

General Purpose Standing Committee No. 1

Personal injury compensation legislation

Ordered to be printed according to Standing Order 231

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

New South Wales. Parliament. Legislative Council. General Purpose Standing Committee No. 1 Report on personal injury compensation legislation / General Purpose Standing Committee No. 1. [Sydney, N.S.W.] : The Committee, 2005. – 279 p. ; 30 cm. (Report ; no. 28)

Chair: Gordon Moyes.

“Ordered to be printed December 2005, according to Standing Order 231”.

ISBN 0734764235

1. Personal injuries—Law and legislation—New South Wales.
2. Compensation (Law) —New South Wales.
 - I. Title.
 - II. Moyes, Gordon.
 - III. Series: New South Wales. Parliament. Legislative Council. General Purpose Standing Committee No. 1. Report ; no. 28

DDC 346.9440323

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Terms of reference

The General Purpose Standing Committee No. 1 inquire into, and report on the operations and outcomes of all personal injury compensation legislation (including but not limited to: claims by persons injured in motor accidents, transport accidents, accidents in the workplace, at public events, in public places and in commercial premises but not including claims by victims injured as a result of criminal acts) approved by the Parliament of New South Wales from 1999, with particular reference to:

- 1. The impact on employment in rural and regional communities;*
- 2. The impact on community events and activities, and community groups;*
- 3. The impact on insurance premium levels and the availability of cost-effective insurance;*
- 4. The level and availability of Compulsory Third Party motor accident premiums required to fund claims cost if changes had not been implemented in 1999; and the impact on the WorkCover scheme if changes had not been implemented in 2001; and*
- 5. Any other issue that the Committee considers to be of relevance to the inquiry.*

These terms of reference were self-referred by the Committee on 8 December 2004.

Committee membership

| | | |
|--|----------------------------|---------------------|
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² Substituting for the Hon Catherine Cusack MLC.

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Chair's Foreword

The General Purpose Standing Committee No 1 of the Legislative Council adopted this inquiry on 8 December 2004 in order to examine the impact and effectiveness of the Government's reforms to civil liability, workers compensation and motor accidents compensation law made principally between 1999 and 2002.

This is an important report dealing with a crucial area of law fundamental to a just and equitable society in New South Wales.

The inquiry attracted considerable interest from a range of parties, including notably: The Cabinet Office on behalf of the NSW Government; the major representative legal associations and individual legal firms and practitioners; the Insurance Council of Australia and major insurers; Unions NSW and individual unions; local councils; community, welfare and recreational groups; and a number of individuals who have been injured in an accident.

I would like to thank all those parties that contributed to the inquiry. The quality of submissions received and evidence given at the Committee's public hearings was very high. In particular, I would like to acknowledge the contribution of those injury victims who had the courage to come forward and tell the Committee of their experiences, despite the pain and suffering they have endured.

This report examines a range of issues including notably:

- The impact of the Government's personal injury compensation law changes on the number of claims for damages, the level of insurance premiums, the availability of affordable insurance and the profits of insurers
- The mechanisms by which individuals who have suffered injury are assessed for damages
- The damages payable to personal injury victims under the separate civil liability, motor accidents and workers compensation arrangements
- The changes to the duty of care provisions under the civil liability reforms.

The report makes a number of recommendations designed to address some of the concerns raised with the Committee during the inquiry, while ensuring that costs remain contained under all areas of personal injury compensation law in New South Wales.

I would like to thank my fellow Committee Members for their work on this difficult inquiry. I would also like to thank the members of the Committee Secretariat who worked on the inquiry: Mr Steven Reynolds, Mr Stephen Frappell, Ms Glenda Baker and Ms Sarah Hurcombe. In particular, I would like to thank Mr Stephen Frappell who prepared this report. Thanks also to Hansard reporters who recorded proceedings at the Committee's hearings.

Revd the Hon Dr Gordon Moyes MLC
Chair

Executive Summary

Personal injury compensation law in New South Wales

Personal injury compensation law in New South Wales falls into four substantive areas: public liability law covering the responsibilities of property owners to the general public (for example in supermarkets and at country fairs); medical negligence law covering the responsibilities of healthcare providers to their patients; workers' compensation law protecting workers should they be injured in the workplace; and motor accident compensation law covering motor vehicle and related accidents.

A notable feature of the various areas of personal injury law in New South Wales is that they incorporate a mix of common law and statutory scheme compensation arrangements. For example, public liability and medical negligence matters remain within the common law, although rights are circumscribed. By contrast, workers injured at work are covered by the statutory no-fault Workers Compensation Scheme, although they may also have limited recourse to the common law. Similarly, motorists injured through the negligence of the owner or driver of another vehicle are covered by the statutory fault-based Motor Accidents Scheme.

The fundamental reason for having the separate statutory workers' compensation and motor accidents schemes, rather than relying on the common law, is to facilitate early intervention and rehabilitation of the injured, without the necessity of going through an adversarial legal system. The workplace and the road are together the greatest source of traumatic injury.

The Government's reforms to personal injury law from 1999 – 2002

In general terms, personal injury compensation claims may attract two forms of damages:

- Economic loss damages in compensation for loss of earning capacity, medical expenses and the like
- Non-economic loss damages (also known as general damages or damages for pain and suffering) in compensation for loss of quality of life, loss of amenities, loss of expected life and pain and suffering.

Between 1999 and 2002, the State Government made substantial changes to all four areas of personal injury compensation law in New South Wales listed above through a number of pieces of legislation, notably the *Motor Accidents Compensation Act 1999*, the *Workers Compensation Legislation Further Amendment Act 2001* which amended the *Workers Compensation Act 1987*, and the *Civil Liability Act 2002* (which covers both public liability and medical negligence matters).

These reforms were introduced largely in response to concerns at the time about rapidly increasing insurance premiums and declining affordability and availability of insurance. In particular, between 2000 and 2003, and especially in 2001 and 2002, Australia experienced a dramatic increase in public liability insurance premiums, combined with a significant decline in the availability of insurance for certain activities and events, leading to perceptions of a 'crisis' in public liability insurance.

Accordingly, a key objective of the Government's reforms between 1999 and 2002 has been to limit the number of small or 'minor' claims for compensation, especially non-economic loss damages, thereby

lowering costs to insurers, and permitting them to pass on lower insurance premiums. To achieve this, the Government has used a number of mechanisms, including notably:

- More extensive use of thresholds and caps to restrict access to non-economic loss damages in compensation for pain and suffering.⁵
- The imposition of a cap on the recovery of legal costs under the *Civil Liability Act 2002* where an award is less than \$100,000
- Changes to the duty of care and the establishment of liability under the *Civil Liability Act 2002*.

The Government has also sought to streamline the operation of the statutory workers' compensation and motor accidents schemes, with the aim of introducing greater speed, certainty and objectivity in the processing of compensation claims.

Reaction to the reforms

Reaction to the Government's personal injury compensation law reforms since they were introduced has varied considerably.

The large representative legal associations and unions have strongly opposed certain aspects of the reforms. They argue that the thresholds on accessing non-economic loss damages in particular have severely disadvantaged thousands of seriously injured individuals in New South Wales by denying them compensation. Put simply, the changes mean that some people who are quite seriously injured are not able to seek non-economic loss damages at all. At the same time, they have argued that insurance companies have not passed on the reduced claim payouts as a result of the reforms in the form of reduced public insurance premiums. Rather, they have suggested that the insurance industry has translated the reforms into record profits, at the expense of the injured, the community and, perhaps, of insurance availability.

By contrast, the insurance industry has largely supported the reforms. In particular, the Insurance Council of Australia and many individual insurers making submissions to the Committee's inquiry argued that the public liability 'crisis' of 2001 – 2002 has been largely overcome, with insurers re-entering the public liability insurance market following the tort law reforms. The industry also cautions against any changes to personal injury law in New South Wales at the current time, to allow the full effects of the Government's reforms of 1999 – 2002 to be realised.

Inconsistency in the law

During the inquiry, the representative legal associations and unions highlighted to the Committee the inconsistencies in access to compensation under personal injury compensation law in New South Wales. As a result of these inconsistencies, individuals who suffer injury are treated differently according to whether they suffered that injury at work, in a motor vehicle or in a public place.

In response, it was proposed that a possible solution would simply be to repeal the *Workers Compensation Act 1987* and the *Motor Accidents Compensation Act 1999*, and to rely solely upon the provisions of the *Civil Liability Act 2002* for the resolution of all personal injury claims in New South Wales.

⁵ The Committee notes that the use of thresholds predates the Government's reforms of 1999-2002, but was expanded considerably under the reforms

The Committee does not support this proposal. There are several important differences between the various personal injury law schemes in New South Wales. Some require compulsory insurance and others do not, some provide early claim notification and assessment and others do not, some provide interim payments pending dispute resolution and others do not. Accordingly, there are good reasons for the maintenance of separate legislative arrangements for injured workers and motor accident victims.

At the same time, however, the Committee believes that where individuals suffer permanent injury with no realistic prospect of recovery, they should have access to the same level of compensation, regardless of whether their injury occurred in the workplace, a motor vehicle accident or in a public place.

The availability of affordable insurance

During its inquiry, the Committee was presented with unambiguous evidence that the Government's reforms have been successful in reducing the number of small claims being brought for compensation, in streamlining the operation of the statutory compensation schemes, and in reducing costs to insurers. Clearly, compensation payments have been reduced in number and size since the government's reforms.

In turn, there is good evidence that reduced compensation payments and hence costs to insurers have been passed on, at least in part, in the form of reduced insurance premiums.

In particular, the reforms through the *Motor Accidents Compensation Act 1999* appear to have been very successful in reducing the cost of compulsory third party (CTP) insurance for motorists. In addition, while the statutory Workers Compensation Scheme is not directly underwritten by insurers or the government, the 2001 workers' compensation reforms also appear to have been successful in reducing the workers' compensation scheme deficit, thereby stabilising the premium paid by employers.

The 2002 reforms to public and medical liability, made later than the reforms to the motor accidents and workers' compensation schemes, at present appear to have had less of an impact on insurance premiums. While there is evidence that public liability premiums have begun to fall appreciably in the last year, and that the availability of insurance has increased, concerns remain about the availability of affordable public liability insurance, especially to not-for-profit and community groups.

The profitability of the insurance industry

As indicated above, the profitability of the insurance industry was a point of particular contention during the Committee's inquiry. Representative legal associations participating in the inquiry devoted considerable effort to attempting to demonstrate that the insurance industry has been systematically profiteering as a result of the Government's reforms of 1999 – 2002.

Equally, however, the Insurance Council of Australia (ICA) and other insurers strongly defended the current profitability of the industry. As noted above, a number of insurers highlighted that premiums are falling in response to the Government's reforms. In addition, the ICA argued that the majority of insurers' profits are derived not from public liability insurance or CTP but from other lines of business and income, including house insurance, commercial insurance and investment income.

The Committee accepts this argument, and believes that the data on the overall profitability of the insurance industry in recent years presented during the inquiry by the legal associations is largely a separate issue to that of the profitability of the individual personal injury lines of insurance. Insurers

should not be asked or encouraged to cross-subsidise higher personal injury benefits by drawing on revenue from other insurance lines.

However, the evidence specifically on the profitability of CTP and public liability insurers does suggest that they have been making strong profits in recent years following the introduction of the *Motor Accidents Compensation Act 1999* and *Civil Liability Act 2002*.

Accordingly, the Committee believes that there is scope for a reassessment of some of the motor accident and public liability law reforms made in New South Wales since 1999, based on the long-term profitability of the CTP and public liability insurance lines.

The Committee also believes that the improving financial position of the Workers Compensation Scheme would support the provision of greater assistance to injured workers in certain circumstances.

The use of the MAA Medical Assessment Guidelines and WorkCover Guidelines

The Committee examines in some detail in this report the alternative mechanisms by which disputed claims for non-economic loss damages may be assessed and finalised in New South Wales. In simple terms there are two alternative arrangements:

- Medical assessment of injury. As part of its reforms to motor accident and workers' compensation law in 1999 and 2001, the Government introduced the use of the modified Motor Accidents Authority (MAA) Medical Assessment Guidelines and WorkCover Guidelines (based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides)) for the assessment of injury. Under this arrangement, an injured motorist or worker must exceed 10% whole person impairment (WPI) (ie 11% or more), based solely on the impact that an injury has had on the physical functions of their body, in order to access non-economic loss damages. Should they exceed 10% WPI, they are then entitled to non-economic loss damages taking into account broader factors such as changes in lifestyle as a result of the injury, pain, depression and future deterioration of the injury.
- Judicial assessment of injury through the courts. This model is used under the *Civil Liability Act 2002*, which assesses claims for non-economic loss damages according to a threshold of 15% of 'a most extreme case', coupled with a sliding scale of damages until the severity of the non-economic loss reaches 33% of 'a most extreme case'. A most extreme case is often thought of as paraplegia, quadriplegia and gross brain damage. Regardless of the severity of the injury, this measure takes into account broader factors such as changes in lifestyle as a result of the injury, pain, depression and future deterioration of the injury.

At the time of their introduction, the Government's rationale for the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines was that they brought consistency and objectivity into the assessment process, and took the process out of the judicial arena and into the medical arena. In doing so, they also had the effect of significantly curtailing the cost of non-economic loss payouts.

However, the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines was strongly criticised by the representative legal associations, lawyers and unions during the inquiry. Fundamentally, it was argued that:

- Assessment of whether an injured person exceeds the 10% WPI threshold in order to access non-economic loss damages must take into account broader considerations of disability such as changes in lifestyle as a result of the injury, pain, depression and future deterioration, rather than simply impairment.
- The use of AMA Guides may not have delivered the greater consistency and objectivity of assessment targeted by the Government.

The Committee recognises the positive results flowing from the Government's reforms to the statutory motor accident and workers' compensation schemes, and acknowledges the desirability of a simple and efficient compensation system which places minimum stress and anxiety on the injured. At the same time, however, the Committee is completely opposed to the ongoing use of the MAA Medical Assessment Guidelines and WorkCover Guidelines (based on the AMA Guides). Quite simply, assessment of whether an injured person should qualify to access non-economic loss damages should be based on disability, not impairment.

Accordingly, the Committee recommends discontinuing the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines.

A new personal injury compensation tribunal

As an alternative to the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines (based on the AMA Guides), the Committee proposes the creation of a new personal injury compensation tribunal, modelled on the processes currently used by the Dust Diseases Tribunal. The tribunal should replace existing mechanisms for determining disputed claims.

The tribunal should have responsibility for the resolution of all statutory and common law compensation claims under the *Civil Liability Act 2002*, the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987*. Under this model, the role of the Claims Assessment and Resolution Service within the Motor Accidents Authority and Arbitrators within the Workers Compensation Commission would be abolished.

However, in making this proposal, the Committee wishes to emphasise its strong belief that the proposed new personal injury compensation tribunal should operate as a claim resolution mechanism alongside current legislative arrangements under the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987*. For example, the Committee supports

- The continuation of rehabilitation benefits to workers under the statutory workers' compensation scheme, including the provision of weekly payments, medical treatment and retraining, regardless of fault.
- The ongoing use of the Accident Notification Form (ANF) system under the motor accidents scheme, together with nominal defendant arrangements and claims-management obligations on CTP insurers.

The Committee also supports the Government's use of independent medical assessment under the current statutory schemes, and believes that an independent medical assessment service should be available to the proposed new personal injury compensation tribunal in order to provide independent medical assessment of injuries.

Access to non-economic loss damages

As indicated, the various areas of personal injury compensation law in New South Wales all incorporate thresholds to restrict access by the injured to non-economic loss damages, together with caps on the size of any non-economic loss damages awarded.

The Committee supports in principle the use of thresholds and caps on non-economic loss damages, and believes that the pool of capital available to fund damages for non-economic loss should be targeted at the most severely injured.

However, the Committee is concerned about inconsistencies in access to non-economic loss damages under personal injury compensation law in New South Wales. As a result of these inconsistencies, individuals who suffer injury are treated differently according to whether they suffered that injury at work, in a motor vehicle or in a public place. The Committee notes that:

- The threshold for accessing non-economic loss damages under the *Civil Liability Act 2002* is 15% of ‘a most extreme case’ (as judicially assessed), with a cap of \$350,000 (indexed annually and currently \$416,000).
- The threshold for accessing non-economic loss damages under the *Motor Accidents Compensation Act 1999* is 10% WPI (as medically assessed), with a cap of \$284,000 (indexed annually and currently \$359,000).
- The threshold for accessing non-economic loss damages under the *Workers Compensation Act 1987* is 10% WPI (as medically assessed), with a cap of only \$50,000. However, \$200,000 is also available in compensation for permanent impairment, for which there is no minimum threshold.

The Committee believes that the current 10% WPI thresholds for accessing non-economic loss damages under the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* should be discontinued, in favour of the test used in the *Civil Liability Act 2002*, namely a threshold of 15% of ‘a most extreme case’, coupled with a sliding scale of damages until the severity of the non-economic loss reaches 33% of ‘a most extreme case’, as judicially assessed. Importantly, this measure encompasses an assessment of disability, not just impairment.

This reform follows on from the discontinuation of the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines, and would return consistency to the eligibility for non-economic loss damages across all areas of personal injury compensation law in New South Wales.

Access to economic loss damages

Access to economic loss damages under personal injury compensation law in New South Wales is not constrained by caps and thresholds (with the exception of common law claims for economic loss damages by injured workers). The Committee reiterates the point made during the inquiry that while the less severely injured may not have access to non-economic loss damages through the operation of the thresholds, they continue to have access to economic loss damages (again with the exception of injured workers under the statutory workers’ compensation scheme, who instead receive weekly compensation payments).

Once more, however, the Committee notes that there are a number of inconsistencies in access to economic loss damages between the various areas of personal injury law in New South Wales. In

particular, the payments available to injured workers, either through weekly compensation payments or common law actions for economic loss damages, are simply not commensurate with the economic loss damages available to injured motorists under the *Motor Accidents Compensation Act 1987* or member of the public covered under the *Civil Liability Act 2002*. In part, this is because the workers' compensation system is designed to encourage and facilitate a return to work for injured workers. Nevertheless, the Committee believes that injured workers should have increased access to economic loss damages.

On a separate issue, the Committee also notes that all areas of personal injury law in New South Wales apply a discount rate of 5% to future economic loss damages paid as a lump sum. This discount rate is intended to acknowledge that a plaintiff awarded a lump sum gains control of that money straight away, allowing the plaintiff to invest the money and gain interest. However, the Committee is concerned that the 5% discount rate is simply too high, meaning that many permanently injured people who receive a lump-sum will not have sufficient income on which to live in the future, and believes that a 3% discount rate would be more appropriate, in line with the recommendation of the Review of the Law of Negligence Report. Importantly, while other Government reforms to personal injury compensation law, notably the use of the thresholds, have sought to limit the amount of damages payable to the less seriously injured, the 5% discount rate affects the most seriously and catastrophically injured, who are most in need of assistance.

Containment of costs

The Committee recognises that the measures outlined above – in particular the recommendations to discontinue the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines, to decrease the 5% discount rate on damages for future economic loss paid as a lump sum to 3% and to increase access to economic loss damages for injured workers – would of their own significantly increase damages payouts. In turn, this would either necessitate significantly higher public liability, CTP and workers compensation premiums, or undermine the financial viability of personal injury insurance in New South Wales.

Accordingly, in order to contain costs under the various legislative arrangements, the Committee makes two recommendations:

- The development of guidelines for the assessment of non-economic loss damages in personal injury cases in New South Wales, similar to the *Guidelines for the Assessment of General Damages in Personal Injury Cases* used in the UK. The Committee believes that this would be a valuable mechanism in maintaining consistency in the awarding of damages across all areas of personal injury law in the proposed new personal injury compensation tribunal. In particular it would help prevent any creeping-up in the number of people being awarded damages for non-economic loss under a 15% of 'a most extreme case threshold', as occurred under the former *Motor Accidents Compensation Act 1988*.
- A reduction in the cap on non-economic loss damages available under the *Civil Liability Act 2002* and the *Motor Accidents Compensation Act 1999* to \$300,000, together with amendments to the provisions of ss.66 and 67 of the *Workers Compensation Act 1987*. In adopting this approach, the Committee notes that it is more important to ensure that people's financial needs are met through adequate economic loss damages than that they are compensated for non-economic loss harm, which is an unmeasurable concept.

Fault as the basis for compensation

The issue of no-fault compensation was raised during the inquiry following the Government's recent move to introduce a no-fault catastrophic motor accident injury scheme in New South Wales. As indicated, the statutory workers' compensation scheme in New South Wales also operates on a no-fault basis. Previous attempts to introduce a national no-fault compensation scheme in Australia, similar to that in New Zealand, have been unsuccessful.

Following examination of this issue, the Committee believes that there would be merit in investigating moving to a universal no-fault statutory compensation scheme in New South Wales. Such a scheme could introduce simplicity and efficiency into the compensation of personal injury, consistency in access to damages, and could avoid problems such as those associated with the AMA Guides.

It has been argued that the removal of fault-based compensation undermines personal responsibility by sending a message that careless behaviour resulting in injury to another person will not attract a significant penalty. The Committee does not accept the argument. In the Committee's opinion, any theoretical deterrent effect through fault-based compensation is effectively blunted by the presence of liability insurance.

However, the Committee acknowledges that the introduction of a universal no-fault compensation scheme in New South Wales would be very difficult at the present time.

Nevertheless, the Committee does believe that the NSW Government should examine moving to abolish fault as a basis for compensation for injured motorists, rather than limiting no-fault compensation to the proposed catastrophic motor accidents injury scheme. The Committee notes that this proposal has been made before, most recently by the Legislative Council's Standing Committee on Law and Justice. In the Committee's opinion, this is an idea for which the time has come. The difficulty of proving fault in a motor accident – which often occurs in the space of a split second – makes it a sensible move. A no-fault motor accident compensation scheme also operates successfully in Victoria.

The Committee also believes that the Government should re-examine whether actions for economic loss damages under Part 5 of the *Workers Compensation Act 1987* should continue to be on the basis of fault. Clearly, this is an issue that is particularly controversial.

The capping of legal fees

As indicated, the *Civil Liability Act 2002* incorporates a cap on the recovery of legal costs by a successful claimant from a defendant where an award for damages is less than \$100,000.

The Committee supports the use of this cap; on the basis that it has helped to eradicate small claims, and has helped prevent the erosion by legal fees of damages payable under a verdict. The Committee believes, however, that the cap on the recovery of legal costs should only apply to awards of damages of up to \$50,000, as adopted in Queensland and the Australian Capital Territory, and as recommended in the Review of the Law of Negligence Report.

The changes to the duty of care and the establishment of liability

As noted, the Government implemented a number of significant reforms to the duty of care and the establishment of liability in the *Civil Liability Act 2002*, designed to change the culture of litigation in New South Wales and to encourage people to accept personal responsibility for their own actions.

While there is evidence that there has been a change in the culture of litigation in New South Wales, the Committee is concerned about the impact of some of the changes to the duty of care and the establishment of liability provisions of the *Civil Liability Act 2002*. The Committee is particularly concerned about the duty of care owed by service providers to children and young people.

Accordingly, the Committee believes that there should be a review of the duty of care provision of the *Civil Liability Act 2002*, to examine whether certain provisions are operating in a potentially unjust manner.

Other issues

The Committee notes that this report also addresses a range of other issues, including issues relating to medical negligence compensation law, the management of injured workers by insurance companies and the impact of the reforms on the legal profession.

Summary

The recommendations in this report constitute a package of reforms which the Committee believes should be adopted in their entirety. The Committee does not envisage, and would not support, adoption by the Government of certain recommendations in the report, such as Recommendation 16 dealing with measures to contain costs, but rejection of related recommendations.

The Committee presents over a table summarising the key elements of its preferred model of personal injury compensation law in New South Wales compared with the current arrangements.

| | Current arrangements | Committee proposals |
|--|---|--|
| <i>Civil Liability Act 2002</i> | | |
| <i>What is the threshold for recovering non-economic loss damages?</i> | 15% of 'a most extreme case', with assessments between 15% and 32% subject to a sliding scale | Unchanged |
| <i>How is the threshold for recovering non-economic loss damages assessed?</i> | Common law principles | Common law principles, using guidelines for the assessment of non-economic loss damages similar to the <i>Guidelines for the Assessment of General Damages in Personal Injury Cases</i> used in the UK |
| <i>Who does the assessment of economic and non-economic loss damages payments?</i> | The courts | Judicial officers in the proposed new personal injury compensation tribunal, supported by an independent medical assessment service |

| | | |
|--|---|-----------|
| <i>What is the cap on non-economic loss damages?</i> | \$350,000 (indexed and currently \$416,000) | \$300,000 |
|--|---|-----------|

Motor Accidents Compensation Act 1999

| | | |
|--|---|--|
| <i>What is the threshold for recovering non-economic loss damages?</i> | > 10% WPI | 15% of ‘a most extreme case’, with assessments between 15% and 32% subject to a sliding scale |
| <i>How is the threshold for recovering non-economic loss damages assessed?</i> | The MAA Medical Assessment Guidelines (based on the AMA Guides 4 th edition) | Common law principles, using guidelines for the assessment of non-economic loss damages similar to the <i>Guidelines for the Assessment of General Damages in Personal Injury Cases</i> used in the UK |
| <i>Who does the assessment of economic and non-economic loss damages payments?</i> | MAA claims assessors supported by medical assessors within the Medical Assessment Service, with recourse to the courts in certain circumstances | Judicial officers in the proposed new personal injury compensation tribunal, supported by an independent medical assessment service |
| <i>What is the cap on non-economic loss damages?</i> | \$284,000 (indexed and currently \$359,000) | \$300,000 |

Workers Compensation Act 1987

| | | |
|--|---|--|
| <i>What is the threshold for recovering non-economic loss damages?</i> | Statutory Scheme: > 10% WPI for s.67 damages Sliding scale for s.66 lump-sum payments | Section 67 damages: 15% of ‘a most extreme case’, with assessments between 15% and 32% subject to a sliding scale |
| <i>How is the threshold for recovering non-economic loss damages assessed?</i> | The WorkCover Guidelines (based on the AMA Guides 5 th edition) | Common law principles, using guidelines for the assessment of non-economic loss damages similar to the <i>Guidelines for the Assessment of General Damages in Personal Injury Cases</i> used in the UK |
| <i>Who does the assessment of non-economic loss damages payments?</i> | Arbitrators with the Workers Compensation Commission, supported by AMSs | Judicial officers in the proposed new personal injury compensation tribunal, supported by an independent medical assessment service |
| <i>What is the cap on non-economic loss damages?</i> | \$50,000 for s.67 damages \$200,000 for s.66 damages up to 75% WPI | \$300,000 for s.67 damages s.66 damages repealed |
| <i>What is the threshold for recovering economic loss damages?</i> | Statutory scheme: no threshold (weekly compensation payments) Common law: 15% WPI | Statutory scheme: Unchanged Common law: 15% of ‘a most extreme case’ |

How is the threshold for recovering economic loss damages assessed?

Common law: The WorkCover Guidelines (based on the AMA Guides 5th edition)

Common law: Common law principles, using guidelines for the assessment of non-economic loss damages similar to the *Guidelines for the Assessment of General Damages in Personal Injury Cases* used in the UK

Who does the assessment of economic loss damages payments?

Common law: The courts

Judicial officers in the proposed new personal injury compensation tribunal, supported by an independent medical assessment service

Summary of Recommendations

- Recommendation 1** **86**
 That the Government look at ways of providing additional assistance to not-for-profit and community groups in paying public liability insurance premiums, possibly through the use of a pooled, bulk purchase insurance scheme.
- Recommendation 2** **86**
 That the Government provide advice to all Local Councils and Shire Associations in New South Wales, for distribution to local community and sporting groups within the wider community, on the effects of the Government's changes to the duty of care provisions of the *Civil Liability Act 2002* and the repeal of s.14 of the *Associations Incorporation Regulation 1999* in 2002.
- Recommendation 3** **104**
 That the Government legislate to require disclosure by insurers operating in the public liability market of basic market, premium, claims and liability data to the Parliament, through an amendment to the *Civil Liability Act 2002* to insert a part similar to Part 15.2 of the Australian Capital Territory's *Civil Law (Wrongs) Act 2002*.
- Recommendation 4** **122**
 That the Government:
- discontinue the use of the MAA Medical Assessment Guidelines based on the AMA Guides (4th edition) under the *Motor Accidents Compensation Act 1999*
 - discontinue the use of the WorkCover Guidelines, based on the AMA Guides (5th edition) under the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*.
- Recommendation 5** **127**
 That the Government create a new personal injury compensation tribunal, based on the current processes of the Dust Disease Tribunal, for the determination of statutory and common law compensation claims made under the *Motor Accidents Compensation Act 1999*, the *Workers Compensation Act 1987* and the *Civil Liability Act 2002*. This tribunal should replace existing mechanisms for determining disputed claims.
- Recommendation 6** **128**
 That the Government develop a new medical service to provide independent medical assessment of claimants' injuries for the proposed new personal injury compensation tribunal.
- Recommendation 7** **145**
 That the Government amend the *Motor Accidents Compensation Act 1999* to replace the existing 10% WPI threshold for the recovery of non-economic loss damages under s.131 of the Act with the same threshold as is used for claims for non-economic loss damages under the *Civil Liability Act 2002* – namely 15% of 'a most extreme case', coupled with a sliding scale of damages until the severity of the non-economic loss reaches 33% of 'a most extreme case'.

Recommendation 8**145**

That the Government amend the *Workers Compensation Act 1987* to replace the existing 10% WPI threshold for the recovery of non-economic loss damages under s.67 of the Act with the same threshold as is used for claims for non-economic loss damages under the *Civil Liability Act 2002* – namely 15% of ‘a most extreme case’, coupled with a sliding scale of damages until the severity of the non-economic loss reaches 33% of ‘a most extreme case’.

Recommendation 9**145**

That the Government ensure that implementation of the recommendations in this report does not affect the current provisions of the *Workers Compensation Act 1987* dealing with the payment of non-economic loss damages to victims of hearing loss.

Recommendation 10**149**

That the Government amend s.14 of the *Civil Liability Act 2002* to reduce the current 5% discount rate on damages for future economic loss paid as a lump sum to a 3% discount rate.

Recommendation 11**149**

That the Government amend the *Motor Accidents Compensation Act 1999*:

- to reduce the current 5% discount rate on damages for future economic loss paid as a lump sum under s.127 of the Act to a 3% discount rate
- to repeal s.124 of the Act preventing the award of damages for loss of earning capacity in respect of the first five days during which loss was suffered
- to change the maximum amount of economic loss damages that may be awarded for loss of net weekly earnings under s.125 of the Act to an amount that is three times the average weekly earnings at the date of the award, consistent with s.12 of the *Civil Liability Act 2002*.

Recommendation 12**161**

That the Government amend the common law provisions of Part 5 of the *Workers Compensation Act 1987*:

- so that persons who recover economic loss damages in respect of an injury under s.151A of the Act may continue to be able to access future compensation for medical expenses under the workers’ compensation system
- so that persons accessing future compensation for medical expenses may be able to negotiate the commutation of their ongoing medical expenses as a lump sum
- so that economic loss damages cannot be accessed under s.151H of the Act unless the injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is at least 15% of ‘a most extreme case’ (as assessed judicially in the proposed personal injury compensation tribunal)
- so that when calculating economic loss damages under s.151I of the Act, the proposed personal injury compensation tribunal is to disregard the amount (if any) by which the injured worker’s net weekly earnings would have exceeded an amount that is three times the average weekly earnings at the date of the award
- to reduce the current 5% discount rate on damages for future economic loss paid as a lump sum under s.151J of the Act to a 3% discount rate
- to amend the provisions of s. 151IA of the Act to provide that damages for economic loss should not be paid to an injured worker beyond the official age for accessing the aged pension in Australia.

- Recommendation 13** **166**
 That the Government amend the *Civil Liability Act 2002*, the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* to provide for the recovery of *Sullivan v Gordon* type damages, possibly based on the provisions of s.100 of the *Civil Law (Wrongs) Act 2002* (ACT).
- Recommendation 14** **166**
 That the Government amend the nervous shock provisions under s.30 of the *Civil Liability Act 2002* so that rescuers who arrive at the scene of an accident after its occurrence are entitled to recover damages where they suffer serious psychological injuries, and are not penalised for the contributory negligence of the victim to whom they provide assistance.
- Recommendation 15** **167**
 That the Government amend the *Motor Accidents Compensation Act 1999* to change the definition of motor vehicles so that transport accidents (where no CTP insured vehicle is involved) are assessed under the *Civil Liability Act 2002*.
- Recommendation 16** **171**
 That the NSW Government legislate if necessary to overturn the 1968 decision of the High Court in *Planet Fisheries Pty Ltd v La Rosa* in order to facilitate the development by the proposed new personal injury compensation tribunal of guidelines for the assessment of non-economic loss damages in personal injury cases in New South Wales.
- Recommendation 17** **172**
 That the Government reduce the caps on non-economic loss damages available under s.16 of the *Civil Liability Act 2002* and s.131 of the *Motor Accidents Compensation Act 1999* to \$300,000.
- Recommendation 18** **172**
 That the Government amend the *Workers Compensation Act 1987*:
- to increase the cap on non-economic loss damages available under s.67 of the Act to \$300,000
 - to repeal s.66 of the *Workers Compensation Act 1987*.
- Recommendation 19** **183**
 That the Government examine and publish a report on the merits or otherwise of introducing universal, no-fault compensation under the NSW Motor Accidents Scheme.
- Recommendation 20** **183**
 That the Government examine and publish a report on the merits or otherwise of universal, no-fault access to economic loss damages under the provisions of Part 5 of the *Workers Compensation Act 1987*.
- Recommendation 21** **188**
 That the Government amend the cap on the recovery of legal costs by a successful claimant from a defendant under s.198D of the *Legal Profession Act 1987* to apply only to awards of damages of up to \$50,000, rather than the current \$100,000.
- Recommendation 22** **188**
 That the Government amend the cap on the recovery of legal costs by a successful claimant from a defendant under s.198D of the *Legal Profession Act 1987* so that it also applies in circumstances where the Court of Appeal reduces damages below \$50,000 and awards costs of the appeal to the successful appellant (previously the defendant) on an uncapped basis.

Recommendation 23**197**

That the Government commission a review by the New South Wales Law Reform Commission of the duty of care and establishment of liability provisions of the *Civil Liability Act 2002*, particularly as they affect children and young people.

Recommendation 24**202**

That the Government commission a review by the New South Wales Law Reform Commission of the medical negligence claims provisions of the *Civil Liability Act 2002*, including:

- Whether the modified Bolam rule is operating successfully
- The restriction on damages where injury is caused by the mentally ill
- The restriction on damages for the cost of raising an unintended child
- The restriction on damages for non-essential medical procedures
- The definition of medical professionals.

Recommendation 25**208**

That the Government move immediately to mandate electronic fund transfer of compensation payments to injured workers by the insurance companies, with payments to be made on the exact date that they are due.

Recommendation 26**213**

That the Government examine whether there would be merit in adopting legislation in New South Wales similar to Schedule 3 of the Australian Capital Territory's *Civil Law (Wrongs) Act 2002* dealing with liability for injury or death of participants in equine activities.

Glossary

| | |
|---------------|--|
| ACCC | Australian Competition and Consumer Commission |
| AMA Guides | American Medical Association's <i>Guides to the Evaluation of Permanent Impairment</i> |
| AMs | Approved medical specialists |
| AMWU | Australian Manufacturing Workers' Union |
| APRA | Australian Prudential Regulation Authority |
| ANF | Accident Notification Form |
| AWE | Average weekly earnings |
| CARS | Claims Assessment and Resolution Service |
| CCUA | Community Care Underwriting Agency |
| CFMEU | Construction Forestry Mining and Energy Union |
| CTP insurance | Compulsory third party insurance |
| IAG | Insurance Australia Group |
| ICA | Insurance Council of Australia |
| MAA | Motor Accidents Authority |
| MAS | Medical Assessment Service |
| NCOSS | Council of Social Services of NSW |
| PwC | PricewaterhouseCoopers |
| TAC | Transport Accident Commission |
| UNITED | United Medical Protection Group of Companies |
| WPI | Whole person impairment |

PART 1

INTRODUCTION AND BACKGROUND

Chapter 1 Introduction

Terms of Reference

1.1 On 8 December 2004, GPSC 1 self-referred the following inquiry terms of reference: that

The General Purpose Standing Committee No. 1 inquire into, and report on the operations and outcomes of all personal injury compensation legislation (including but not limited to: claims by persons injured in motor accidents, transport accidents, accidents in the workplace, at public events, in public places and in commercial premises but not including claims by victims injured as a result of criminal acts) approved by the Parliament of New South Wales from 1999, with particular reference to:

- 1. The impact on employment in rural and regional communities;*
- 2. The impact on community events and activities, and community groups;*
- 3. The impact on insurance premium levels and the availability of cost-effective insurance;*
- 4. The level and availability of Compulsory Third Party motor accident premiums required to fund claims cost if changes had not been implemented in 1999; and the impact on the WorkCover scheme if changes had not been implemented in 2001; and*
- 5. Any other issue that the Committee considers to be of relevance to the inquiry.*

Submissions

1.2 Following the adoption of the terms of reference, the Committee placed advertisements calling for written submissions in the major Sydney and regional newspapers, commencing on 29 January 2005. The Committee also wrote directly to a large number of individuals and organisations inviting them to make a written submission to the inquiry. The closing date for written submissions was Friday, 11 March 2005.

1.3 The Committee subsequently received 63 submissions and 9 supplementary submissions from the Government, the representative legal associations and individual legal firms, insurers, unions, local councils, social and community services bodies, community and sporting groups, special interest groups and private individuals. A more detailed summary of parties making submission to the inquiry is provided in Chapter 2. A list of submissions is at Appendix 1.

