That is perhaps the harder area to assess savings and it really will not be until some years down the track that we will be able to say that the new scheme is or is not meeting those assumptions. Although there are certain milestones along the way, that will give good pointers to it, including informed feedback from both insurers and plaintiffs' lawyers as to what is happening with the claims.

Mr RYAN: I think you said that 38 per cent of the old scheme was made up of whiplash claims. Is there any possibility that $100 might be an underestimate as to what effect the new scheme might have on premiums?

Mr BOWEN: That $100 might be an underestimate?

Mr RYAN: Yes. In other words, is there likely to be any chance of even more savings, given that the new scheme may well have taken so many claims out of the scheme, in that whiplash is highly unlikely to make the grade and was 38 per cent of previous claims? That is a fairly significant chunk out of the old scheme that is no longer there?

Mr BOWEN: It was 38 per cent of total claims, and of total claims previously about 50 per cent were receiving non-economic loss. I am not sure how all that weighs up. Probably a great number of those whiplash claims were not previously receiving non-economic loss either. I would expect that to be the case, unless there was something that fitted into the previous statutory definition that took them beyond 12 months - it was a significant impairment; it had to be at least 15 per cent of the most serious case. You would think that a lot of simple whiplashes would not have passed that test either, and so would not have previously been getting non-economic loss.

Mr GRELLMAN: The new legislation actually continues the trend that was commenced with the 1995 amendments to move the compensation field more towards the more seriously injured, and that is not to dismiss or trivialise whiplash. At the end of the day it is a mathematical equation to determine how to achieve a significant reduction in premiums and what benefits or other costs you can take out of the scheme to achieve that reduction. Certainly whiplash and the smaller claims have been largely removed.

Mr BREEN: The point is that if the 1995 amendments took whiplash out of the range of claims and benefits and this new scheme does not include some significant reductions as a consequence of there being no whiplash claims, how do you achieve the $100 reduction? That question still remains outstanding.

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS AUTHORITY AND THE MOTOR ACCIDENTS COUNCIL

At Sydney on Monday 11 December 2000

The Committee met at 10.00 a.m.

PRESENT

The Hon. R. D. Dyer (Chair)

The Hon. P. J. Breen
The Hon. Dr A. Chesterfield-Evans
The Hon. J. F. Ryan
The Hon. Janelle Saffin

DAVID BOWEN, General Manager, Motor Accidents Authority, Level 22, 580 George Street, Sydney,

CONCETTA RIZZO, Manager, Insurance Division, Motor Accidents Authority, Level 22, 580 George Street, Sydney, and

ADRIAN MARK GOULD, Consulting Actuary, Level 4, 5 Elizabeth Street, Sydney, affirmed and examined.

CHAIR: Mr Bowen, in what capacity are you appearing before the Committee?

Mr BOWEN: As General Manager of the Motor Accidents Authority.

CHAIR: Did you receive a summons issued under my name in accordance with the provisions of the Parliamentary Evidence Act 1901?

Mr BOWEN: I did.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mr BOWEN: I am.

CHAIR: Would you please briefly outline your qualifications and experience as they are relevant to the terms of reference for this inquiry?

Mr BOWEN: I am the General Manager of the Motor Accidents Authority. As such, I am a member of both the Board of Directors of the authority and a member of the Motor Accidents Council.

CHAIR: Ms Rizzo, in what capacity are you appearing before the Committee?

Ms RIZZO As Manager of the Insurance Division of the Motor Accidents Authority.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Ms RIZZO I did.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Ms RIZZO I am.

CHAIR: Would you please briefly outline your qualifications and experience as they are relevant to the terms of reference for this inquiry?

Ms RIZZO As the Manager of the Insurance Division I have been responsible for preparing some of the material that will be accessed.

CHAIR: Mr Gould, in what capacity are you appearing before the Committee?

also correct in saying that fewer than 50 per cent of them are receiving compensation under the current scheme. Could you explain to the Committee why that is a policy constraint, that is, that recurrent funding seems to be ruled out?

Mr BOWEN: The authority has taken the view that it has only a limited amount of financial resources to provide to rehabilitation programs and that it should focus on capital requirements. The whole establishment of the brain injury program was funded from capital provided by the MAA and research. As soon as you lock up a component of your funding into a recurrent service requirement it takes that funding out for ever being available to other sorts of initiatives. Brain injury remains a very significant focus for the Motor Accidents Authority. The answer to the question details the significant funding that has been and continues to be applied to brain injury. That will not change. The other issue is that you start to be placed in the position of picking between different sorts of services—which should and should not get recurrent funding. You do that in the knowledge that you will not be able to recurrently fund all the services that merit some support from the authority. The demand is greater than the ability of the MAA to meet out of its resources.

CHAIR: My concern arises partly from the fact that there is an absence of a long-term no-fault scheme. I remember visiting a facility, which I think was funded by the Motor Accidents Authority, at Castle Hill when I was Minister for Community Services. Does the pickup funding normally come from a department such as Community Services or from the Department of Health?

Mr BOWEN: It usually will come from the Ageing and Disability Department. We still provide money for establishments. During the last 12 months I have opened brain injury community outreach centres in the Central Coast and Newcastle. The property was purchased and all the renovations were made with MAA funding but support staff are picked up through the Ageing and Disability Department.

The Hon. P. J. BREEN: I think that last time you were before the Committee you referred to a special hat. People could turn a light on by thinking.

Mr BOWEN: That is the brain switch as I recall, a spinal cord injury project. I would have to find out where that is up to. It is one of quite a number of innovative research programs that we have funded. It might have been a two or three year one. I have not seen a final report on that but I can get you a progress report.

The Hon. P. J. BREEN: I was distracted during your response to Mr Ryan's last question. He was asking you about the 10 per cent threshold for pain and suffering. You mentioned the Glenbrook rail accident. Could you explain again the relationship between the 10 per cent pain threshold and the consequences of the Glenbrook rail accident?