1.4 The Committee wishes to thank all those individuals and organisations that made a submission. The quality of submissions to the inquiry was extremely high.

Public hearings

1.5 The Committee held a total of six public hearings during this inquiry. They were held on 2 May, 23 May, 6 June, 20 June, 4 July and 14 October 2005. The hearing on 23 May was held at Wagga Wagga, with the remaining hearings held at Parliament House, Sydney.

- 1.6 A list of witnesses is provided at Appendix 2 and transcripts of the hearings can be found on the Committee's web site at www.parliament.nsw.gov.au/gpsc1. A list of documents tabled at the public hearings is at Appendix 3.
- 1.7 The Committee would like to thank those witnesses who presented evidence during the hearings.

Structure of this report

- 1.8 This report is in six parts. Part 1 includes an introduction and background information to the inquiry, including a summary of the different areas of personal injury compensation law in New South Wales.
- 1.9 Part 2 examines in more detail the Government's 1999 – 2002 personal injury compensation law reforms:
- Chapter 3 examines the 1999 reforms to motor accidents compensation law, Chapter 4 the 2001 reforms to workers' compensation law, Chapter 5 the 2002 reforms to public liability compensation law and Chapter 6 the 2001-2002 reforms to medical negligence compensation law.
 - Chapter 7 reviews the Government's 2002 public liability reforms and considers whether the reforms were justified with the benefit of hindsight.
 - Chapter 8 examines areas of inconsistency in the law following the reforms, and summarises proposals for 'principled' reform using the *Civil Liability Act 2002* as an appropriate benchmark.
- 1.10 Part 3 examines the impact of the Government's 1999 – 2002 reforms on claim numbers, premiums, the availability of affordable insurance and insurer profitability:
- Chapter 9 considers claim numbers, costs, and insurance premiums.
 - Chapter 10 examines ongoing concerns about the availability of public liability insurance to community groups and for community events, especially in country areas.
 - Chapter 11 assesses the claim that the insurance industry has been profiteering as a result of the Government's tort law reforms.
- 1.11 Part 4 examines claims management under personal injury compensation law in New South Wales:
- Chapter 12 examines the management of claims under the statutory NSW motor accidents and workers' compensation schemes.
 - Chapter 13 considers the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines (based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*) under the statutory workers' compensation and motor accidents scheme.

- Chapter 14 in turn examines options for a return to judicial assessment of injury as an alternative to the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines.

1.12 Part 5 examines damages payments available to the injured under the Government's reforms:

- Chapter 15 examines access to non-economic loss damages under personal injury compensation law in New South Wales. This is the single biggest point of contention in relation to the Government's tort law reforms of 1999 - 2002.
- Chapters 16 and 17 look at the adequacy of income support payments and economic loss damages available to injured workers, motorists and members of the public.
- Chapter 18 considers additional technical issues related to the payment of damages in New South Wales.
- Chapter 19 examines measures to contain costs and premiums under the Committee's proposed reforms.

1.13 Part 6 examines a range of other issues raised during the inquiry:

- Chapter 20 looks at fault as a basis for personal injury compensation in New South Wales, and examines whether there would be merit in extending no-fault compensation arrangements for personal injury in this state.
- Chapter 21 considers the cap on legal costs under the *Civil Liability Act 2002* where an award of damages to an injured person is less than \$100,000.
- Chapter 22 examines the Government's changes to the duty of care and the establishment of liability under the *Civil Liability Act 2002*.
- Chapter 23 assesses certain provisions of medical negligence compensation law in New South Wales under the *Civil Liability Act 2002*.
- Chapter 24 examines the performance of insurance companies in New South Wales in their management of injured workers.
- Chapter 25 considers other issues, including the impact that the Government's reforms have had on the legal profession.

Chapter 2 Background

This chapter examines the different areas of personal injury compensation law in New South Wales, and the Government's reforms implemented between 1999 and 2002. It also provides an overview of the range of views of parties that participated in the inquiry.

The different areas of personal injury compensation law

- 2.1 Substantive personal injury compensation law in New South Wales falls into four areas, incorporating both statutory compensation and common law entitlements. These are examined below.

Motor accidents compensation law

- 2.2 Individuals injured in a motor accident resulting from the negligence of the owner or driver of another vehicle are entitled to compensation under the statutory fault-based NSW Motor Accidents Scheme, constituted under the *Motor Accidents Compensation Act 1999* and administered by the Motor Accidents Authority (MAA). The scheme is a compulsory third party (CTP) personal injury scheme for the owners of motor vehicles registered in the state. A claim cannot be made if the injured person was totally at fault or no one was at fault. Access to common law claims is restricted.⁶

Workers compensation law

- 2.3 Workers injured at work in New South Wales are entitled to compensation under the statutory NSW Workers Compensation Scheme, constituted under the *Workers Compensation Act 1987*. The scheme is administered by WorkCover, and provides no-fault benefits, meaning that the worker does not need to prove negligence on the part of the employer to gain immediate access to assistance benefits. The scheme is funded by employer premiums, currently set at an average of 2.57% of wages. An injured worker may also be able to make a common law claim for damages if they believe that they can prove fault, although access to the common law is restricted.

Public liability law

- 2.4 Public liability is the liability of occupiers of property (eg. government agencies, local councils and privately administered companies) to which the public have access, such as building sites,

⁶ The Committee notes that the former Premier, the Hon Bob Carr, announced on 11 June 2005 a proposed 'Life Time Care and Support Scheme' for the catastrophically injured, to commence on 1 January 2007. The scheme will not be fault based, entitling all people catastrophically injured in a motor vehicle accident to life time medical care and support. This is discussed in more detail in Chapters 3 and 16. See the Hon Bob Carr, Speech to the NSW ALP State Conference, 11 June 2005, pp13-14, cited at <http://www.nswalp.com/conference2005/Bob.Carr.pdf> (accessed 16 June 2005).

supermarkets, fairs and markets. Public liability law in New South Wales remains within the common law, although rights are circumscribed, notably by the *Civil Liability Act 2002* and the *Civil Liability Amendment (Personal Responsibility) Act 2002*.

Medical negligence law

2.5 The liability of healthcare providers to their patients also remains within the common law in New South Wales. However, common law rights have been modified by the *Health Care Liability Act 2001* and the *Civil Liability Act 2002*.

Summary

2.6 The reason for having separate personal injury compensation law regimes, notably the separate statutory workers' compensation and motor accidents schemes, is to facilitate different assessment, treatment and rehabilitation regimes. The workplace and the road are together the greatest source of traumatic injury in Australia. Accordingly, the separate statutory workers' compensation and motor accidents schemes are designed to facilitate early intervention and rehabilitation, without the necessity of going through an adversarial legal process. This is discussed in further detail in Chapter 8.

2.7 The Committee notes that a criminal victims compensation scheme also operates in New South Wales. This scheme is outside the scope of the Committee's terms of reference.

The reforms to personal injury compensation law since 1999

2.8 Since 1999, the Government has introduced a number of significant changes to personal injury compensation law in New South Wales, with the key objective of reducing the number of small or 'minor' claims for compensation. In turn, this is intended to deliver a decrease in costs to insurers and improvements in the availability and affordability of insurance.

2.9 As indicated above, the major pieces of Government legislation have included the:

- *Motor Accidents Compensation Act 1999*
- *Workers Compensation Amendment Act 2000*
- *Workers Compensation Legislation Further Amendment Act 2001*
- *Health Care Liability Act 2001*
- *Civil Liability Act 2002*
- *Civil Liability Amendment (Personal Responsibility) Act 2002*.

2.10 A detailed summary of the changes to the law of motor accidents compensation, workers' compensation, public liability and medical negligence is provided respectively in chapters 3, 4, 5 and 6. In general terms, however, the reforms enacted to personal injury compensation law in New South Wales since 1999, primarily through the above pieces of legislation, fall into three categories: reforms to the availability of damages; reforms to claim procedures; and reforms to the duty of care and the establishment of liability. These are examined below.

The reforms to the availability of damages

- 2.11** Personal injury compensation claims may attract two forms of damages:
- Economic loss damages in compensation for loss of earning capacity, medical expenses and the like
 - Non-economic loss damages (also known as general damages or damages for pain and suffering) in compensation for pain and suffering, loss of quality of life, loss of amenities and loss of expected life.
- 2.12** The Government's reforms to personal injury compensation law in New South Wales since 1999 have aimed to reduce the number of small or 'minor' claims for non-economic loss damages through the introduction of claim thresholds. Two basic types of thresholds have been employed:
- Thresholds based on the level of permanent impairment, as assessed using the MAA Medical Assessment Guidelines and WorkCover Guidelines (based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides)). This arrangement operates under the *Workers Compensation Act 1987* and the *Motor Accidents Compensation Act 1999*.
 - Thresholds set at a percentage of 'a most extreme case'. This arrangement operates under the *Civil Liability Act 2002*.
- 2.13** In its written submission, the Law Society of NSW cited the following table summarising the caps and thresholds for accessing non-economic loss damages that currently apply for workers' compensation, motor accident, public liability and medical negligence matters in New South Wales.

Table 2.1 Caps and thresholds for accessing non-economic loss damages in New South Wales

| | Motor accident matters | Workers compensation matters | Civil liability and medical negligence matters |
|---|--|--|---|
| <i>What is the threshold for recovering damages for pain and suffering?</i> | > 10% permanent impairment. (No damages may be awarded for pain and suffering unless the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10%) | <i>Common law:</i> Permanent impairment of the injured worker ... [must be] at least 15% as a result of the accident <i>Statutory scheme:</i> Injury must cause at least 10% permanent impairment | The injuries must constitute at least 15% of 'a most extreme case', with assessments between 15% and 32% subject to a sliding scale |
| <i>How is the threshold measured?</i> | The MAA Medical Assessment Guidelines (based on the AMA Guides 4 th edition) | The WorkCover Guidelines (based on the AMA Guides 5 th edition) | Common law principles |
| <i>Who does the assessment?</i> | Medical assessors within the Medical Assessment Service | <i>Statutory scheme:</i> ‘Approved medical specialists’ appointed by the President, Workers Compensation Commission | Judicial assessment (ie the judge hearing the case makes the assessment) |
| <i>What is the cap?</i> | The maximum amount that a court may award for non-economic loss is \$284,000 (indexed) | <i>Statutory scheme:</i> Pain and suffering cannot exceed \$50,000* | The maximum amount that may be awarded for non-economic loss is \$350,000 (indexed), but the maximum amount is to be awarded only in ‘a most extreme case’. |

* An additional \$200,000 is available in statutory lump-sum payments for disability
Source: Submission 41, Law Society of NSW, p36

The reforms to claim procedures

2.14 The Government’s reforms to personal injury compensation law in New South Wales since 1999 have incorporated a range of changes to the procedures for making claims, resolving claims, paying compensation and paying legal costs. The aim of these reforms has been to reduce legal costs and provide faster, more efficient and cost effective processing of claims, leading to better health outcomes for the injured.

2.15 The Committee notes that in his evidence on 4 July 2005, Mr Bowen, General Manager of the MAA, highlighted the desirability of a simple and efficient personal injury compensation system which places minimum stress and anxiety on the injured. In support, Mr Bowen tabled a 2001 study by the Australasian Faculty of Occupational Medicine and Royal Australasian College of Physicians entitled *Compensation Injuries and Health Outcomes*, which found that:

There is good evidence to suggest that people who are injured and claim compensation for that injury have poorer health outcomes than people who suffer similar injuries but are not involved in the compensation process.⁷

2.16 Similarly, in his private written submission, Dr Ian Harris⁸ argued that statistically, compensated patients have nearly four times the odds of having a poor health outcome after surgical intervention compared to non-compensated patients.

The AMA Guides

2.17 As indicated, an important element of the Government's reforms to the statutory workers' compensation and motor accidents schemes is the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines (based on the AMA Guides) in determining a measure of whole person impairment (WPI), expressed as a percentage figure. This figure is used to assess whether the injured person qualifies for non-economic loss damages in accordance with the thresholds outlined in Table 2.1. Specifically:

- the *WorkCover Guidelines for the Evaluation of Permanent Impairment* are used to determine injured workers' entitlements to statutory lump-sum compensation for permanent impairment under s.66 of the *Workers Compensation Act 1987*
- the *WorkCover Guidelines for the Evaluation of Permanent Impairment* are used to determine whether injured workers meet the 10% threshold to claim non-economic loss damages under s.67 of the *Workers Compensation Act 1987*
- the *WorkCover Guidelines for the Evaluation of Permanent Impairment* are used to determine whether injured workers meet the 15% threshold under s.151H of the *Workers Compensation Act 1987* in order to make a claim for common law economic loss damages
- the *MAA Medical Assessment Guidelines for the Assessment of Permanent Impairment of a Person Injured as a Result of a Motor Accident* are used to determine whether persons injured in motor accidents meet the 10% threshold to claim non-economic loss damages under s.131 of the *Motor Accidents Compensation Act 1999*.

2.18 By contrast to the statutory workers' compensation and motor accidents schemes, civil liability matters continue to be determined according to common law principles without use of the AMA Guides. The threshold for accessing non-economic loss damages under the *Civil Liability Act 2002* is set at 15% of 'a most extreme case'.

⁷ The Australasian Faculty of Occupational Medicine and Royal Australasian College of Physicians, *Compensation Injuries and Health Outcomes*, Sydney, 2001, p2, Tabled document, 4 July 2005.

⁸ Dr Harris is an orthopaedic surgeon in practice in Liverpool and Kogarah. He is currently doing a PhD at the University of Sydney exploring the effect of compensation on outcomes after surgery and trauma. Submission 55, Dr Harris, p1

The cap on legal costs

- 2.19 The Government also introduced in the *Civil Liability Act 2002* an amendment to the *Legal Profession Act 1987* to impose a cap on the recovery of costs from a defendant by a successful claimant for personal injury damages where a court awards damages of less than \$100,000.

The reforms to the duty of care and the establishment of liability

- 2.20 The Government introduced in the *Civil Liability Act 2002* a number of changes to the duty of care and the establishment of liability. They included:
- Removing the duty to protect people from obvious risks of dangerous recreational activities
 - Clarifying the scope of reasonable foreseeability
 - Allowing waivers by providing for the voluntary assumption of risk
 - Establishing a peer acceptance defence for professionals
 - Providing protection for volunteers and ‘good Samaritans’.⁹

Stakeholder views of the reforms

- 2.21 During the inquiry, the Committee received submission and took evidence from a broad range of individuals and organisations, including:
- The Cabinet Office on behalf of the NSW Government.¹⁰
 - Representative legal organisations, namely the Australian Lawyers Alliance¹¹, the NSW Bar Association¹² and the Law Society of NSW¹³; together with individual law firms such as Chase Lawyers¹⁴, Peacocke Dickens & Price¹⁵ and individual lawyers/solicitors such as Mr Peter Bartley¹⁶, Mr Stuart Gregory¹⁷, Mr Bruce

⁹ Submission 53, The Cabinet Office, pp13-14

¹⁰ Submission 53, The Cabinet Office. During the hearing on 4 July 2005, the Committee took evidence from representatives of The Cabinet Office, Attorney General’s Department, MAA and WorkCover NSW.

¹¹ The Australian Lawyers Alliance has a membership of nearly 500 lawyers who specialise in representing injured plaintiffs in compensation claims. Submission 23, Australian Lawyers Alliance, p5

¹² Submission 29, NSW Bar Association. See also Mr John McIntyre, President, Law Society of NSW, Evidence, 20 June 2005, p2

¹³ The Law Society of NSW is the professional association of solicitors in NSW, with a membership of more than 18,300 practising solicitors, or 92.5% of practising solicitors in the state. Submission 41, Law Society of NSW, p7

¹⁴ Submission 5, Chase Lawyers

¹⁵ Submission 14, Peacocke Dickens & Price

¹⁶ Mr Bartley is a solicitor, attorney and accredited specialist in personal injury law based in Dubbo, NSW. Submission 11, Mr Peter Bartley, p1

McCann¹⁸, Mr Paul Macken¹⁹, Mr Terence O’Riain²⁰, Mr Timothy Abbott²¹ and Mr John Potter.²²

- The Insurance Council of Australia (ICA)²³, which is the peak body representing the general insurance industry in Australia, together with several major insurers, namely Suncorp Group²⁴, Insurance Australia Group (IAG)²⁵, Vero Insurance²⁶ and QBE Insurance.²⁷ The Committee also received submissions from the Community Care Underwriting Agency (CCUA)²⁸, which provides insurance to the not-for-profit sector, United Medical Protection Group of Companies (UNITED)²⁹, which provides medical indemnity insurance to medical practitioners, and from Jardine Lloyd Thompson on behalf of the NSW Local Government Mutual Liability Scheme (Statewide Mutual)³⁰, which is a not-for-profit provider of public liability and

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- 17 Mr Gregory is an articulated clerk with Clayton Utz Solicitors. Submission 16, Mr Stuart Gregory, piii
- 18 Mr McCann is a solicitor with B.E.McCann & Co Solicitors. Submission 18, Mr Bruce McCann, p1
- 19 Mr Macken is a solicitor with Leigh Virtue & Associates. Submission 25, Mr Paul Macken
- 20 Mr O’Riain is a sole practitioner in a personal injury firm, Border Attorneys, in Albury. Submission 26, Mr O’Riain
- 21 Mr Abbott is a solicitor with Walsh and Blair Lawyers, Wagga Wagga. Submission 57, Mr Abbott
- 22 Mr Potter is a partner in Commins Hendriks Solicitors, one of the largest legal firms in country NSW. He is an Accredited Specialist in personal injury law, based in Wagga Wagga. Submission 58, Mr Potter.
- 23 Members of the ICA account for over 90% of total premium income written by private sector general employers in Australia. ICA members issue more than 41 million insurance policies annually and deal with 3.5 million claims each year. Submission 49, ICA, p3
- 24 The Suncorp Group, through GIO General Ltd, is a licensed CTP insurer in NSW, and also provides public liability insurance to policy holders in NSW. Australia-wide, Suncorp has 23% of the home, 22% of the motor, 20% of the workers’ compensation and 21% of the commercial insurance markets. Submission 22, Suncorp Group, p6
- 25 IAG, formerly NRMA Insurance Group, is Australia’s largest general insurance company (by reference to premiums written), owning leading brands including NRMA insurance, CGU, SGIO, SGIC and Swann Insurance. Submission 35, IAG, p1
- 26 Vero Insurance is a general insurer operating as part of the Promina Group, which collectively is the third largest general insurance business (by reference to premiums written) in Australia. Submission 38, Vero Insurance, p6
- 27 Submission 45, QBE Insurance
- 28 CCUA is a joint venture between Allianz Australia Insurance, IAG and QBE Insurance. It was formed in December 2002 to provide public liability insurance to not-for-profit organisations. Submission 7, CCUA, p1
- 29 UNITED is the largest medical indemnity organisation in Australia, providing medical indemnity insurance to medical practitioners through its wholly owned insurer, Australasian Medical Insurance Limited.
- 30 Statewide Mutual has been operating since 1 December 1993, and provides public liability and professional indemnity insurance of \$200 million to the majority of Local Government Authorities in NSW. Submission 43, Jardine Lloyd Thompson, p2

professional indemnity insurance to the majority of local government authorities in the state.

- Unions NSW (formerly the NSW Labour Council)³¹, which is the peak union body in the state, together with individual unions such as the Australian Manufacturing Workers' Union (AMWU)³², the Australian Workers Union³³, the Construction Forestry Mining and Energy Union (CFMEU)³⁴ and the Forestry Furnishing Building Products and Manufacturing Division (FFPD Division) of the CFMEU.³⁵
- The Local Government Association of NSW and Shires Association of NSW³⁶, which is the peak body representing local councils and shire associations, together with the following individual local councils: Nambucca Shire Council³⁷, Wagga Wagga City Council³⁸, Leeton Shire Council³⁹ and Dungog Shire Council⁴⁰. The Committee also received a submission from the Riverina Regional Organisation of Councils.⁴¹
- The Council of Social Services of NSW (NCOSS),⁴² which is the peak social and community services body in the state, together with the Society of St Vincent de Paul⁴³ and the NSW Meals on Wheels Association.⁴⁴
- Community, entertainment and recreation groups such as the Country Women's Association of NSW⁴⁵, the Sydney Festival⁴⁶ and the Outdoor Recreation Industry Council of NSW.⁴⁷

³¹ Unions NSW represents approximately 750,000 union members throughout NSW. Submission 51, Unions NSW, p5

³² Submission 37, AMWU

³³ Submission 46, Australian Workers Union

³⁴ Submission 39, CFMEU

³⁵ Submission 49, CFMEU FFPD Division

³⁶ The Local Government Association of NSW and Shires Association of NSW represents 152 councils and county councils, together with regional Aboriginal land councils in NSW. Submission 40, Local Government Association of NSW and Shires Association of NSW, p2

³⁷ Submission 4, Nambucca Shire Council

³⁸ Submission 27, Wagga Wagga City Council

³⁹ Submission 32, Leeton Shire Council

⁴⁰ Dungog Shire Council has a population of 8,500 residents centred on the town of Dungog. Submission 36, Dungog Shire Council

⁴¹ The Riverina Regional Organisation of Councils encompasses the local government areas of Carrathool, Griffith, Hay, Jerilderie, Leeton, Murrumbidgee and Narrandera in the Western Riverina of NSW. Submission 33, The Riverina Regional Organisation of Councils, p1

⁴² NCOSS is the peak body for the social and community services sector in NSW. Submission 19, NCOSS, p1

⁴³ Submission 15, Society of St Vincent de Paul

⁴⁴ Submission 21, The NSW Meals on Wheels Association

⁴⁵ Submission 17, Country Women's Association of NSW

⁴⁶ The Sydney Festival is an annual arts festival. Submission 26, Sydney Festival, p1

- Special interest groups such as Injuries Australia⁴⁸
- The Australian Industry Group (Ai Group)⁴⁹
- A number of individuals who had been injured in an accident, either making private written submissions or appearing along with representatives of the unions and representative legal organisations during the Committee's public hearings.

- 2.22** The Committee notes that the parties identified above presented widely divergent opinions on the Government's changes to personal injury compensation law in New South Wales since 1999.
- 2.23** The strongest advocates of the reforms were the Insurance Council of Australia (ICA) and the major insurers. In general terms, they argued that the reforms have been successful in lowering claim numbers and insurance costs, leading to lower insurance premiums for community groups and businesses. Accordingly, the insurance industry strongly advocated maintenance of the current legislative arrangements to ensure certainty in the insurance system into the future.
- 2.24** The Local Government Association of NSW and Shires Association of NSW, together with individual local councils, also generally supported the reforms, on the basis that they have at least led to a stabilisation of insurance premiums, with the expectation of falls in the future.
- 2.25** By contrast, the representative legal associations and individual legal firms and lawyers were strongly opposed to the Government's reforms since 1999. In general terms, they argued that the changes to the reforms were unnecessary, have been inconsistently applied, and have operated excessively in favour of the insurance industry by boosting insurance industry profitability at the expense of individuals who are unable to qualify for non-economic loss compensation, even for serious injuries.
- 2.26** Similarly, unions argued that workers are particularly badly off under the Government's 2001 reforms, when compared to injured motorists and individuals injured in a public place. Unions also highlighted deficiencies in the operation of the claims procedures under the statutory workers' compensation scheme.
- 2.27** Finally, community and welfare organisations also expressed concerns about the failure of the reforms to lead to significant reductions in their premiums, especially amongst not-for-profit and community groups.

⁴⁷ Submission 28, Outdoor Recreation Industry Council of NSW

⁴⁸ Injuries Australia is a non-profit organisation established to assist people injured in the workplace and on the roads. Submission 6, Injuries Australia, p1

⁴⁹ Ai Group is a national industry association with 8,500 member in the manufacturing, engineering, construction, labour hire, airline, printing and related service sectors. Submission 42, Ai Group, p1

PART 2

THE 1999 – 2002 REFORMS TO PERSONAL INJURY COMPENSATION LAW

Chapter 3 **The 1999 reforms to motor accidents compensation law**

This chapter examines the Government's reforms to motor accidents compensation law through the *Motor Accidents Compensation Act 1999*. As indicated in Chapter 2, individuals injured in a motor accident as a result of the negligence of the owner or driver of another vehicle are entitled to compensation under the statutory fault-based NSW Motor Accidents Scheme, constituted under the *Motor Accidents Compensation Act 1999* and administered by the Motor Accidents Authority (MAA).

The Committee notes that under s.210 of the *Motor Accidents Compensation Act 1999*, a committee of the Legislative Council is required to monitor and review the operation of the NSW Motor Accidents Compensation Scheme. The Legislative Council's Standing Committee on Law and Justice has performed this function since 1999, producing its Sixth Report on the scheme on 20 May 2005. The reports of the Law and Justice Committee contain significant additional comments on the operations of the MAA and the NSW Motor Accidents Scheme.

The *Motor Accidents Compensation Act 1999*

- 3.1** The Motor Accidents Compensation Bill 1999 was introduced into Parliament on 2 June 1999 and assented to on 8 July 1999. It was introduced by the Government to meet two principal objectives:
- To lower the cost of compulsory third party (CTP) premiums (green slips). Up until 1999, the cost of green slips had been steadily increasing, and by June 1999 had reached \$441 on average in the Sydney Metropolitan region.
 - To alleviate the length and complexity of motor accidents claims procedures, including the time taken to reach settlement with an insurance company, the costs of the legal process, and the number and cost of the medical examinations an injured person was required to undergo.⁵⁰
- 3.2** The *Motor Accidents Compensation Act 1999* amended the *Motor Accidents Act 1988*, establishing a new NSW Motor Accidents Scheme providing compulsory third party insurance and compensation to a driver/passenger injured in a motor vehicle accident when they were not at fault.
- 3.3** The NSW Motor Accidents Scheme is administered by the MAA, which is a statutory corporation first established by the Parliament under the *Motor Accidents Act 1988* on 10 March 1989, and now constituted under the *Motor Accidents Compensation Act 1999*. The MAA is funded by a levy on third party premiums.
- 3.4** The NSW Motor Accidents Scheme is fault based. A person may lodge a claim under the scheme if he or she is injured in a motor vehicle accident, whether he or she was the driver, a passenger, pedestrian, cyclist or motorbike rider, so long as the driver or the owner of another

⁵⁰ Submission 54, The Cabinet Office, p30

vehicle was partially or completely at fault. Compensation is reduced in cases where the injured person is partly to blame for his or her own injuries. A claim cannot be made if:

- the injured person was totally at fault
- no one was at fault
- the person at fault was not the owner or driver of a motor vehicle.⁵¹

3.5 Compensation where the motor vehicle involved in the accident was not insured or cannot be identified is payable under a Nominal Defendant scheme operated by the MAA.

Damages available under the Act

3.6 The *Motor Accidents Compensation Act 1999* contained a number of reforms to the availability of economic and non-economic loss damages to motor accident victims, outlined below.

Non-economic loss damages

3.7 Section 131 of the *Motor Accidents Compensation Act 1999* provides that no damages may be awarded to an injured motorist for non-economic loss (ie pain and suffering) unless the degree of injury exceeds a threshold of 10% whole person impairment (WPI). Under s.134, the maximum non-economic loss damages that a court may award is \$284,000 (indexed annually and currently \$359,000).⁵²

Economic loss damages

3.8 Section 124 of the *Motor Accidents Compensation Act 1999* provides injured motorists with damages for economic loss, however economic loss entitlements are not paid for the first five days of lost income. In turn, under s.125, when awarding economic loss damages, courts/tribunals are to disregard the amount by which the injured or deceased person's weekly earnings would have exceeded \$2,500 (indexed and currently \$3,296).⁵³

3.9 Section 127 of the Act sets a 5% discount rate on damages for future economic loss paid as a lump sum. The discount rate is intended to acknowledge that a plaintiff awarded a lump sum in lieu of lost income or large future medical costs gains control of that money straight away, allowing the plaintiff to invest the money and earn interest.

⁵¹ Cited in Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, p 15

⁵² This rate was increased from \$341,000 on 1 October 2005. See *Motor Accidents Compensation (Determination of Loss) Order No 6* under the *Motor Accidents Compensation Act 1999*, cited in the *NSW Government Gazette*, No 120, 30 September 2005, p7912

⁵³ See *Motor Accidents Compensation (Determination of Loss) Order No 6* under the *Motor Accidents Compensation Act 1999*, cited in the *NSW Government Gazette*, No 120, 30 September 2005, p7912

The management of claims under the Act

- 3.10** The *Motor Accidents Compensation Act 1999* also included a number of provisions to streamline the management and settlement of claims for compensation under the NSW Motor Accidents Scheme.

Accident Notification Forms

- 3.11** Part 3.2 of the *Motor Accidents Compensation Act 1999* provides for the early notification of motor accident injuries through an Accident Notification Form (ANF).
- 3.12** In turn, under s.50 of the Act, insurers have up to 10 days to advise the injured person whether they accept provisional liability for the accident, in which case they can make payments of up to \$500 under s.51 of the Act. These provisions are designed to encourage prompt and appropriate medical and related treatment, without the need to lodge a full compensation claim.

Early resolution of claims

- 3.13** Under Part 4.2 of the *Motor Accidents Compensation Act 1999*, a full claim for compensation must be made within six months of the date of an accident.
- 3.14** In turn, under Part 4.3, upon receiving a claim for compensation, an insurer must meet a three-month deadline to either accept or deny liability for the claim. Where the insurer does not wholly deny responsibility for the claim, the insurer must then make a reasonable offer of settlement within one month of the injury stabilising or two months after the claimant provides all necessary particulars (whichever is greater).
- 3.15** If the claim cannot be resolved by negotiation and settlement either party may take the matter to the Claims Assessment and Resolution Service (CARS), described below.

The Claims Assessment and Resolution Service

- 3.16** Part 4.4 of the *Motor Accidents Compensation Act 1999* establishes CARS for the resolution of disputed claims. Generally, there is no access to the courts unless the matter has first been before a CARS claims assessor, although some complex claims may be exempted from the CARS process. CARS is designed to avoid litigation and offer a less formal and faster method of resolving claims than the courts.
- 3.17** The decision of a CARS claims assessor is binding on the insurer and on the claimant if the claimant accepts the amount within 21 days.

The Medical Assessment Service

- 3.18** Part 3.4 of the *Motor Accidents Compensation Act 1999* established the Medical Assessment Service (MAS). Doctors appointed to the MAS are responsible for assessing the degree of impairment of injured individuals referred to them by CARS claims assessors using the MAA

Medical Assessment Guidelines (based on the AMA Guides). The MAS is intended to provide an independent medical assessment procedure for resolving medical disputes.

The proposed Life Time Care and Support Scheme

- 3.19** As noted in Chapter 2, the former New South Wales Premier, the Hon Bob Carr, announced on 11 June 2005 a proposed no-fault 'Life Time Care and Support Scheme' for individuals catastrophically injured in motor vehicle accidents in New South Wales, to commence on 1 January 2007.
- 3.20** Each year, around 120 people are catastrophically injured in motor vehicle accidents in New South Wales, including cases of quadriplegia, paraplegia and brain damage. However, under the fault-based NSW Motor Accidents Scheme, about half of those approximately 120 victims are not entitled to assistance because they were the driver at fault.
- 3.21** The proposed Life Time Care and Support Scheme will not be fault based, entitling all people catastrophically injured in a motor vehicle accident to life time medical care and support, including daily attendant and nursing care, medical treatment and rehabilitation, domestic services and respite care.
- 3.22** It is envisaged that the scheme will cost \$280 million an year, to be funded by a \$20 increase in the net cost of CTP green slips per annum.⁵⁴

⁵⁴ The Hon Bob Carr, Speech to the NSW ALP State Conference, 11 June 2005, pp13-14, cited at <http://www.nswalp.com/conference2005/Bob.Carr.pdf> (accessed 16 June 2005). See also the Hon Bob Carr, 'Premier Carr Announces Life Time Care and Support Scheme', News Release, 11 June 2005

Chapter 4 **The 2001 reforms to workers' compensation law**

This chapter examines the Government's reforms to workers' compensation law through the *Workers Compensation Legislation Further Amendment Act 2001*. As indicated in Chapter 2, workers injured at work in New South Wales are entitled to compensation under the statutory NSW Workers Compensation Scheme, constituted under the *Workers Compensation Act 1987*, which provides no-fault benefits. An injured worker may also be able to make a common law claim, although access to the common law is restricted.

The history of workers' compensation law

4.1 New South Wales has had a statutory no-fault workers' compensation scheme since 1910, with compulsory insurance since 1926. However, the relationship between the statutory workers' compensation scheme and common law remedies for workplace injuries caused by negligence has been particularly contentious in New South Wales over the past few decades. A brief history is provided below.

The Workers Compensation Act 1987

4.2 In July 1987, the Unsworth Labor Government enacted the *Workers Compensation Act 1987*, abolishing common law remedies for workplace injuries or death caused by negligence and at the same time introducing extensive reforms to the statutory workers' compensation system in New South Wales. At the time, there was strong opposition to the abolition of common law workers' compensation claims, particularly from the legal profession and unions. As part of its 1988 election platform, the then Opposition promised that if the Coalition won government, common law rights would be restored.⁵⁵

The Workers Compensation (Benefits) Amendment Act 1989

4.3 Following its election in 1989, the Greiner Government moved to reinstate common law remedies for workplace injuries or death caused by negligence through the enactment of the *Workers Compensation (Benefits) Amendment Act 1989*. The whole of Part 5 of the *Workers Compensation Act 1987* was repealed and a new Part 5 inserted.

4.4 The new Part 5 imposed stringent restrictions on the right to seek common law damages, which shut out smaller claims and limited the amount of non-economic loss damages payable. Maximum amounts that could be awarded were also set where previously there had been no such limitation.⁵⁶

⁵⁵ Cited in Parliamentary Library Research Service, Briefing Paper No 8/01, *The Future of the NSW Workers Compensation Scheme*, pp2-3

⁵⁶ Cited in Parliamentary Library Research Service, *The Future of the NSW Workers Compensation Scheme*, pp3-4

The early to mid-1990s

- 4.5 In the early 1990s, the new workers' compensation scheme appeared to be operating successfully. In May 1990, a \$1.1 billion surplus was announced, and the target premium rate paid by employers was lowered from 3.2% to 2.6%. Cost blowouts, a feature of earlier workers' compensation schemes, seemed to have been curtailed. In 1993-94, the target premium rate was reduced to 1.8%.
- 4.6 However, by the mid 1990s, it became apparent that the health of the workers' compensation scheme was not as robust as previously thought. The surplus eroded to a \$454 million deficit at 30 June 1996, in response to which the premium rate was increased back up to 2.5%. The reasons advanced for this turnaround included an increase in claims due in part to higher employment and greater awareness of the scheme, overly generous benefits, low premiums and high legal costs.⁵⁷

The 1997 Grellman Inquiry

- 4.7 In April 1997, in response to the continuing deficit of the workers' compensation scheme, the Government initiated the Inquiry into the Workers Compensation System in New South Wales (the Grellman Inquiry). The final report of the inquiry was handed down on 15 September 1997.
- 4.8 The Grellman report recommended that access to common law should be retained, but with further amendments, including:
- Damages to be assessed according to a 'whole of body' work-related permanent impairment assessment.
 - The maximum amount payable for non-economic loss damages to be capped at \$220,000 and a financial threshold of 20% of the maximum (ie \$44,000) applied before damages could be awarded.
 - A worker must make an irrevocable election to pursue a common law action.
 - A worker is entitled to ongoing permanent impairment weekly benefits until damages are recovered.
- 4.9 The Grellman report also recommended measures to improve the participation of stakeholders, in particular employers and insurers, in the workers' compensation system.⁵⁸

1998 Legislation

- 4.10 In 1998, the workers' compensation system was again subject to significant change through the *Workers Compensation Legislation Amendment Act 1998* and the *Workplace Injury Management and Workers Compensation Act 1998*. These Acts introduced a number of reforms designed to

⁵⁷ Cited in Parliamentary Library Research Service, *The Future of the NSW Workers Compensation Scheme*, p11

⁵⁸ Cited in Parliamentary Library Research Service, *The Future of the NSW Workers Compensation Scheme*, pp4-5

address the issues raised in the Grellman Inquiry in relation to stakeholder participation in the workers' compensation system.⁵⁹

The Workers Compensation Legislation Bill 2001

4.11 On 27 April 2001, the NSW Minister for Industrial Relations, the Hon John Della Bosca MLC, publicly announced that as at 31 December 2000, the NSW Workers Compensation Scheme had a deficit of \$2.18 billion. This was an increase of \$1.12 billion on the deficit of \$1.6 billion at June 2000. The Minister cited three main reasons for the rapid increase in the deficit:

- A greater than expected increase in claim costs over the second half of 2000, including an increase of almost 30% in the number of common law claims lodged in the six months to 31 December 2000.
- The state of the national economy, including an increase of \$120 million in estimated liability due to a revision of assumptions about future inflation and investment returns.
- The Government had set a rate for employers of 2.8% of wages (net of the GST), while the average premium cost of the scheme was 2.89% of wages (net of the GST).⁶⁰

4.12 In response to this cost blow-out, the Government introduced the Workers Compensation Legislation Bill 2001 into the Legislative Council on 29 April 2001. The bill was designed to amend the *Workers Compensation Act 1987* and its companion act, the *Workplace Injury Management and Workers Compensation Act 1988*, to make reforms to claims procedures, dispute resolution, lump sum compensation, common law damages and other matters.

4.13 The bill met with intense lobbying from trade unions, the legal profession and others. One of the main areas of concern was the proposed change to common law claims. After negotiations, on 21 May 2001 the Government referred the issues of common law claims to a judicial inquiry, to be undertaken by Justice Sheahan of the Land and Environment Court. The remaining aspects of the Government's reforms were incorporated into a new amendment bill – the Workers Compensation Legislation Amendment Bill 2001 (No 2). The bill was introduced into the Legislative Assembly on 19 June 2001 and assented to on 17 July 2001.⁶¹

⁵⁹ Cited in Parliamentary Library Research Service, *The Future of the NSW Workers Compensation Scheme*, pp14-15

⁶⁰ The Hon John Della Bosca MLC, Minister for Industrial Relations, 'Streamlining Workers Compensation – Simpler, Fairer, Faster', Media Release, 27 March 2001.

⁶¹ Cited in Parliamentary Library Research Service, Briefing Paper No 14/01, *Workers Compensation Common Law Matters: The Sheahan Inquiry*, pp1-2

The Sheahan Inquiry

4.14 The Commission of Inquiry into Workers Compensation Common Law Matters (the Sheahan Inquiry) commenced on 18 June 2001, and reported on 31 August 2001. The Sheahan Report recommended that:

- Common law actions should be restricted to recovery of economic loss damages with common law damages for non-economic loss to be abolished.
- Economic loss damages should remain capped, available only to age 65.
- Only workers assessed to have a whole person impairment (WPI) of 20% or more should be entitled to make a common law claim for economic loss damages.
- The requirement that a worker be required to elect whether to claim common law damages or to make a claim for permanent loss compensation under the statutory workers' compensation scheme should be repealed, but that recovery of common law economic loss damages should preclude the receipt of any further statutory benefits.
- As soon as the scheme's financial position permitted, the maximum compensation recoverable for non-economic loss under the statutory workers' compensation scheme under ss.66 and 67 of the *Workers Compensation Act 1987* should be increased gradually to \$250,000, and that this amount be indexed thereafter.
- Common law damages for economic loss should be available as a structured settlement, including statutory lump sums.⁶²

The *Workers Compensation Legislation Further Amendment Act 2001*

4.15 In November 2001, the NSW Government introduced a number of reforms to the NSW Workers Compensation Scheme through the *Workers Compensation Legislation Further Amendment Bill 2001*. These reforms were introduced to give effect to the recommendations of the Sheahan Inquiry. The bill received royal assent in December 2001.

4.16 The *Workers Compensation Legislation Further Amendment Act 2001* included a number of amendments to the *Workers Compensation Act 1987*, the *Workplace Injury Management and Workers Compensation Act 1988* and other acts. In essence, these amendments again rebalanced the relationship between the statutory NSW Workers Compensation Scheme and the common law. The principal amendments included:

- The imposition of the 15% threshold for accessing common law damages, with common law actions restricted to recovery of economic loss damages.
- The stipulation that in awarding common law damages for future economic loss, courts are to disregard any earning capacity of the injured worker after age 65.
- The imposition of the 10% WPI threshold for accessing non-economic loss damages under the statutory workers' compensation scheme (except for psychological/psychiatric injury for which the threshold was set at 15% WPI).

⁶² Cited in Parliamentary Library Research Service, *Workers Compensation Common Law Matters: The Sheahan Inquiry*, pp6-7

- The increase to \$200,000 in the maximum amount of lump sum statutory compensation available if the level of permanent impairment is greater than 75%.⁶³

The current statutory NSW Workers' Compensation Scheme

4.17 The following is a summary of the major provisions of the current NSW Workers' Compensation Scheme.

The dispute resolution process

4.18 The *Workplace Injury Management and Workers Compensation Act 1998* establishes the Workers Compensation Commission for the resolution of disputes under the statutory workers' compensation scheme.⁶⁴

4.19 The Workers Compensation Commission has a President, two Deputy Presidents, a Registrar and Arbitrators, supported by Approved Medical Specialists (AMSs) and other staff:

- The President, who is the head of the Commission, hears appeals of Arbitrators' decisions and determines points of law. The President also appoints Arbitrators and the AMSs.
- The two Deputy Presidents also hear appeals on Arbitrators' decisions.
- The Registrar oversees the running of the commission and decides how the commission deals with disputes.
- The Arbitrators are responsible for resolving claims. Initially, they are responsible for trying to bring two parties to an agreed resolution of their dispute. If this does not happen, Arbitrators may then determine the case.
- The independent AMSs are responsible for assessing medical disputes for the Commission.
- Dispute Assessment Managers can issue Interim Payment Directions for weekly compensation payments (up to 12 weeks) and have the authority to order payment of medical and related expenses (up to a total of \$5,000).⁶⁵

4.20 As indicated, the decision of an Arbitrator may be appealed to the President and the two Deputy Presidents of the commission. Appeals may be made both in respect of matters of facts and law. However, the amount in dispute must exceed \$20,000, or more than 20% of the amount claimed. The NSW Court of Appeal retains a right of review.⁶⁶

⁶³ Cited in Parliamentary Library Research Service, *Workers Compensation Common Law Matters: The Sheahan Inquiry*, pp6-7

⁶⁴ The Workers Compensation Commission, 'Our Role', cited at www.wcc.nsw.gov.au/the_commission.asp (accessed on 10 May 2005)

⁶⁵ The Workers Compensation Commission, 'Who we are', cited at www.wcc.nsw.gov.au/the_commission.asp (accessed on 10 May 2005)

⁶⁶ Submission 23, Australian Lawyers Alliance, p12

Weekly compensation payments

- 4.21** Under Division 2 of Part 3 of the *Workers Compensation Act 1987*, the primary form of benefit payable to a worker who has suffered an injury in the course of employment and is absent from work is a weekly compensation payment for the period that he or she is incapacitated:
- Under ss. 35 and 36, for the first 26 weeks of total incapacity, the weekly payment is the amount of the worker's pre-injury weekly wage rate, subject to a cap of \$1,000 per week. This does not include overtime, shift work or penalty rates.
 - Under s.37, after the first 26 weeks, where the injured worker remains totally incapacitated and the employer is unable to provide suitable light work, the injured worker is entitled to receive ongoing compensation at the rate of 90% of the worker's pre-injury rate of pay up to age 66, except that the payment shall not exceed \$235.20 per week (indexed and currently at \$340.90 per week). Various additional allowances are available for dependents.
 - Under s.38, where a injured worker is partially incapacitated, they are entitled to the same rate of compensation as under s. 35 and 36, for the first 26 weeks, after which the rate falls back to in accordance with the provisions of s.37. Under s.38A they must also be seeking suitable employment.

Medical, hospital and rehabilitation costs

- 4.22** Under Division 3 of Part 3 of the *Workers Compensation Act 1987*, an injured worker is entitled to compensation for the cost of medical and related treatment (other than domestic assistance), hospital treatment, ambulance services and any rehabilitation service (such as physiotherapy or chiropractic services).

Commutations

- 4.23** Under Division 9 of Part 3 (s.87E) of the *Workers Compensation Act 1987*, a weekly compensation payment or compensation for medical, hospital and rehabilitation expenses can be commuted to a lump sum with the agreement of the injured worker.
- 4.24** Under s.87EA, preconditions for commutation of such liabilities include that a period of at least two years has elapsed since the worker's first claim for weekly payments of compensation in respect of the injury was made, and all opportunities for injury management and return to work for the injured worker have been fully exhausted.

Permanent impairment

- 4.25** Under s.66 of the *Workers Compensation Act 1987*, a worker who has suffered permanent impairment as a result of a work related injury is entitled to receive up to \$200,000 in damages where the degree of permanent impairment is greater than 75%.

- 4.26 The Committee notes that the range of injuries for which s.66 compensation can be received, including psychological disorders or damage to internal organs, was broadened under the *Workers Compensation Legislation Further Amendment Act 2001*.⁶⁷

Pain and suffering

- 4.27 Under s.67 of the *Workers Compensation Act 1987*, a worker who receives an injury that results in greater than 10% WPI is entitled to receive compensation for pain and suffering up to \$50,000. Pain and suffering compensation is in addition to any other compensation under the act.

The current common law entitlements of injured workers

- 4.28 The following is a summary of the major provisions of the *Workers Compensation Act 1987* relating to common law actions for damages by injured workers.

Statutory limitations on bringing common law claims

- 4.29 The *Workers Compensation Act 1987* includes statutory limitations on when common law claims can be brought:
- Under s.151C, an injured worker is not entitled to commence court proceedings for damages until six months have elapsed since notice of the injury was given to the employer.
 - Under s.151D, an injured worker is not entitled to commence court proceedings for damages more than three years after the date on which the injury was received, except with the leave of the court in which the proceedings are to be taken.

Modified common law damages

- 4.30 Under s.151G of the *Workers Compensation Act 1987*, the only common law damages that may be awarded to an injured worker are damages for past and future economic loss. Damages for non-economic loss cannot be brought under common law. (Non-economic damages are only available under the statutory scheme).
- 4.31 In turn, under s.151H, common law damages cannot be accessed unless the injury results in the death of the worker or in a minimum 15% WPI, as certified by an AMS. In assessing whether the 15% WPI threshold has been exceeded, impairment resulting from physical injury is to be assessed separately from impairment resulting from psychological injury.
- 4.32 Under s.151I, when calculating economic loss damages, the courts are to disregard the amount (if any) by which the injured worker's net weekly earnings would have exceeded the maximum amount of weekly compensation under the statutory scheme (\$1,000 a week as adjusted from time to time by the award rate of pay index).

⁶⁷ Ms Telfer, General Manager of Strategy, Policy Division, WorkCover, Evidence, 4 July 2005, p15

- 4.33** In addition, under s.151IA, in awarding damages for future economic loss due to deprivation or impairment of earning capacity, the courts are to disregard any earning capacity of the injured worker after age 65.

Effect of the recovery of damages on compensation

- 4.34** Under s.151A of the *Workers Compensation Act 1987*, if an injured worker recovers common law economic loss damages, then the worker ceases to be entitled to any further compensation in respect of the injury concerned, including entitlement to participate in any injury management program.

Chapter 5 **The 2002 reforms to public liability compensation law**

This chapter examines the Government's reforms to public liability compensation law in New South Wales through the *Civil Liability Act 2002* and the *Civil Liability Amendment (Personal Responsibility) Act 2002*. These reforms were introduced in response to the so-called 'crisis' in the public liability insurance, particularly in 2001-2002. Other Australian jurisdictions adopted similar measures, coordinated through a series of Ministerial Council meetings of responsible Commonwealth, state and territory ministers.

What is public liability insurance?

5.1 Public liability insurance covers damages claims for acts which result in injury, death or damage to property. The Australian Competition and Consumer Commission (ACCC) lists several major features of public liability insurance:

- Public liability insurance is considered a voluntary form of insurance, although there are several exceptions, such as certain public events and facilities, where a licensing authority may require public liability insurance. Many organisations that operate on a voluntary basis, typically with the support of local councils, must also hold public liability insurance. This protects the council from any call on its own public liability insurance.
- Public liability insurance is considered a form of long-tail insurance, which means that there can be a considerable gap in time between when a policy is written and the time in which the financial outcome of a claim is fully known. The delay may occur because, for example, injured people may wait until their injury is stabilised before making a claim. Alternatively, depending on the statutes of limitations, which vary between each state and territory, claims can be made some years after an accident, even if the policy has expired. This long-tail characteristic is cited as one of the reasons why insurers may experience difficulty in accurately estimating future claim costs, and in turn setting appropriate premiums.
- Public liability insurance can involve unpredictable risks. The risks may vary from a largely predictable number of high frequency events (for example, slips and falls in a supermarket), to the highly unpredictable, such as claims arising from a major accident. This is cited as a further reason for insurers experiencing problems in accurately estimating future claim costs.
- Public liability policies are typically written on a 'claims occurring basis'. This type of policy covers claims for incidents which occur during the policy period, regardless of when the claim is reported to the insurer.⁶⁸

5.2 Another key component of all public liability insurance is reinsurance. Reinsurance refers to the act of ceding or sharing risk with other insurance providers, generally on the international market.⁶⁹

⁶⁸ ACCC, *Third Monitoring Report on Public Liability and Professional Indemnity Insurance*, July 2004, pp 15-16

- 5.3 The Committee lists in Appendix 4 the key industry participants in the public liability insurance market in Australia, and summarises the distribution of premium revenue by state and territory in Appendix 5.

The public liability insurance market ‘crisis’ of 2001-2002

- 5.4 Between 2000 and 2003, and particularly in 2001-2002, Australia experienced a dramatic increase in public liability insurance premiums, combined with a significant decline in the availability of insurance for certain activities and events. Some insurers withdrew from the Australian market completely, while others withdrew from providing certain types of cover. As a result, many community groups, sporting and recreational activity providers and professional groups either could not get or could not afford public liability insurance.
- 5.5 This in turn led to perceptions of a ‘crisis’ in public liability insurance. For example, on 8 March 2002, *The Daily Telegraph* published an article entitled ‘Death of fun: As politicians plan another talkfest, community spirit is dying before our eyes’ which listed 50 community activities which had either been cancelled or were in danger of being cancelled. They included
- The cancellation of Australia Day celebrations in Victoria Park, Dubbo, due to a five fold increase in public liability costs.
 - The sale of a 27 bed backpacker hostel in Katoomba due to a 300% increase in its insurance premium.
 - The cancellation of the bridge to bridge race on the Hawkesbury River.
 - The cancellation of the King St Fair in Newcastle due to high public liability insurance premium quotes for the event.⁷⁰
- 5.6 Other articles followed, including an article in *The Australian* entitled ‘How the insurance crisis is affecting Australia’s way of life’.⁷¹
- 5.7 This perceived ‘crisis’ in turn led to suggestions that parts of Australia’s legal system were ‘out of control’, with sections of the community criticising a perceived ‘culture of blame’ which was said to have become entrenched in Australian society.⁷²

The first ministerial meeting on public liability

- 5.8 In response to the public liability ‘crisis’, state and territory Governments came under increasing pressure from the community to act.⁷³ As stated by Mr Laurie Glanfield, Director General of the Attorney General’s Department:

⁶⁹ Parliamentary Library Research Service, Briefing Paper No 7/02, *Public Liability*, p 9

⁷⁰ Cited in Parliamentary Library Research Service, Briefing Paper No 7/02, *Public Liability*, pp 1-2

⁷¹ Submission 49, ICA, p8

⁷² S.Clark & R.McInnes, ‘Unprecedented reform: The new tort laws’, *Insurance Law Journal*, Vol 15, 2004, p 99

Many Government departments will have files full of letters from members of the community addressed to the Premier and other Ministers seeking urgent assistance in the crisis.⁷⁴

5.9 On 27 March 2002, Commonwealth, state and territory ministers with responsibility for personal injury compensation law attended the first of a series of Ministerial Council meetings on the issue of public liability insurance in Canberra. The *Joint Communiqué* from the meeting listed the following major factors as behind rising public liability premiums:

- changing community attitudes towards litigation
- changes in what is held to constitute negligence
- increased damages payouts
- past under-pricing and poor profitability of the insurance industry
- the collapse of HIH
- insurance companies becoming more selective about the risks they cover.⁷⁵

5.10 These findings were based in part on a report by Trowbridge Consulting and Deloitte Touche Tohmatsu entitled *Public Liability Insurance – Analysis for meeting of ministers 27 March 2002*. This report was commissioned by the Commonwealth Treasury for the ministerial meeting.⁷⁶

The ACCC Insurance Industry Market Pricing Review

5.11 On 31 March 2002, ACCC published a report entitled *Insurance Industry Market Pricing Review*,⁷⁷ which found that the insurance industry in general had experienced very low returns on equity

⁷³ See for example the following media releases and NSW parliamentary debates and articles: M.Egan MLC, 'Public Liability Insurance', Media Release, 26/3/02; B.Carr MP, 'Public Liability Insurance', Media Release, 20/3/02; M Egan MLC, 'Public Liability Insurance', Media Release, 21/2/02; D.Gay MLC, 'Time for State Government to move on Public Liability', Media Release, 22/1/02; NSWPD (LA), 21/3/02, p 961; NSWPD (LA), 20/3/02, p 828; NSWPD (LA), 19/3/02, pp 683, 689; NSWPD (LA), 27/2/02, pp 54, 82, 85; NSWPD (LA), 15/11/01, p 18705; NSWPD (LA), 25/10/01, p 18053; NSWPD (LA), 23/10/01, p 17762; NSWPD (LC) 14/3/02, p 485; NSWPD (LC) 13/3/02, p 294; NSWPD (LC) 14/11/01, p 18510; NSWPD (LC) 28/11/01, p 18947; NSWPD (LC) 13/11/01, p 18422; 'Ministers at odds over liability insurance plan', *The Australian*, 23/1/02, p 2; 'Hockey puts premium on risky business', *The Australian*, 22/1/02, p 14.

⁷⁴ Mr Glanfield, Director General, Attorney General's Department, Evidence, 4 July 2005, p12

⁷⁵ Ministerial meeting on Public Liability, *Joint Communiqué*, 27 March 2002, Canberra

⁷⁶ Parliamentary Library Research Service, Briefing Paper No 7/02, *Public Liability*, p14

⁷⁷ The report was commissioned on 7 June 2001 by the Hon Joe Hockey MP, the then Commonwealth Minister for Financial Services and Regulation, to report on changes in the insurance market and specifically on the upward movement of insurance premiums. At the time of the request, the collapse of HIH was expected to have a significant impact on the general insurance industry.

over the previous nine years, with the average return less than could have been achieved by investing in cash.⁷⁸

- 5.12** In particular, the report noted that companies involved in product and public liability insurance⁷⁹ had achieved low returns over the previous decade, including very low returns (less than -5% returns) in the short term. Furthermore, the report found that the performance outlook for companies involved in product and public liability insurance remained very poor.
- 5.13** Consistent with this analysis, the report also noted that companies involved in product and public liability reported some of the largest increases in premiums over the previous year.⁸⁰

The *Civil Liabilities Act 2002*

- 5.14** In response to the perceived ‘crisis’ in public liability insurance, the NSW Government introduced the *Civil Liabilities Act 2002* into Parliament on 28 May 2002. The Act received assent on 18 June 2002 and commenced operation, retrospectively, on 20 March 2002.⁸¹
- 5.15** The *Civil Liabilities Act 2002* includes a number of provisions restricting access to damages:
- Section 16(1) of the Act restricts access to non-economic loss damages through the use of a threshold set at 15% of ‘a most extreme case’ (generally thought of as quadriplegia, paraplegia or severe brain damage). A sliding scale of damages that may be awarded then applies until the severity of the non-economic loss reaches 33% of a most extreme case.
 - Section 16(2) of the Act provides that the maximum non-economic loss damages that may be awarded in ‘a most extreme case’ is \$350,000 (indexed to average weekly earnings (AWE) annually on 1 October and currently at \$416,000).⁸²
 - Section 12(2) of the Act provides that the maximum economic loss damages that may be awarded are capped at a rate of three times the rate of AWE in New South Wales for the most recent quarter before the date of the award.
 - Section 14 of the Act requires that if an award for damages includes a lump-sum component for future economic loss, that amount is discounted by 5% (or some other percentage rate prescribed by regulations).

⁷⁸ The Committee notes that this does not take into account the rising value of property investments owned by insurance companies.

⁷⁹ Separate data for public liability insurance only (as opposed to product liability insurance) was not provided

⁸⁰ ACCC, *Insurance Industry Market Pricing Review*, March 2002, pii

⁸¹ This was the date when the initial announcement was made to introduce reforms

⁸² Section 18(1) of the *Civil Liability Act 2002* provides additional information on the indexation of maximum amount relating to non-economic loss. The current maximum was increased to \$416,000 from \$400,000 on 1 October 2005. See the *NSW Government Gazette*, No 107, 26 August 2005, p 6134

- 5.16 Schedule 2 of the *Civil Liabilities Act 2002* also contains a range of amendments to existing legislation. Importantly, schedule 2.2 of the *Civil Liabilities Act 2002* amended the provisions of the *Legal Profession Act 1987* dealing with legal costs. Section 198D of the *Legal Profession Act 1987* now provides that where an award is less than \$100,000, the maximum amount of costs recoverable by a legal practitioner is 20% of the amount or \$10,000, whichever is greater.

The second ministerial meeting on public liability

- 5.17 A second Ministerial Council meeting to discuss public liability law in Australia was held in Melbourne on 30 May 2002. The *Joint Communiqué* from that meeting noted that the states and territories had already made considerable progress towards developing a consistent national response to the ‘crisis’ in public liability insurance. The provisions of the *Civil Liabilities Act 2002* were noted, alongside similar legislation in other jurisdictions. However, the meeting agreed on a series of further measures to reduce and contain claim costs and increase the transparency of insurance industry practices, including:

- the introduction of legislation to protect volunteers and not-for-profit organisations
- the introduction of reforms aimed at reducing and/or containing costs, increasing the certainty and predictability of the cost of claims, and managing the community’s expectation with respect to personal responsibility and assumptions of risk
- the introduction of waivers for risky activities
- the removal of barriers to structural settlement
- improvements to the handling of claims so as to reduce costs and encourage settlements over litigation (for example, through compulsory conferencing).⁸³

Ongoing ACCC monitoring

- 5.18 As part of the *Joint Communiqué* from the second Ministerial Council meeting on 30 May 2002, the Commonwealth indicated that the ACCC would be requested to update its March 2002 *Market Industry Pricing Review* by July 2002, and to continue to update the report every 6 months for the next two years. The stated reason for this was as follows:

This ongoing monitoring role will enable an assessment of whether the insurance industry is adjusting premiums to take account of cost savings, and provide the gauge for the effectiveness of measures taken on a national basis to stabilise and contain claims-management costs as reflected in public liability premiums.⁸⁴

- 5.19 The Committee notes that on 17 February 2005, the Assistant Federal Treasurer, the Hon Mal Brough MP, extended the ACCC’s monitoring role for a further three years, to report at 12-monthly intervals.⁸⁵

⁸³ Parliamentary Library Research Service, Briefing Paper No 11/02, *Public Liability- an update*, p4

⁸⁴ Ministerial meeting on Public Liability, *Joint Communiqué*, 30 May 2002, Melbourne

⁸⁵ The Hon Mal Brough MP, Assistant Treasurer, Media Release, ‘Insurance Premiums Down’, 17 February 2005, <http://assistant.treasurer.gov.au/mtb/content/pressreleases/2005/012.asp> (accessed 21 March 2005)

The *Final Report of the Review of the Law of Negligence*

5.20 The second Ministerial Council meeting on 30 May 2002 also agreed that an expert panel be established to review the law of negligence and develop options to limit liability and the quantum of awards for damages.⁸⁶

5.21 In response, the Commonwealth Government announced on 2 July 2002 the terms of reference for an inquiry into the law of negligence to be chaired by the Hon David Ipp. A very early reporting date was set: the inquiry panel was to report on some of the terms of reference by 30 August 2002, and the remainder by 30 September 2002. In part, the terms of reference stated:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of others. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.

5.22 The panel submitted its final report to the Commonwealth Government on 30 September 2002: *The Final Report of the Review of the Law of Negligence* (the Ipp Report). In its report, the panel made 61 recommendations for reform of the law of negligence in Australia. Some of the principal recommendations were:

- A re-statement of aspects of the law of negligence, and the situations in which an individual should be considered to have been negligent.⁸⁷
- Amendment to the availability of damages, including a 15% threshold on access to non-economic loss damages capped at \$250,000, with loss of earning calculations at twice the average full time adult ordinary time earnings, and a discount rate of 3% applied to lump sum compensation for future economic loss.⁸⁸
- Legal costs to be capped so that the defendant should not be ordered to pay the plaintiff's legal costs in any case where the award of damages was less than \$30,000. In cases where the award of damages was between \$30,000 and \$50,000, the recovery of legal costs should be capped at no more than \$2,500.⁸⁹

5.23 As already noted, the NSW Government had already pre-empted some of these recommendations in its reforms through the *Civil Liability Act 2002*.

5.24 Following the release of the Ipp report, PricewaterhouseCoopers (PwC) was engaged to provide an actuarial assessment of the report's recommendations. PwC concluded:

We estimate that the net effect of all the proposed [quantifiable] changes will be to reduce ... costs of public liability claims by 14.7%. This comprises an approximate 19.6% reduction in personal injury claim costs, with no reduction in property damage claims costs ...

⁸⁶ Ministerial meeting on Public Liability, *Joint Communiqué*, 30 May 2002, Melbourne

⁸⁷ *Review of the Law of Negligence Final Report*, September 2002, recommendations 28 and 29

⁸⁸ *Review of the Law of Negligence Final Report*, September 2002, recommendations 47, 48(a), 49, 53, 60, 51

⁸⁹ *Review of the Law of Negligence Final Report*, September 2002, recommendations 45(a) & (b)

All things being equal, those reductions in claims costs might translate into corresponding reduction in insurers' premiums of around 13.5% on average.⁹⁰

The *Civil Liability Amendment (Personal Responsibility) Act 2002*

- 5.25** In response to the Ipp report, the NSW Government introduced a second stage of personal injury compensation law reform through the *Civil Liability Amendment (Personal Responsibility) Act 2002*. This Act was introduced into Parliament on 23 October 2002 and assented to on 28 November 2002.
- 5.26** The *Civil Liability Amendment (Personal Responsibility) Act 2002* made various amendments to the *Civil Liabilities Act 2002*, mainly dealing with the duty of care and the establishment of liability. The reforms included:
- a statutory reformation of the standard and duty of care
 - changes to liability for harm resulting from a recreational activity
 - a framework for structured settlements in cases involving damages for personal injury
 - the introduction of proportionate liability for claims involving economic loss or property damage
 - protection for good Samaritans who come to the assistance of a person in danger from all civil liability for acts or omissions in good faith
 - protection for volunteers doing work for community organisations from all civil liability for acts or omissions in good faith
 - provision that an apology by or on behalf of a person will not constitute an admission of liability, and will not be relevant to the determination of fault or liability in connection with civil liability of any kind.
- 5.27** Some minor amendments to the *Civil Liability Act 2002* were also made in late 2003 by the *Civil Liability Amendment Act 2003*.

The response of other jurisdictions

- 5.28** As indicated previously, the Committee notes that various reforms to personal injury compensation law have been introduced by other Australian state and territory jurisdictions over the past two to three years, mirroring many of the reforms in New South Wales. The Commonwealth Government has also introduced a range of legislative reforms.
- 5.29** A summary of the civil liability reforms across Australia up to 30 December 2004 is provided in the Australian Competition and Consumer Commission's *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance* at Appendix B.

⁹⁰ Cited in submission 49, ICA, p10

Chapter 6 The 2001-2002 reforms to medical negligence compensation law

This chapter examines the Government's reforms to medical negligence compensation law in New South Wales through the *Health Care Liability Act 2001* and subsequent *Civil Liability Act 2002*. The provisions of the *Health Care Liability Act 2001* were largely repealed in 2002, in favour of the provisions of the *Civil Liability Act 2002*.

What is medical indemnity insurance?

6.1 Medical indemnity insurance is a form of liability insurance that indemnifies medical practitioners for financial loss arising from actions brought against them as a result of the performance of their professional duties. Claims against medical practitioners are lodged as a result of a breach, or perceived breach, of a given standard of care in the treatment of a patient.⁹¹

The medical indemnity insurance market 'crisis' prior to 2001

6.2 Similar to the public liability insurance market, the cost of medical indemnity insurance increased rapidly prior to 2001. This was generally attributed to both poor management on behalf of insurers and inadequate regulation of the industry, together with factors such as:

- Increasing claim numbers.
- Increasing claim costs. The cost of litigation almost tripled between 1980 and 2000 due to higher processing costs and higher compensation payments.
- Expansion, particularly in the lower courts, of the definition of what constituted negligence, together with more generous damages awards. In late 2001, record damages of \$14.2 million were awarded to a plaintiff in a medical negligence case: *Simpson v Diamond* [2001] NSWSC 925. The full bench of the NSW Court of Appeal subsequently reduced the damages to \$11.0 million in *Diamond v Simpson* (No 1) [2003] NSWCA 67.
- The need for some medical insurance companies to build reserves to meet unfunded liabilities (ie. claims which had yet to be reported).
- The breakdown of the traditional cross-subsidy that existed between low-risk and high risk-medical practice.⁹²

6.3 In response to the combination of these factors, the largest medical insurer in New South Wales, United Medical Protection Group of Companies (UNITED)⁹³, sharply increased its

⁹¹ ACCC, *Medical Indemnity Insurance*, Second Monitoring Report, December 2004, px

⁹² Submission 53, The Cabinet Office, p25

⁹³ The majority of NSW medical practitioners are insured by United Medical Protection Group of Companies (UNITED).

premiums prior to 2001. For example, subscriptions for some obstetricians rose from \$2,000 in 1998 to \$42,000 in 2000, and were reported as being likely to increase to \$70,000 in 2001. Consequently, many doctors refused to work in rural areas where conditions were considered more risky. Some doctors also ceased performing more risky practices and procedures. Some country doctors in the public hospital system resigned.⁹⁴

- 6.4 In May 2002, UNITED was placed into provisional liquidation.⁹⁵ In response, the Commonwealth Government introduced a range of reforms to the regulatory framework of the medical indemnity insurance industry. In addition, the states and territories introduced a range of tort law reforms. The reforms in New South Wales are discussed below.

The *Health Care Liability Act 2001*

- 6.5 The NSW Government introduced the *Health Care Liability Act 2001* into Parliament on 19 June 2001. The Act received assent on 5 July 2001. The Act, in its original form⁹⁶, introduced a number of reforms discussed below.

Damages

- 6.6 Part 2 of the *Health Care Liability Act 2001*, now repealed, was concerned with the awarding of damages in health care claims. Many of the provisions of the Act pre-empted those subsequently introduced through the *Civil Liability Act 2002*. For example:
- Section 13(2) fixed the maximum amount of damages that could be awarded for non-economic loss at \$350,000.
 - Sections 13(1) and 13(3) set the threshold for access to non-economic loss damages at 15% of 'a most extreme case', with a sliding scale of damages until the severity of the disability reached 33% of 'a most extreme case'.
 - Section 11 applied a 5% discount rate to lump sum payments in compensation for economic loss.

Professional indemnity insurance

- 6.7 Part 3 of the *Health Care Liability Act 2001*, which remains in force today, introduced various provisions in relation to professional indemnity insurance:
- Section 19 provides that 'a person is not entitled to practise as a medical practitioner unless the person is covered by approved professional indemnity insurance'. Accordingly, the Medical Board is not to register a person as a medical practitioner unless it is satisfied that the person is covered by approved professional indemnity insurance or satisfies the requirements of an exemption.

⁹⁴ Submission 53, The Cabinet Office, pp25-26

⁹⁵ ACCC, *Medical Indemnity Insurance*, Second Monitoring Report, December 2004, pix

⁹⁶ Many of the provisions of the Act were subsequently subsumed into the *Civil Liability Act 2002*.

- Section 21 requires that insurers have a comprehensive risk management program that ‘identifies potential problems in relation to individual medical practitioners and particular categories of medical services and provides strategies to effectively deal with those problems’.

Protection from liability for the provision of emergency health care

- 6.8 Part 4 of the *Health Care Liability Act 2001*, now repealed, set out various provisions protecting medical practitioners, registered nurses and certain other health practitioners from liability should they provide emergency health care in good faith and on a voluntary basis without fee.

The *Final Report of the Review of the Law of Negligence*

- 6.9 Chapter 3 of the *Final Report of the Review of the Law of Negligence* (the Ipp Report) specifically examined the standard of care owed by medical practitioners in their treatment of patients. Out of that examination, Recommendation 3 of the report advocated the adoption of the following test to apply in cases where a medical practitioner is alleged to have been negligent in providing treatment to a patient:

A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational.⁹⁷

- 6.10 This recommendation amounted to a reversion to the test laid down in *Bolam v Friar Hospital Management Committee*⁹⁸ (the *Bolam* rule), with the qualification that the opinion cannot be irrational. According to the *Bolam* rule, a doctor is not negligent if he or she acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion, even though other doctors adopt a different practice.
- 6.11 The *Bolam* rule was previously rejected by the High Court in *Rogers v Whitaker*⁹⁹. In that case, the court held that the ‘standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade’. While the court acknowledged that accepted practice may help to decide what proper care and skill is required in a profession or trade, in the end ‘it is for the Courts to adjudicate on what is the appropriate standard of care’.¹⁰⁰

⁹⁷ Negligence Review Panel, *Review of the Law of Negligence Final Report*, September 2002, recommendations 3

⁹⁸ [1957] 1 WLR 582

⁹⁹ (1992) 175 CLR 479

¹⁰⁰ *Rogers v Whitaker* (1992) 175 CLR 479 at 487, cited in Clark & McInnes, *op cit*, p 103

Ongoing ACCC monitoring

- 6.12** In October 2002, the Prime Minister announced that the Australian Competition and Consumer Commission (ACCC) would monitor medical indemnity premiums to assess whether they were actuarially and commercially justified.¹⁰¹
- 6.13** The ACCC has produced two monitoring reports to-date, examined later in this report. The first was produced in February 2004, and the second in December 2004.

The *Civil Liability Act 2002*

- 6.14** As indicated, parts 2 and 4 of the *Health Care Liability Act 2001* were subsequently repealed by the *Civil Liability Act 2002*, in favour of the provisions of the *Civil Liability Act 2002*. As discussed, the continued relevance of the *Health Care Liability Act 2001* is largely limited to the provisions of Part 3, which requires that medical practitioners be appropriately insured.
- 6.15** In relation to the Ipp Report recommendation for the restatement of a modified *Bolam* rule, s.5O of the *Civil Liability Act 2002* states in part:
- (1) A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
 - (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- 6.16** Accordingly, s.5O restores a modified version of the *Bolam* rule in medical negligence law in New South Wales. Indeed, the Act goes beyond the recommendations of the Ipp Report by extending a modified *Bolam* rule to all professions, not just medical practitioners.
- 6.17** However, the *Civil Liability Act 2002* does not completely restore the *Bolam* principle as s.5P precludes the application of the standard of care in s.5O to the duty to warn of risk. Accordingly, the standard of care to be applied when warning of risk is to be determined by the courts rather than peer professional opinion, thus preserving the rule in *Rogers v Whitaker*.

¹⁰¹ The Hon John Howard MP, 'A new medical indemnity insurance framework', 23 October 2002

Chapter 7 The 2002 public liability reforms in retrospect

This chapter examines the Government's 2002 personal injury law reforms in retrospect. During the inquiry, the representative legal associations – specifically the Law Society of NSW and the NSW Bar Association – argued that the reforms were essentially unnecessary, given the evidence available now on insurer costs and profitability and the judicial trend against awarding excessive damages at the time. By contrast, the insurance industry argued that the Government's intervention was justified given the rapid escalation in premiums in 2001 and 2002.

The argument that the reforms were unnecessary

7.1 In their written submissions, the Law Society of NSW and the NSW Bar Association presented a number of arguments why the public liability reforms of 2002 were unnecessary. These arguments are examined below.

Claims costs were stable prior to the reforms

7.2 In its written submission, the Law Society of NSW argued that public liability claim costs remained relatively stable throughout the period leading up to the passage of the *Civil Liability Act 2002*, and that by extension, the Government's reforms were unnecessary.

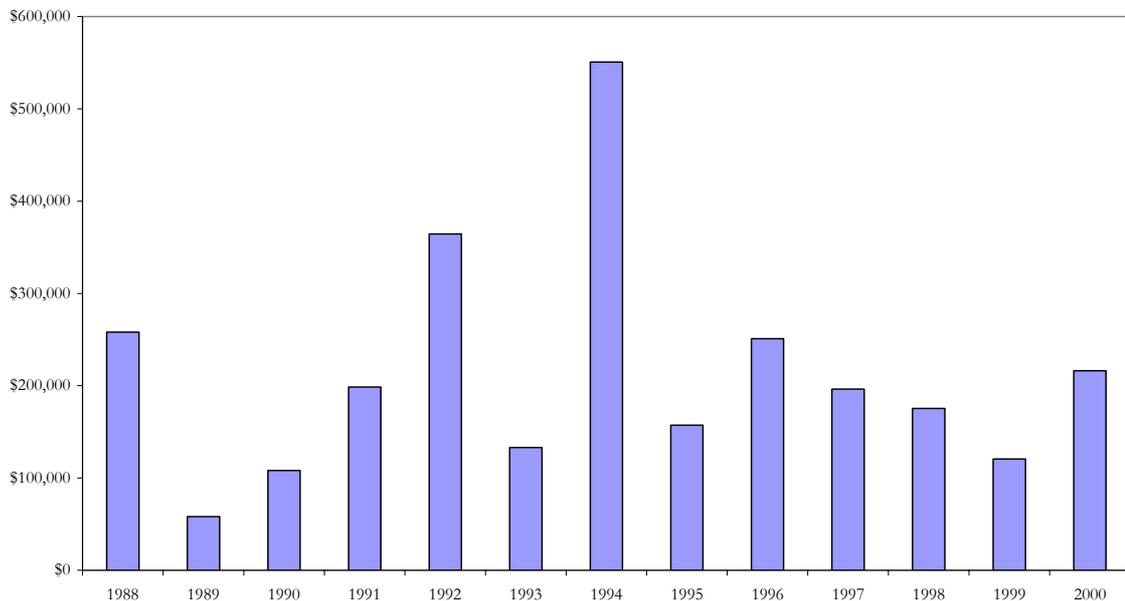
7.3 In support, the Law Society cited the following table of average damages payouts in public liability matters in New South Wales between 1988 and 2000, based on a paper by the Hon Justice Davies entitled 'Negligence: Where Lies the Future', delivered at the Supreme and Federal Court Judges' Conference in Adelaide in January 2003.