Mr BOWEN: The Transport Administration Act provides that compensation for injuries in rail accidents is to be determined in accordance with the damages provisions of the Motor Accidents Act. Prior to 1999 that provision was located in the Motor Accidents Act. Given that it did not deal with motor accidents, in 1999 it was moved in amendments to the Transport Administration Act, but it had been there since the Motor Accidents Act was introduced in 1988. The consequence is that the damages provision of the Motor Accidents Act limit entitlement to non-economic loss to those

who exceed the 10 per cent threshold. There are also provisions of our Act that limit entitlement of parental claim to those who witnessed or were psychologically affected by a child's death providing that the psychological effect was greater than 10 per cent, as mentioned on the impairment scales. There is a justiciable issue as to how those provisions are applied. I understand that is being pursued through the Glenbrook litigation.

The Hon. P. J. BREEN: So it would be futile to ask you how many people in the Glenbrook rail inquiry have been unable to claim as a result of the 10 per cent threshold?

Mr BOWEN: I have no information at all on that.

The Hon. P. J. BREEN: Is there any way of knowing with regard to motor vehicle accidents generally how many people are no longer claiming as a result of that 10 per cent threshold?

Mr BOWEN: I can tell you what the assumption is in terms of the effect of the Act. The assumption was that the number of people who would be eligible for non-economic loss would reduce from about 40 per cent under the old Act to 10 per cent—the 10 per cent most seriously injured—under the new Act. In terms of what effect that is happening on settlements that are outside of the assessment service, I cannot say. I would think it would be factored in by both claimants and their legal representatives and insurers.

But having said that, we would not have anticipated that there would be very many, if any, claims that would get close to being at or over 10 per cent that would have stabilised at this point in time. That was indeed true even looking at the old scheme. If you looked at the amount of non-economic loss paid on so-called claims in the 12 month development period, it was very low even under the old scheme because these are people with serious injuries and it would not be expected that their injury would have stabilised and they would finalise a claim all within 12 months.

The Hon. P. J. BREEN: There was an assumption, though, that there were a lot of people with soft tissue injury, particularly neck injuries, who would not qualify under the 10 per cent threshold and I would have expected that there should be a dramatic drop in numbers given that those people had represented a considerably large proportion of claims in the past. Certainly in other States such as Queensland where these restrictions are not in place, the number of people who could claim was considerably higher than in New South Wales.

Mr BOWEN: Well, the number of people who can claim compensation here is exactly the same. It is their entitlement to the non-economic loss component that has been restricted. We certainly were not expecting nor have we seen any reduction in the number of claims being made.

The Hon. P. J. BREEN: What about 10 per cent whole-of-body impairment? Should that not result in far fewer people claiming?

Mr BOWEN: There would be far fewer people entitled to non-economic loss, but they will still have other damages that have been incurred for which they will make a

claim. Concetta may be able to advise me otherwise but I would doubt that there would be very many, if any at all, in the history of this scheme where people received a non-economic loss entitlement without any other form of compensation.

The Hon. P. J. BREEN: Is it fair to say that you are now processing those in the office of the Motor Accidents Authority [MAA]?

Mr BOWEN: We have, the figures in here somewhere, 60-odd applications for medical assessment, but quite a few less for impairment. My recollection is about of those, only one has gone to a final assessment because in the other cases the injury had not stabilised. The assessor was unable to make a final determination.

The Hon. P. J. BREEN: The anecdotal evidence is that lawyers certainly in the suburbs are not receiving claims from people with motor accident injuries. The question is: Where are they going? Are they going direct the authority or to somewhere else such as specialist lawyers?

Mr BOWEN: The drop-off in legal representation on claims is not as dramatic on our data as perhaps some members of the legal profession suggest. There has been a drop-off in the level of legal representation from 60 per cent to 50 per cent, which is significant. But what it is showing is that 50 per cent of claims that are notified onto our claims database by the insurers have a lawyer involved for the claimant, which is still a reasonably high amount. I am not sure what the explanation is. A lot of lawyers are telling you and telling me the same: they are not getting any clients walking in the door. It is not supported by the evidence available to us. The only explanation I have is that in addition to that reduction from 60 per cent to 50 per cent there has been a compression in the number of practitioners who are doing this work and whether it has, as you suggest, compressed into more specialist firms is perhaps one explanation for it.

The Hon. P. J. BREEN: In one firm that I know of, I believe I have mentioned it to you on another occasion, the turnover previously was something like $2 million a month in motor vehicle accident work. Now it is down to half a dozen claims a month. That seems to be a dramatic drop.

Mr BOWEN: It certainly does, but I have no explanation why that is being reported when we still have indications that 50 per cent of claimants have a legal representative. It is not sustained by the information we have available to us.

The Hon. Dr A. CHESTERFIELD-EVANS: You said there are 60 claims for non-economic loss which claim to be over the 10 per cent threshold, of which only one has stabilised, is that the figure you have given?

Mr BOWEN: I will find that for you. There have been 60 applications for medical assessment services. I am sure there is nowhere near that many for impairment assessment. It is in an attachment to our response tabled today to the questions, which shows the number of matters and their disposition at both medical assessment service and claims assessment service.

The Hon. JANELLE SAFFIN: Does the 60 per cent to 50 per cent drop represent new or existing claims?

The Hon. P. J. BREEN: I note the authority is catering for unrepresented claimants. In answer to some questions from the Law Society you referred to the outreach service and compared it with the service provided by the Commonwealth Administration Appeals Tribunal, which assists unrepresented claimants making appeals. On page 23 of your responses to questions, at the top of the page the Law Society asked:

> Is the aim of the service to replace the role of lawyers in the New Scheme.

Your response states:

> The CAS aims to assist injured persons making a claim by offering procedural information and administrative support through its outreach service. It is in no way intended to replace the services provided to injured persons by legal practitioners.

That response does not directly answer the question. There is a concern by the Law Society and by a number of legal practitioners that ultimately this scheme will replace the need for a lawyer when there is no question of dispute about liability. Do you have an observation about that?

Mr BOWEN: Our interest in this scheme is making sure that claimants receive their fair entitlements to compensation as required by the legislation. The MAA has set up its outreach service because there is an expected drop-off in the level of legal representation and we wish to provide assistance to people who are proceeding with their claim on their own behalf. But the true test as to whether or not a claimant can get through, process a claim and have it dealt with by the insurer without legal representation is how they are dealt with by the insurer. Something I have been at pains to stress to our CTP insurers is that if they deal with claimants in the way they dealt with them under the old scheme, they will drive them back into the hands of lawyers in no time because that approach is very adversarial, it was tactical and it required people to have a lawyer to protect their interest.

The Hon. P. J. BREEN: But is it not true that under the old scheme there was no organisation like the Claims Advisory Service [CAS] to facilitate the process? Claimants were really on their own; previously they were in the lion's den?

Mr BOWEN: That is true.

The Hon. P. J. BREEN: But now with your assistance it could be argued that claimants do not have to be concerned at all; they can simply be guided by what you tell them, is that right?

Mr BOWEN: We are not going to give them advice on whether an offer they have received from an insurer is reasonable; we do not give them advice if the insurer challenges liability for the claim. That type of legal advice is a matter that if the person is unhappy with the response they have from the insurer, they would continue to access.

The Hon. P. J. BREEN: I understand that on the question of liability, but on the question of whether the compensation offer is reasonable, if there is no lawyer in

the equation there is really nobody else for them to go to except to the Claims Advisory Service?

Mr BOWEN: Or if they feel they have been properly dealt with by the insurer. Your opening comments indicated that the type of claims we are dealing with here are ones where there will be no entitlement to non-economic loss. So the claim is for provision of medical services, lost income, and any claim that does not involve that in terms of the past really is quite easy to settle. It is only a matter of adding up the amounts. Where it starts to draw in potential future medical costs and loss of future earning capacity, it becomes a little more complex, and when it gets into non-economic loss it is more complex again. However, if insurers take the trouble to sit down with claimants and explain all of their entitlements and work their way through it, and the claimant is happy with the outcome of that process, it may well be able to be done without a lawyer.

The Hon. P. J. BREEN: Is it your policy generally through this CAS to encourage people who are unrepresented to come directly to you?

Mr BOWEN: No. our policy is to have a service available that can fill what was a massive information gap in terms of what information claimants were given about their entitlements and the procedure by which they would be dealt with. I believe at the last hearing of this Committee I recall referring to some market research that the Motor Accidents Authority had undertaken in 1998 and saying that most claimants, even when they were legally represented, had no idea of what was happening with their claim or how it was being processed. They were given no information at all. This was to fill that sort of gap. It does recognise that there are likely to be more unrepresented claimants go through, but it is not only to fill that demand.

Interestingly, if you look at the profile of where the questions are coming from, the Claims Advisory Service is answering nearly as many questions from legal practitioners as it is from claimants. A number of the claimants who ring the service in fact have a lawyer but the lawyer has not told them what to expect and they have rung the Claims Advisory Service to get advice on the procedure. I think that is fulfilling a very important role in making sure that people know what is going to happen to them when they have suffered an injury and need to make a claim.

The Hon. P. J. BREEN: On that subject, there is a cap of $260,000 for non-economic loss, I believe. Do you have any observation to make about that? Again, I am interested from the point of view of the Glenbrook rail disaster. A number of people suffered injuries that would indicate—certainly prior to this legislation being in place—that their non-economic loss was worth considerably more than $260,000. In addition to that, the figure is also being applied in other jurisdictions where personal injuries or damages are involved.

Mr BOWEN: The threshold under this Act is the same as under the previous Act and it is indexed each year. In fact, because of a timing problem it was not the same, but that has been corrected in a statute law bill. It is now the same and, in regard to its application to matters, there have not been any matters settled so that no-one has been disadvantaged by that. My understanding of this, without having looked at it, is that the amount of that cap is pretty close to the maximum amount of non-economic loss that the Supreme Court might award in personal injury cases. You might get slightly more,

but given that people who would reach the cap for non-economic loss under this scheme are those with really quite catastrophic injuries, non-economic loss represents only a very small proportion of their compensation payments.

The Hon. P. J. BREEN: Do you regard the cap as it stands as adequate?

Mr BOWEN: Yes. It is certainly higher than any other non-economic loss cap in any other jurisdiction. Most of them are significantly lower. In South Australia it is $95,000 and the Comcare system is quite a bit under $100,000 and in fact may be as low as $60,000.

The Hon. P. J. BREEN: Do you have any observation or comment to make about its application to a situation such as the Glenbrook rail disaster?

Mr BOWEN: I really think I should not make any further comment about that. The application to Glenbrook is by the reference to the Motor Accidents Act from another Act, which is under another Minister's portfolio.

The Hon. P. J. BREEN: The other cap that we put on the legislation, as I recall, was in relation to legal costs of insurance companies of $25,000. That was applied as a result of negotiations with the Government at the time. Has any situation arisen, do your knowledge, that would call for that provision to come into play?

Mr BOWEN: This relates to a cost penalty on matters in respect of which there has been a Claims Assessment and Resolution Service [CARS] assessment and it has gone on to court. To my knowledge there have not been any finalised CARS assessments that have been taken to court. In fact, there have only been very limited number of finalised CARS assessments.

The Hon. P. J. BREEN: So that it is too early to make an assessment of that?

Mr BOWEN: It is too early to tell on that, yes.

The Hon. J. F. RYAN: With regard to caps on legal costs, one of the questions asked by the Law Society in regard to legal costs related to a schedule that basically sets legal costs at a particular rate. I have been informed that there is also an opportunity for solicitors to contract out. I think it is referred to in question 8.1. There is a schedule of costs but there is apparently a wide practice by lawyers of opting out of that system of fee regulation. Have you any idea how many legal practices are actually charging those costs and how many are going outside the range? One imagines that ultimately if the case is successful the insurer will wind up meeting those increased costs, and that will be a factor that will increase the costs of the scheme. If the schedule is being so extensively bypassed, is there anything that the MAA proposes to do about either making the schedule more realistic or making more people comply with it?

Mr BOWEN: The schedule of fees operates so that it applies to set the maximum amount of both party-party and solicitor-client costs—the amount recoverable from the insurer and the amount that the client has to pay the solicitor. There are circumstances where that whole regulated fee regime does not apply and those are the matters that are exempted from CARS. There are some specific statutory exemptions and a whole range of discretionary exemptions. It is intended to take the

regulation of medico-legal costs." Is that what you had in mind when you were referring to something being under consideration with regard to costs?