Table 7.1 Average damages payouts in public liability matters in New South Wales: 1988 - 2000

| Year | Average Damages |
|------|-----------------|
| 1988 | \$258,016 |
| 1989 | \$58,174 |
| 1990 | \$108,029 |
| 1991 | \$198,522 |
| 1992 | \$364,379 |
| 1993 | \$133,139 |
| 1994 | \$550,877 |
| 1995 | \$157,285 |
| 1996 | \$250,987 |
| 1997 | \$196,376 |
| 1998 | \$175,271 |
| 1999 | \$120,471 |
| 2000 | \$216,201 |

Source: Hon Justice Davies, 'Negligence: Where Lies the Future', paper at the Supreme and Federal Court Judges' Conference, Adelaide, 23 January 2003, cited in Submission 41, Law Society of NSW, p14

7.4 The data in Table 7.1 is reproduced in Figure 7.1 below.

Figure 7.1 Average damages in public liability matters in New South Wales: 1998 - 2000

Source: Hon Justice Davies, 'Negligence: Where Lies the Future', paper at the Supreme and Federal Court Judges' Conference, Adelaide, 23 January 2003, cited in Submission 41, Law Society of NSW, p13

7.5 Based on Table 7.1 and Figure 7.1, the Law Society in turn suggested that insurers' financial position in 2002 was much better than was thought at the time. As stated by the Hon Justice Davies in his paper, 'Negligence: Where Lies the Future':

It is debatable whether the insurance industry in general is in difficulty. On the contrary, there is evidence that general insurance profitability for the year ended 2001 was the highest since 1997 and there is also evidence that, because there are fewer competitors in the market, insurers can be more selective about what insurance they take and at what price.¹⁰²

7.6 In addition, the Law Society also cited the Queensland Government Liability Taskforce Report of February 2002 which indicated that the profitability of public liability insurers was improving prior to the introduction of the *Civil Liability Act 2002*, with gross losses estimated to have fallen from \$398 million in 1999 to \$228.5 million in 2000.¹⁰³

The judicial trend in liability cases was against claimants

7.7 In its written submission, the NSW Bar Association noted that in the 1980s and early 1990s, there were many court decisions which could be interpreted as significantly liberalising the rules of negligence and access to damages at common law. Such trends led to the coining of phrases such as 'Santa Clause Judges'.

¹⁰² Hon Justice Davies, 'Negligence: Where Lies the Future', paper at the Supreme and Federal Court Judges' Conference, Adelaide, 23 January 2003, cited in Submission 41, Law Society of NSW, p14

¹⁰³ Queensland Government Liability Insurance Taskforce Report, February 2002, cited in Submission 41, Law Society of NSW, p14

- 7.8** However, the Association argued that by the late 1990s, and prior to the enactment of the *Civil Liability Act 2002* and the *Civil Liability Amendment (Personal Responsibility) Act 2002*, the courts were already moving to reassert a more commonsense approach to the finding of fault and the assessment of damages under the common law.¹⁰⁴
- 7.9** In support of this position, the Bar Association cited a number of recent decisions of the courts asserting individual responsibility, in particular in relation to activities voluntarily undertaken:
- *Agar v Hyde*¹⁰⁵ in 2000 and *Woods v Multi-Sport Holding Pty Ltd*¹⁰⁶ in 2002. In these cases the plaintiffs had suffered injury whilst playing rugby and indoor cricket respectively. In each case, the High Court found for the defendants on the basis of either an absence of a duty of care or the obvious nature of the risks involved in the activity.
 - *Van der Sluice v Display Craft Pty Ltd*¹⁰⁷ in 2002. In this case, the plaintiff was injured when he fell off a ladder whilst installing Christmas decorations for the defendant. The plaintiff regularly carried out this kind of work. The Court of Appeal held that the risk of injury when standing on the upper rungs of a ladder was obvious and that the defendant was entitled to expect that the plaintiff was aware of the risk and would take steps to avoid injury.
 - *Romeo v Conservation Commission of the Northern Territory*¹⁰⁸ in 1998. In this case the plaintiff had wandered over a cliff in a coastal reserve whilst intoxicated. The High Court found that there was no failure to warn of the obvious risk posed by a cliff or any failure to fence off the relevant area, consistent with the longstanding common law position that there is no duty of care in relation to obvious and apparent risk.
 - *State of NSW v Godfrey*¹⁰⁹ in 2004. In this case, the mother of an unborn child was involved in an armed hold-up by an escaped prisoner, leading to the premature birth of her child with disabilities. The Court of Appeal held that the Department of Corrective Services was not liable for the disability suffered by a prematurely born child. The court held the damages suffered to be too remote to be causally connected.¹¹⁰
- 7.10** Given this perceived move by the courts towards a more commonsense approach to the finding of fault, the NSW Bar Association submitted that the codifying of various duty of care and negligence principles in the *Civil Liability Act 2002* was both unnecessary and undesirable.¹¹¹

¹⁰⁴ Submission 29, NSW Bar Association, pp15,40

¹⁰⁵ (2000) 201 CLR 552

¹⁰⁶ (2002) 208 CLR 460

¹⁰⁷ [2002] NSWCA 204

¹⁰⁸ (1998) 192 CLR 431

¹⁰⁹ (2004) NSWCA 7

¹¹⁰ Cited in submission 29, NSW Bar Association, pp42-23

¹¹¹ Submission 29, NSW Bar Association, p43

7.11 Similarly, in its written submission, the Law Society of NSW cited a significant body of recent High Court decisions up to 2002, and an even larger body of intermediate court of appeal decisions up to 2002, finding in favour of the defendant. The Society provided the following table summarising the result of tort appeals to the High Court from 1987 to 2002.

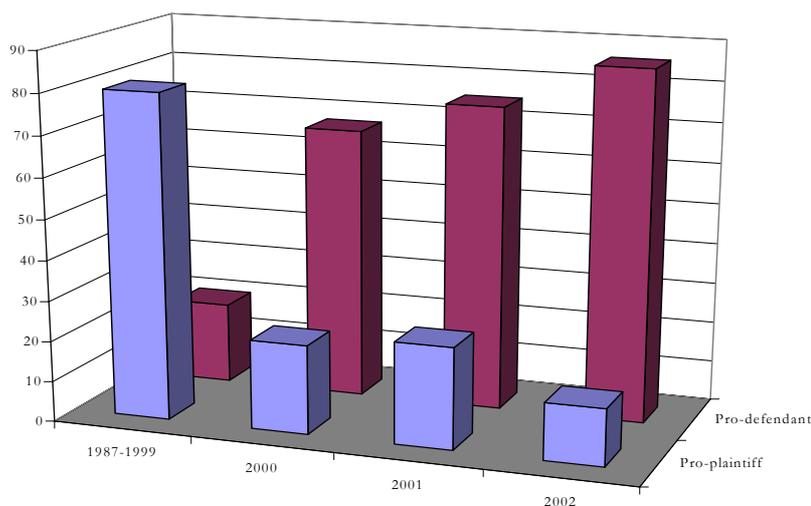
Table 7.2 The results of tort appeals in the High Court: 1987 – 2002

| Year | Cases | Pro-plaintiff | | Pro-defendant | |
|-----------|-------|---------------|-----|---------------|-----|
| 1987-1999 | 40 | 32 | 80% | 8 | 20% |
| 2000 | 9 | 2 | 22% | 6 | 67% |
| 2001 | 8 | 2 | 25% | 6 | 75% |
| 2002 | 7 | 1 | 14% | 6 | 86% |

Source: Hon Justice Davies, 'Negligence: Where Lies the Future', paper at the Supreme and Federal Court Judges' Conference, Adelaide, 23 January 2003, cited in Submission 41, Law Society of NSW, p12

7.12 The data in Table 7.2 is reproduced in Figure 7.2 below.

Figure 7.2 Percentage of successful tort appeals to the High Court: 1987 – 2002



Source: Hon Justice Davies, 'Negligence: Where Lies the Future', paper at the Supreme and Federal Court Judges' Conference, Adelaide, 23 January 2003, cited in Submission 41, Law Society of NSW, p12

7.13 In his written submission and in evidence, Mr John Potter, partner with Commins Hendriks Solicitors, also argued that the courts had reacted to the civil liability 'crisis' by moving to contain the size of verdicts and to make it more difficult for plaintiffs to succeed in personal injury actions.¹¹²

¹¹² Submission 58, Mr Potter, p8

Higher public liability premiums were caused by cyclical and one-off factors

- 7.14** In their written submissions, both the NSW Bar Association and the Law Society of NSW attributed the significant increases in public liability premiums cited in Chapter 4 prior to and after the Government's 2002 reforms to cyclical and one-off external factors.
- 7.15** For example, the NSW Bar Association argued that the significant increases in insurance premiums during 2001 and 2002 reflected only temporary tightness in the insurance market. The Bar Association identified four factors behind the sudden premium increases at the time:
- The cyclical nature of public liability insurance, which by its nature is a 'long tail' business.
 - The collapse of HIH. The HIH Royal Commission subsequently demonstrated that HIH had been writing public liability insurance premiums with little regard to ultimate claim costs or proper actuarial considerations, in the process artificially depressing the market.¹¹³
 - The September 11 2001 terrorist attacks, which sent shivers through the international reinsurance market and led to higher premiums for Australian insurers. These increases were in turn passed on to consumers via increased premiums.
 - Lower returns from investments during the downturn on the stock market during 2001 and 2002 (insurers invest the money they receive from premiums until such time as it may be needed to meet a claim).
- 7.16** In turn, the Bar Association argued that the 'crisis' generated by the above factors in 2001 and 2002 has since largely resolved itself: the Australian insurance market has stabilised post HIH; international reinsurance markets have stabilised with many policies now carrying terrorism exclusion clauses; and insurers are again making profits from their investments during the current growth in the stock market. Accordingly, the Association suggested that the coincidence of the four factors cited above in 2001 and 2002 was probably unique in our lifetime.¹¹⁴
- 7.17** Similarly, in its written submission, the Law Society of NSW argued that for all the inflamed rhetoric of an insurance 'crisis' and 'litigation explosion' during 2001 and 2002, it is now clear that the perceived crisis in availability and pricing of public liability insurance was largely due to cyclical factors affecting the insurance market, exacerbated by one-off events.¹¹⁵
- 7.18** In relation to cyclical factors, the Law Society of NSW argued that there was significant rationalisation of the insurance market between 1999 and 2002, with the mergers of several insurance companies leading to increases in premiums after 1999. At the end of 2002 there were generally considered to be only six major players competing to underwrite insurance in Australia – Allianz, CGU, IMA, QBE, RSA and Suncorp Metway.¹¹⁶

¹¹³ The Committee notes subsequent court cases brought by the Australian Securities and Investments Commission against former officials of HIH have proved illegal conduct on their behalf.

¹¹⁴ Submission 29, NSW Bar Association, pp14-17

¹¹⁵ Submission 41, Law Society of NSW, p7

¹¹⁶ Submission 41, Law Society of NSW, p16

7.19 In relation to one-off events, the Law Society noted the paper of the Hon Justice Davies entitled 'Negligence: Where Lies the Future', in which he cited several non-cyclical factors contributing to the higher public liability premiums in 2002:

- The collapse in global stock markets in 2001 and 2002. One estimates is that the net worth of insurers world wide was reduced by \$US175 billion in 2001 and 2002.
- The run of major company collapses world-wide, including Enron and WorldCom.
- The run of major disasters during 2002 and 2002. The destruction of the World Trade Centre alone is estimated to have cost the insurance industry \$80 billion.¹¹⁷

7.20 In addition, the Law Society cited the Queensland Government Liability Taskforce Report of February 2002 which suggested that some of the apparent causes of the insurance premium increases included:

- Poor federal government policy and regulatory control, which allowed insurers such as HIH to have poor management controls and to offer very low premiums in the 1990s, with generally inadequate reserves and imprudent management systems. This in turn forced other insurers to lower their premiums to protect market share, leading to declining profitability.
- New Australian Prudential Regulation Authority (APRA) solvency requirements for long-tail classes such as public liability, particularly in relation to minimum capital requirements.
- A fall in expectations of investment returns during 2002 (upon which insurers rely for their profits), reflecting declining interest rates and the slowing growth of the US economy.
- Higher reinsurance rates, reflecting the global decline in investor income to insurers.
- A massive change in the risk profile of the global reinsurance market following the September 11 2001 terrorist attacks.
- The Ansett and Enron collapses.¹¹⁸

A re-assessment of the reforms?

7.21 Based on the above evidence, the representative legal associations expressed their concern that the *Civil Liability Act 2002* was passed as a permanent solution – the legislation continues in force unless it is amended or repealed – to a short-term crisis in the availability of public liability insurance.¹¹⁹ For example, Mr Slattery QC, Senior Vice President of the NSW Bar Association, stated in evidence:

¹¹⁷ Hon Justice Davies, 'Negligence: Where Lies the Future', paper at the Supreme and Federal Court Judges' Conference, Adelaide, 23 January 2003, cited in Submission 41, Law Society of NSW, p16

¹¹⁸ Queensland Government Liability Insurance Taskforce Report, February 2002, cited in Submission 41, Law Society of NSW, pp16-17

¹¹⁹ See Submission 29, NSW Bar Association, pp12-18; Submission 41, Law Society of NSW, pp8-18

It is the contention of the Bar Association that, although it was appropriate for government to deal with that crisis and to do so in a way that involved some proper response to provide insurance or to ensure that insurance was provided to all community groups involved in community and recreational activities, what was actually done was a classic managerial error, which was to provide a long-term solution to solve a short-term problem.¹²⁰

- 7.22 In turn, this argument suggests that the public liability reforms implemented by the NSW Government were not necessary, raising the possibility of a rebalancing or winding-back of the reforms with the benefits of hindsight.

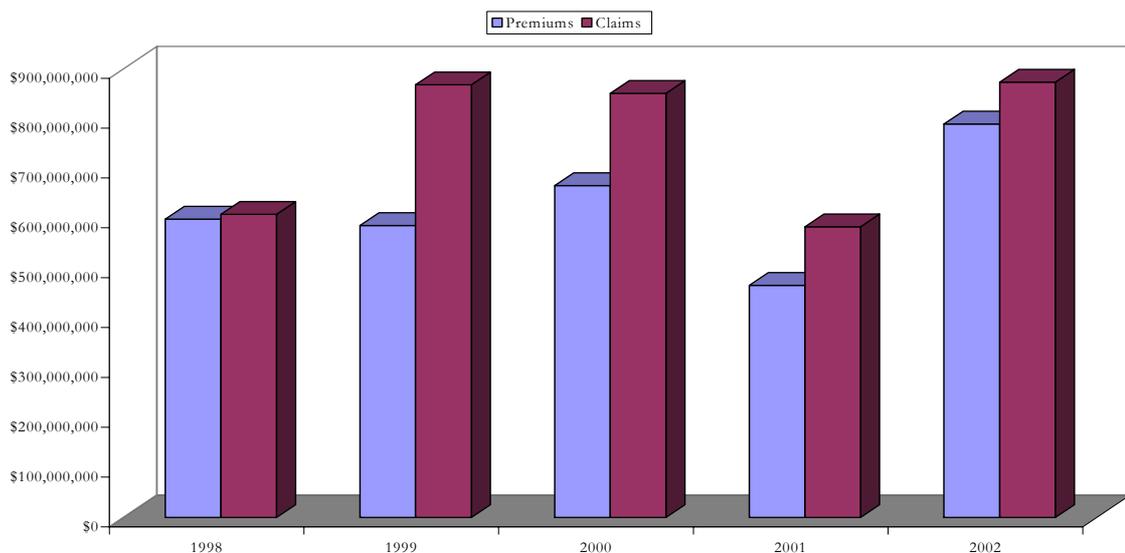
The argument that the reforms were necessary

- 7.23 By contrast to the representative legal associations, both the Insurance Council of Australia (ICA) and The Cabinet Office on behalf of the NSW Government presented a number of arguments why the public liability reforms of 2002 were necessary. These arguments are examined below.

Claims costs were rising prior to the reforms

- 7.24 By contrast to the representative legal associations, in its written submission, the ICA argued that prior to the Government's public liability reforms in 2002, insurer costs were significantly exceeding premiums. In support, the ICA cited APRA public liability data on claims and premiums for 1998 to 2002, presented in Figure 7.3 below.

Figure 7.3 Public and product liability claims and expense data: June 1998 – June 2002



Source: APRA, Selected Statistics on the General Insurance Industry, <http://www.apra.gov.au/Statistics/Selected-Statistics-on-the-General-Insurance-Industry.cfm> (accessed 15 July 2005), cited in submission 49, ICA, Attachment A, p5

¹²⁰ Mr Slattery QC, Senior Vice President, NSW Bar Association, Evidence, 2 May 2005, p3

7.25 Based on Figure 7.3, the ICA submitted that public liability claim costs outstripped premiums in every year between 1998 and 2002, and that this gap grew significantly in the years leading up to 2002. The dip in both premiums and claims figures in 2001 reflects in part the absence of HHH data, following the company's failure on 15 March 2001. However, the ICA submitted that the ongoing gap between premiums and claims in 2001 indicates that the problem was not limited to HHH but was industry-wide.¹²¹

7.26 This was reiterated by Mr Alan Mason, Executive Director of the ICA, during the hearing on 6 June 2005:

The public liability crisis of 2001 and 2002 was not a short-term phenomenon. Rather, it was a reflection of seriously increasing claims costs over a number of years, dating back to the 1990s, combined with serious underpricing of the product. Insurers therefore acted to protect their position by significantly increasing prices, thereby giving rise to major community concern about the affordability of public liability insurance, or by withdrawing from the market altogether, thereby giving rise to community concern about the availability of cover in the first place.

It is true that the collapse of HHH contributed to that instability, because HHH anecdotally accounted for about 40 per cent of business in Australia. The World Trade Centre attack in September 2001 also had an impact on the availability of capital for the global industry. But the core drivers were the core liability business and claims in Australia.¹²²

7.27 Similarly, in its written submission on behalf of the NSW Government, The Cabinet Office also argued that claim costs were rising rapidly prior to the Government's public liability reforms, with an increase in the frequency and size of small to medium claims. The Cabinet Office cited data from the Commonwealth Treasury that in the 10 years to 2002, annual inflation in Australia averaged 2.5%, but awards for personal injury over the same period increased by an average annual rate of 10%.¹²³

7.28 As a result, The Cabinet Office argued that public liability insurers were making significant underwriting losses prior to the reforms of 2002, and had taken the commercial decision to significantly increase premiums and/or to withdraw from the public liability market. As a result, the Cabinet Office submitted that a decisive and effective response from the Government was necessary.¹²⁴

The growing culture of litigation

7.29 In its written submission on behalf of the NSW Government, The Cabinet Office attributed the increase in the frequency and size of small to medium claims cited above to a growing culture of litigation in society. In particular, The Cabinet Office submitted that claims for

¹²¹ Submission 49, ICA, Attachment A, p6. See also Mr Alan Mason, Executive Director, ICA, Evidence, 6 June 2005, pp31-32

¹²² Mr Mason, Evidence, 6 June 2005, p32

¹²³ Commonwealth Treasury, *Reform of Liability Insurance Law in Australia*, February 2004, p4 cited in submission 53, The Cabinet Office, p9

¹²⁴ Submission 53, The Cabinet Office, p7,9

minor injuries with no prospect of success were on the rise, taking up more and more court time. The Cabinet Office also cited a trend towards seeking compensation for injuries which were a result of individual carelessness or bravado.

7.30 The Cabinet Office provided a number of pieces of evidence in support of this perceived growing culture of litigation.

7.31 First, The Cabinet Office cited the following court cases:

- *Jackson v Roads and Traffic Authority of NSW*. In this case, Mr Jackson sued the Roads and Traffic Authority for negligence after he fell onto a railway track after climbing over a guardrail to urinate.
- *Mitchell v The University of Wollongong*. In this case, Ms Mitchell was injured when she tried to sit on a retractable seat in a theatre without first pulling it down. She sued the owner of the theatre for not warning that the seats retracted.
- *Green v Australian Rugby Football League Ltd & Ors*. In this case, Mr Green was injured playing rugby league, but tried unsuccessfully to sue the Australian Rugby League on the basis that the rules were too dangerous.
- *Fox v Newton and Ors*. In this case, a 16-year old boy who was refused entry to a hotel nightclub attempted to gain access by breaking into the upstairs flat where the hotel manager and his wife lived. The boy sued the manager for injuries he received when he was discovered and assaulted by the manager.¹²⁵

7.32 Second, The Cabinet Office cited the submission by the former NSW Premier, the Hon Bob Carr, to the 2001 Inquiry into a NSW Bill of Rights conducted by the Legislative Council's Law and Justice Committee. The former Premier stated in his submission to the inquiry:

Already it seems that people are not prepared to accept responsibility for their own actions. If a person trips and falls today, instead of blaming himself or herself for carelessness, the person will be looking for someone to sue. If a person is burnt by coffee while juggling it and driving a car at the same time, instead of recognising that this is a really stupid thing to do, the person will sue because the coffee was too hot.¹²⁶

7.33 Third, The Cabinet Office argued that the perceived growing culture of litigation was acknowledged by the Chief Justice of NSW, the Hon Justice Spigelman AC, in an address entitled 'Negligence: The Last Outpost of the Welfare State' in April 2002.¹²⁷ The Cabinet Office submitted:

In his address, the Chief Justice criticised the tendency of lawyers to 'search for deep pockets' in the hope of finding wealthy organisations or well-insured individuals or bodies who could profitably be sued. Insurance premiums for public liability had become, in his view, a form of taxation – 'something compulsory but ubiquitous even

¹²⁵ Submission 53, The Cabinet Office, p10. See also The Cabinet Office, Response to questions on notice from 4 July 2005, pp1-2

¹²⁶ The Hon Bob Carr, Submission to the Inquiry into a NSW Bill of Rights, 2001, cited in submission 53, The Cabinet Office, p10

¹²⁷ The Hon Justice Spigelman AC, 'Negligence: The Last Outpost of the Welfare State', 27 April 2002, cited in submission 53, The Cabinet Office, p11

when voluntary' – imposed by the judiciary as an arm of the State. He pointed to a 'seemingly inexorable increase in that form of taxation by a series of decisions on substantive and procedural law'.¹²⁸

7.34 Finally, The Cabinet Office also cited the judgement of Justice McHugh in the High Court in *Tame v New South Wales* in 2002 in which he stated:

Negligence law will fall – perhaps it has already fallen – into public disrepute if it produces results that ordinary members of the public regard as unreasonable.¹²⁹

7.35 The Committee also notes that it received anecdotal evidence of a growing culture of litigation in society from Mr Owen Rogers, CEO of the Society of St Vincent de Paul, during the hearing on 2 May 2005:

... the arrangements for public liability are vital for the Society to survive in a world where people are prone to suing if they are hurt. Thirty or 40 years ago it would be unheard of, people suing a charity. With high morality we had a sense of community, but where morality is low litigation is high. Today the Society is sued by the people we are serving if they have been injured and consider the Society negligent. We also find that the society is sued at times by our members if they have been injured through negligence.¹³⁰

The judicial trend in liability cases reflects the Government's reforms

7.36 The Committee notes that Mr Laurie Glanfield, Director General of the Attorney General's Department, also responded to the claim by the representative legal associations that the judicial trend in liability cases was against claimants prior to the reforms of 2002. Mr Glanfield commented in his evidence of 4 July 2005:

Some have argued before the Committee that the fact that the higher courts were starting to give recognition to the principle of personal responsibility and overturn decisions on appeal means that the Government's legislation was simply not necessary. The Government does not agree. By giving recognition to the principle of personal responsibility in legislation, the law is clear for everybody. More importantly, it provides certainty going forward, which will contribute to a more stable premium environment. Importantly, it reduces the risk that parties will incur the costs of an appeal just to get the right result.¹³¹

7.37 In support, Mr Glanfield submitted that the Government's reforms to personal responsibility have been reflected in a number of recent decisions in the Court of Appeal. For example, Mr Glanfield noted that the cases of *Jackson v Roads and Traffic Authority of NSW* and *Mitchell v The University of Wollongong* cited earlier, which predated the Government's reforms, were

¹²⁸ Submission 53, The Cabinet Office, p11. This point was also made by Mr Glanfield, Director General, Attorney General's Department, Evidence, 4 July 2005, p10

¹²⁹ *Tame v New South Wales* (2002) 211 CLR 317 at 354 per McHugh J, cited in submission 53, The Cabinet Office, p11. See also Mr Glanfield, Evidence, 4 July 2005, p11

¹³⁰ Mr Owen Rogers, CEO, Society of St Vincent de Paul, Evidence, 2 May 2005, p57

¹³¹ Mr Glanfield, Evidence, 4 July 2005, p11

subsequently overturned in the Court of Appeal in 2003 following the enactment of the *Civil Liability Act 2002*. In one case, the Court stated:

... this shift towards personal responsibility for one's own conduct, especially in the context of sporting and recreational pursuits where the risk of injury is obvious, accords with current expectations of the community as reflected in legislation such as the *Civil Liability Act 2002* ...¹³²

- 7.38** In its written submission, the ICA also suggested that there has been a change in the culture of litigation, with individuals no longer countenancing legal actions for personal injuries from which they have suffered no major physical harm or where they know they are responsible for the injury themselves.¹³³

Higher public liability premiums were caused by long-term structural change

- 7.39** In response to the argument by the representative legal associations that the higher public liability premiums reflected cyclical and one-off factors, both the ICA and The Cabinet Office argued that the higher premiums were caused by long term structural changes.

- 7.40** The ICA cited in its submission the finding of the report by Trowbridge Consulting and Deloitte Touche Tohmatsu entitled *Public Liability Insurance – Analysis for meeting of ministers 27 March 2002*, cited previously in Chapter 5. The report highlighted that:

- In 1998, the insurance market had entered a phase where insurers started recognising losses, but market forces, particularly the growth of HIH, continued to keep premium rates low.
- In June 2000, the market had bottomed, and rates began to rise.
- In March 2001, HIH was put into provisional liquidation, and a significant amount of capacity fell out of the market.
- From 1 July 2002, APRA regulatory changes came into force, including significantly higher capital requirements based on the riskiness of each class of business, together with new compulsory risk management systems.
- Following the September 11 2001 terrorist attacks, there was decreased capacity and risk appetite in global reinsurance markets.

- 7.41** Accordingly, the ICA argued that the Trowbridge Deloitte report did find that there was a 'crisis' in insurance and that the risk existed that insurance availability could be diminished even further if Governments did not respond.¹³⁴

- 7.42** In its written submission on behalf of the NSW Government, The Cabinet Office argued that the forces driving the increase in public liability premium in 2001 and 2002 included:

¹³² Cited by Mr Glanfield, Evidence, 4 July 2005, p11. See also The Cabinet Officer, Response to questions on notice from 4 July 2005, p1

¹³³ Submission 49, ICA, p7

¹³⁴ Submission 49, ICA, pp7-8

- An increase in claim numbers. APRA statistics show that between December 1998 and December 2000, claims increased from 48,000 a year to 89,000 a year, an 85% increase
- An increase in claim costs
- Expansion, particularly in the lower courts, of what constitutes negligence, together with more generous damages awards
- Insufficient insurer attention to pricing risk, together with past underpricing of premiums
- Industry rationalisation and reduction of competition
- The collapse of HIH
- The global impact of the terrorist attacks of September 11 2001
- Cyclical factors.¹³⁵

The maintenance of the current arrangements

- 7.43** Based on the evidence cited above, the Committee notes that the insurance industry strongly opposed a winding-back of the 2002 public liability reforms, instead arguing for the maintenance of the current legislative framework without further amendment.
- 7.44** For example, in its written submission, the ICA highlighted the need for certainty in the law so that the insurance industry can rationally and confidently price the products it underwrites and/or assist government to obtain optimum performance from its insurance schemes.¹³⁶ Mr Mason further commented on this matter during hearings:

We think it would be exceedingly premature and dangerous at this stage to seek to undo the reforms until they are fully tested because the last thing we would like to see, as an industry and for the community, is to find ourselves back in the situation we were two or three years ago.¹³⁷

- 7.45** Similar positions were expressed by Suncorp and Vero Insurance in their written submissions, and by Mr Douglas Pearce, Group Executive of Insurance Strategy with IAG, during his oral evidence.¹³⁸
- 7.46** Finally, in its written submission on behalf of the NSW Government, The Cabinet Office submitted:

With an appreciation of the complex and multifaceted problems underlying the need for reform, and the principled measures by which the Government and Parliament

¹³⁵ Submission 53, The Cabinet Office, p7

¹³⁶ Submission 49, ICA, p4

¹³⁷ Mr Mason, Evidence, 6 June 2005, p37

¹³⁸ Submission 22, Suncorp Group, p14; Submission 38, Vero Insurance, pp14,28; Mr Pearce, Group Executive, Insurance Strategy, IAG, Evidence, 6 June 2005, pp57-58

chose to address these problems, it is clear that any efforts to undermine the achievements of the legislative reforms should be resisted.¹³⁹

Committee comment

- 7.47** In their evidence, both the Law Society of NSW and the NSW Bar Association argued that the increases in public liability premiums, especially in 2001 and 2002, were largely due to cyclical and one-off factors, and that the courts were already moving to redress any imbalance in judicial decision-making. By extension, both the Law Society of NSW and the NSW Bar Association submitted that some of the more rigid provisions of the Government's tort law reforms could now be relaxed.
- 7.48** By contrast, both the ICA and The Cabinet Office on behalf of the NSW Government argued that the spike in public liability insurance premiums in 2001 and 2002 was attributable to more than just cyclical and one-off factors, citing in particular long-term structural changes in the profitability of the insurance industry, a growing culture of litigation and ever increasing court costs. The Cabinet Office argued strongly that the Government's reforms through the *Civil Liability Act 2002* have led to a change in the culture of litigation in New South Wales.
- 7.49** Based on the evidence before it, the Committee accepts that there was a real feeling of 'crisis' in the availability of public liability insurance during 2001 and 2002 which justified the intervention of the Government. That said, the Committee also accepts that several years on since the Government's reforms, there is now scope, with the benefit of hindsight, to re-examine the operation of the Government's public liability reforms.
- 7.50** In coming to this conclusion, the Committee acknowledges the argument made by insurers and The Cabinet Office that the tort reforms since 1999 should be maintained without amendment, to increase certainty and predictability in the insurance industry. However, the Committee does not believe that the Government should be constrained from making adjustments to personal injury compensation law, especially where it may be acting in an inequitable manner, simply out of the objective of maintaining certainty and predictability.

¹³⁹ Submission 53, The Cabinet Office, p47

Chapter 8 Calls for ‘principled’ reform of the law

This chapter examines the various inconsistencies in personal injury compensation law in New South Wales and the call of the representative legal associations during the inquiry for so-called ‘principled’ reform of the law to restore consistency and coherence in the treatment of the injured, using the provisions of the *Civil Liability Act 2002* as an appropriate benchmark.

In response to this call, Government representatives argued that while consistency in the law is in principle a good thing, there are fundamental differences between the various compensation arrangements for injured workers, motorists and members of the public that warrant the different arrangements.

Inconsistency in the law

8.1 During the inquiry, significant concerns were raised about various inconsistencies in personal injury compensation law in New South Wales. Put simply, individuals who sustain personal injury in this state are compensated differently according to whether their injury occurred in a motor vehicle accident, in the workplace or in a public place.

8.2 This concern was raised particularly in relation to access to non-economic loss damages. The Committee cited in Chapter 2 the table produced by the Law Society of NSW showing the different thresholds and monetary caps for non-economic loss damages that currently apply for workers’ compensation, motor accidents and public liability matters in New South Wales (see Table 2.1 for details). The Committee notes that:

- The threshold for accessing non-economic loss damages under the *Civil Liability Act 2002* is 15% of ‘a most extreme case’ (as judicially assessed), with a cap of \$350,000 (indexed annually and currently \$416,000).
- The threshold for accessing non-economic loss damages under the *Motor Accidents Compensation Act 1999* is 10% whole person impairment (WPI) (as medically assessed), with a cap of \$284,000 (indexed annually and currently \$359,000).
- The threshold for accessing non-economic loss damages under the *Workers Compensation Act 1987* is 10% WPI (as medically assessed), with a cap of only \$50,000. However, \$200,000 is also available in compensation for permanent impairment, for which there is no minimum threshold.

8.3 In addition, there are also areas of inconsistency in access to economic loss damages under the various legislative arrangements. As an example, under the *Motor Accidents Compensation Act 1999*, motor accident victims are not awarded damages for loss of earning capacity in respect of the first five days during which loss was suffered. No such restriction applies under the *Civil Liability Act 2002*.

8.4 The Law Society of NSW raised this inconsistency in the law as one of the key themes of its written submission. As stated by the Society:

In the three major areas of tort law, the Parliament has adopted a variety of different provisions as the basis upon which liability can be established and damages calculated.

There is no discernible principle lying behind these differences. Persons who suffer injuries in the three different ways are subject to quite different caps and thresholds and different heads of damages can be recovered in different ways. The inconsistencies between the different systems of personal injury damages in NSW are unfair and create numerous anomalies that are contrary to community expectations.¹⁴⁰

- 8.5** The Law Society of NSW attributed these various inconsistencies in the law to the perceived ad hoc manner of implementation of the tort law reforms between 1999 and 2002. The Society suggested that a central consideration that has been driving the Government's reforms has been a focus on cost reductions and reduced premium levels, to the apparent exclusion of the adequacy of payments made to injury victims.¹⁴¹ As stated by the Society:

The Government's tendency to present the compensation needs of the injured as a discretionary financial interest, and one which is in competition with premiums, rather than a social right (the right of restitution), has allowed it to create a systems in which fair compensation has given way to financial and political concerns.¹⁴²

- 8.6** Similarly, the NSW Bar Association also argued in its written submission that the Government's reforms since 1999 have led to three inconsistent regimes, undermining the community's sense of the coherence and value of the law.¹⁴³

- 8.7** Mr Slattery QC, Senior Vice President of the NSW Bar Association, reiterated this during his evidence on 2 May 2005. Mr Slattery suggested to the Committee that under the current arrangements, an individual suffering a very substantial spinal or leg injury might be compensated for non-economic loss under the *Civil Liability Act 2002*, would be less likely to be compensated under the *Motor Accidents Compensation Act 1999*, and would have virtually no chance of compensation under the *Workers Compensation Act 1987*. Mr Slattery continued:

That simply offends people who are told about it. I have seen it in my own chambers and I have heard anecdotally that when people are told, "Sorry, this injury occurred in a work place. Had it occurred in a motor car or had it occurred at someone else's house you would have been compensated for your pain and suffering. But now you can't be." They look at you in absolute bewilderment, and they do that because it offends a fundamental human idea that we all hold as members of society that the law should be rational and coherent, and that it should treat people equally in equal circumstances.¹⁴⁴

- 8.8** Accordingly, the Association argued that a genuine objective of reform of personal injury compensation law in New South Wales should be the restoration of overall consistency in all types of awards for compensation.¹⁴⁵

¹⁴⁰ Submission 41, Law Society of NSW, p40

¹⁴¹ Submission 41, Law Society of NSW, pp21-22. See also Mr McIntyre, President, Law Society of NSW, Evidence, 20 June 2005, p3,7

¹⁴² Submission 41, Law Society of NSW, p22

¹⁴³ Submission 29, NSW Bar Association, pp4,14,20

¹⁴⁴ Mr Slattery QC, Senior Vice President, NSW Bar Association, Evidence, 2 May 2005, p5

¹⁴⁵ Submission 29, NSW Bar Association, p14

- 8.9 This issue was also raised by Dr Andrew Morrison, representing the Australian Lawyers Alliance, during the hearing on 6 June 2005:

You have to picture the problem that we have when someone comes to us and says, “I have been injured in a factory by a bale, which fell from a shelf because it was bumped by an unregistered forklift.” There is a variety of possible schemes, and possible sets of rights or lack of rights, which then apply.

In respect of workers’ compensation, if he wishes to sue his employer he has no rights; he is left on the miserable workers’ compensation rights for the rest of his life, a pension, no lump sum compensation other than very small sums, and he is on that drip feed indefinitely. If, however, he is working on that factory hired by a labour hire company, then his employer is not in the factory and he can sue under the *Civil Liability Act*. But, if the accident arises out of the driving of a motor vehicle, it does not come under the *Civil Liability Act*; it comes under the *Motor Accidents Compensation Act*. Those produce ultimately very fine distinctions. We spend a lot of time in courts, a lot of wasted time, debating those distinctions. They are important only because your rights under the different schemes are so different. For the life of me, I cannot understand why ...¹⁴⁶

- 8.10 Finally, the Committee also notes the evidence of Mr Paul Bastian, State Secretary of the Australian Manufacturing Workers’ Union:

Despite anything else, the other inequity that stands out to us is that we do not understand why an injured worker is different to someone that is injured in a car or a shopping centre. You can have exactly the same injury in a shopping centre or in a car accident, but if you have it at work you get less and your rights are less. I do not understand that. Our members do not understand it. It is an inequity that should be got rid of.¹⁴⁷

Proposals for ‘principled’ reform based on the *Civil Liability Act 2002*

- 8.11 In response to the inconsistencies in personal injury compensation law in New South Wales, the representative legal associations advocated ‘principled’ reform of workers’ compensation and motor accidents law in New South Wales, based upon the *Civil Liability Act 2002* as an appropriate benchmark.
- 8.12 For example, in its written submission, the NSW Bar Association submitted that the inconsistencies in the law should be removed in favour of one standard for the award of damages for personal injury, based on the provisions of the *Civil Liability Act 2002*. The Association noted that the *Civil Liability Act 2002* retains fault-based liability for injury, and thus most closely represents community standards for the making of damages decisions.¹⁴⁸
- 8.13 The Bar Association also noted in its written submission the comments of the Chief Justice of New South Wales, the Hon Justice Spigelman AC, in an address on 27 April 2002 at the time of the public liability law reforms. In his address, the Chief Justice stated:

¹⁴⁶ Dr Morrison, Australian Lawyers Alliance, Evidence, 6 June 2005, p10

¹⁴⁷ Mr Bastian, State Secretary, AMWU, Evidence, 4 July 2005, p5

¹⁴⁸ Submission 29, NSW Bar Association, pp4,14,39

An approach that restricts liability and damages in a principled manner is capable of resulting in the same degree of control of insurance premiums as that achieved by the special schemes.¹⁴⁹ Such an approach would, in my opinion, achieve that result in a manner more likely to be regarded in the long term as fair and, therefore, to receive broad community acceptance.¹⁵⁰

8.14 Similarly, in its written submission, the Law Society of NSW advocated that the provisions relating to common law claims in the *Workers Compensation Act 1987*, the *Motor Accidents Compensation Act 1999* and the *Civil Liability Act 2002* should as far as possible be unified in the interest of fairness and clarity, based on the adoption of the *Civil Liability Act 2002* as a model.¹⁵¹

8.15 In support, the Law Society cited a paper by Dr John Bell entitled, 'Uniform Tort Law: A Fairer System for a Fairer Result: Recommendations for a balanced system that treats everyone equally', in which he argued that a more 'principled' reform of tort law is necessary:

Critics of some aspects of the statutory intervention in tort law have been concerned that they are based on ad hoc decisions rather than on universally defensible principles. Examples of such decisions include the 1999 reform of the motor accident compensation system to meet the electoral promises of the recently re-elected government of 'a \$100 reduction in the average price of greenslips' and the 2001 reform of work-related accident compensation law which effectively removed the worker's right to sue the employer for common law damages and was directed expressly at reducing premiums to 2.8% of the payroll from an estimated 3% of payroll.