Mr BOWEN: It was not.

The Hon. P. J. BREEN: Is it something that is likely to be on the Minister's agenda in relation to regulation? If there is a regulation to deal with a perceived problem regarding costs, it seems to me that there ought to be something in the legislation rather than dealt with by regulation.

Mr BOWEN: It was not until we received the submissions and questions in this process that anyone had suggested to me—or, as far as I am aware, any officer of the authority—that there was a common practice of contracting out. It has not been mentioned to me in any of the meetings I have had with the legal profession previously. I agree that it is something that we will now have to consider and provide some advice to the Minister on it.

The Hon. P. J. BREEN: It states that the Minister has sought further consultation. Was that at the Minister's initiative or on the initiative of the authority?

Mr BOWEN: This regulation was intended to do a few things to tidy up the existing regulation. It was proposing to deregulate the medico-legal fees. The Minister was unhappy to do that on what was presented to him without some further consultation. That is in hand and we will give him advice on that. I am happy to touch upon the reasons we were proposing deregulation of medico-legal costs, if you like.

The Hon. P. J. BREEN: I would certainly be interested in that.

The Hon. J. F. RYAN: Is that what this proposed unknown regulation would have done?

Mr BOWEN: Yes.

CHAIR: It deals with medico-legal costs?

Mr BOWEN: It deals with some other issues: what is caught by the regulated amount of the legal fee and what is billable over and above that as a disbursement. It also deals with that issue and puts a bit more clarity into it. One of the main components was the deregulation of medico-legal costs. The regulation picked up what I thought was a reasonable scale of fees for medico-legal reports, because it was a scale negotiated between the Law Society and the Australian Medical Association. One would think that ostensibly this would represent a reasonable level of fee. However, it has been the basis of submissions to us by both the insurers and plaintiff lawyers that the amounts under that scale were insufficient to allow them to get the very best experts in some particular field.

We grappled with this to see whether we could create a more detailed schedule that had different sorts of fees for different types of medico-legal reports. We have not been able to successfully set that out. It was with some reluctance that we were in fact recommending to the Minister that he deregulate these fees while we went through a process of determining what the market rates are for a variety of different specialist

costs. It then has added to it all of the other components to the premium—the acquisition costs and the profit being the main two, with the acquisition costs being broken down into the other components that have previously been mentioned. So, in undertaking our assessment we have available to us an independent actuarial assessment of the risk premium.

The risk premium is the major component of the premium. So we can make an assessment as to whether the insurer's risk premium is within the sort of range that is relevant. We also, on things like acquisition costs and profit, can make comparisons with what previously have been included in premium filings. They all do have to add up to a final figure. So, when we say that the insurer's profits have increased, we are saying that in their premium filings, as from last year to this year, the amount that is put aside as representing the insurer's profit has decreased, and that our assessment of that decrease is that it fits in with our overall assessment of the premium filing.

Mr GOULD: There is very little I can add, other than to reiterate that the pie charts in the report concerning insurers' profits are based on estimates. They can only be based on estimates. Frustrating though it may be for members of the Committee, it will be several years before it becomes apparent as to whether those are under or over estimates.

The Hon. P. J. BREEN: But they are the insurance companies' estimates, not your estimates, are they not?

Mr GOULD: They are the insurance companies' estimates, but the major components of them are reviewed independently, and for reasonableness, by the Motor Accidents Authority, with assistance from ourselves as consultants to the Motor Accidents Authority, in relation to the main area of estimated future claims costs.

The Hon. P. J. BREEN: If I could just say that our concern about estimates is that we need to have some understanding about whether they are yours or whether they are from the insurance companies. For example, the slide on premium filings shows that the insurers have included lower percentage legal fees. In your information and in your evidence today you have said that the legal fees being paid out are exactly the same, that they are not lower at all.

Mr BOWEN: We can offer a possible explanation for that. I might deal with that issue and then return to the question of premium filing. The amount of legal costs paid out this year, compared to last year, has been the same. But it is an extremely low amount. It really is recognising that the types of claims that are settled in this first year are ones which, even under the old scheme, had very little legal representation. It does take into account that there has been a speeding up of matters moving to settlement. So it is the total amount of legal costs, not the legal costs per settled claim. If we were looking at it in terms of legal costs per settled claim, then there would be a reduction. It is just a comparison of the total amounts paid.

The other component to Mr Breen's question is whose estimates these are. The system we operate under is file and right. So the insurers file their premium estimates, and the MAA has to consider those within the terms of the legislation, which empowers us not to approve of a premium if we believe it is excessive. One of the factors that is taken into account as to whether or not the premium is excessive is whether or not it

CHAIR: Can the AMA perhaps be asked for any particular form of assistance?

Mr BOWEN: The AMA and its local practice directories—I am not sure that I have got the name right—have been of assistance. I suspect from discussions I have had with them that they often have similar sorts of problems in getting information that they want out to their members picked up and acted upon.

The Hon. Dr A. CHESTERFIELD-EVANS: Have you asked the drug companies?

Mr BOWEN: Not even the Motor Accidents Authority can afford to engage the drug companies to sell our wares.

The Hon. Dr A. CHESTERFIELD-EVANS: They might use them to get their foot in the door as a marketing ploy.

Mr BOWEN: We had thought about whether we would follow it up with door-to-door attendance. It is a very resource-intensive process and we would like to give a little longer for this further mail-out and the follow-up survey to have effect. If we still have less than 60 per cent knowledge in the next survey of all the practices then I suspect we will have to do the door-to-door attendance.

The Hon. J. F. RYAN: When do you expect to have done the next survey?

Mr BOWEN: In the first six months of next year so I probably think March, April, some time like then would be reasonable. Getting in a large number of people to phone up 4,000-odd practices is a fairly intensive task.

The Hon. P. J. BREEN: Can I make an observation about the form? It does have a separate section for the doctor to fill out and I think a separate section again for somebody else to fill out, perhaps the lawyer or the claimants themselves. Certainly on the face of it, it would be a daunting task for a doctor suddenly confronted with a new form that appears to involve questions other than medical questions. It may be that the doctor simply puts the form in the patient's file and that is where it stays.