The only truly defensible model of legislative intervention is that which has been identified by the Chief Justice of NSW, the Hon JJ Spigelman AC as 'principle driven reform'. He has argued that restricting liability and damages in accordance 'with the application of universally applicable principles' is equally capable of restraining the escalation in insurance premiums as is ad hoc decision making. It is implicit in such an approach that there should be compelling reasons shown if victims of negligence in the workplace, in motor accidents, in the health care area, or in the broader area of public liability are not provided with the same access to the common law system and with the same basis for assessment of their damages for their injuries.¹⁵²

8.16 The Committee notes that similar positions in favour of 'principled' reformed, based on the provisions of the *Civil Liability Act 2002*, were presented by Mr John Potter, the Australian Workers Union and the Construction Forestry Mining and Energy Union (CFMEU).¹⁵³

¹⁴⁹ The Committee interprets this as meaning the statutory NSW motor accidents and workers' compensation schemes.

¹⁵⁰ The Hon Justice Spigelman AC, 'Negligence: The Last Outpost of the Welfare State', 27 April 2002, cited in submission 29, NSW Bar Association, p13

¹⁵¹ Submission 41, Law Society of NSW, p9

¹⁵² Dr John Bell, 'Uniform Tort Law: A Fairer System for a Fairer Result: Recommendations for a balanced system that treats everyone equally', cited in submission 41, Law Society of NSW, p21

¹⁵³ Mr Potter is a partner in Commins Hendriks Solicitors and an Accredited Specialist in personal injury law, based in Wagga Wagga. Submission 58, Mr Potter, p6; see also Mr Potter, Evidence, 23 May 2005, pp40-41. See also submission 46, Australian Workers' Union, p2; submission 39, CFMEU, p2

Support for the current separate legislative schemes

- 8.17** In response to the calls for greater consistency in the law, the Government representatives to the inquiry submitted that while consistency in the law is in principle a good thing, there are fundamental differences between the various areas of personal injury law covering motor accident, workplace accident and public liability claims which necessitate the different arrangements. Accordingly, they strongly opposed simply repealing the *Workers Compensation Act 1987* and the *Motor Accidents Compensation Act 1999* and relying instead on the provisions of the *Civil Liability Act 2002*.¹⁵⁴
- 8.18** For example, in her evidence to the Committee, Ms Vicki Telfer, General Manager of Strategy and Policy Division with WorkCover, argued that a unified system would create some significant difficulties in the area of workers' compensation. In support, she noted that the workers' compensation system is not fault-based – it provides a range of significant benefits such as weekly payments, medical treatment and retraining regardless of fault. By contrast, under the common law system, there is a requirement to show that someone was negligent in order to gain access to compensation. Accordingly, using the *Civil Liability Act 2002* as an alternative to the workers' compensation scheme would involve extensive and potentially protracted litigation, without providing early treatment and rehabilitation assistance to help injured workers back to work.¹⁵⁵
- 8.19** Similarly, Mr David Bowen, General Manager of the Motor Accidents Authority (MAA), noted in his evidence to the Committee that different governments in New South Wales since 1942 have accepted that motor vehicle accidents should be dealt with separate to other personal injury claims. In support, he noted the following differences between the motor accidents scheme and the provisions of the *Civil Liability Act 2002*:
- First, the motor accident scheme is a compulsory insurance scheme, recognising the extent to which motor vehicle travel is an inherent part of every day life, that accidents do happen, and that there needs to be a funding source to pay for compensation for injuries arising from those accidents. 'It makes motor vehicle accidents different to every other activity in which a person may be injured'.
 - Second, the motor accident scheme has a nominal defendant arrangement so that people injured by an uninsured or unidentified vehicle can bring a claim, unlike in civil liability.
 - Third, the motor accident scheme puts obligations on insurers to make payments for treatment, rehabilitation and care once liability is admitted. This is ongoing until the claim is settled. There are no such obligations under the *Civil Liability Act 2002* where payments will only be made on the finalisation of a case by settlement or verdict.
 - Fourth, there are considerable other claims-management obligations on CTP insurers both in the legislation and the accompanying guidelines to ensure efficient management of the claim. Again, no such obligation exists under the *Civil Liability Act 2002*.

¹⁵⁴ See for example Mr Glanfield, Director General, Attorney General's Department, Evidence, 4 July 2005, pp21-22

¹⁵⁵ Mr Telfer, Evidence, 4 July 2005, pp15-16,22. See also Mr Lean, Evidence, 14 October 2005, pp10-11

- Fifth, the motor accidents scheme comprises an informal, flexible and very accessible system for the resolution of claims through the Claims Assessment and Resolution Service (CARS) and the Medical Assessment Service (MAS), which is much faster than going before the courts under the *Civil Liability Act 2002*.¹⁵⁶

8.20 During the hearing on 6 June 2005, the Committee also questioned Mr Alan Mason, Executive Director of the Insurance Council of Australia (ICA), about the desirability of achieving consistency in personal injury compensation law in New South Wales. In response, Mr Mason indicated greater consistency in the law would allow insurers to deliver more efficiently their products to the market place, citing the inconsistency which insurers have to contend with not only between different legislative schemes in New South Wales, but also between different jurisdictions of Australia. At the same time, however, Mr Mason was cautious about any proposal to rationalise personal injury compensation law in New South Wales by relying solely on the provisions of the *Civil Liability Act 2002*:

Our hesitation would be in the complexity of what that would imply in terms of a massive change – it does not matter which of the systems you pick as the benchmark – to the others and whether or not you could understand that change with confidence, price it and everything else. At the end of the day it is the community needs that governments in their policy setting are trying to balance.¹⁵⁷

8.21 Mr John Rogers, General Manager of Commercial Insurance with Suncorp, expressed a similar position during the hearing on 6 June 2005.¹⁵⁸

Committee comment

8.22 The Committee is very concerned that inconsistencies in access to compensation under personal injury compensation law in New South Wales means that individuals who suffer injury are treated differently according to whether their injury occurred at work, in a motor vehicle or in a public place.

8.23 To rectify this perceived problem, the representative legal associations argued for ‘principled’ reform to achieve consistency in the law. As the Committee understands it, this could be achieved either by modifying workers’ compensation and motor accidents law to bring them more into line with the provisions of the *Civil Liability Act 2002*, or simply by repealing workers’ compensation and motor accidents law and relying solely upon the provisions of the *Civil Liability Act 2002*.

8.24 In response, Government representatives presented cogent arguments against simply repealing workers’ compensation and motor accidents legislation, in the process disbanding the statutory workers’ compensation and motor accidents compensation schemes, and relying on the *Civil Liability Act 2002*. They highlighted several important differences between the various areas of personal injury law in New South Wales – some require compulsory insurance

¹⁵⁶ Mr Bowen, General Manager, MAA, ‘Opening Statement’, Tabled document, 4 July 2005, pp12-14. See also Mr Bowen, General Manager, MAA, Evidence, 4 July 2005, p22

¹⁵⁷ Mr Mason, Executive Director, ICA, Evidence, 6 June 2005, p38

¹⁵⁸ Mr Rogers, General Manager, Commercial Insurance, Suncorp, Evidence, 6 June 2005, p53

and others do not, some are fault based and others are not, some provide interim payments pending dispute resolution and others do not.

- 8.25** The Committee accepts these arguments, and does not support wholesale repeal of workers' compensation and motor accidents law in New South Wales. In particular, the Committee notes that the NSW Workers Compensation Scheme is directed at returning injured workers to the workforce through the provision of no-fault statutory benefits.
- 8.26** At the same time, however, the Committee believes that there is scope for greater consistency and cohesion across the three areas of personal injury compensation law in New South Wales. The community expects that people will be treated equitably before the law. In the Committee's opinion, the inconsistencies between the different systems of personal injury compensation create numerous anomalies and injustices that are contrary to community expectations.
- 8.27** The Committee examines these issues further in Parts 4 and 5 of the report.

PART 3

CLAIM NUMBERS, PREMIUMS, AFFORDABLE INSURANCE AND PROFITS

Chapter 9 Claim numbers, costs and premiums

This chapter examines the impact of the Government's public liability and medical negligence reforms on claim numbers, costs and insurance premiums. It also examines the impact of the Government's motor accident reforms on CTP premiums. As before, a key objective of the NSW Government's reforms has been a reduction in the number and cost of claims, leading to a decrease in insurance premiums and an associated increase in the availability and affordability of insurance.

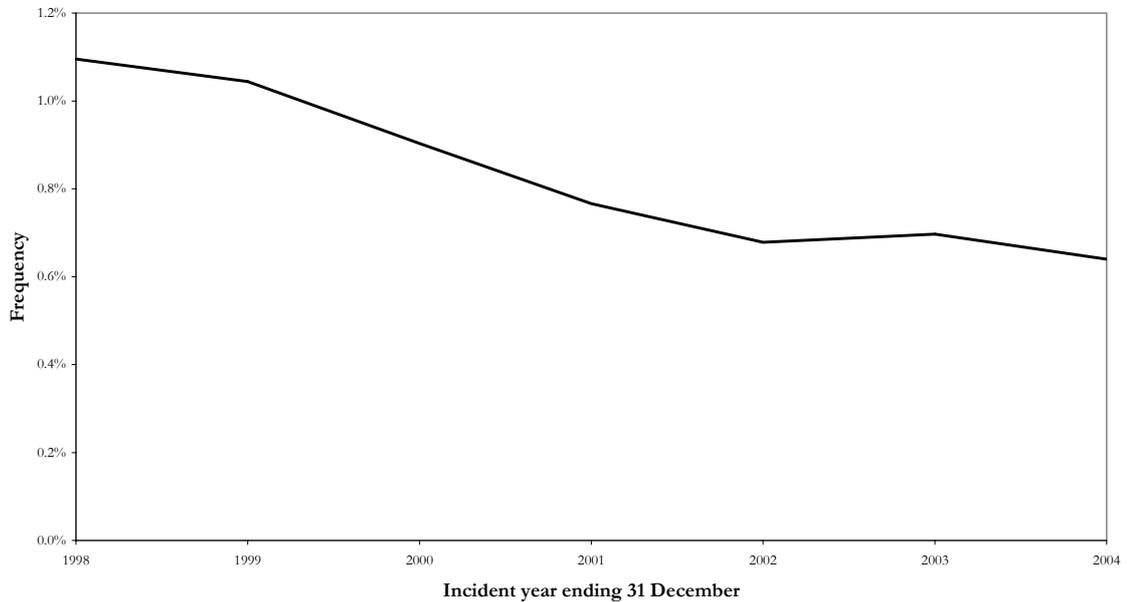
The Committee notes that the statutory workers' compensation scheme is funded by employer premiums, currently set at an average premium rate of 2.57% of wages¹⁵⁹, together with investment returns on those premiums. It is not directly underwritten by insurers or the government. Accordingly, workers' compensation claim numbers, costs and premiums are not considered in this chapter.

Public liability claim numbers, costs and premiums

Public liability claim numbers

- 9.1 Public liability claim numbers have dropped significantly in New South Wales since the introduction of the *Civil Liability Act 2002*.
- 9.2 As indicated in Chapter 5, at the second Ministerial Council on public liability held in Melbourne on 30 May 2002, Ministers agreed that the Australian Competition and Consumer Commission (ACCC) should monitor insurance industry pricing on an ongoing basis. The ACCC has now produced five monitoring reports on public liability and professional indemnity insurance across Australia, the most recent dated July 2005 and released on 11 August 2005.
- 9.3 In the *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance*, the ACCC provided the following graph showing the frequency of personal injury and death claims reported in Australian from 1988 to 2004.

¹⁵⁹ This rate varies according to industry and occupation, and according to the safety performance of an insurer.

Figure 9.1 Frequency of personal injury and death claims reported: 1998 – 2004

Source: ACCC, *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance*, July 2005, p10

9.4 Figure 9.1 shows that the frequency of personal injury and death claims reported as a proportion of all insurance policies Australia-wide fell from 1.1% in 1998 to 0.6% in 2004.¹⁶⁰

9.5 In its written submission, the Law Society of NSW cited separate data supplied by the Hon Justice Blanch, Chief Judge of the District Court, on civil matters (both public liability and medical indemnity claims) registered in the NSW District Court between 1998 and 2004. Unfortunately, differentiated data to show the individual trends in public liability and medical indemnity claims is not available. This data is reproduced in Table 9.1 below.

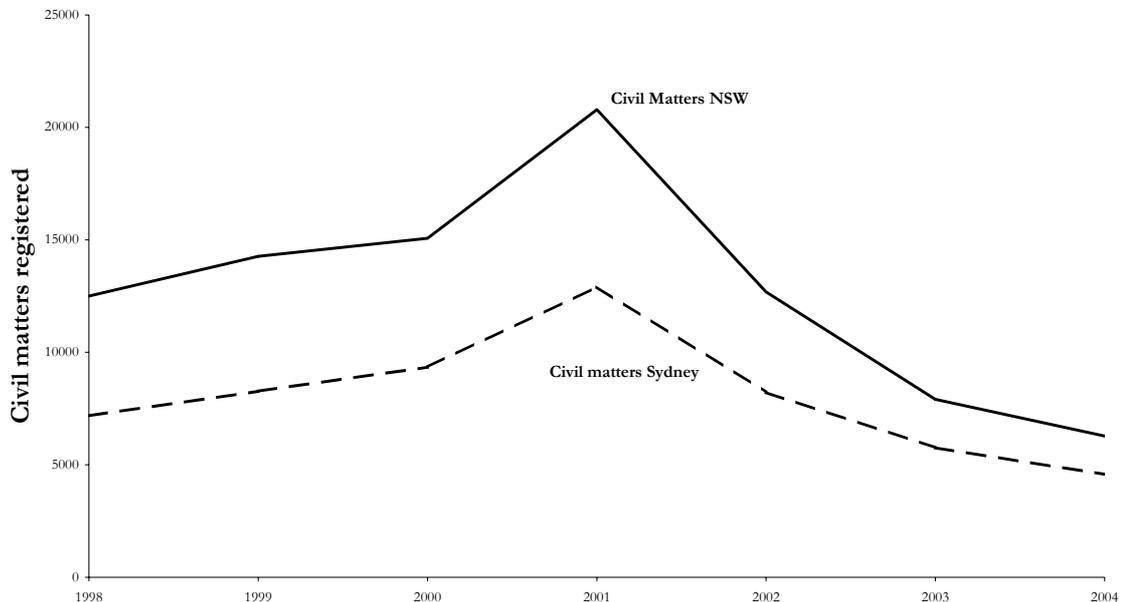
Table 9.1: Civil matters registered in the NSW District Court: 1998 – 2004

| Year | Civil matters registered (NSW) | % change | Civil matters registered (Sydney) | % change |
|------|--------------------------------|----------|-----------------------------------|----------|
| 1998 | 12,500 | 15 | 7,182 | -27 |
| 1999 | 14,261 | 14 | 8,272 | 15 |
| 2000 | 15,070 | 6 | 9,348 | 13 |
| 2001 | 20,784 | 38 | 12,916 | 38 |
| 2002 | 12,686 | -39 | 8,220 | -36 |
| 2003 | 7,912 | -38 | 5,755 | -30 |
| 2004 | 6,275 | -26 | 4,570 | -21 |

Source: Letter from the Hon Justice Blanch, Chief Judge of the District Court, 7 March 1999, cited in submission 41, Law Society of NSW, p34

9.6 Based on the data in Table 9.1, the Law Society in turn presented the following graph of civil matters registered in the NSW District Court between 1998 and 2004.

¹⁶⁰ ACCC, *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance*, July 2005, p10 and data supplied by the ACCC (Email from Mr Andrew Murphy to the Committee Principal Council Officer, 17 August 2005).

Figure 9.2 Civil matters registered in District Courts in NSW: 1998 – 2004

Source: Submission 41, Law Society of NSW, p34

- 9.7** As shown in Figure 9.2, the Law Society of NSW noted that there was a significant ‘spike’ in civil liability claims in 2001-2002, reflecting a rush of claims in anticipation of the Government’s reforms to personal injury law.¹⁶¹ Overall, however, the Society cited a 62% drop in civil filings in the NSW District Court between 2001 and 2003, including a 70% fall in major country venues.¹⁶²
- 9.8** The ICA cited the same figures in its written submission. In addition, it noted that the Supreme Court experienced a decline in civil listing between 2002 and 2003 in the order of 25%.¹⁶³

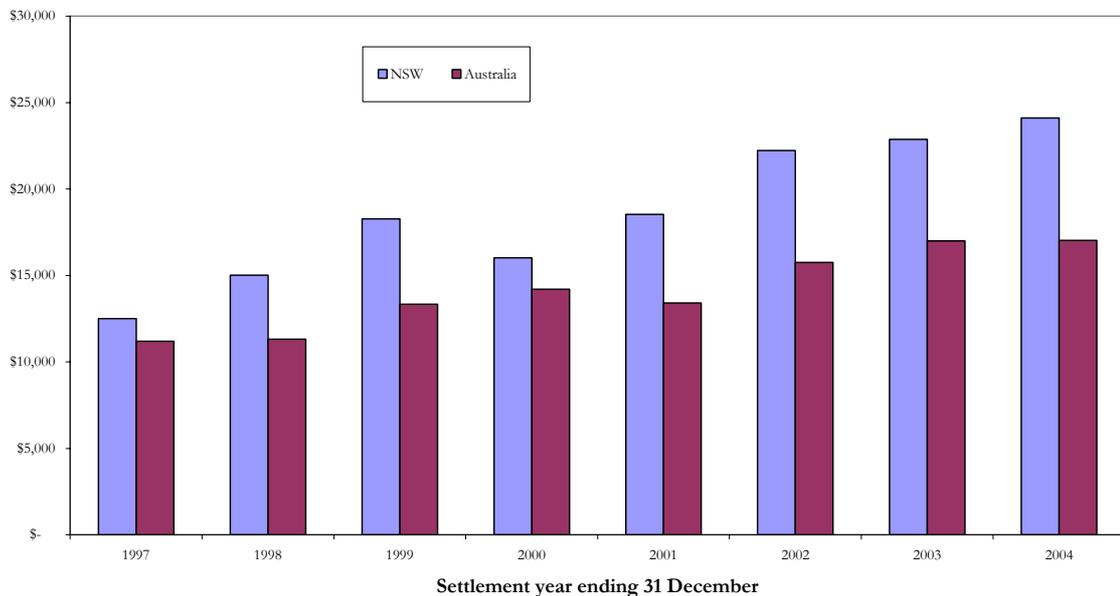
Public liability claim costs

- 9.9** While the data cited above indicates that public liability claim numbers have fallen significantly in recent years in New South Wales, average claim costs continue to rise.
- 9.10** In its *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance*, the ACCC provided information on the average size of public liability claims settled by jurisdiction. New South Wales, along with the Australian Capital Territory, has the highest average claim size across Australia. The average cost of claims in New South Wales and Australia as a whole is shown in Figure 9.3 below.

¹⁶¹ Submission 42, Law Society of NSW, p34

¹⁶² Submission 41a, Law Society of NSW, p6

¹⁶³ Submission 49, ICA, p6

Figure 9.3 Average size of public liability claims settled – New South Wales and Australia: 1997 – 2004

Notes: Data shown in real terms adjusted to 31 December 2004 using AWE index.

Deprived by ACCC from responses provided by seven insurers.

Source: ACCC, *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance*, July 2005, pp11-12 and data supplied by the ACCC (Email from Mr Andrew Murphy to the Committee Principal Council Officer, 17 August 2005).

- 9.11** In its *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance*, the ACCC also found that the total number of claims settled and the total cost of claims settled that are medium and high-cost claims (that is, greater than \$50,000) have increased over the monitoring period, whereas the incidence of low-cost claims has reduced. This is shown in Table 9.2 below.

Table 9.2 Proportion of total claims settled by number and cost – public liability: 1997 – 2004

| Claim size | | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 |
|----------------------|-----------|------|------|------|------|------|------|------|------|
| \$50,000 or less | By number | 97 | 96 | 96 | 96 | 95 | 93 | 92 | 92 |
| | By cost | 45 | 44 | 36 | 33 | 35 | 31 | 28 | 28 |
| \$50,001 - \$500,000 | By number | 3 | 4 | 4 | 4 | 5 | 7 | 8 | 7 |
| | By cost | 41 | 46 | 44 | 42 | 50 | 51 | 54 | 49 |
| \$500,001 or more | By number | 0.1 | 0.1 | 0.2 | 0.2 | 0.2 | 0.3 | 0.3 | 0.4 |
| | By cost | 14 | 10 | 20 | 25 | 15 | 18 | 18 | 23 |

Note: Derived by ACCC from responses provided by seven insurers.

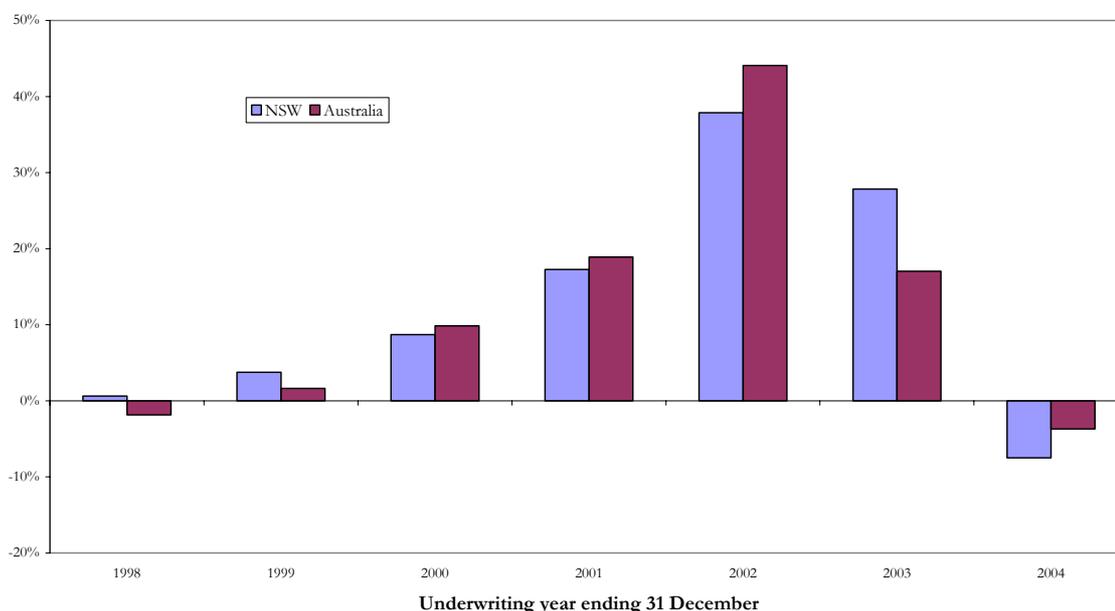
Source: ACCC, *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance*, p13

Public liability premiums

9.12 In its *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance*, the ACCC found that in the 12 months to 31 December 2004, the average premiums for public liability insurance in New South Wales fell by 7% in real terms from \$1,786 to \$1,652. For Australia as a whole, in the 12 months to 31 December 2004 the average premiums for public liability insurance fell by 4% in real terms from \$1,416 to \$1,363.¹⁶⁴

9.13 The percentage changes in average premiums for public liability insurance for New South Wales and Australia from 1998 to 2004 is shown in Figure 9.4 below.

Figure 9.4 Percentage change in real average public liability premiums: 1998 – 2004



Notes: Data shown in real terms adjusted to 31 December 2004 using AWE index.

Derived by ACCC from responses provided by seven insurers.

Source: ACCC, *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance*, July 2005, pp15-16 and data supplied by the ACCC (Email from Mr Andrew Murphy to the Committee Principal Council Officer, 17 August 2005).

9.14 The Committee notes that in its previous monitoring report – the *Fourth Monitoring Report on Public Liability and Professional Indemnity Insurance* – the ACCC provided interim results showing that between the year ending 31 December 2003 and the half year ending 30 June 2004, average civil liability premiums nation-wide decreased by 15%.¹⁶⁵

9.15 This figure was cited widely during the Committee’s inquiry in written submission and initial hearings, prior to the release of the ACCC’s fifth monitoring report with the revised estimate of a 4% reduction in the average premiums for public liability insurance in the 12 months to 31 December 2004. However, given that the 15% figure has subsequently been revised

¹⁶⁴ ACCC, *Fifth Monitoring Report on Public Liability and Professional Indemnity Insurance*, July 2005, pp15-16, and data supplied by the ACCC (Email from Mr Andrew Murphy to the Committee Principal Council Officer, 17 August 2005).

¹⁶⁵ ACCC, *Fourth Monitoring Report on Public Liability and Professional Indemnity Insurance*, January 2005, p15.

downwards significantly to 4%, the Committee chooses not to cite the comment of parties concerning the 15% figure.

- 9.16** The Committee does, however, note the comment of Mr Anthony Lean, Policy Manager, Legal Branch, The Cabinet Office, during the hearing of 14 October that the key point is that premiums have started to come down after the significant increases in 2001 – 2003.¹⁶⁶
- 9.17** A number of individual insurers, however, argued during the inquiry that premiums have stabilised or are falling.
- 9.18** For example, in its written submission, Suncorp indicated that it has not taken any decisions to reduce pricing of its public liability insurance premiums, preferring to await more data on both its risk profile and claims outcomes. However, Suncorp did indicate that its premiums rates have not been adjusted upwards in recent times, representing in real terms a decrease in premiums of 9% through the absorption of inflation and GDP inflation.¹⁶⁷
- 9.19** Similarly, Vero Insurance submitted that the number of variables in the public liability insurance system – including the possibility of resurgent claims costs, the risk of legislative revisions and judicial reinterpretation – mean that confidence will take time to develop before cost savings are locked into lower public liability premiums.¹⁶⁸ At the same time the company submitted:
- Changes to the law in NSW over recent years have provided a very reliable keel for what was an increasingly unattractive area of insurance: public liability.
- In that short time, premium rates have declined and the availability of cover increased considerably. This is now unarguable and has been the subject of independent robust ACCC scrutiny.¹⁶⁹
- 9.20** In its written submission, Insurance Australia Group (IAG) indicated that since 30 June 2004, it has moved to decrease its premiums by 10% in all states and territories of Australia.¹⁷⁰
- 9.21** By contrast, however, the Law Society of NSW argued in its written submission that even with the recent reductions in civil liability premiums cited by the ACCC (4%), this follows rises of 44% in 2002 and 17% in 2003. As a result, the Law Society submitted that premiums remain close to double their 1999 level.¹⁷¹

¹⁶⁶ Mr Lean, Policy Manager, Legal Branch, The Cabinet Office, Evidence, 14 October 2005, p3

¹⁶⁷ Submission 22, Suncorp Group, p10. See also Mr Mark Coss, National Liability Manager, Suncorp, Evidence, 6 June 2005, p50

¹⁶⁸ Submission 38, Vero Insurance, p8

¹⁶⁹ Submission 38, Vero Insurance, p3

¹⁷⁰ Submission 35, IAG, p4

¹⁷¹ Submission 41, Law Society of NSW, p30. See also Law Society of NSW, Response to questions on notice, 5 July 2005, pp1-2

Cover limits and excess

- 9.22** During the hearing on 20 June 2005, Mr John McIntyre, President of the Law Society of NSW, also argued that the recent reduction in premiums cited by the ACCC hides the fact that many insurance policies written since 2003 include reduced cover limits and higher excess levels.¹⁷² This was reiterated in the Law Society's supplementary submission.¹⁷³
- 9.23** In relation to this issue, the Committee notes that the ACCC's fifth monitoring report found that in respect of the terms and conditions of insurers' standard public liability insurance policy, cover limits and levels of excess have risen on average by around 10% and 20% respectively since 2002.¹⁷⁴

Medical negligence claim numbers, costs and premiums**Medical negligence claim numbers**

- 9.24** As with public liability claims, medical negligence claim numbers have fallen significantly in New South Wales in recent years.
- 9.25** The ACCC has also published two monitoring reports on medical indemnity insurance in Australia. The second report was dated December 2004 and released on 28 December 2004.
- 9.26** In its *Second Monitoring Report on Medical Indemnity Insurance*, the ACCC found that nation-wide, the number of medical indemnity claims increased by 124% between 1997-1998 and 2001-2002, before decreasing by 18% in 2002-2003. The frequency of claims by year of notification increased from 2.9% in 1997-1998 to 4.2% in 2001-2002, before decreasing to 3.6% in 2002-2003.¹⁷⁵
- 9.27** In its written submission, United Medical Protection Group of Companies (UNITED)¹⁷⁶ also provided the following graph of medical negligence claims in New South Wales handled by it between January 1999 and December 2004.

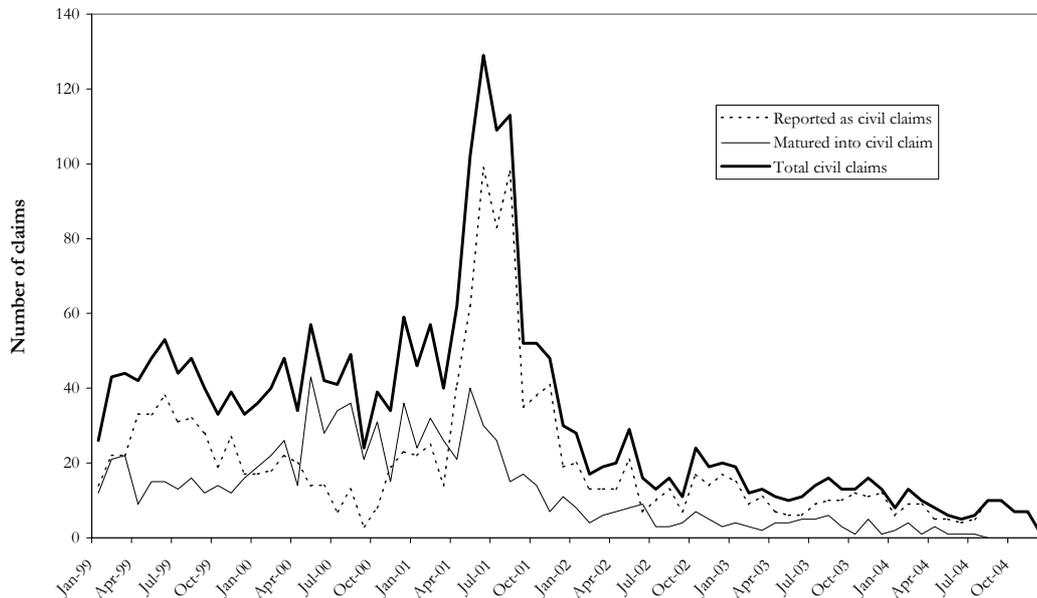
¹⁷² Mr McIntyre, President, Law Society of NSW, Evidence, 20 June 2005, p5.

¹⁷³ Submission 41a, Law Society of NSW, p10

¹⁷⁴ ACCC, *Fourth Monitoring Report on Public Liability and Professional Indemnity Insurance*, January 2005, pviii,18

¹⁷⁵ ACCC, *Medical Indemnity Insurance*, Second Monitoring Report, December 2004, p20

¹⁷⁶ As before, UNITED is the largest medical indemnity organisation in Australia, providing medical indemnity insurance to medical practitioners through its wholly owned insurer, Australasian Medical Insurance Limited.

Figure 9.5 UNITED medical negligence claims in New South Wales: 1994 - 2004

Source: Submission 31, UNITED, p3

9.28 Figure 9.5 shows a spike in medical negligence claims lodged with UNITED prior to the implementation of the *Health Care Liability Act 2001*, as a rush of claimants attempted to beat the introduction of the legislation. However, since then, claim numbers have fallen steadily.

9.29 In its submission, UNITED also cited by way of comparison two comparable data sets on medical negligence claim numbers before and after the 2001 and 2002 reforms:

- Pre-reform data: Over the thirty month period from 1 September 1998 to 31 March 2001, 8,646 incidents were reported to UNITED in New South Wales. As at 31 December 2001 (ie nine months after the end of the selected period), 1,985 (23%) of these reported incidents had incurred costs.
- Post-reform data: Over the thirty month period from 1 September 2001 to 31 March 2004, 8,239 incidents were reported to UNITED in New South Wales. As at 31 December 2004 (again, a point nine months after the end of the selected period), 1,194 (14%) of these reported incidents had incurred costs.

9.30 In its submission, UNITED noted that the reduction in medical negligence claims in New South Wales since 2002 reflects not only the Government's civil liability reforms but also the Government's initiative after 1 January 2002 to assume liability for claims made against Visiting Medical Officers in public hospitals through the NSW Treasury Managed Fund.¹⁷⁷

¹⁷⁷ Submission 31, UNITED, pp2-3

Medical negligence claim costs

- 9.31** Medical negligence claim costs also appear to have fallen dramatically in New South Wales in recent years.
- 9.32** In its *Second Monitoring Report on Medical Indemnity Insurance*, the ACCC found that nation-wide, the anticipated cost of claims by year of notification increased significantly between 1997-1998 and 2001-2002 from \$82 million to \$263 million. However, by 2002-2003, following the implementation of the Government's civil liability reforms, the anticipated cost of claims had decreased by 13% to \$229 million.¹⁷⁸
- 9.33** Similarly, in its written submission, UNITED presented figures showing a significant drop in medical negligence claim costs in New South Wales since the Government's reforms of 2001 and 2002:
- Closed claims: Between December 2001 and December 2004, the average litigated claim cost fell by 34% and the average unlitigated claim cost by 73%, although UNITED suggested that this impact will probably be less significant as the more complex claims are resolved. The average cost of disciplinary hearings has reduced by 21%.¹⁷⁹
 - All claims: Between December 2001 and December 2004, the average litigated claim cost is estimated to have fallen by 24% and the unlitigated claim cost by 12%. Disciplinary claims increased by 5% in average claim costs, perhaps reflecting patients seeking redress by advising the appropriate complaints body rather than pursuing a legal claim.
- 9.34** Based on this data, UNITED suggested that there has been a substantial reduction in the number of litigated and unlitigated claims since the reforms, with a significant reduction in average claim costs, particularly for unlitigated claims. This is shown in Table 9.3 below.

Table 9.3 UNITED medical negligence claim numbers and costs: December 2001 – December 2004

| Case type | Claim numbers | | | | Change in average claim costs | | | |
|--------------|-------------------|-----|--------------------|-----|-------------------------------|------|---------------|------|
| | <i>Pre-reform</i> | | <i>Post-reform</i> | | <i>Change</i> | | <i>Change</i> | |
| Litigated | 1,252 | 570 | 471 | 304 | -62% | -47% | -24% | -34% |
| Unlitigated | 157 | 79 | 149 | 76 | -5% | -4% | -12% | -73% |
| Disciplinary | 231 | 64 | 345 | 118 | 49% | 84% | 5% | -73% |

Source: Submission 31, UNITED, p5

- 9.35** The Committee notes that during the hearing on 2 May 2005, Mr David Brown representing UNITED indicated that UNITED's actuaries expect claim costs and numbers to gradually rise again over the next five years.¹⁸⁰

¹⁷⁸ ACCC, *Medical Indemnity Insurance*, Second Monitoring Report, December 2004, p19

¹⁷⁹ The data for finalised or closed claims is a relatively small sample.

¹⁸⁰ Mr Brown, Solicitor, UNITED, Evidence, 2 May 2005, p53

Medical negligence premiums

- 9.36** In its *Second Monitoring Report on Medical Indemnity Insurance*, dated December 2004, the ACCC found that nation-wide, the average medical indemnity premium decreased by 12% in 2003-2004 to \$5,549, having increased from a previous low of \$4,434 in 1999-2000.¹⁸¹
- 9.37** Similarly, in its written submission, UNITED indicated that it reduced premiums by an average of 20.5% during 2005. While cautious about longer-term trends, UNITED submitted that this figure represents ‘a very significant turn around after a decade of escalating claim costs and corresponding premium increases’.¹⁸²
- 9.38** This evidence was reiterated by Mr David Brown representing UNITED during the hearing on 2 May 2005. Mr Brown further cited two benefits from the decline in medical indemnity insurance premiums:
- Downward pressure on costs to patients flowing on from the reduction in medical costs
 - An increase in the viability of the provision of medical services, such as obstetric services, in country towns.¹⁸³
- 9.39** In its written submission on behalf of the NSW Government, The Cabinet Office submitted that the Government’s reforms had stabilised the medical indemnity environment and resulted in medical insurance being more affordable and available. In particular, The Cabinet Office submitted that as a result of the reforms, doctors in rural and regional areas continue to be able to practise, to the benefit of their local communities.¹⁸⁴

CTP premiums

- 9.40** As indicated in Chapter 3, one of the Government’s principal objectives in introducing the *Motor Accidents Compensation Act 1999* was to reduce the cost of compulsory third party (CTP) premiums. This objective has clearly been achieved.
- 9.41** In its written submission, QBE indicated that in September 1999, at the time of the enactment of the *Motor Accidents Compensation Act 1999*, the average cost of CTP insurance for a sedan in the Sydney metropolitan area was \$433 per annum. However, since then, premiums have been reduced significantly in real terms, such that today, the average premium for a sedan in the Sydney metropolitan area is approximately \$337 per annum.
- 9.42** A graph of quarterly average premiums for CTP green slips in New South Wales from September 1991 to March 2005 is provided in Figure 9.6 below.¹⁸⁵

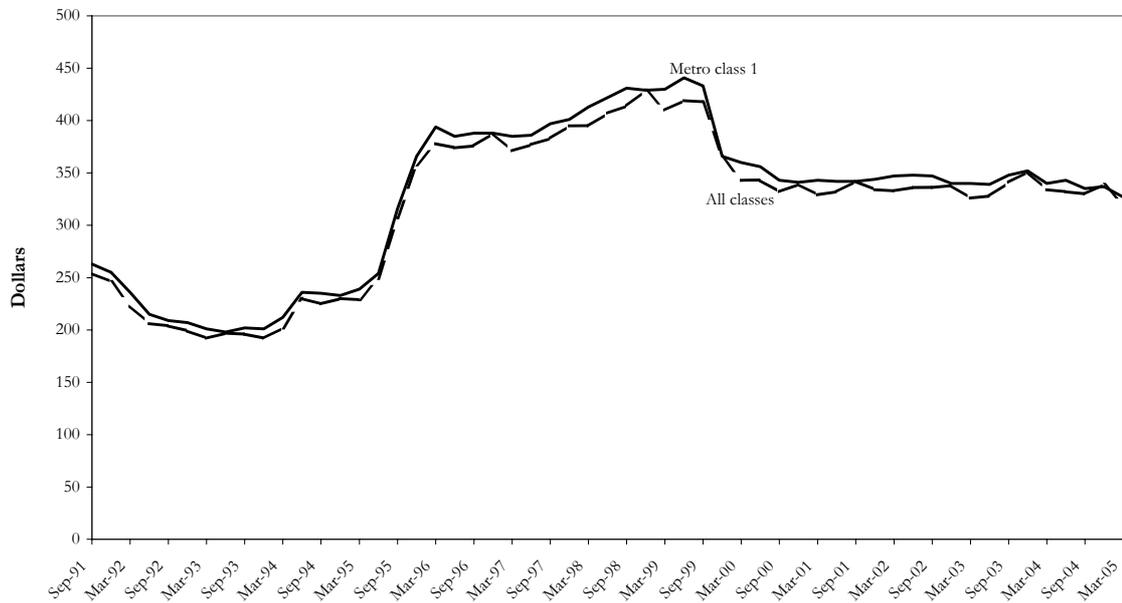
¹⁸¹ ACCC, *Medical Indemnity Insurance*, Second Monitoring Report, December 2004, p20

¹⁸² Submission 31, UNITED, p7

¹⁸³ Mr Brown, UNITED, Evidence, 2 May 2005, p52

¹⁸⁴ Submission 53, The Cabinet Office, pp27-28

¹⁸⁵ Submission 45, QBE, Part 1, p3

Figure 9.6 Quarterly average premiums for annual CTP policies (\$): September 1991 – March 2005

Source: MAA, cited in submission 45, QBE, Part 1, p3

- 9.43** The Committee noted that the above graph does not allow for inflation. In real terms, the reduction in CTP premiums over recent years is more pronounced than that shown above.¹⁸⁶
- 9.44** QBE further suggested in its written submission that had the Government's 1999 changes not been made, CTP premiums would have risen to approximately \$640 (excluding the GST) per annum by 2005. This calculation was based on normal rates of inflation, the current frequency of accidents and a propensity to claim calculation set at the 1999 level. Indeed, in the absence of the Medical Assessment Service (MAS) system, which was also introduced in 1999, QBE suggested that it is likely that superimposed inflation would have driven premiums to an even higher level than \$640.¹⁸⁷
- 9.45** In turn, QBE suggested that had premiums reached a level of \$640 or more, this would have raised serious affordability issues, with a large number of customers simply not in a position to pay for CTP insurance. Following on from this, the number of unregistered and uninsured vehicles would also have increased, adversely affecting road safety.¹⁸⁸
- 9.46** This evidence was reiterated by Ms Robyn Norman, General Manager of CTP Insurance with QBE Australia, during the Committee's public hearing on 20 June 2005:

I think in CTP every year there has been a decrease in premiums and I therefore think, yes, that the benefits of tort reform have been passed on.¹⁸⁹

¹⁸⁶ Ms Norman, General Manager, CTP Insurance, QBE Australia, Evidence, 20 June 2005, p33

¹⁸⁷ Submission 45, QBE, Part 1, p5

¹⁸⁸ Submission 45, QBE, Part 1, p6

¹⁸⁹ Ms Norman, Evidence, 20 June 2005, p35

- 9.47 Similarly, in its written submission, Suncorp Group argued that the 1999 reforms saw an immediate reduction of average CTP premiums. Since then, premiums have remained stable, representing a further significant drop in real terms.¹⁹⁰
- 9.48 Suncorp also submitted that calculating the likely level of CTP premiums today if the Government's reforms of 1999 had not been introduced is very problematic, given that at the time of the reforms in 1999, inflation on CTP claim costs was running at approximately 9% per annum. However, taking a conservative approach, Suncorp estimated current average CTP premiums would be over \$600 today.¹⁹¹
- 9.49 The Committee also notes that in its written submission, IAG indicated that CTP premiums fell from 51.5% of average weekly earnings (AWE) in September 1999 to 34.4% of AWE in December 2004. While the IAG submitted that it is not possible to attribute all the reduction in CTP insurance premiums since 1999 to the *Motor Accidents Compensation Act 1999*, 'it is likely the biggest single factor'.¹⁹²
- 9.50 In its written submission on behalf of the NSW Government, The Cabinet Office also argued that the *Motor Accidents Compensation Act 1999* has been successful in reducing CTP premiums in New South Wales, reiterating the evidence cited above of a fall in the absolute cost of CTP premiums between June 1999 and June 2004, and a fall as a percentage of AWE. In total dollar terms, The Cabinet Office submitted that the saving to motorists over the 5-years of operation of the *Motor Accidents Compensation Act 1999* is in excess of \$1 billion.¹⁹³

The shift in injury costs to the public purse

- 9.51 The Committee notes that it received a individual submission from Mr Stephen Makin in which he argued that as a result of the changes to personal injury compensation law in New South Wales since 1999, some of the cost burden of treatment and ongoing care for the injured has been shifted from the insurance companies to the taxpayer through Medicare, the pharmaceutical benefits scheme (PBS), the disability support pension, sickness benefits, unemployment benefits and other forms of social security benefit. The cost of providing these services is largely borne by the Commonwealth Government rather than the State Government.
- 9.52 Importantly, Mr Makin argued that the changes to personal injury compensation law have not led to a reduction in the number of personal injury incidents per se.¹⁹⁴
- 9.53 The Committee notes that various other witnesses also observed in evidence that there has been a shift in costs from insurance companies to the Federal and State Governments, and to the families of those injured.¹⁹⁵

¹⁹⁰ Submission 22, Suncorp Group, p8

¹⁹¹ Submission 22, Suncorp Group, p13

¹⁹² Submission 35, IAG, p5

¹⁹³ Submission 53, The Cabinet Office, p32. See also Mr Bowen, General Manager, Motor Accidents Authority, Evidence, 4 July 2005, p17; Mr Bowen, Evidence, 14 October, p7

¹⁹⁴ Submission 61, Mr Makin, pp1-3

Committee comment

- 9.54** As highlighted previously, a key objective of the Government's personal injury compensation law reforms has been to limit the number of small or 'minor' claims for compensation, thereby lowering costs to insurers, and permitting them to pass on lower insurance premiums.
- 9.55** Based on the evidence cited in this chapter, the Committee concludes that the Government's reforms to public liability and medical negligence law, primarily through the *Health Care Liability Act 2001* and the *Civil Liability Act 2002*, appear to have been very successful in reducing the number of small claims, and hence costs to insurers. Whether this has been achieved while continuing to provide fair and appropriate compensation and assistance to the seriously injured is considered later in this report.
- 9.56** The Committee also recognises that public liability, medical negligence and CTP premiums are falling, with the expectation of further reductions in premiums in the future. In particular, the reforms through the *Motor Accidents Compensation Act 1999* appear to have been very successful in reducing the cost of CTP insurance to motorists. The reforms to civil liability, made later than the reforms to the motor accidents schemes, appear at this time to have had less of an impact on premiums. This may be attributable to the long-tail nature of public liability insurance, by contrast to CTP insurance.
- 9.57** The Committee also accepts the evidence that in part, the reduction in the number of personal injury claims means that the cost burden of treatment and ongoing care has been shifted. In some instances, it has probably been shifted to the individual, who may rely on personal savings or private family support. However, in other instances, it is likely to have been shifted to the taxpayer through funding of social security services, provided largely by the Commonwealth Government.

¹⁹⁵ Mr John Potter, Partner, Commins Hendriks Solicitors, Evidence, 23 May 2005, p37. Ms Catherine Cleary, Country Women's Association, Evidence, 6 June 2005, p25. Mr Mark Richardson, CEO, Law Society of NSW, Evidence, 20 June 2005, pp17-18.

Chapter 10 The availability of affordable public liability insurance

This chapter examines the availability of affordable public liability insurance, especially to community and welfare groups and local councils. As indicated in Chapter 5, during the public liability insurance ‘crisis’ of 2001-2002, grave concerns were expressed about the impact of rapidly increasing insurance premiums on local councils, community groups and events, and sporting organisations and clubs.

The availability of affordable insurance to local councils

- 10.1** Local councils are faced with a high degree of exposure to negligence actions and public liability claims because of the wide range of services and facilities provided by councils that are used by the general public, including playgrounds, swimming centres, sporting grounds, child care facilities, community centres and libraries. In addition to the above facilities, local councils are usually responsible for maintaining infrastructure used by the public such as footpaths and roads.¹⁹⁶
- 10.2** All but 19 local government authorities in New South Wales are insured through the Statewide Mutual Scheme. This scheme has been operating since 1 December 1993, and currently provides \$200 million in public liability and professional indemnity coverage to insured local councils throughout New South Wales.¹⁹⁷
- 10.3** Following its inception in 1993, the Committee understands that Statewide Mutual accumulated massive underwriting losses. However, since the passage of the *Civil Liability Act 2002*, claim numbers and costs have fallen dramatically under the scheme, with the result that at June 2004, the scheme returned to a modest surplus of \$4,016.
- 10.4** Statewide Mutual provided the following table of total claim numbers and costs under its scheme, including an incurred but not reported (IBNR) factor, from 1994 to 2005.

¹⁹⁶ Parliamentary Library Research Service, Briefing Paper No 7/02, *Public Liability*, pp 3-7

¹⁹⁷ Submission 43, Jardine Lloyd Thompson, p2

Table 10.1 Statewide Mutual claim numbers and costs (including IBNR): 1994 – 2005

| Year | Paid to date | IBNR | Total Cost | Count |
|------|--------------|--------------|--------------|-------|
| 1995 | \$16,729,182 | \$310,879 | \$17,040,079 | 2,457 |
| 1996 | \$24,290,219 | \$1,398,223 | \$25,688,442 | 2,904 |
| 1997 | \$31,262,817 | \$1,323,398 | \$32,586,215 | 3,302 |
| 1998 | \$28,415,605 | \$8,762,821 | \$37,178,426 | 3,761 |
| 1999 | \$29,730,842 | \$4,055,407 | \$33,786,249 | 4,168 |
| 2000 | \$23,441,490 | \$4,615,729 | \$28,057,219 | 3,970 |
| 2001 | \$27,492,425 | \$9,289,903 | \$36,782,328 | 4,085 |
| 2002 | \$10,735,511 | \$11,237,101 | \$21,972,612 | 3,513 |
| 2003 | \$3,079,765 | \$6,099,395 | \$9,179,160 | 2,175 |
| 2004 | \$1,616,037 | \$8,130,442 | \$9,746,479 | 1,712 |
| 2005 | \$194,737 | \$10,605,434 | \$10,800,171 | 1,333 |

Source: Statewide Mutual, Response to questions on notice from 20 July 2005

- 10.5** The Committee notes that Table 10.1 shows a dramatic reduction in claim numbers and costs incurred by Statewide Mutual since 2002, following the implementation of the Government's public liability reforms. Claim numbers have fallen from a projected high of 4,085 in 2001 to a projected 1,333 in 2005. Anticipated claim costs have fallen from a high of \$36.8 million in 2001 to an anticipated \$10.8 million in 2005.
- 10.6** Following the move of the Statewide Mutual scheme into surplus, the Board of Management of Statewide Mutual has determined that member councils will receive a distribution of the surplus capital each year (\$4 million), to a maximum of 10% of their premium, subject to their risk management performance. It is anticipated that most councils will receive an average deduction of 7½% to 8% in their insurance premiums in the following years.¹⁹⁸
- 10.7** Individual local councils making submissions to the inquiry supported this evidence. In its supplementary written submission, the Wagga Wagga City Council provided the following table showing the Council's public liability premiums from 1999/2000 to 2005/2006.

Table 10.2: Public liability premiums paid by Wagga Wagga City Council: 1999/2000 – 2005/2006

| Year | Premium |
|-----------|-----------|
| 1999-2000 | \$175,000 |
| 2000-2001 | \$192,452 |
| 2001-2002 | \$211,750 |
| 2002-2003 | \$300,000 |
| 2003-2004 | \$420,000 |
| 2004-2005 | \$462,000 |
| 2005-2006 | \$485,100 |

Source: Submission 27a, Wagga Wagga City Council, p1

- 10.8** Table 10.2 shows that the Wagga Wagga City Council has paid ever increasing public liability premiums since 1999/2000.

¹⁹⁸ Submission 43, Jardine Lloyd Thompson, pp1-7. See also Mr Attenborough, Executive Officer, Board Member, Stateside Mutual, Evidence, 20 June 2005, pp26-29

- 10.9** However, in its supplementary written submission, the Wagga Wagga City Council confirmed that it has experienced a dramatic reduction in the number of minor claims since the Government's tort law reforms of 2002.¹⁹⁹ In turn, in evidence to the Committee on 23 May 2005, Mr Donald Pembleton, Risk Analyst with Wagga Wagga City Council, indicated his understanding from Statewide Mutual that premiums would decrease in future years as a result of the reduced claim numbers and costs since the 2002 reforms.²⁰⁰
- 10.10** Similarly, in evidence to the Committee on 23 May 2005, Mr Anthony Batchelor, Director of Corporate Services with Leeton Shire Council, indicated that the council's insurance premium increased from \$75,000 in 2004-2005 to \$88,000 in 2005-2006. However, the Council has implemented a range of risk management practices in order to achieve the discount of up to 10% on offer from Statewide Mutual.²⁰¹
- 10.11** Dungog Shire Council also indicated in its written submission that it has experienced a 141% increase in its liability premium since 2000, with the Council's excess rising by 150%. However, the Council has also witnessed a significant decline in claim number since the introduction of the *Civil Liability Act 2002*.²⁰²

Council Committees of Management

- 10.12** The Committee notes that many local councils in New South Wales use Committees of Management constituted under s.355 of the *Local Government Act 1993* for the management of ongoing council or community events using council facilities. This allows both council and community events to be covered under the Council's public liability insurance policy.²⁰³
- 10.13** Section 355 of the *Local Government Act 1993* provides:

A function of a council may, subject to this Chapter, be exercised:

- (a) by the council by means of the councillors or employees, by its agents or contractors, by financial provision, by the provision of goods, equipment, services, amenities or facilities or by any other means, or
- (b) by a committee of the council, or
- (c) partly or jointly by the council and another person or persons, or
- (d) jointly by the council and another council or councils (including by means of a Voluntary Regional Organisation of Councils of which the councils concerned are members), or

¹⁹⁹ Submission 27, Wagga Wagga City Council, p1

²⁰⁰ Mr Pembleton, Risk Analyst, Wagga Wagga City Council, Evidence, 23 May 2005, p2,3,6

²⁰¹ Mr Batchelor, Director of Corporate Services, Leeton Shire Council, Evidence, 23 May 2005, pp13-14

²⁰² Submission 36, Dungog Shire Council, p2

²⁰³ See for example submission 4, Mr Tom Port, p1

- (e) by a delegate of the council (which may, for example, be a Voluntary Regional Organisation of Councils of which the council is a member).

10.14 The Committee notes that where a Committee forms a s.335 Committee to manage a particular community event, the Council needs then to consult with its insurer, generally Statewide Mutual, to have the event endorsed.²⁰⁴

10.15 In its written submission, the Leeton Shire Council noted that insurers impose stringent guidelines and require risk management plans for each event managed by a Council Committee of Management. In the past, the Council has had significant difficulties with certain events:

- Participants in the Sunrise Festival street parade over Easter 2004 all required public liability cover – however some floats were unable to get an extension of cover, while individuals riding on the floats were required to sign on and sign off at the end of the parade as ‘volunteers’ to ensure that they were covered for personal accident insurance.
- Leeton’s triathlon event is no longer held for insurance reasons.
- Leeton Council has faced issues in relation to the hiring out of council facilities such as halls, ovals and parks. Council has a casual hirers public liability policy available to users provided they do not use facilities more than ten times a year. However, the cost of public liability insurance for community groups (eg craft groups) which use Council halls on a weekly basis is too expensive for the small membership involved. The Council indicated that it is considering ways around this dilemma.²⁰⁵

10.16 Commenting on the increased use of s.355 Council Committees of Management, Mr John Attenborough, Executive Officer on the Board of Management of Statewide Mutual, observed:

Statewide Mutual, as the insurer of the majority of councils throughout New South Wales, has little problem in providing cover to councils for their committees in organising activities, such as New Year celebrations, Australia Day celebrations, Anzac Day marches, and many other activities that are put on throughout the year specifically for community groups. We have established schemes, which are available through the Web, for not-for-profit organisations to gain insurance. ...We have also established a scheme for stallholders that participate in fetes and fairs.²⁰⁶

The availability of affordable insurance to not-for-profit organisations

10.17 An issue of particular concern to the Committee during the inquiry was the availability of affordable public liability insurance to not-for-profit community organisations.

²⁰⁴ Submission 4, Mr Tom Port, p1. See also Mr Batchelor, Leeton Shire Council, Evidence, 23 May 2005, p10

²⁰⁵ Submission 32, Leeton Shire Council, p2. See also Mr Batchelor, Evidence, 23 May 2005, p12

²⁰⁶ Mr Attenborough, Executive Officer, Board of Management of Statewide Mutual, Evidence, 20 June 2005, p26

Not-for-profit insurance premiums

- 10.18** During the inquiry, the Committee received evidence suggesting that public liability premiums for not-for-profit organisations have at least stabilised, if not fallen, in recent years, although this is by no means true for all not-for-profit organisations.
- 10.19** The Community Care Underwriting Agency (CCUA) is a joint venture between Allianz Australia Insurance Ltd, IAG and QBE insurance Ltd. It was formed in December 2002 to provide public liability insurance to not-for-profit organisations, following consultation with federal and state governments, industry members and other stakeholders. Mr Philip Turner, Manager of CCUA, made the following comment on the formation of CCUA during the hearing on 2 May 2005:
- Going back to 2002 when the whole issue of the not-for-profit sector was raised, many insurers – including the three companies that formed Community Care – looked at the not-for-profit sector and did not have much of an idea of exactly what they did. It was a misunderstood sector in some of the activities that were undertaken. But the three companies got together thinking that they could accept a risk by sharing it between the three companies and trying to have affordable premiums by sharing the risk between three companies. Therefore, they were more prepared to underwrite a risk that might have been considered unusual whereas, if they had been individual insurers, they may not write it. The sharing of the risk has been the best part of it.²⁰⁷
- 10.20** Since December 2002, CCUA has been contacted by over 6,000 community groups throughout Australia and has written in excess of 1,800 policies, including over 100 policies covering single day events.²⁰⁸
- 10.21** In his evidence to the Committee on 2 May 2005, Mr Turner observed that CCUA premiums are likely to remain stable in the future, although he did not speculate on the possibility of any premium reductions.²⁰⁹
- 10.22** Similarly, in its written submission, Suncorp Group indicated that since the Government's public liability reforms, Suncorp has for the first time made available public and product liability insurance to eligible not-for-profit organisations. Eligible not-for-profit organisations can obtain cover of up to \$20 million. Additional cover is also available for members participating in certain low risk sport and recreational activities and for most fund raising events, live drama, dance and music performances, entertainment, functions, parades and festivals. Suncorp currently has policies with over 1,300 not-for-profit organisations.²¹⁰
- 10.23** In evidence on 6 June 2005, Mr John Rogers, General Manager of Commercial Insurance with Suncorp, indicated that in May 2005, Suncorp moved to reduce liability premiums for the not-for-profit sector by 10%.²¹¹

²⁰⁷ Mr Turner, Manager, CCUA, Evidence, 2 May 2005, p45

²⁰⁸ Submission 7, CCUA, p2. See also Mr Turner, Evidence, 2 May 2005, p44

²⁰⁹ Mr Turner, Evidence, 2 May 2005, pp44, 46

²¹⁰ Submission 22, Suncorp Group, pp7,10

²¹¹ Mr Rogers, General Manager, Commercial Insurance, Suncorp, Evidence, 6 June 2005, p48

- 10.24** The Committee also received a written submission from the NSW Meals on Wheels Association, which has been a provider of insurance to the not-for-profit sector in the state for over 15 years. In its submission, the Association indicated that up until six months ago, there were many not-for-profit organisations in the state that were unable to get any public liability coverage from Australian underwriters or, if they did get coverage, it was at a premium they could ill-afford. However, the Association submitted that this situation has eased somewhat recently, although there are still many organisations that are struggling to afford the premiums being charged.²¹²
- 10.25** By contrast with this evidence of stable or falling public liability premiums for not-for-profit community organisations, however, the Committee notes the final *2005 Insurance Survey Results* compiled by the Council of Social Services of NSW (NCOSS) and released on 10 June 2005.²¹³
- 10.26** The *2005 Insurance Survey Results* showed that public liability premiums for the community sector increased by 9.16% on average between 2004 and 2005 (36 organisations answered this question, with 15 showing increases of 14% or more, but also 9 organisations showing decreases in premiums).²¹⁴
- 10.27** Given these findings, Mr Gary Moore, the Director of NCOSS, indicated that NCOSS is looking to create a pooled bulk purchase insurance scheme, with the assistance of the Government, to cover a large number of small and medium-size not-for-profit organisations. However, he suggested that even under this scenario, he would not expect premium prices to plateau, let alone fall, until 2007-2008.²¹⁵
- 10.28** In response to the results of the 2005 NCOSS insurance survey, Mr Laurie Glanfield, Director General of the Attorney General's Department, noted that while the survey found a 9.16% increase in premiums between 2004 and 2005, only 80 organisations responded to the 2005 survey, significantly less than the 250 respondents to the 2004 survey. Mr Glanfield suggested that this may be indicative of fewer insurance problems amongst community organisations, with those not experiencing problems not responding to the survey.²¹⁶
- 10.29** The Committee also notes that in its written submission, the Society of St Vincent de Paul indicated that since the collapse of HIH in March 2001, its insurance premium has increased from \$200,000 to \$600,000.²¹⁷ Commenting on this increase, the CEO of the Society, Mr Owen Rogers observed:

These huge increases in premiums mean that the Society has fewer funds available to assist people in need. Charities and not-for-profit organisations are not able to pass on the increased costs of liability insurance ... The Society cannot turn to government for additional funds because government is continually stating that there are limited funds available and no surplus funds can be made available. As insurance costs

²¹² Submission 21, Meals on Wheels, p1

²¹³ Email from Ms Handley to the Committee Principal Council Officer, 10 June 2005

²¹⁴ NCOSS, *2005 Insurance Industry Results*, June 2005, pp1-2

²¹⁵ Mr Moore, Director, NCOSS, Evidence, 2 May 2005, p63

²¹⁶ Mr Glanfield, Evidence, 4 July 2005, pp13,26

²¹⁷ Submission 15, Society of St Vincent de Paul, p1

increase, charities will have fewer funds to assist people in need and may in the future have to close some of its special works.²¹⁸

- 10.30** In its written submission on behalf of the NSW Government, The Cabinet Office argued that the availability of cost-effective insurance has significantly improved for not-for-profit and community organisations. The Cabinet Office noted evidence from the ICA that calls to Insurance Enquiries and Complaints Ltd fell from an average of 56 calls per week in 2002 from parties having difficulty obtaining public liability cover to six to eight calls a fortnight in 2003, a drop of over 90%. The Cabinet Office also highlighted the role of the CCUA in improving insurance availability to the sector.²¹⁹

The closure of some community groups and events

- 10.31** In its written submission, the Law Society of NSW argued that despite one of the key objectives of the tort law reforms being an increase in the availability of insurance coverage to the community, there is still evidence, especially in the field of public liability, that the availability and affordability of insurance remains problematic. In support, the Law Society cited in its submission a broad range of articles and media releases voicing concerns about the availability of insurance for community groups and activities.²²⁰

- 10.32** Similarly, in its written submission to the inquiry, Dungog Shire Council indicated that despite the Government's reforms, many community events within the shire have either been cancelled or reduced in scale in recent years, while some community groups have either folded or amalgamated with other organisations because of the cost of public liability insurance. The Council cited the following examples:

- The Gresford Community Group has not run the Gresford Billycart Derby and Easter Fair since 2001.
- Dungog Public School P&C has had to withdraw from certain fundraising activities.
- Dungog Arts Society had to reduce its activities to a minimum in 2003 due to the high cost of insurance.
- Clarence Town Preschool has had to curtail its major fund raising event.
- Dungog Historical Society has had to limit the number of activities in which it participates after a 160% increase in its premium.
- Dungog Sunshine Club has faced a 277% increase in its premium.²²¹

- 10.33** The Council further noted the case of the "Timberfest Festival". The Council has had to provide financial assistance to the organising committee of the festival to enable it to continue. The Council noted:

²¹⁸ Mr Owen Rogers, CEO, Society of St Vincent de Paul, Evidence, 2 May 2005, p58

²¹⁹ Submission 53, The Cabinet Office, pp16-17

²²⁰ Submission 41, Law Society of NSW, pp41-42. See also Mr McIntyre, Evidence, 20 June 2005, pp2-3

²²¹ Submission 36, Dungog Shire Council, p2

Without community events rural communities can lose their identity and purpose. Such events encourage community participation and provide opportunities for communities to develop and promote their local areas.²²²

10.34 Similarly, the Leeton Shire Council indicated that a number of community events and activities are no longer held in the shire.²²³

10.35 In its written submission, the Country Women's Association of NSW also argued that the cost of public liability has had a profound effect on community groups and functions. The Association cited:

- the closure of traditional community events such as annual billycart championships in country towns, and the curtailing of others such as the conduct of Carols by Candlelight without candles
- the decline of sporting and model clubs due to increasing insurance cover costs
- the closure of council-run playgrounds and the removal of potentially unsafe equipment.²²⁴

10.36 The Committee also notes the evidence of Ms Sandra Handley, Project Officer with the Council of Social Services of NSW (NCOSS), during the hearing on 2 May 2005:

Continuing lack of affordability of public liability insurance, as well as exclusions by some insurers, means that both vital human services and the activities that create a community have been cut. For example, local festivals that have been run for years have had to stop because they can no longer afford public liability insurance. Fundraising organisations are now folding because they are now raising funds just to pay for their insurance; they are not able to raise funds for anything else.²²⁵

10.37 Finally, the Committee also notes that while the degree of public anxiety that was evident in 2001 and 2002 about the cost and availability of public liability insurance has since diminished, the issue continues to attract ongoing public attention. For example, the Committee notes articles such as 'Insurers are the real winners from negligence reforms' in the *Sydney Morning Herald* on 10 February 2005 and 'Cashing in on the death of fun' in the *Sun Herald* on 12 September 2004.²²⁶

Tumba Rail

10.38 During the hearing on 23 May 2005, the Committee heard evidence from Mr Cedric Priest, President of Tumba Rail. Tumba Rail was a regional heritage rail preservation society that operated tourist trikes (both hand propelled and motorised) on a 1.8km section of the disused Wagga to Tumbarumba rail line. Tumba Rail also maintained the Ladysmith Railway Station.

²²² Submission 36, Dungog Shire Council, p3

²²³ Submission 32, Leeton Shire Council, pp1-2

²²⁴ Submission 17, Country Women's Association of NSW, p2

²²⁵ Ms Handley, Project Officer, NCOSS, Evidence, 2 May 2005, p62

²²⁶ Cited in submission 11, Mr Bartley, Attachments B and C.

However, Tumba Rail was forced to close in 2002 when its public liability insurance premium was increased from \$1,500 to \$45,000. The line remains closed today.²²⁷

- 10.39** In his evidence, Mr Priest attributed the massive increase in the insurance premium for Tumba Rail to an inability by insurers to appreciate the operation of the trikes, which travel no faster than 10km an hour and have safety rails. Mr Priest argued insurers were simply not interested in offering cover to railway groups of any description.²²⁸

The ongoing viability of other community groups and events

- 10.40** In its written submission, NCOSS indicated that it continues to receive at least four calls a week from community organisations that are considering closure or cutting of services due to increases in their insurance premiums. For example, NCOSS cited a recent contact from an individual who runs an unincorporated social group that organises dances and picnics for local housing estate tenants. The group has 57 members, but is currently uninsured and is considering closing down as the members are all pensioners and cannot afford the insurance premium. NCOSS also indicated its belief that rural and regional communities have been, and continue to be, more adversely affected than communities in metropolitan areas.²²⁹
- 10.41** Similarly, the Society of St Vincent de Paul indicated in its written submission that it has been forced to restrict some activities involving children. For example, the Society has had to close or alter some of its hostels, including a hostel catering for mothers and children.²³⁰ In addition, the Society has been forced to adopt very diligent risk control practices, and has been very proactive in its training of volunteers and employees.²³¹

The Yanco Hall Markets

- 10.42** During the hearing on 23 May 2005, the Committee took evidence from Mr Hugh Milvain, President of the Yanco Hall Committee, which runs the Yanco Hall Markets in Yanco.
- 10.43** The Yanco Hall Markets have been operating for approximately 23 years and are held on the last Sunday of every month except December, when they are held on the second Sunday. Presently, there are about 60 regular stallholders, and an average of 500 visitors each stall day. Stall products include books, needlecraft, woodwork, cakes and jams, jewellery, clothes, glassware, plants, music, and soap and beauty products.
- 10.44** Up until recently, Leeton Shire Council's public liability insurance policy gave the hall committee cover for all activities held at the hall. However, due to changes in the Council's insurance cover, the Yanco Hall Committee was recently forced to seek separate insurance cover for the markets. After a number of unsuccessful approaches, the committee obtained

²²⁷ Mr Priest, President, Tumba Rail, Evidence, 23 May 2005, pp21-23

²²⁸ Mr Priest, Evidence, 23 May 2005, p23

²²⁹ Submission 19, NCOSS, pp1-2

²³⁰ Submission 15, Society of St Vincent de Paul, pp1-2

²³¹ Mr Rogers, CEO, Society of St Vincent de Paul, Evidence, 2 May 2005, p58

cover from a Melbourne-based broker at a cost of \$2,750 per annum, with an excess of \$1,000 per claim.²³²

- 10.45 Mr Milvain indicated to the Committee that at present, the markets will be able to keep going, but the cost of insurance will be largely met by the Leeton Shire Council.²³³

Wagga Wagga Junior Rugby League

- 10.46 The Committee also took evidence during the hearing on 23 May 2005 from Mr Robert Hay, Secretary of Wagga Wagga Junior Rugby League. Wagga Wagga Junior Rugby League has between 600 and 700 registered players, together with about 2,000 young players aged between 7 and 15. The League is insured under the umbrella of the Country Rugby League's insurance policy, to which Wagga Wagga Junior Rugby League makes a contribution. In 2005-2006 the cost of insurance of Mr Hay's club, Wagga Brothers, was \$250, up from \$210 in the previous year, together with \$32 per player.

- 10.47 Mr Hay indicated that as an organisation that relies almost solely on volunteers, the demand that volunteers be insured and have certain qualifications such as coaching and first-aid certificates has driven many of the volunteers from the organisation. This has meant that four of the five junior rugby league clubs in Wagga Wagga currently struggle for volunteers, and suffer a high turnover of coaches and other staff.²³⁴

Do all incorporated community groups need insurance?

- 10.48 In his written submission to the inquiry, Mr Timothy Abbott, Partner with Walsh and Blair Lawyers, argued that many incorporated community and sporting groups, including community groups and events that have closed, could in reality continue to operate without the need for any public liability insurance coverage. Mr Abbott attributed this to two considerations.

- 10.49 First, as a result of the changes to the duty of care under the *Civil Liability Act 2002*, the rights of any person participating in a recreational activity have been all but removed. The changes to the duty of care are discussed in more detail in Chapter 22 of this report

- 10.50 Second, the Government introduced in 2002 the *Associations Incorporation Amendment Public Liability Regulation* which amended the *Associations Incorporation Regulation 1999* by removing s.14, which previously provided that:

Unless exempted by section 45 of the Act, an incorporated association must effect and maintain public liability insurance with an approved insurer for a cover of at least \$2,000,000.²³⁵

²³² Mr Milvain, 'Yanco Village Markets', tabled document, p1

²³³ Mr Milvain, President, Yanco Hall Committee, Evidence, 23 May 2005, pp16-17

²³⁴ Mr Hay, Secretary, Wagga Wagga Junior Rugby League, Evidence, 23 May 2005, pp29-31

²³⁵ Cited in submission 57, Mr Abbott, p3

10.51 To illustrate his argument, Mr Abbott cited the example of the Yerong Creek Tennis Club, which previously paid \$400 for a public liability insurance policy, but ‘have absolutely nothing – a \$2 cash tin’. Mr Abbott argued that the club simply could not be sued because they are exempt from prosecution under the protection of the 2002 *Association Incorporation Amendment Public Liability Regulation*.

10.52 At the same time, however, Mr Abbott argued that the insurance industry has been ‘ripping off’ community and sporting groups by continuing to aggressively sell public liability premiums in circumstances where it is all but impossible to bring a claim.²³⁶ As stated by Mr Abbott in his evidence to the Committee on 23 May 2005:

I see that what has happened here is that the insurers have conned the legislators and perhaps the judiciary into making all these draconian changes that affect people’s rights, but on the other hand they go around and sell insurance policies to people who do not need them and should not have them and probably do not have anything that they can insure against.²³⁷

10.53 This point was also made to the Committee by Dr Andrew Morrison, representing the Australian Lawyers Alliance, during the hearing on 6 June 2005:

The fact of the matter is that the Australian insurers have a captive market and take full advantage of it. But the reality is that they [volunteers] do not need insurance; they are exempt.²³⁸

Support for the reforms

10.54 While considerable concerns remain about the availability of affordable public liability insurance to not-for-profit community groups and events, some parties to the inquiry strongly supported the Government’s 2002 reforms.

10.55 In its written submission, the Local Government Association of NSW and Shires Association of NSW indicated that it was centrally involved in development of the Government’s public liability reforms through the *Civil Liability Act 2002* and the *Civil Liability Amendment (Personal Responsibility) Act 2002*, and argued that the reforms appear to have arrested the threatened closure of a number of community events.²³⁹ The association submitted:

The evidence available to the Association in what is still a relatively short period since the reforms were introduced, strongly suggests that these were important and well targeted reforms. These reforms and some market responses have addressed the threat to most community events and activities and non-government organisations, and relieved some of the pressure on insurance premiums.²⁴⁰

²³⁶ Submission 57, Mr Abbott, p3

²³⁷ Mr Abbott, Partner, Walsh and Blair Lawyers Evidence, 23 May 2005, p48

²³⁸ Dr Morrison, Australian Lawyers Alliance, Evidence, 6 June 2005, p15

²³⁹ Submission 40, Local Government Association of NSW and Shires Association of NSW, pp2-3

²⁴⁰ Submission 40, Local Government Association of NSW and Shires Association of NSW, p5

10.56 Accordingly, the Local Government Association of NSW and Shires Association of NSW indicated that it did not see any compelling need to undo the reforms to public liability law in New South Wales.²⁴¹

10.57 The Committee notes that Counsellor Genia McCaffery, representing both the Local Government Association and the Shires Association, reiterated this position during her evidence to the Committee on 20 June 2005:

I guess we are great proponents and advocates for these reforms and I think in the really relatively short period of time that the reforms have been introduced, we think there is clear evidence that the reforms are having the desired result. I guess we would urge that you do not go back on the reforms because I think they are producing the right results for our communities.²⁴²

10.58 Similarly, in its written submission on behalf of the NSW Government, The Cabinet Office submitted that as a result of the Government's public liability reforms, the threat to many community groups, local councils, sporting associations and tourism operators has been averted. The Cabinet Office noted that prior to the reforms, the Government received daily representations from community and sporting associations regarding lack of available and affordable insurance, whereas now the Government receives very few, if any, representations on the issue.²⁴³ At the same time, Mr Glanfield submitted:

It would be unreasonable, however, to expect the civil liability reforms to be a panacea for all insurance problems, particularly where the organisation seeking to be insured has no risk-management processes in place.²⁴⁴

10.59 Mr Glanfield therefore emphasised the importance of community groups adopting good risk management strategies. With the adoption of such strategies, not only are insurers more likely to underwrite them, but fewer injuries are likely to occur.²⁴⁵

10.60 In its written submission, the Sydney Festival²⁴⁶ indicated that while it experienced a steep rise in its insurance premium from \$28,000 in 1999 to \$240,000 in 2004, by 2004 this trend had begun to reverse, and in the 2004-2005 financial year the anticipated final cost of its public liability insurance policy is just over \$170,000. In part, Sydney Festival attributed this to the Government's public liability reforms.²⁴⁷

²⁴¹ Submission 40, Local Government Association of NSW and Shires Association of NSW, p5

²⁴² Counsellor McMaffery, President, Local Government Association of NSW, Evidence, 20 June 2005, p21

²⁴³ Submission 53, The Cabinet Office, pp21-22. See also Mr Lean, Policy Manager, Legal Branch, The Cabinet Office, Evidence, 14 October 2005, p5

²⁴⁴ Mr Glanfield, Evidence, 4 July 2005, p13

²⁴⁵ Mr Glanfield, Evidence, 4 July 2005, p13

²⁴⁶ The Sydney Festival holds annually a large number of outdoor, free, large-scale events which may have as many as 100,000 people in attendance.