Mr BOWEN: The medical certificate component of the form is very similar to the workers compensation one and we did that for the deliberate reason of trying to ensure that it was something they were already comfortable with and already used to using. We wanted to build upon the fact that the workers compensation certificate was already out there and in use, and that this was something along the same lines to assist in getting acceptance. It is also not that much different, although in fact less detailed, than the medical certificate that is required to be filled in attached to the claim form. So we are trying to get a consistency in approach to all of this to make it acceptable. I would have thought the form is reasonably clear on the face of it, that it is only the last page of the medical certificate that is required to be completed by the doctor.

The Hon. J. F. RYAN: On page 19 of the responses you have given to questions you make reference to the fact that a mail-out was sent out using medical practitioners supplied by the AMP company. Is there any reason why the MAA does not have its own database of medical practitioners?

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS AUTHORITY AND THE MOTOR ACCIDENTS COUNCIL

—

At Sydney on Monday, 17 December 2001

—

The Committee met at 10 a.m.

—

PRESENT

The Hon. R. D. Dyer (Chair)

The Hon. P. J. Breen
The Hon. J. Hatzistergos
The Hon. J. F. Ryan

Transcript provided by CAT Reporting Services Pty Limited

BELINDA GAIL CASSIDY, Manager, Motor Accidents Assessment Service, Level 22, 580 George Street, Sydney,

RICHARD GRELLMAN, Chair, Motor Accidents Council, Level 22, 580 George Street,

STEVEN CLOUGH, Principle Compliance Officer, Motor Accidents Authority, Level 22, 580 George Street, Sydney, sworn and examined, and

DAVID BOWEN, General Manager, Motor Accidents Authority, Level 22, 580 George Street, Sydney, and

CONCETTA RIZZO, Manager Insurance Division, Motor Accidents Authority, Level 22, 580 George Street, Sydney, affirmed and examined:

CHAIR: Did you receive a summons issued under my hand in accordance with the Parliamentary Evidence Act 1901?

Mr BOWEN: I did.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr BOWEN: I am.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Ms CASSIDY: I did.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Ms CASSIDY: I am.

CHAIR: Did you receive a summons issued under my hand in accordance with the Parliamentary Evidence Act 1901?

Mr GRELLMAN: Yes.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr GRELLMAN: Yes.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Dr CLOUGH: Yes.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Dr CLOUGH: Yes, I am.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Ms RIZZO: Yes.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Ms RIZZO: Yes.

The Hon. JOHN HATZISTERGOS: Might it not be better to look at that situation in terms of working out fairness?

Ms RIZZO: I take your point. I think it is a good idea to look at different categories of injuries and we do intend to do that.

The Hon. JOHN HATZISTERGOS: When do you intend to do that?

Ms RIZZO: Early next year.

The Hon. JOHN HATZISTERGOS: Why did choose the brain injuries?

Ms RIZZO: They are very serious injuries. They cover a range of injury as far as being extremely serious to moderate. They are claims of which we have had a substantial number.

The Hon. JOHN HATZISTERGOS: You would not have expected a different outcome in terms of your fairness examination from the one you actually obtained looking at that category, whereas you would have for something else?

Ms RIZZO: I did not have expectations, but the result was that there was an improvement for them. We will look at the other categories as well.

The Hon. PETER BREEN: Can I ask about that? The expression "fairness indicator" suggests some kind of benchmark, but the words are not even used in the report. Is it intended that it only apply to brain injuries?

Ms RIZZO: No. The words actually used are "most seriously injured".

The Hon. PETER BREEN: If you use the words "fairness indicator", is it appropriate to describe your benchmark that way? The words do not appear in the report.

Ms RIZZO: When we talk about benchmark the way we have done, the analysis is that we have compared brain injury that has been notified to the insurers in the first year after the introduction of the legislation with the brain injuries that were notified in the last year of the previous legislation. The benchmark is really the last year of the previous legislation.

The Hon. PETER BREEN: Is that what you are calling the "fairness indicator", is it?

Ms RIZZO: The fairness indicator is something the committee agreed with some time ago and that refers to the most serious injured. We took brain injury as one example of the most seriously injured, because it is an important group.

The Hon. PETER BREEN: You will not be applying that same fairness indicator across the board to other lesser injuries?

Ms RIZZO: We will.

The Hon. PETER BREEN: You are not going to get the same outcome, you are not going to get an improvement in all categories of injuries in the new scheme as opposed to the old scheme?

Ms RIZZO: I will wait and see the analysis. I do not know.

Mr BOWEN: We would hope we get an improvement for those with very serious and catastrophic injuries, and the reason for choosing brain injury is it is by far overwhelmingly the largest category of the most serious injured in our scheme. Of 260 per year on average catastrophic injuries, 220 of those 260 are brain injury.

The Hon. PETER BREEN: At some point you are going to have to pay less money to people for less serious injuries?

Mr BOWEN: For the less serious injuries we would expect that there is a reduction in

development in the old scheme, it is not no different. You cannot say under the old scheme people got all these non-economic loss matters settled within two years. The proportion was at that same sort of low point at that point in development.

To provide the Committee with some information and to reality check to see whether the costing assumptions under the new scheme are correct, we undertook this non-economic loss audit. It is based on the reserving practices of insurers. Dr Clough has indicated there are some issues as to how the insurers identify and reserve, and we will take that up with them, but it is the best indicator we have at this stage of how many we anticipate will finally get non-economic loss.

The Hon. JOHN RYAN: As a Member of Parliament I have difficulty explaining to my constituents that a group of people who are likely to make a profit from this exercise have reserved an amount of money, which is yet still an estimate, and so far 36 claims have been finalised, 1,500 at least to go, and I am yet unable to explain to people at some stage or other when am I going to be able to say to them that you will start to see the other 1,500 or 1,700 odd claims show up in claims as finalised to justify to them that they are paying an appropriate amount of premium. At the moment if those claims are not realised for the money for which it has been reserved, then it might be reasonably said the insurers will make that much profit, plus its interest, at well above what they had estimated.

Mr BOWEN: Miss Rizzo answered the question earlier in which she referred to the cash flow document in here which shows the payment trend. I would point out again that that sort of payment profile is very similar to the old scheme, and the experience, in terms of when payments come through, which is the bulk of them will come through in years three, four and five, is true of the new scheme as it was of the old scheme. As the more serious get to the point where the injuries have stabilised and you can start to make reasonable assessments of what the person's full compensation will be, given that it is a lump sum once and for all payment system.

The Hon. PETER BREEN: After five years we will be able to look back and say there were 1,700 non-economic loss claims in that first year?

Mr BOWEN: Our estimate now is around 1,560, that is because the claim numbers are down, partially because more matters than we anticipated are being resolved at an ANF stage.

The Hon. PETER BREEN: It will be roughly 10 per cent of claims that will get non-economic loss. If it drops below that, my understanding of your answer to one of the questions to the Law Society is that you will recommend to the Minister that the figure should be increased so the figure gets back up to 10 per cent.

Mr BOWEN: We would make an appropriate policy recommendation to the Minister. I would not want to tie myself to saying that the threshold be varied is the only way you could respond to that.

The Hon. JOHN RYAN: Can I make reference to the MAA claims assessment guidelines and the basis for which claims can be considered sufficiently complex to be exempted. The MAA has stated that each case is assessed and checked on its facts. Can you explain the criteria for assessing these facts? Is there a check list of sorts to check the claim's complexity?

Mr BOWEN: Ms Cassidy is the principal claims assessor and that is her role, so I will hand that question to her.

Ms CASSIDY: There are two ways of getting an exemption from the claims assessment and resolution service. The first way is almost an automatic kind of exemption. You have to satisfy me as the principal claims assessor that your claim involves either a denial of liability, a contributory negligence alleged of greater than 25 per cent, there is a fraudulent or misleading claim alleged or the claimant lacks legal capacity, they are an infant or so severely brain injured that they cannot act on their own. Once you have satisfied me, that is almost an automatic exemption, a certificate of exemption is issued with a brief statement of reasons supporting it.

The other way section 92(1)(b) of the Act says you can be exempted from the assessment process is to have a finding that your matter is not suitable for the assessment process. The claims assessment guidelines list a number of matters to be taken into account in exercising a discretion to exempt a matter under that section and they basically revolve around issues of complexity. If the

Appendix 4 Submission from ICAC, dated 8 March 2004

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

08 March 2004

The Hon. Peter Primrose, MLC
Chair
Standing Committee on Parliamentary Privilege and Ethics
Parliament House
Macquarie Street
SYDNEY NSW 2000

Our Ref: E03/1390

Dear Sir,

RE: INQUIRY INTO PARLIAMENTARY PRIVILEGE AND SEIZURE OF DOCUMENTS BY ICAC

Thank you for your letter dated 5 March 2004 inviting the Commission to make a further submission in relation to the disputed documents.

The Commission submits that the documents identified in its letter of 20 January 2004 to The Hon. Dr Meredith Burgmann do not come within the scope of proceedings in Parliaments and are not privileged.

One test of a document's relationship to Parliamentary proceedings may be adapted from s.16(2) of the Parliamentary Privileges Act 1987 (Commonwealth) – whether it was prepared "in the course of, or for the purposes of or incidental to, the transacting the business of a House or a committee". It is, of course, true that this provision is not applicable to the New South Wales Parliament but it purports to effectively restate Article 9 of the Bill of Rights 1689.

The material in dispute was collected and used for the purposes of civil litigation. The primary purpose for which this material was collected by and provided to Mr Breen was for the purposes connected with such litigation. The fact that Mr Breen may have used some of the knowledge he gained as a result of acting in the Ram matter to better inform himself in Parliamentary debates does not, it is submitted, qualify the actual Ram file and documents as "proceedings in Parliament" for the purposes of Article 9.

As with the case of correspondence between a Member and a constituent, the question of whether any part of such material is subsequently used in proceedings in Parliament is

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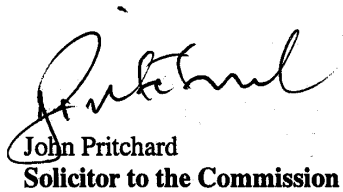
immaterial (see Erskine May's Parliamentary Practice (21st edition) at pp.132-133) and *R v Grassby* (1992) 55 A Crim R 419).

The Commission does not seek to use any information from the disputed documents to question any speech or debate by Mr Breen in the Parliament. The documentation is sought for its relevance to the Commission's current investigation into Mr Breen's use of Parliamentary allowances and resources. The material is directly relevant to this investigation.

Yours sincerely,



John Pritchard
Solicitor to the Commission

Appendix 5 Submission from Mr Breen, dated 10 March 2004

Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

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The Hon. Peter Breen, M.L.C.
Reform the Legal System
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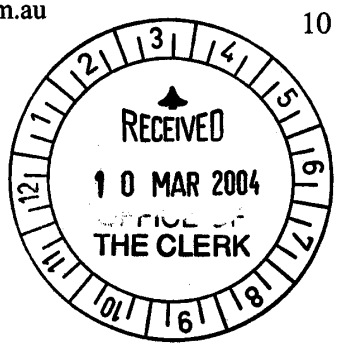
10 March 2004

The Hon. Peter Primrose
Chairman
Standing Committee on Parliamentary
Privilege and Ethics
Parliament House
Sydney NSW 2000



Dear Mr. Primrose,

Thank you for your letter dated 5 March 2004 inviting me to make a submission to your inquiry regarding the status of certain documents seized from my office by the Independent Commission Against Corruption (ICAC). The documents in question comprise a suspension file in the name of Peter Ram and various letters and papers on the file relating to a claim for damages by Mr. Ram for injuries arising out of a motor vehicle accident on the 27 July 1998.

I am grateful for the opportunity to make the submission, which is supplementary to a submission I made to the President, the Hon Dr Meredith Burgmann, on 10 February 2004. In that submission, I said that the Peter Ram file attracts parliamentary privilege 'both in the purpose for which the file was intended to be used when I brought it into the Parliament and in the way I actually used it.' I went on to say that the dominant purpose [for which I retained the file] was to assist me to argue the case for a Motor Accidents Authority. The Committee will note that I said nothing in my submission about the purpose for which the file was created.