²⁴⁷ Submission 24, Sydney Festival, p1

The 'It's your business' program

- 10.61** In its written submission, the NSW Department of Tourism, Sport and Recreation indicated that in response to the 'crisis' in liability insurance, it developed a resource entitled 'It's your business' to assist sporting and recreational organisations to implement appropriate risk management practices. Since March 2002, sporting and recreational organisations, government authorities and small business operators have purchased over 1,000 copies of 'It's your business' across New South Wales. In addition, over 110 copies have been distributed to central libraries.
- 10.62** The Department has also provided training opportunities to directors, paid staff and volunteers throughout the sport and recreational industry across New South Wales. The Department's Sports Development Program Agreements with funded organisations specify that a minimum of two directors be required to attend an 'It's your business' workshop each term of the agreement. Over 86 workshops have been conducted since the program was launched in 2002.
- 10.63** Finally, the Department also noted that it has encouraged pooling of resources amongst sporting and recreational organisations to negotiate group insurance cover by affiliated local clubs, associations and other members. Group purchasing of insurance has allowed organisations with comparable risk profiles to obtain more affordable insurance. Cricket, basketball and netball are three sports with group pooling arrangements which have achieved reduced premiums over the last two years as a result.²⁴⁸
- 10.64** The Committee commends the Department of Tourism, Sport and Recreation on this practical initiative.

Committee comment

- 10.65** During the public liability insurance 'crisis' of 2001 and 2002, grave concerns were expressed about the impact of rapidly increasing public liability insurance premiums on community groups and events, sporting organisations and clubs, tourism operators, small businesses and local councils. Some of those concerns continue to be expressed today.
- 10.66** While in general terms, the Government's 2002 reforms to public liability law have started to deliver lower premiums and greater availability and affordability of insurance, the Committee remains particularly concerned about the availability of affordable insurance to not-for-profit and community groups.
- 10.67** Accordingly, the Committee believes that Government should look at ways of providing additional assistance to the not-for-profit sector in meeting public liability insurance costs, especially to small, unfunded, not-for-profit organisations such as historical societies, fundraising groups and welfare providers. Such assistance may be possible through the pooled, bulk purchase insurance scheme for not-for-profit organisations being explored by NCOSS.

²⁴⁸ Submission 60, Department of Tourism, Sport and Recreation, pp 1-2

Recommendation 1

That the Government look at ways of providing additional assistance to not-for-profit and community groups in paying public liability insurance premiums, possibly through the use of a pooled, bulk purchase insurance scheme.

- 10.68** The Committee also notes evidence presented during the inquiry that due to the Government's changes to the duty of care provisions of the *Civil Liability Act 2002* and the repeal in 2002 of s.14 of the *Associations Incorporation Regulation 1999*, many incorporated community groups may no longer need public liability insurance, or may only require limited coverage.
- 10.69** The Committee believes that the Government should provide advice on this issue to all Local Councils and Shire Associations in New South Wales, for distribution to local community and sporting groups within the wider community.
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Recommendation 2

That the Government provide advice to all Local Councils and Shire Associations in New South Wales, for distribution to local community and sporting groups within the wider community, on the effects of the Government's changes to the duty of care provisions of the *Civil Liability Act 2002* and the repeal of s.14 of the *Associations Incorporation Regulation 1999* in 2002.

Chapter 11 The profitability of the insurance industry

This chapter examines the impact of the Government's personal injury compensation law reforms on the profitability of the insurance industry. Representative legal associations argued strongly during the inquiry that while claim numbers and costs are down significantly, insurers have not fully passed on these reduced costs through lower premiums. This claim was vigorously contested by the Insurance Council of Australia (ICA) and individual insurers.

The Committee notes that the NSW Workers Compensation Scheme is once again not included in this analysis of profitability. This is because the scheme is funded by employer premiums and investment returns on those premiums and accordingly does not have any direct bearing on insurer profits. However, the Committee does examine the current financial position of the NSW Workers Compensation Scheme.

Claims of profiteering by the insurance industry

11.1 In its written submission to the inquiry, the Law Society of NSW argued that there appears to be 'systematic profiteering' within the general insurance industry as a result of the Government's personal injury compensation law reforms, at the expense of the general economy, the community and, perhaps, of insurance availability.²⁴⁹ As a result, the Law Society argued that there is now:

an effective imbalance between premiums and profits. While injury compensation benefits have fallen across all three areas of tort as a result of the amendments, overall premiums have not reduced. Furthermore, within the privately underwritten systems, insurer profits have increased.²⁵⁰

11.2 Mr John McIntyre, President of the Law Society of NSW, reiterated these comments in his evidence on 20 June 2005:

The second essential thing that needs to be recognised is that the insurers that are underwriting the injury compensation schemes in this state have taken the resulting savings, that is, the difference between premiums and payouts, into record profits.²⁵¹

11.3 In response to these claims of profiteering, Vero Insurance raised in its submission the question: What are the economic mechanisms preventing an insurance company arrogating to itself the benefits of changes in the liability environment? In response, Vero Insurance observed:

The most significant mechanism to prevent insurers enriching themselves as a result of tort law changes is the operation of the open market. An open and competitive

²⁴⁹ Submission 41, Law Society of NSW, p27

²⁵⁰ Submission 41, Law Society of NSW, p44

²⁵¹ Mr McIntyre, President, Law Society of NSW, Evidence, 20 June 2005, p2. The Committee also notes the additional comments of the Law Society on insurer profits in its supplementary written submission. See submission 41a, Law Society of NSW, p7

market will prevent any insurer capturing and holding the benefits of tort law reform.²⁵²

The overall profitability of the insurance industry

- 11.4 During the inquiry, the Committee was presented with a great deal of evidence from various sources on the overall profitability of the insurance industry in Australia, incorporating profits from both public liability lines of insurance and other lines of insurance. This evidence is presented below.

Public profit reports

- 11.5 In its written submission, the NSW Bar Association cited the following tables showing the strong overall profitability of insurance companies in Australia in recent years:

Table 11.1: Profitability of IAG and Suncorp Group (\$ millions)

| Insurer | Year ended 30 June 2002 | Half year at 31 Dec 2002 | Year ended 30 June 2003 | Half year at 31 Dec 2003 | Year ended 30 June 2004 | Half year at 31 Dec 2004 |
|---------|-------------------------------|--------------------------------|-------------------------------|--------------------------------|-------------------------------|--------------------------------|
| IAG | \$25 loss | \$62 | \$153 | \$302 | \$665 | \$446 |
| Suncorp | \$311 | \$155 | \$384 | \$281 | \$618 | \$413 |

Table 11.2: Profitability of QBE and Promina (\$ millions)

| Insurer | Year ended 30 Dec 2002 | Half year at 30 June 2003 | Year ended 31 Dec 2003 | Half year at 30 June 2004 | Year ended 31 Dec 2004 |
|---------|---------------------------|------------------------------|---------------------------|------------------------------|---------------------------|
| QBE | \$279 | \$241 | \$572 | \$320 | \$820 |
| Promina | \$307 loss | Not available | \$272 | \$204 | \$458 |

Source: Submission 29, NSW Bar Association, p18

- 11.6 Similarly, in its written submission, the Law Society of NSW noted that the most recently reported profits results for Suncorp, IAG and QBE were all up over 40% on the previous year.²⁵³

APRA Quarterly General Insurance Performance data

- 11.7 In its written submission, the Law Society of NSW cited the Australian Prudential Regulation Authority (APRA) *Quarterly General Insurance Performance* for the September quarter 2004, issued on 6 January 2005, which found that:

Industry net profit/loss after tax for the year ended 30 September 2004 was \$5.0 billion, which corresponds to a return on equity of 23.2 percent for the year.²⁵⁴

²⁵² Submission 38, Vero Insurance, p18

²⁵³ Submission 41, Law Society of NSW, p27

11.8 In the media release accompanying the report, APRA indicated:

... the first edition of the regulator's *Quarterly General Insurance Performance* publication released today shows an industry that has recovered strongly from its lows of several years ago. The industry is providing strong capital backing for policyholders, attractive returns to investors and making a positive contribution to the Australian economy.²⁵⁵

11.9 The Law Society of NSW submitted that the current profitability of the insurance industry appears to be the result of two factors:

- Consistently strong underwriting results, with insurance premiums systematically higher than net incurred claims value: APRA found that in the year to September 2004, insurers made \$3.3 billion in underwriting profit, up from \$2.3 billion for the year ending September 2003, \$771 million for the year ending September 2002, and an underwriting loss of \$692 for the year ending September 2001.²⁵⁶
- High investment volumes and returns: APRA found that in the year to September 2004, net assets of the industry increased by \$3.1 billion (15.3 percent) to \$23.3 billion, and increased by 37.2 percent over the two years to September 2004.²⁵⁷

11.10 In its response to questions on notice, the ICA also cited data from the APRA *Quarterly General Insurance Performance* for the September quarter 2004. The ICA submitted that taking into account investment income and other expenses and taxes, the net profit after tax for the insurance industry over the year to the September quarter 2004 was \$4.516 billion. Commenting on this result, the ICA observed:

The results as at September 2004 cover arguably one of the best performing years for the industry in a very long time and as such should not be viewed in isolation. It was a period where there was a low claim frequency in areas such motor [accidents], brought on by environmental factors such as the drought. Similarly, the period was notable for the exceptional performance of equity markets.²⁵⁸

11.11 The Committee notes that the most recent APRA *Quarterly General Insurance Performance* for the March quarter 2005, issued 7 July 2005, found that:

- The industry underwriting result for the twelve months to 31 March 2005 was \$3.4 billion, an increase of 5.1% on the previous year.

²⁵⁴ APRA, *Quarterly General Insurance Performance Statistics*, September 2004 (issued 6 January 2005), cited at <http://www.apra.gov.au/Statistics/Quarterly-General-Insurance-Statistics.cfm>, (accessed on 11 July 2005), p 5

²⁵⁵ APRA, Media Release, 'New APRA statistics reveal sound general insurance profitability', 6 January 2005, cited at http://www.apra.gov.au/Media-Releases/05_02.cfm (accessed 31 March 2005)

²⁵⁶ APRA, *Quarterly General Insurance Performance*, September 2004 (issued 6 January 2005), p5.

²⁵⁷ APRA, *Quarterly General Insurance Performance*, September 2004 (issued 6 January 2005), pp5,8

²⁵⁸ ICA, Response to questions on notice, 6 July 2005, p2

- Industry net profit after tax for the year ended 31 March 2005 was \$5.1 billion. Return on equity was 21.9% for the year ended 31 March 2005, up from 20.5 percent in the previous twelve-month period.²⁵⁹

11.12 Commenting on these results, APRA observed:

Underwriting Result

... The industry continues to produce strong underwriting results with an underwriting profit for the twelve months to 31 March 2005 of \$3.4 billion, and an underwriting combined ratio of 84 percent over the period.

Profitability

Although industry profits continue to be solid, lower investment income for the March 2005 quarter, due to increasing interest rates, has led to the lowest quarterly profits since September 2003. Industry annualised return on equity was 13.6 percent compared with 17.1 percent annualised for the comparable quarter last year. The March 2005 annualised quarterly result for return on assets was 4.1 percent.²⁶⁰

The KPMG General Insurance Industry Survey 2004

11.13 In its written submission, the Law Society of NSW also cited the findings of the KPMG *General Insurance Industry Survey 2004*, which stated that:

The 2003/2004 reporting season was characterised by the most favourable industry results in decades. All insurers surveyed showed increases in gross written premiums which, in total, increased by 12 percent from last year. Underwriting profitability before tax improved by 428 percent to circa \$1.6bn, whilst investment returns added a 73 percent improvement (year on year) with a contribution of over \$2bn. Profit after tax improved from last year's figure of \$916m to \$2.5bn.²⁶¹

11.14 The Committee notes, however, that the survey also stated:

... the industry is in only its second year of recovery. The recovery cycle should therefore not be thought of as complete (by insurers). ... the recent underwriting profits are still 'outperformed' by the quantum of preceding underwriting losses.²⁶²

²⁵⁹ APRA, Quarterly General Insurance Performance Statistics, March 2005 (issued 7 July 2005), cited at <http://www.apra.gov.au/Statistics/Quarterly-General-Insurance-Statistics.cfm>, (accessed on 11 July 2005), p5

²⁶⁰ APRA, Quarterly General Insurance Performance Statistics, March 2005, pp5-6

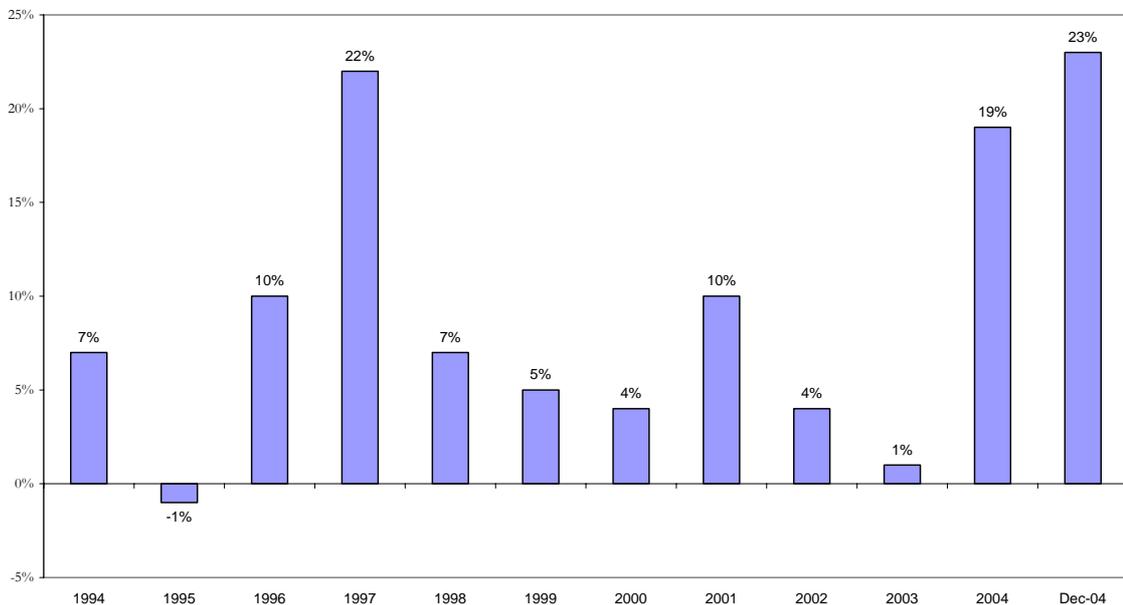
²⁶¹ KPMG, KPMG General Insurance Industry Survey 2004, Executive Summary, p1, cited in submission 41, Law Society of NSW, p25

²⁶² KPMG, KPMG General Insurance Industry Survey 2004, Executive Summary, p1, cited at http://www.kpmg.com.au/Portals/0/2004-GenInsuranceExec_Summ.pdf (accessed 31 March 2005)

The second Cumpston Sargeant report

- 11.15** The Committee notes that the Law Council of Australia commissioned Cumpston Sargeant Pty Ltd to compile a report on the profitability of the insurance industry for the Personal Injury and Compensation Forum held by the Law Council of Australia in Sydney on 3 June 2005. The report is entitled 'High insurer profits allow better benefits to the injured?' (hereafter referred to as the second Cumpston Sargeant report).
- 11.16** The second Cumpston Sargeant report cited the following graph of returns on capital for Australian direct insurers from 1994 to 2004

Figure 11.1 Past returns on capital for Australian direct insurers: 1994 – 2004



Note: Data for Dec 2004 is for the six months to December 2004.

Source: Cumpston Sargeant Pty Ltd, 'High insurer profits allow better benefits to the injured?' 1 June 2005, p2, tabled document, 6 June 2005.

- 11.17** Based on Figure 11.1, Cumpston Sargeant argued that the average after-tax profit for the insurance industry for the 11 years to June 2004 was approximately 6% of net premiums, and the average after-tax return on capital about 8%. However, the after-tax return for the six months to December 2004 was a high 23%.²⁶³

'Hiding' of profits?

- 11.18** During his evidence to the Committee on 20 June 2005, Mr McIntyre also argued that the true overall profitability of insurers in Australia may be even greater than that cited by the Law Society, due to the 'hiding' of profits as claims reserves.

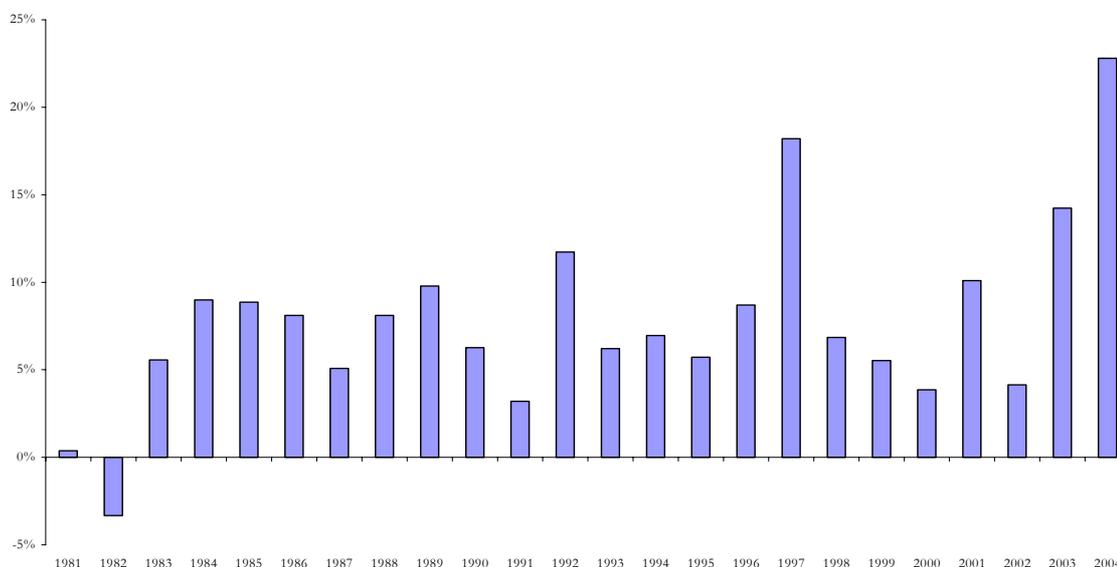
²⁶³ Cumpston Sargeant Pty Ltd, 'High insurer profits allow better benefits to the injured?' 1 June 2005, p2, tabled document, 6 June 2005.

- 11.19** For example, Mr McIntyre argued that Suncorp’s half yearly results to 31 December 2004 show a transfer of \$163 million over the previous 18 months to reserves in order to increase insurers’ prudential margins.²⁶⁴ Similarly, he argued that QBE’s half yearly results to 31 December 2004 showed an increase in the probability of its reserves meeting liabilities (the prudential margin) from 86% in 2000 to 94% in 2004. Mr McIntyre noted that APRA only requires a prudential margin of 75%.²⁶⁵
- 11.20** In response, the ICA acknowledged that insurers have built up their capital reserves in recent years to exceed APRA’s minimum capital requirements. However, the ICA defended this build-up on the basis that APRA wants healthy capital reserves and assets underpinning the insurance industry to ensure that a collapse similar to that of HIH is not repeated.²⁶⁶

The Finity Consulting Report

- 11.21** In response to the Second Cumpston Sargeant Report, the ICA commissioned Finity Consulting to provide a separate report entitled ‘Insurer Profitability and the Impact of Tort Reform’ (henceforth referred to as the Finity report).
- 11.22** The Finity report provided the following graph of overall insurance industry profitability from 1981 to 2004, again based on APRA data from the quarterly “Insight” general insurance statistics.

Figure 11.2 Return on Equity – Direct Insurers: 1981 – 2004



Source: Finity Consulting, ‘Insurer Profitability and the Impact of Tort Reform’, June 2005, p1

²⁶⁴ The prudential margin is a measure of the capital held in reserve by insurers as a buffer against claims.

²⁶⁵ Mr McIntyre, Evidence, 20 June 2005, p4. The Law Society of NSW also presented this evidence in its supplementary written submission. See submission 41a, Law Society of NSW, p8

²⁶⁶ ICA, Response to questions on notice, 6 July 2005, p4

- 11.23** In contrast to the second Cumpston Sargeant report, the Finity report observed that according to APRA data, insurance industry returns on capital averaged 10% over the 24 years to 2004, and 11% over the 10 years to 2004. (These results may be overstated as they do not include the 2001 result for HIH, which was the second largest insurance company in Australia at the time of its collapse).
- 11.24** Finity attributed the strong profitability result for the insurance industry in 2004, as cited in Figure 11.2, to a number of factors:
- the premium cycle hitting its peak for commercial classes – commercial property, public liability, professional indemnity and workers’ compensation
 - good economic conditions across all insurance classes
 - favourable weather conditions having a positive impact on motor accidents and compulsory third party (CTP) claims
 - few extreme events for the commercial property and home classes
 - a favourable claims environment for bodily injury claims following the series of tort reforms which commenced in New South Wales in 1999
 - strong equity returns.
- 11.25** However, Finity also observed that the overall profitability of the insurance industry tends to be cyclical and volatile, and that the results for 2004 will only be repeated (or exceeded) in the future if the factors outlined above continue to coincide.²⁶⁷

The profitability of different insurance lines

- 11.26** During his evidence on 6 June 2005, Mr Alan Mason, Executive Director of the ICA, noted that while there is no doubt that the insurance industry has returned to overall profitability in recent years, public liability insurance²⁶⁸ and CTP insurance together account for only 7.7% and 8.6% of total insurance revenue across Australia. Accordingly, Mr Mason submitted that the majority of insurers’ profits are derived not from public liability insurance or CTP insurance but from other lines of business and income, including house insurance, commercial insurance and investment income.²⁶⁹
- 11.27** Moreover, Mr Mason emphasised that insurers do not cross-subsidise insurance lines, and that if there was a hypothetical wind-back of the tort reforms, the reduced profitability of the public liability market could not be covered by other, more profitable insurance lines. This is because insurers operate in different segments of the market, and have to ensure that each product line is priced appropriately.²⁷⁰

²⁶⁷ Finity Consulting, ‘Insurer Profitability and the Impact of Tort Reform’, June 2005, pp2-3

²⁶⁸ This does not include CTP or workers’ compensation insurance. See Mr Mason, Executive Director, ICA, Evidence, 6 June 2005, p36

²⁶⁹ Mr Mason, Evidence, 6 June 2005, p34,36. See also ICA, Response to questions on notice, 7 July 2005, p1

²⁷⁰ Mr Mason, Evidence, 6 June 2005, p36. This comment was also made by Mr Rogers, General Manager, Commercial Insurance, Suncorp, Evidence, 6 June 2005, p50

11.28 Similarly, Vero Insurance rejected in its written submission the ‘strong and repeated claims’ that tort law reforms were introduced to assist insurers and increase their profits. Vero Insurance submitted that this analysis of insurance company profits assumes:

- that the above average aggregate profits over recent years are derived in whole or in part from business lines associated with personal injury claims
- that if personal injury lines achieve a break-even point, the profits of other insurance lines should be redirected to reinstate benefits affected by tort law reform, or
- that if cross subsidisation is not practicable then insurers should raise premiums and extend cover in a manner that has no socially disruptive effects.²⁷¹

11.29 In response, however, Mr McIntyre disputed Mr Mason’s claim that public liability insurance accounts for only 7.7% of insurers’ total business. He argued that public liability insurance is increasingly embedded in other products such as household and fire insurance, but that even treating public liability insurance as a stand alone product, public liability premiums as a percentage of net insurer premiums have increased from 4.4% in the mid-2000 to the 7.7% estimate cited in mid-2004.²⁷²

The profitability of CTP insurers

11.30 The Committee notes that parties to the inquiry also specifically addressed the profitability of CTP lines of insurance in New South Wales and Australia.

MAA Annual Report 2003-2004

11.31 The Motor Accidents Authority’s (MAA’s) *Annual Report 2003-2004* provides the following data on estimated insurer profits under the CTP insurance scheme for 2000 – 2003.

Table 11.3 Estimated CTP profits: 2000-2003

| Year ended 30 Sept | Premium written (\$ million) | Estimated profit (\$ million) |
|--------------------|---------------------------------|----------------------------------|
| 2000 | \$1,325 | \$315 |
| 2001 | \$1,321 | \$282 |
| 2002 | \$1,342 | \$277 |
| 2003 | \$1,388 | \$217 |

Source: MAA *Annual Report 2003-2004*, p104.

11.32 In his evidence to the Committee on 14 October 2005, Mr Bowen, General Manager of the MAA, acknowledged that in the first year of the new scheme, the profitability of CPT insurers was in excess of 20% of premiums written, well in excess of the 8-10% profit margin targeted by the MAA. Since then, profits have been declining as CTP insurers have priced the reforms into premiums, so that in the year ending 30 September 2003, total profits were estimated at \$217 million.²⁷³

²⁷¹ Submission 38, Vero Insurance, pp26-27

²⁷² Mr McIntyre, Evidence, 20 June 2005, p5. See also submission 41a, Law Society of NSW, p10

²⁷³ Mr Bowen, Evidence, 14 October 2005, pp5-6

- 11.33** Mr Bowen attributed the strong profitability of CTP insurers, especially in the early years of the scheme, to two factors:
- Uncertainty as to the effect of the reforms, and hence delays in passing on premium reductions
 - A significant reduction in claims, notably small claims, in recent years in New South Wales (this forms part of a national and international trend reflecting a decline in road accidents).²⁷⁴

- 11.34** In its written submission, the NSW Bar Association also cited the estimated profit figures for CTP insurers from the MAA's *Annual Report 2003-2004* cited above. The Bar Association submitted that the stated intention of the *Motor Accidents Compensation Act 1999* was to return CTP insurer profits to approximately 6-8% of premiums written.²⁷⁵ However, the Association submitted that insurers made profits as a percentage of premiums written of 23.77% in 2000, 21.34% in 2001, 20.64% in 2002 and 15.63% in 2003. These figures, and the calculations on which they are based, are cited in Table 11.4 below.

Table 11.4 Projected insurer profits as a percentage of premiums written

| Premium year (ending 30 Sept) | Premium written (\$ million) | Target profit at 8% of premium | Estimated profit (\$ million) | 'Excess'* profit (\$ million) | Percentage premium retained as profit |
|-------------------------------|------------------------------|--------------------------------|-------------------------------|-------------------------------|---------------------------------------|
| 2000 | \$1,325 | \$106 | \$315 | \$209 | 23.77% |
| 2001 | \$1,321 | \$105 | \$282 | \$177 | 21.34% |
| 2002 | \$1,342 | \$107 | \$277 | \$170 | 20.64% |
| 2003 | \$1,388 | \$111 | \$217 | \$106 | 15.63% |

* This does not necessarily represent the position of the Committee.

Source: Submission 29, NSW Bar Association, p22

- 11.35** Based on the figures cited in Table 11.4, the Bar Association submitted that in the first four years of its operation, the *Motor Accidents Compensation Act 1999* has delivered approximately \$650 million in 'excess' profits (ie above the 8% of premiums written) to CTP insurers.²⁷⁶
- 11.36** As indicated in Chapter 3, under s.210 of the *Motor Accidents Compensation Act 1999*, the Legislative Council's Standing Committee on Law and Justice has an ongoing role in monitoring the operation of the NSW Motor Accidents Compensation Scheme.
- 11.37** The Committee recognises that the Law and Justice Committee has consistently called for greater reporting by the MAA of the profit of insurers under the CTP scheme, including their profit margins. In its Sixth Report on the scheme of 20 May 2005, the Law and Justice Committee recommended:

²⁷⁴ Mr Bowen, Evidence, 14 October 2005, p5

²⁷⁵ Based on evidence from the General Manager of the MAA, Mr Bowen, to the Standing Committee on Law and Justice, 16 February 2004, cited in submission 29, NSW Bar Association, p21

²⁷⁶ Submission 29, NSW Bar Association, p22. See also Mr Slattery QC, Evidence 2 May 2005, p16. The Committee also notes the additional evidence presented on this topic by the Law Society of NSW in its supplementary written submission. Submission 41a, Law Society of NSW, p8

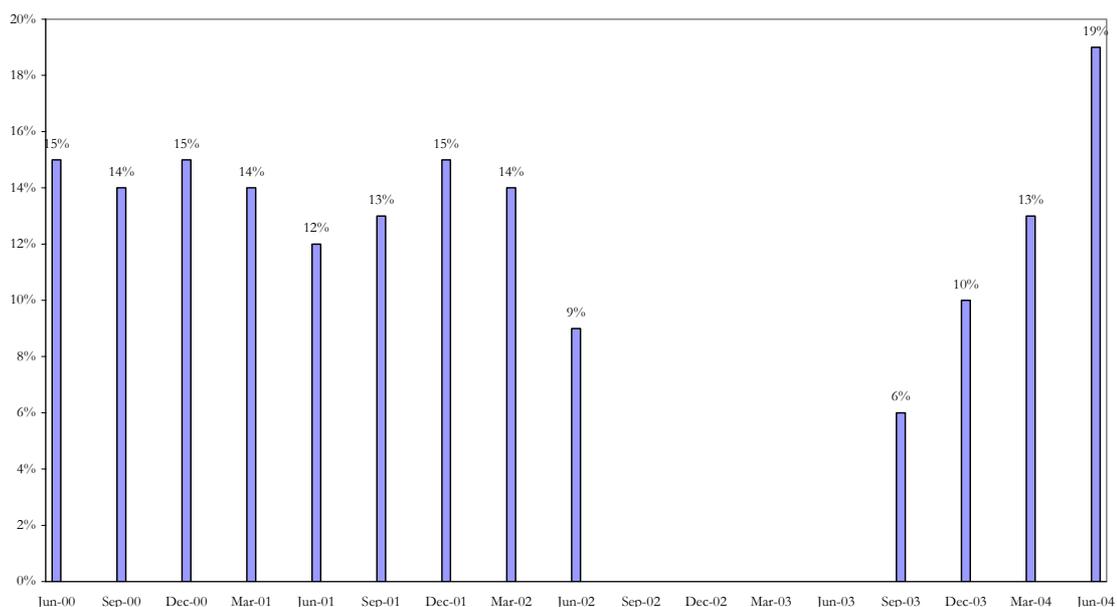
That in order for the MAA to satisfy the statutory obligation set out in section 28 of the Act, the MAA present a separate and specific report on insurer profits annually to the Committee. The report should contain:

- the MAA’s assessment of the profit margins and the actuarial basis for its calculation in relation to each of the licensed insurers, and
- the data provided to it by the insurers pursuant to section 28(1) that forms the basis of their assessment.²⁷⁷

The second Cumpston Sargeant report

11.38 The second Cumpston Sargeant report on the profitability of the insurance industry cited the following chart on CTP insurance returns on capital in New South Wales, Queensland and the Australian Capital Territory, the only jurisdictions with private CTP insurance. The chart covers the period from June 2000 to June 2004.

Figure 11.3 CTP returns on capital in NSW, Queensland and ACT: June 2000 – June 2004



Note: The estimated returns are derived from APRA quarterly “Insight” general insurance statistics, which were not published for the quarters ending September 2002 to June 2003. The “Insight” statistics are not intended to provide full details, and the estimated returns thus rest on a number of approximate assumptions.

Note: Compulsory third party and travel insurance data are grouped together in “Insight” from September 2003 on, and the CTP figures shown here were estimated by assuming that travel insurance formed unchanged percentages of net premiums and net claims from June 2002 on. As travel insurance is a much smaller class of insurance than CTP, the estimates for CTP should be reasonably reliable.

Source: Cumpston Sargeant Pty Ltd, ‘High insurer profits allow better benefits to the injured?’ 1 June 2005, p2, tabled document, 6 June 2005.

²⁷⁷ Legislative Council Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council: Sixth Report*, 20 May 2005, p30

- 11.39** As shown in Figure 11.3, the second Cumpston Sargeant report concluded that the return on capital for CTP insurers over the year to the June quarter 2004 was 19%. In gross terms, the report estimated that the difference between net CTP premiums and claims in New South Wales grew from around \$350 million over the year to June 2000 to \$750 million over the year to June 2004.²⁷⁸
- 11.40** The Committee raised this estimate of 19% return on capital with Ms Robyn Norman, General Manager of CTP Insurance with QBE Australia, during her testimony on 20 June 2005. In response, Ms Norman queried how such a figure could have been generated, given the vast number of claims still to be paid out from 2003-2004. Rather, Ms Norman indicated that QBE is anticipating an average profit of around 8% of gross premiums for the year.²⁷⁹

The Finity Consulting Report

- 11.41** In response to the findings of the second Cumpston Sargeant report on CTP insurer profitability, the Finity report argued that the estimate of a 19% return on capital over the year to the June quarter 2004 is approximate only, and that Cumpston Sargeant acknowledged a number of caveats in the data. In particular, APRA has not published class-by-class underwriting statistics since June 2002.
- 11.42** Moreover, the Finity report argued that the 19% result is not necessarily reflective of profits in current prices, but also includes changes in reserves for previous years, to the extent that the CTP system in New South Wales is performing better than insurers anticipated. Even for the first year of operation of the current CTP scheme, the 12% of remaining unresolved claims are anticipated to comprise more than 50% of the total claim costs.²⁸⁰
- 11.43** Accordingly, the Finity report concluded:

Given the uncertainties about claim costs we believe that it is unlikely that insurers would absorb a wind back of tort reform within current prices.²⁸¹

The profitability of public liability insurers

- 11.44** As with CTP insurance, parties to the inquiry also specifically addressed the profitability of public liability insurers in New South Wales and Australia.

²⁷⁸ Cumpston Sargeant Pty Ltd, 'High insurer profits allow better benefits to the injured?' 1 June 2005, p2, tabled document, 6 June 2005, p4. See also submission 41a, Law Society of NSW, p7

²⁷⁹ Ms Robyn Norman, General Manager, CTP Insurance, QBE Australia, Evidence, 20 June 2005, p34

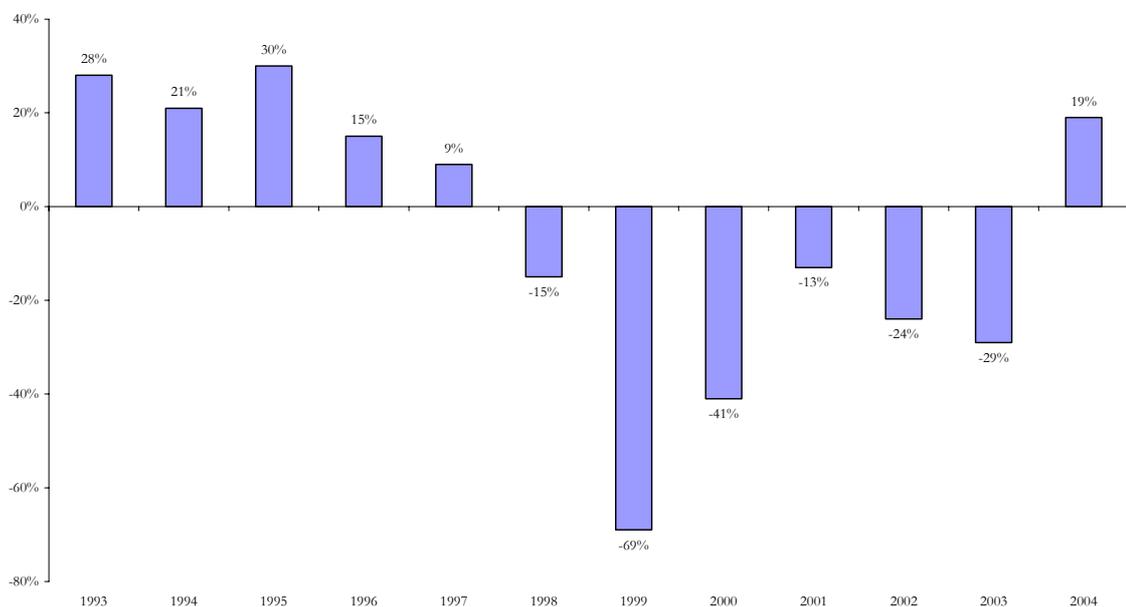
²⁸⁰ Finity Consulting, 'Insurer Profitability and the Impact of Tort Reform', June 2005, pp7-8

²⁸¹ Finity Consulting, 'Insurer Profitability and the Impact of Tort Reform', June 2005, p8

The first Cumpston Sargeant report

- 11.45** The Law Society of NSW also commissioned Cumpston Sargeant Truslove Pty Ltd to prepare a report on insurance profitability for inclusion in its submission to this inquiry, made in March 2005 (henceforth the first Cumpston Sargeant report).
- 11.46** The following graph from the first Cumpston Sargeant report estimates annual profits of public liability insurers as a percentage of premiums from 1993 – 2004.