As the ICAC rightly points out in its letter to the President dated 20 January 2004, the file was created for purposes connected with litigation. But the purpose for which a document is created is only one of two related criteria to be considered when deciding whether the document is covered by parliamentary privilege. More important in the present context than the question why the document was created is the issue of the purpose for which it was retained. Both criteria need to be considered before deciding parliamentary privilege does or does not attach to a document.

In his submission to the Committee dated 7 November 2003 (page 9) during its inquiry into the execution of a search warrant in my parliamentary offices, the Clerk of the Parliaments, John Evans, said 'it is clear that for a document to attract parliamentary privilege it must either have been *created* specifically for the purposes of a proceeding in Parliament, or otherwise have been *attained or retained* for the purposes of a proceeding in Parliament' (my emphasis).

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Stephen Skehill, Solicitor, made an oral submission to the same inquiry on 10 November 2003 (page 19 of the transcript) and gave evidence as to his understanding of the meaning of 'proceedings in Parliament' in the context of Article 9 of the Bill of Rights. Mr Skehill said it is often difficult to know whether material was 'prepared *or obtained*' (my emphasis) for the purposes of or incidental to proceedings in Parliament.' In other words, the question of whether a document is covered by parliamentary privilege is not limited to the purpose for which it was created and may include the purpose for which it was obtained.

I invite the Committee to apply the same principles it applied in December 2003 when it found that the ICAC had no authority to seize from my parliamentary offices material within the scope of proceedings in Parliament. On that occasion, the Committee decided that the transcript of two interviews between myself, a prisoner named Stephen Jamieson and a private investigator was material related to proceedings in Parliament and therefore protected by parliamentary privilege.

The transcript was created for the obvious purpose of finding exculpatory material to help Mr Jamieson prove his innocence and it would be incredible to suggest it was created for any other purpose. Indeed, a careful reading of paragraph 3.12 of the December 2003 report confirms that part of the transcript was created on 28 November 2002, a week after the relevant speech was delivered on 20 November 2002. But the main reason I retained the transcript in my parliamentary offices was for purposes incidental to proceedings in the House. The distinction is important otherwise the Committee's decision, which forms the basis of its December 2003 report, makes no sense.

The Peter Ram documents were retained for the purpose of informing me about proceedings in Parliament and were used specifically for that purpose. Although I exercised legal skill and judgment for Mr. Ram's benefit, I did the same for Mr. Jamieson, and in both cases I received no personal benefit or remuneration for my legal advice other than my income as a member of Parliament. I have a longstanding objection to members undertaking secondary employment for profit or receiving consultancy fees in addition to their parliamentary remuneration.

Another point I would like to make is that I have practised continuously as a solicitor and barrister for more than 30 years and I can assure the Committee that there can be no other good reason for taking on a single litigation matter as a member of Parliament other than to inform myself for the purpose of proceedings in the Parliament. The Peter Ram file was actually created two months before my election to Parliament in 1999 and the test to be applied in deciding whether the file is covered by parliamentary privilege is the purpose for which I retained it. In my view, the Peter Ram file more obviously attracts parliamentary privilege than the transcript relied upon by the Committee in its December 2003 report.

I note that parliamentary privilege is similar to but not the same as the common law protection of legal professional privilege. I might have claimed legal professional privilege over the Peter Ram documents when the ICAC seized them from my office. The advice I received at the time, however, directed my mind to the dominant purpose for which the documents were retained in my parliamentary offices. Significantly, legal professional privilege is for the benefit of the client while parliamentary privilege protects the House in the exercise of its various functions.

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Parliament functions only through the activities of its members and the original intention behind Article 9 of the Bill of Rights was to protect members from actions brought against them by the Monarch for anything they said in speeches in Parliament. In other words, the Bill of Rights recognises that members may properly discharge their responsibilities to constituents only when the rights and immunities of the House allow them to speak without fear of reprisals by the executive government. As I said in my submission to the previous inquiry, the ICAC is a creature of the legislature, but its operations and continued existence depend on policy considerations of the executive.

The issues raised by me with the Attorney General and the Chief Justice arising out of the Peter Ram matter and the way I articulated those issues also demonstrate the role of parliamentary privilege in protecting the doctrine of separation of powers. I would be loathe to make adverse comments on behalf of constituents about the judiciary without the protection of parliamentary privilege. Similarly, I would have serious reservations about criticising the executive.

At paragraph 2.59 of the report dated December 2003 the Committee refers to English and United States authorities for the proposition that Article 9 of the Bill of Rights safeguards the separation of powers in that 'it prevents the other branches of government, the executive and the judiciary, calling into question or enquiring into the proceedings of the legislature.' The role of parliamentary privilege in safeguarding the separation of powers doctrine cannot be overstated.

A footnote on page 17 of the report quotes the ICAC Commissioner in another context advising the government that parliamentary privilege extends to 'anything that a member has done in preparation for what is said in Parliament.' This statement appears to suggest that the ICAC applies different standards in its dealings with the government to the standards it applies elsewhere. If the ICAC adhered to this statement by the Commissioner no objection could be taken to the claim of privilege in respect of the Peter Ram documents.

Another matter I would like to address is the question whether the Peter Ram documents can be divided up in such a way as to identify which parts of the file may be covered by privilege. I believe this is a futile exercise, with respect, since each document in the file taken individually is unlikely to be covered by parliamentary privilege. Only the totality of the file, that is, all the documents viewed together, could be said to influence my thinking in anticipation of debate on the motor accidents legislation. I note in passing that the *Parliamentary Privileges Act* 1987 (Cth) provides that the definition of 'document' includes 'a part of a document'.

Once again, I respectfully draw the Committee's attention to its report dated December 2003. At no stage does the report suggest an analysis of the Stephen Jamieson transcript to determine which parts of the material were actually used in debate. In reality, speeches in Parliament, questions in the House and statements in Committee hearings are the end product of wide experience, detailed research and considerable thought. I am not aware of any requirement to track the source of the words actually used in order to sustain a claim of parliamentary privilege.

In all the circumstances, I urge the Committee to dismiss the ICAC's objections to the claim of privilege in respect of the Peter Ram documents and to recommend that the House uphold its rights and immunities. If the ICAC position on the disputed documents were to be supported, it would be a matter of some concern that the Committee is prepared to make a decision at odds with its previous decision on similar facts just three months ago. Please let me know if you would like me to elaborate on these remarks in person, or whether you require further information.

Yours sincerely,

PETER BREEN

Appendix 6 Minutes of Proceedings

Minutes of the Committee's proceedings

Note: Asterisks indicate text which has been deleted as it is not relevant to this inquiry.

Meeting No. 9

Wednesday 25 February 2004, Parliament House, 1.05 pm.

1. Members present

Mr Primrose (in the Chair)
Ms Fazio
Ms Forsythe
Miss Gardiner
Ms Griffin
Revd Mr Nile

An apology was received from Mr Catanzariti

In attendance: David Blunt, Velia Mignacca, Janet Williams.

2. Confirmation of minutes

Minutes no. 8 were confirmed on motion of Ms Fazio.

****

5. Consideration of matter of privilege regarding the seizure of documents of Mr Breen by the Independent Commission Against Corruption

Documents related to the reference received from the House on the matter of privilege regarding the seizure of documents of Mr Breen by the Independent Commission Against Corruption were distributed to the Committee for consideration.

Resolved on the motion of Revd Mr Nile:

That the Chair and Deputy Chair meet with the Clerks to discuss the process of the inquiry

That the Committee meet during the week commencing Monday 1 March 2004 to consider this inquiry.

6. Adjournment

The Committee adjourned at 1.13 pm sine die.

Meeting No. 10

Friday 5 March 2004, Parliament House, 10.02 am.

1. Members present

Mr Primrose (in the Chair)
Ms Fazio
Ms Forsythe
Miss Gardiner
Revd Mr Nile

Apologies were received from Mr Catanzariti and Ms Griffin

In attendance: John Evans, David Blunt, Velia Mignacca, Janet Williams.

2. Confirmation of minutes

Minutes no. 9 were confirmed on motion of Ms Forsythe.

****

5. Consideration of matter of privilege regarding the seizure of documents of Mr Breen by the Independent Commission Against Corruption

The Committee deliberated in relation to the reference from the House, dated 25 February 2004.

The Clerk addressed the Committee, describing the process by which the material seized from Mr Breen's office by the ICAC was examined and material falling within the definition of proceedings in Parliament was identified, in accordance with the resolution of the house of 4 December 2003.

An extract from the Committees Report on *Parliamentary privilege and seizure of documents by ICAC*, highlighting tests identified by relevant authorities for determining whether documents fall within the definition of proceedings in Parliament, was distributed to Committee members.

The Committee deliberated.

Resolved on the motion of Revd Mr Nile:

That the Clerk prepare a comprehensive list of the disputed documents for the Committee to consider.

That the Clerk prepare a document identifying relevant tests to be applied to determine whether or not documents fall within the definition of proceedings in Parliament.

That letters be written to the ICAC and Mr Breen inviting them to provide any further submissions they may wish to make in relation to the terms of reference by 5.00 pm Wednesday 10 March 2004.

6. Adjournment
The Committee adjourned at 11.08 am sine die.

Meeting No. 11

Thursday 18 March 2004, Parliament House, 1.00 pm.

1. Members present
Mr Primrose (in the Chair)
Mr Catanzariti
Ms Fazio
Ms Forsythe
Miss Gardiner
Ms Griffin
Revd Mr Nile

In attendance: John Evans, Lynn Lovelock, David Blunt, Janet Williams.

2. Confirmation of minutes
Minutes no. 10 were confirmed on motion of Ms Fazio.

3. Correspondence
The Chair tabled the following correspondence:

Correspondence received:

- Letter dated 8 March 2004 to the Chair from Ms Irene Moss, Commissioner, Independent Commission Against Corruption, responding to an invitation, dated 5 March 2004, to make a further submission in relation to disputed documents

- Letter dated 10 March 2004 to the Chair from the Hon Peter Breen MLC, responding to an invitation, dated 5 March 2004, to make a further submission in relation to disputed documents

****

Correspondence sent:

- Letter dated 5 March 2004 from the Chair to Ms Irene Moss, Commissioner, Independent Commission Against Corruption inviting the Commission to make a further submission in relation to disputed documents.

- Letter dated 5 March 2004 from the Chair to the Hon Peter Breen MLC inviting him to make a further submission in relation to disputed documents.

****

4. Consideration of matter of privilege regarding the seizure of documents of Mr Breen by the Independent Commission Against Corruption

At the invitation of the Chair, the Clerk to the Committee briefed the Committee in relation to:

- a document setting out proposed tests to be applied in considering the documents in dispute, as requested by the Committee at its last meeting;
- verbal advice received during a conference with Bret Walker SC on Friday 12 March 2004; and
- a list of the documents in dispute, prepared by the Clerk, as requested by the Committee at its last meeting.

The Committee deliberated.

Resolved on the motion of Revd Mr Nile: That the list of the documents in dispute be tabled and made available to members only and not published.

Resolved on the motion of Ms Forsythe:

That the Committee accept and adopt the proposed tests to be applied to the documents.

That, having viewed the list of documents and having considered the submissions received and applying the proposed tests, the Committee finds that the documents fall within the scope of "proceedings of parliament."

That the Chair prepare a draft report for consideration by the Committee.

5. Adjournment
The Committee adjourned at 2.12 pm sine die.

Meeting No. 12

Wednesday 31 March 2004, Parliament House, 1.00 pm.

2. Members present
Mr Primrose (in the Chair)
Mr Catanzariti
Ms Fazio
Ms Forsythe
Miss Gardiner
Ms Griffin
Revd Mr Nile

In attendance: Lynn Lovelock, David Blunt, Janet Williams.

3. Confirmation of minutes

Minutes no. 11 were confirmed on motion of Ms Fazio.

4. Consideration of matter of privilege regarding the seizure of documents of Mr Breen by the Independent Commission Against Corruption

The Committee deliberated.

The Committee considered the Chair's draft report.

Resolved, on the motion of Revd Mr Nile: That the report be adopted.

Resolved, on the motion of Ms Fazio: That the report be signed by the Chair and presented to the House.

5. Adjournment

The Committee adjourned at1.25 pm sine die.