Figure 11.4 Annual profits of public liability insurers as a percentage of premiums: 1993 – 2004



Source: Cumpston Sargeant Truslove Pty Ltd, 'Actuarial report on NSW injury compensation legislation', cited in Submission 41, Law Society of Australia, Annexure A, p12

- 11.47** Based on Figure 11.4, the first Cumpston Sargeant report concluded:

Although insurers apparently made a profit of about 19% of premiums in the year ending June 2004, they appear to have made losses in each of the six prior years. Some of the losses may reflect public liability insurers increasing their provisions for asbestos liabilities from a much earlier cover.²⁸²

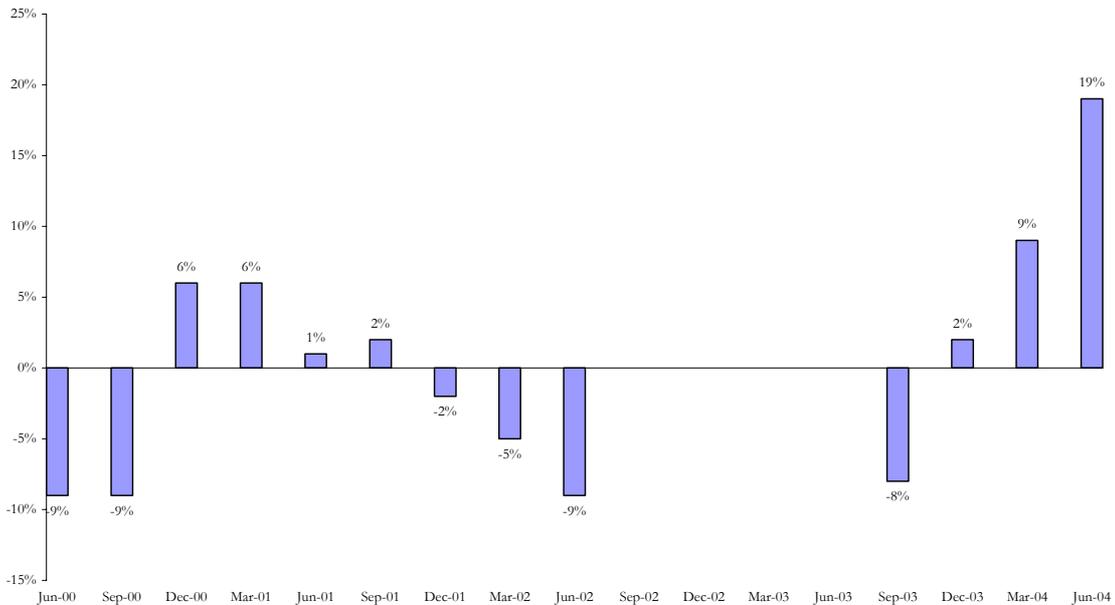
The second Cumpston Sargeant report

- 11.48** The second Cumpston Sargeant report provided further estimates of the quarterly public liability returns of public liability insurers based on APRA data from the quarterly "Insight" general insurance statistics. Figure 11.5 below from the second Cumpston Sargeant report

²⁸² Cumpston Sargeant Truslove Pty Ltd, 'Actuarial report on NSW injury compensation legislation', cited in Submission 41, Law Society of Australia, Annexure A, p12

shows the returns of public liability insurers as a percentage of premiums from June 2000 to June 2004.

Figure 11.5 Returns of public liability insurers as a percentage of premiums: June 2000 – June 2004



Note: The estimated returns are derived from APRA quarterly “Insight” general insurance statistics, which were not published for the quarters ending September 2002 to June 2003. Many uncertainties exist in these estimates. Source: Cumpston Sargeant Pty Ltd, ‘High insurer profits allow better benefits to the injured?’ 1 June 2005, p6, tabled document, 6 June 2005.

- 11.49** Based on APRA data from the quarterly “Insight” general insurance statistics, Figure 11.5 shows that public liability insurers achieved a 19% return on capital in the June quarter 2004.
- 11.50** The Committee notes that Dr Andrew Morrison, representing the Australian Lawyers Alliance, commented on the level of profitability of public liability insurers during the hearing on 6 June 2005, and in particular the 19% return on capital for the year ending June 2004 cited in the second Cumpston Sargeant report. Dr Morrison observed:

What is most interesting is that their level of profitability cut in long before the changes from the 2002 legislation could possibly have had effect. Bear in mind that from the time the Parliament changed the law to reduce compensation in 2002 until cases came to court there would be a significant lead-time. Yet profitability had returned before those changes could conceivably have had any effect. So they were making substantial sums of money before the 2002 legislation ...²⁸³

²⁸³ Dr Morrison, Australian Lawyers Alliance, Evidence, 6 June 2005, p10

The Finity Consulting Report

11.51 In response to the findings of the second Cumpston Sargeant report, the Finity report noted that APRA does not publish data on net assets or total profit results by class of business, and that the second Cumpston Sargeant report makes particular mention of the lack of adequate data to undertake the type of analysis in its report.²⁸⁴ Accordingly, the Finity report argued that the finding of a 19% return on capital for public liability insurers for the year ending June 2004 needs to be treated with caution:

- While the estimated 19% result is above insurers' targeted return of 12 – 15% after tax, it should be expected that the actual result in any period would fluctuate because of the uncertainties and volatilities associated with insurance.
- The estimated 19% result is an accounting year result that incorporates profits from the most recent year (2003-2004) together with revisions to claim cost estimates for earlier years – including years prior to the public liability tort reforms. To the extent that tort reform has had a beneficial impact on the claims environment, this may be leading to downward assessments of claims costs for older pre-tort reform accident periods which will inflate current year profits estimates.²⁸⁵

11.52 Based on this assessment, Finity concluded:

We do not believe that it is possible, purely from the results of the analysis undertaken, to conclude that current premiums are too high and that a wind back of some of the tort reforms could be absorbed within current prices.²⁸⁶

APRA Selected Statistics on the General Insurance Industry data

11.53 During his evidence on 6 June 2005, Mr Mason cited to the Committee the APRA public liability data presented in Figure 7.3 of this report as evidence that between 1998 and 2002, insurers were making very significant losses on public liability insurance, including losses in 1999 and 2000 of \$500 or \$600 million respectively. Mr Mason argued that during those years, the total cost of claims was well in excess of the level of premiums being collected by the industry.²⁸⁷

11.54 In response, Mr McIntyre cited the second Cumpston Sargeant report as evidence that public liability insurers made combined losses of only around \$150 million in total during the period between 1998 and 2002.²⁸⁸

²⁸⁴ Finity Consulting, 'Insurer Profitability and the Impact of Tort Reform', June 2005, p1

²⁸⁵ Finity Consulting, 'Insurer Profitability and the Impact of Tort Reform', June 2005, p5

²⁸⁶ Finity Consulting, 'Insurer Profitability and the Impact of Tort Reform', June 2005, p5

²⁸⁷ Mr Mason, Evidence, 6 June 2005, p31

²⁸⁸ Mr McIntyre, Evidence, 20 June 2005, p5

The adequacy of the available data

- 11.55** The Committee notes that the available data on insurance industry performance and profitability, as outlined above, is not ideal. The second Cumpston Sargeant report made the following comments on the availability of appropriate data from APRA with which to analyse insurer profitability:
- APRA used to publish premiums and claims data for each class of business in each state every six months, but has not done so since June 2002.
 - APRA used to publish annual analyses by accident year and state of claim numbers and costs for CTP and employer liability, together with aggregate data on claim numbers and costs for public liability for Australia.
 - APRA used to publish statistics for CTP and travel insurance, but marks the data for these as “na” in its quarterly *Insight* statistics.
 - APRA’s quarterly *Insight* statistics and its new *Quarterly general insurance performance* statistics would be more valuable if they showed revenues, expenditures, assets and liabilities for each class separately.²⁸⁹
- 11.56** Given the uncertainty about the performance and profitability of public liability insurers in particular, the NSW Bar Association argued in its written submission that public liability insurers should be subject to minimum standards of financial disclosure to the Parliament, including compulsory disclosure of basic market, premium, claims and liability data to the Parliament.
- 11.57** The Bar Association noted that such disclosure is required under Part 15.2 of the Australian Capital Territory *Civil Law (Wrongs) Act 2002*, and submitted that the ACT legislation is an appropriated model for adoption in New South Wales. The ACT act requires public liability insurers operating in the ACT to report to the relevant Minister each year on 31 July key insurance data for the previous financial year. For each class of insurance, that data includes:
- premiums paid
 - the number of claims
 - the number of claims paid and refused to be paid.
- 11.58** The relevant ACT Minister is then responsible for reporting aggregated data (to protect commercially sensitive information) to the Parliament by the following 31 October. The legislation provides penalties for non-compliance with its provisions.²⁹⁰
- 11.59** The provisions of Part 15.2 of the ACT *Civil Law (Wrongs) Act 2002* are reproduced in Appendix 6.

²⁸⁹ Cumpston Sargeant Pty Ltd, ‘High insurer profits allow better benefits to the injured?’ 1 June 2005, pp8-9, tabled document, 6 June 2005.

²⁹⁰ Submission 29, NSW Bar Association, pp18-20. See also Mr Slattery QC, Senior Vice President, NSW Bar Association, Evidence, 2 May 2005, p10

- 11.60** By contrast, in its supplementary written submission, the Law Society of NSW argued that Parliament should initiate a study to determine insurers' profitability and capacity to absorb changes to compensation without substantially changing insurance price or availability. Furthermore, the Law Society submitted that this monitoring should be ongoing.²⁹¹

The financial position of the NSW Workers Compensation Scheme

- 11.61** In its written submission, The Cabinet Office argued that the changes to the NSW Workers Compensations Scheme have successfully addressed the scheme's growing deficit.
- 11.62** In support, The Cabinet Office noted that the independent actuary of the NSW Workers Compensation Scheme, PricewaterhouseCoopers (PwC), estimated that the scheme deficit in December 2004 was \$1.65 billion, a 50% reduction on the \$3.2 billion deficit as of December 2002. Without the 2001 reforms, PwC suggested that the deficit would have been over \$6 billion by June 2007.²⁹² The Cabinet Office continued:

The implications of reducing the deficit while keeping premium prices at an affordable level should not be underestimated. It means that compensation continues to be available to workers, and that employers are not forced to reduce other costs (for example by hiring fewer staff) to pay for premiums which might need to increase to meet any deficit.²⁹³

- 11.63** The Committee notes that on 5 October 2005, the Minister for Industrial Relations, the Hon John Della Bosca MLC, released the latest assessment of the WorkCover scheme prepared by PricewaterhouseCoopers for the year to June 2005. The report showed a further fall in the scheme deficit from \$1.65 billion in December 2004 to \$1.40 billion in June 2005 (not taking into account new claims handling expenses going forward and a new risk margin to comply with international accounting standards), a drop of \$259 million. The operating surplus for the year was estimated at \$404 million.²⁹⁴ Commenting on the results, the Hon John Della Bosca MLC observed:

The underlying result shows the continuing trend of an improvement to the WorkCover scheme's financial position. ... The operating surplus is evidence that the fundamentals are strong.

... All these initiatives are moving the scheme to a point where premiums can be reduced and benefits enhanced.²⁹⁵

- 11.64** The Committee notes that the estimates outlined above, including the estimated \$1.40 billion deficit at June 2005, are an actuarial estimate of the financial position of the NSW Workers Compensations Scheme. As such, they attempt to estimate outstanding claims liabilities and

²⁹¹ Submission 41a, Law Society of NSW, p14

²⁹² Submission 53, The Cabinet Office, p44

²⁹³ Submission 53, The Cabinet Office, pp44-45. See also Ms Telfer, Evidence, 4 July 2005, p28

²⁹⁴ The Hon John Della Bosca MLC, 'WorkCover Scheme Valuation', Media Release, 5 October 2005, pp1,4

²⁹⁵ The Hon John Della Bosca MLC, 'WorkCover Scheme Valuation', p2

claim handling expenses, compared with the value of assets in the scheme, including the impact of external factors such as changes in inflation assumptions and the difference between actual and long-term expected returns on investments. It is relevant to note, however, that in recent years, the NSW Workers Compensation Scheme has been running significant surpluses on underwriting operations.²⁹⁶

- 11.65** The Committee understands that WorkCover NSW is aiming to achieve full funding of the NSW Workers Compensation Scheme by 2014.²⁹⁷

Committee comment

- 11.66** The impact of the Government's tort laws reforms since 1999 on the profitability of the insurance industry is a very contentious issue. The major representative legal organisations participating in the inquiry devoted considerable effort and resources to attempting to demonstrate that the insurance industry has been systematically profiteering in recent years as a result of the Government's post-1999 reforms to personal injury compensation law in New South Wales. Equally, the ICA and individual insurers made significant efforts to defend the profitability of the industry.
- 11.67** The Committee regards the evidence on the overall profitability of the insurance industry (as opposed to the profitability of public liability and CTP insurance) in recent years as largely irrelevant. The Committee accepts that the profitability of insurance lines such as home and commercial insurance is a separate issue to that of the profitability of personal injury lines of insurance, such as public liability insurance and CTP insurance. Insurers should not be asked or encouraged to cross subsidise different lines of insurance.
- 11.68** However, the available data specifically on the profitability of CTP insurers does suggest that they have been making strong profits in recent years following the introduction of the *Motor Accidents Compensation Act 1999*. In the first year of the new scheme, the profitability of CPT insurers was in excess of 20% of premiums written.
- 11.69** Similarly, the available data specifically on the profitability of public liability insurers, while very poor, suggests that public liability insurance lines have delivered strong returns to insurers in recent years. This follows a sustained period during which many companies were probably making a loss on public liability insurance.
- 11.70** Given the range of factors that have contributed to the current profitability of the insurance industry, the Committee does not believe that the industry has been systematically profiteering as a result of the Government's reforms to personal injury compensation law in New South Wales. Importantly, however, the Committee believes that there is scope for a reassessment of some of the motor accident and public liability law reforms made in New South Wales since 1999, based on the long-term profitability of the CTP and public liability insurance lines.
- 11.71** The Committee also notes the improving financial position of the NSW Workers Compensation Scheme. While acknowledging that significant changes to the scheme would

²⁹⁶ The Hon John Della Bosca MLC, 'WorkCover Scheme Valuation', p4

²⁹⁷ WorkCover NSW, *Annual Report 2003/2004*, pp4,6 and 21, cited in Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, p 1

need to be considered responsibly, the Committee is of the opinion that the scheme's improving finances would support the provision of greater assistance to injured workers in certain circumstances.

- 11.72** Finally, the Committee also supports calls for greater disclosure by public liability insurers of basic market, premium, claims and liability data to the Parliament. Accordingly, the Committee recommends that the NSW Government adopt legislation similar to the disclosure requirements of Part 15.2 of the ACT *Civil Law (Wrongs) Act 2002*.

Recommendation 3

That the Government legislate to require disclosure by insurers operating in the public liability market of basic market, premium, claims and liability data to the Parliament, through an amendment to the *Civil Liability Act 2002* to insert a part similar to Part 15.2 of the Australian Capital Territory's *Civil Law (Wrongs) Act 2002*.

PART 4

CLAIMS MANAGEMENT

Chapter 12 Claims management under the statutory schemes

This chapter examines the management of claims under the statutory NSW Motor Accident Scheme and the NSW Workers Compensation Scheme. During the inquiry, the large representative legal associations and unions expressed a number of concerns about the operation of both schemes, notably the resolution of disputed claims. By contrast, however, Government representatives to the inquiry argued that the government's 1999 and 2001 reforms to the schemes have been operating very successfully, with significant reductions in legal costs and faster, more efficient and cost effective processing of claims.

The operation of the NSW Motor Accidents Scheme

The ANF system and early treatment and rehabilitation

- 12.1** As indicated previously in Chapter 3, the Government introduced a new Accident Notification Form (ANF) as part of its 1999 reforms to motor accidents law in New South Wales, designed to provide for early notification and payment of compensation for those injured in a motor vehicle accident.
- 12.2** In its written submission on behalf of the NSW Government, The Cabinet Office argued that the ANF system has been very successful in encouraging early notification and payment of compensation:
- In the first 45 months of the new scheme, 43% of claimants used the new ANF to notify insurers of their claim for compensation. By the end of the 45-month period, 51% of ANF claims had converted to full claims.
 - In the first 45 months of the new scheme, the average time to lodge an ANF was 25 days. The notification period was reduced by 24% across all claims and ANFs. The average time to finalise a claim dropped by 22%, and the number of matters finalised within the first 45 months increased from 47% to 58%.
- 12.3** Based on this evidence, The Cabinet Office argued that the introduction of the ANF system has assisted injured people to have their claims lodged and settled more quickly. This in turn promotes faster recovery.²⁹⁸
- 12.4** Mr Bowen reiterated this in his evidence of 4 July 2005. Mr Bowen cited a study into whiplash undertaken for the MAA that compared the health outcomes of motor accident victims treated under the pre-1999 and post-1999 schemes. The study found that participants in the current MAA scheme had a 40% improvement in health outcomes, which was attributed to the focus under the current scheme on early treatment and rehabilitation.²⁹⁹

²⁹⁸ Submission 53, The Cabinet Office, p33

²⁹⁹ Mr Bowen, Evidence, 4 July 2005, pp19, 20

The CARS dispute resolution process

- 12.5** As indicated in Chapter 3, disputed claims under the *Motor Accidents Compensation Act 1999* are resolved through the Claims Assessment and Resolution Service (CARS), with support from the Medical Assessment Service (MAS), which is intended to provide an independent medical assessment procedure for resolving medical disputes. Assessments by CARS assessors are binding immediately on the insurer, and on the injured person if that person accepts the assessment within 21 days. Claims cannot go before the courts unless they have been through CARS, except where CARS Assessors issue an exemption on the basis that there are complex legal issues or difficult matters of fact to decide.³⁰⁰
- 12.6** In its written submission, the NSW Bar Association argued that users of CARS are becoming increasingly dissatisfied with its operation. What was intended to be a quick and easy process has become increasingly bureaucratic:
- personnel at the MAA now regularly reject CARS applications for minor technical deficiencies
 - CARS assessors regularly require the provision of chronologies, schedules of damages, statements from all the witnesses and written submissions, such that there is now more legal work required to prepare a CARS application than to run a District Court case
 - Insurers cite inconsistency in decision making by CARS assessors, delays and absence of substantive appeal rights.
- 12.7** The Bar Association also submitted that the minimum processing time for CARS is four months on average, and the minimum time to have a matter determined through the MAS is six months. The Bar Association compared these processing times unfavourably with litigation through the District Court.
- 12.8** Accordingly, the Bar Association submitted that the CARS system is a prime illustration of how an attempt to produce a low cost and easy-to-use alternative dispute resolution system has become tied down in bureaucratic processes, and recommended that the use of CARS should be limited to only the most simple of cases, with larger cases more quickly and efficiently disposed of in the District Court.³⁰¹
- 12.9** In evidence, Mr Goudkamp, President of the Australian Lawyers Alliance, also submitted that the annual cost of running the CARS/MAS system now exceeds \$6 million per annum, and that the process is extremely cumbersome, bureaucratic and slow:

Cases that normally should be finished in 1½ to two years are now taking four to five years – perhaps even longer – from the date of the accident. As a CARS assessor I am hearing a lot of these cases. I am yet to hear a case now closer than 2002. In most of the cases I am hearing, and other CARS assessors are hearing, the accidents occurred in 1999, 2000 and 2001, and we are now halfway through 2005. These are not complicated cases. The reason they are being so delayed is that cases are simply incapable of being resolved until the whole MAS process, including the initial

³⁰⁰ Submission 54, The Cabinet Office, p35

³⁰¹ Submission 29, NSW Bar Association, p27

assessment, applications for reviews and reassessment, has been finalised. It is an extremely slow process.³⁰²

12.10 By contrast, in its written submission on behalf of the NSW Government, The Cabinet Office argued that the establishment of CARS has led to an improvement in the average time of notification, determination of liability and finalisation of full claims. The Cabinet Office indicated that the main improvement has been a 25% reduction in the time taken for insurers to decide liability.³⁰³

12.11 The Committee also notes the evidence on finalisation rates from the Motor Accidents Assessment Service (MAAS) *Bulletin* of August 2005. The Bulletin indicates 100% of all applications received by the MAAS (both CARS and MAS) in 2001-2002 have been finalised. For 2002-2003, 99.75% of MAS applications have been finalised, and 95% of CARS claims have been finalised. For 2003-2004, the figures are 98% and 84% respectively.³⁰⁴

Legal costs and returns to claimants

12.12 In its written submission, The Cabinet Office argued that the *Motor Accident Compensation Act 1999* and associated regulations has delivered a significant reduction in the cost of administering the motor accidents compensation scheme, with as much as possible of the premium dollar now being returned to injured motorists. In particular, The Cabinet Office highlighted that:

- legal costs have been reduced by about two-thirds from \$85.9 million in a comparable period before the reforms to \$27.4 million since the reforms
- legal costs on an average claim have decreased from \$3,250 to \$960
- investigation costs have more than halved, dropping from \$60.1 million to \$27.1 million over two comparable periods
- the return to claimants under the *Motor Accidents Compensation Act 1999* scheme has averaged 61.3% of total premiums, compared to 58% under the previous scheme
- actual payments to claimants under the *Motor Accidents Compensation Act 1999* scheme have increased from 80% of premiums to 86% due to the reduction in the level of legal and investigation expenses.³⁰⁵

12.13 Commenting on the overall operation of the NSW Motor Accidents Scheme in its first five years, Mr Bowen observed:

These trends indicate that injured people now lodge their claims more quickly. They access their claims for treatment of their injuries more quickly. They settle their claims

³⁰² Mr Goudkamp, President, Australian Lawyers Alliance, Evidence, 6 June 2005, p6

³⁰³ Submission 53, The Cabinet Office, p33

³⁰⁴ *MAAS Bulletin*, Volume 5, No 3, August 2005, p3

³⁰⁵ Submission 53, The Cabinet Office, p32. See also Mr Bowen, Evidence, 4 July 2005, p18

more quickly. It also suggests that the legislation may succeed in changing the adversarial nature of the motor accidents compensation system.³⁰⁶

The operation of the NSW Workers Compensation Scheme

The Workers Compensation Commission dispute resolution process

- 12.14** As indicated in Chapter 4, the Workers Compensation Commission is responsible for the resolution of claims and disputes under the workers' compensation system. The Workers Compensation Commission consists of the President, two Deputy Presidents, a Registrar and approximately 80 Arbitrators, supported by Approved Medical Specialists and other staff.
- 12.15** During the inquiry, particular concerns were expressed about the performance of the Arbitrators with the Workers Compensation Commission.
- 12.16** In its written submission, the Australian Manufacturing Workers' Union (AMWU) argued that most Arbitrators with the Commission do not have sufficient legal and medical knowledge to properly determine disputed claims, and that different Arbitrators determine claims in different ways – leading to inconsistencies of approach. As a result, the AMWU speculated that the rate of appeal of decisions may be as high as 20%.
- 12.17** To address these concerns, the AMWU recommended:
- That the number of Arbitrators be significantly reduced and those remaining be required to undertake an increased workload to ensure consistent practices.
 - That all Arbitrators be required to have not only legal qualifications, but also to have extensive experience and knowledge of workers' compensation legislation and the various medical matters that may arise.
 - The removal of the current prohibition on Arbitrators having workers' compensation legal practices, thereby allowing Arbitrators to develop their knowledge of workers' compensation legislation.
 - The adoption of consistent procedures in the determination of claims.
 - Rewording s.354 of the *Workplace Injury Management and Workers Compensation Act 1998* (Procedures before the Commission) to ensure that arbitration hearings are open, thorough and informed. The AMWU submitted that while this section aims for hearings to be conducted with as little formality and technicality as possible, experience has shown it often results in decisions being made without sufficient regard to the facts and the law involved in particular claims.
 - That Arbitrators be required to provide full and detailed reasons for their decisions.³⁰⁷

³⁰⁶ Mr Bowen, Evidence, 4 July 2005, p18

³⁰⁷ Submission 37, AMWU, pp6-7. See also Mr Bastian, State Secretary, AMWU, Evidence, 4 July 2005, p3,4

- 12.18** The AMWU also argued that the appeals processes should be revised so that legal error is appealable with no restrictions. Currently, if Arbitrators make a legal error in determining a claim, there are no grounds for appeal unless the error relates to a claim of more than \$5,000 (amongst other requirements).³⁰⁸
- 12.19** Similarly, in its written submission, Unions NSW indicated its belief that employees are not receiving a fair hearing before the Workers Compensation Commission, and that Arbitrators have little or no experience of the workers' compensation system.³⁰⁹ Accordingly, Unions NSW recommended that jurisdiction over statutory benefits be transferred from the Workers Compensation Commission to the Industrial Relations Commission of NSW.³¹⁰ Mr Mark Lennon, Assistant Secretary of Unions NSW, reiterated this position during the hearing on 20 June 2005.³¹¹
- 12.20** The Australian Lawyers Alliance also argued in its written submission that Arbitrators with the Workers Compensation Commission lack experience and adopt inconsistent approaches both procedurally and substantively. As a result, the Alliance noted that the backlog of matters that have been appealed from Arbitrators now exceeds 12 months.³¹²
- 12.21** By contrast, in its written submission on behalf of the NSW Government, The Cabinet Office argued that the Workers Compensation Commission 'provides a transparent, flexible and independent forum for the appropriate, fair, just, timely and cost effective resolution of workers' compensation disputes.'³¹³

Outcomes of the NSW Workers Compensation Scheme

Disputation rates

- 12.22** In its written submission on behalf of the NSW Government, The Cabinet Office noted that prior to 2001, New South Wales had the highest rate of disputed workers' compensation claims in Australia. In 2000, approximately 32,000 or 45% of major claims³¹⁴ were referred for conciliation. However, under the new scheme, disputes have declined by nearly 60% from 8,000 per quarter to around 3,300.³¹⁵

Legal fees

- 12.23** The Cabinet Office also argued that prior to the Government's 2001 reforms, a large proportion of payouts from the NSW Workers Compensation Scheme were being consumed

³⁰⁸ Submission 37, AMWU, p7.

³⁰⁹ Submission 51, Unions NSW, p6. See also Mr Lennon, Assistant Secretary, Unions NSW, 20 June 2005, p42

³¹⁰ Submission 51, Unions NSW, p9

³¹¹ Mr Lennon, Assistant Secretary, Unions NSW, Evidence 20 June 2005, p48

³¹² Submission 23, Australian Lawyers Alliance, p12

³¹³ Submission 53, The Cabinet Office, p40

³¹⁴ Defined as claims where the worker is away from work for five days or more.

³¹⁵ Submission 53, The Cabinet Office, p45

in legal fees, reducing the capital available for compensation payments to workers. Legal payments had risen from \$200 million in 1996-1997 to \$350 million in 2000-2001. In some cases, legal fees were considerably higher than the final award to the injured worker.³¹⁶

12.24 However, The Cabinet Office claimed that the 2001 reforms have saved \$1,793 million since their introduction, overwhelmingly (over 80%) as a result of reduced legal and related costs.³¹⁷

12.25 In support, Ms Telfer, General Manager of Strategy, Policy Division, WorkCover, indicated that in 2001-2002, 16% of premiums were paid in legal fees, with 17% paid in weekly benefits. By contrast, provisional data for 2005-2006 indicates that legal fees are down to 9½% of premiums, with weekly benefits rising to 36% of premiums.³¹⁸

Timeliness

12.26 The Cabinet Office further argued in its written submission that since the 2001 reforms, there has been a sustained improvement in the time taken to determine workers' compensation claims, together with a significant improvement in return to work rates:

- Over 62% of injured workers now receive their weekly benefits within seven days of their injury being notified to the insurer, compared to 53% under the previous scheme. More recent data suggest the figure may be as high as 80%.³¹⁹
- The percentage of claimants receiving benefits for 26 weeks or more fell to 6% by the beginning of 2004, indicating an improvement in the return to work rates.³²⁰

12.27 In 2003-2004, the Claims Assistance Service handled 5,611 cases, an increase of almost 12% on 2002-2003, with a resolution rate of almost 81%.³²¹

Committee comment

12.28 During the inquiry, the large representative legal associations and unions argued that the dispute resolutions mechanisms under the NSW Motor Accident Scheme and the NSW Workers Compensation Scheme have failed to deliver timely, cost effective and equitable resolutions of claims for compensation by injured motorists and workers. Consequently, they advocated that the current dispute resolutions mechanisms be either significantly modified, or repealed.

³¹⁶ Submission 53, The Cabinet Office, p37

³¹⁷ This information was based on the advice of the WorkCover Scheme's independent actuary, PricewaterhouseCoopers, provided in its report on the valuation of the scheme as at 31 December 2003. The \$1,793 million figure quoted is the estimate of the change in the ultimate cost of the scheme as a result of the 2001 reforms for accident years up to 31 December 2003. See The Cabinet Office, Response to questions on notice from 6 July 2005, p6

³¹⁸ Ms Telfer, General Manager of Strategy, Policy Division, WorkCover, Evidence, 4 July 2005, p16

³¹⁹ Submission 53, The Cabinet Office, p45. See also The Cabinet Office, Response to questions on notice from 4 July 2005, p3

³²⁰ The Cabinet Office, Response to questions on notice from 4 July 2005, p4

³²¹ Submission 53, The Cabinet Office, p45

- 12.29** By contrast, Government representatives presented a strong case that the statutory motor accidents and workers' compensation schemes have been operating very successfully since the Government's reforms in 1999 and 2001, with significant reductions in legal costs and faster, more efficient and cost effective processing of claims. The Committee notes the evidence highlighted earlier in Chapter 2 that speedy and efficient resolution of compensation claims minimises stress and anxiety for the injured, and ultimately leads to the best health outcomes.
- 12.30** In response to this evidence, the Committee believes that both the CARS and Workers Compensation Commission have in themselves been operating relatively effectively. However, the Committee is very concerned that both schemes rely on the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines (based on the AMA Guides) for the resolution of claims. The Committee examines this issue in further detail in the following chapter.

Chapter 13 The use of the modified AMA Guidelines

As indicated in Chapter 2, a central element of the operation of both the NSW Workers Compensation Scheme and NSW Motor Accidents Scheme is the assessment of whole person impairment (WPI) by Approved Medical Specialists (AMSs) and by doctors appointed to the Medical Assessment Service (MAS). Both AMS and doctors with the MAS use variations of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides), specifically the modified Motor Accidents Authority (MAA) Medical Assessment Guidelines and WorkCover Guidelines, in their assessment of WPI. In turn, WPI assessment is used to determine whether an injured individual is entitled to non-economic loss damages, according to the 10% WPI threshold used under both statutory schemes. Injured workers are also entitled to separate lump sum payments under s.66 of the *Workers Compensation Act 1987* according to their level of WPI.

The use of the MAA Medical Assessment Guidelines and WorkCover Guidelines was the focus of considerable controversy during the inquiry. On the one hand, supporters of the guidelines argued that they provide for consistency and objectivity in the assessment of eligibility for non-economic loss damages, without exposing accident victims to the court system. On the other hand, opponents of the guidelines argued that they lack consistency and objectivity, and fail to take into account the disability (as opposed to impairment) suffered by an injured person.

The use of the guidelines

13.1 The MAA Medical Assessment Guidelines and WorkCover Guidelines (based on the AMA Guides) are prescribed for use under the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* as follows:

- Part 3.1 (notably s.44(1)(c)) and s.133 of the *Motor Accidents Compensation Act 1999* prescribe the use of the MAA Medical Assessment Guidelines, which modify the AMA Guides (4th edition), for use under the NSW Motor Accidents Scheme.³²²
- Section 65 of the *Workers Compensation Act 1987* deals with the determination of the degree of permanent impairment under the NSW Workers Compensation Scheme. Section 65 in turn refers to the WorkCover Guidelines in Part 7 (Medical assessment) of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998*. Section 322 of the 1998 Act adopts the WorkCover Guidelines for assessment of the degree of permanent impairment of an injured worker. The WorkCover Guidelines modify the AMA Guides (5th edition).³²³

13.2 Significantly, assessment of WPI is based solely on the impact that an injury has on the physical functions of the injured person's body. It is not based on other lifestyle considerations.

³²² See MAA, Guidelines for the Assessment of the Degree of Permanent Impairment, 1 September 2005, cited at <http://www.maa.nsw.gov.au/default.aspx?MenuID=170> (accessed 25 August 2005)

³²³ See WorkCover, *WorkCover Guides for the Evaluation of Permanent Impairment*, 1st Edition, June 2002, cited at http://www.workcover.nsw.gov.au/NR/rdonlyres/D8E4592F-D76C-495F-9A30-61F2996F6288/0/workcover_guides_for_evaluation_permanent_impairment_970.pdf (accessed 11 May 2005)

- 13.3** As indicated previously, an injured motorist must exceed 10% WPI (ie. 11% or more) as assessed using the MAA Medical Assessment Guidelines in order to access non-economic loss damages of up to \$359,000. However, should an injured motorist exceed the 10% WPI threshold, Claims Assessors with the Claims Assessment and Resolution Service (CARS) then have discretion to determine non-economic loss damages to be awarded (subject to the cap on damages), taking into account factors such as changes in lifestyle as a result of the injury, pain, depression and future deterioration of the injury.
- 13.4** Similarly, an injured worker must exceed 10% WPI (ie. 11% or more) as assessed using the WorkCover Guidelines in order to access non-economic loss damages under s.67 of the *Workers Compensation Act 1987* of up to \$50,000. Once again, however, should an injured worker exceed the 10% WPI threshold, Arbitrators with the Workers Compensation Commission have discretion to determine non-economic loss damages to be awarded (subject to the cap on damages), taking into account factors such as changes in lifestyle as a result of the injury, pain, depression and future deterioration of the injury.
- 13.5** As indicated in Chapter 4, an injured worker is also entitled to up to \$200,000 in compensation for permanent impairment under s.66 of the *Workers Compensation Act 1987*. This is determined according to set formulas under s.66, based on the assessed WPI figure. For example, an injured worker who is assessed as having 1% WPI is entitled to \$1,250 in compensation. An injured worker who is assessed as having 10% WPI is entitled to \$12,500 in compensation.

Disability v impairment

- 13.6** The principal objection to the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines (most parties to the inquiry simply referred to the AMA Guides) is that the assessment of WPI is based purely on the physical injury suffered by the individual, and takes no account of the disability suffered by the person (ie the changes in lifestyle as a result of the injury, pain, depression and future deterioration of the injury).
- 13.7** In its written submission, the Australian Lawyers Alliance highlighted the distinction to be drawn between disability and impairment, and the impact of the AMA Guides on access to non-economic damages under the New South Wales statutory workers' compensation and motor accident regimes:
- Historically, at common law, judges would make an assessment of 'disability' arising from an injury informed by the basic principle of compensation in the common law: that the negligent party should return the injured party to the position they would have occupied (so far as money can do so), had the negligence never occurred. This assessment would be based on evidence from doctors on the degree of injury, and evidence about the impact of the injury on the work and general life of the claimant.
 - However, as indicated, the New South Wales statutory workers' compensation and motor accident regimes adopt a measure of WPI as their mechanism for assessing the degree of injury. Impairment assessments attempt to measure the degree to which the functions of the injured person's body have been reduced.
 - The principal distinction between these two approaches is that whereas disability assessment attempts to assess the impact of an injury in the context of the injured

person's work and general life, impairment assessment does not. For example, a truck driver who lost an eye and could no longer work would receive a different disability assessment from an office worker who lost an eye but could continue to work. However, an impairment assessment would make no distinction between the two.³²⁴

- 13.8** Based on this summary of disability and impairment, the Australian Lawyers Alliance argued that the key problem with the use of the AMA Guides is that they provide a measure of impairment only, not disability. Indeed, the introduction to the AMA guide states:

Impairment percentages derived from the Guides should not be used as a direct estimate of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for the basic activities of living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary first step in determining disability.³²⁵

- 13.9** In a supplementary written submission, the Australian Lawyers Alliance also cited the case of Mr Tim and Mrs Susan Harris, reproduced below, as an example of an injury that is simply not assessable under the MAA Medical Assessment Guidelines. As a result, Mr and Mrs Harris were not eligible for any non-economic loss damages whatsoever.

The case of Mr and Mrs Harris

Susan and Tim Harris were driving home carefully when they were hit head-on at high speed. Susan, who was seven months pregnant and sitting in the back seat for added safety, suffered massive blood loss and internal injuries. She also lost her unborn son, Lars.

Despite being a legal 'person' requiring a birth certificate and burial, Lars's existence is not recognised by NSW's motor accident compensation laws. Because he wasn't born at the time, these laws don't acknowledge that he was killed by the accident.

So if Lars's life wasn't recognised in its own right, surely his death counts as a very serious injury to his mother? Not under NSW law.

Motor accident compensation is governed by a long, technical book called the American Medical Association Guide to the Evaluation of Permanent Impairment. According to these guides, Lars' death doesn't add up to the 10% Susan needs to be compensated for her pain and suffering.³²⁶

Source: Submission 23b, Australian Lawyers Alliance, p1

³²⁴ The Committee notes that this point was also made by Mr Slattery QC, Senior Vice President, NSW Bar Association, Evidence, 2 May 2005, p14

³²⁵ See also Mr Goudkamp, President, Australian Lawyers Alliance, Evidence, 6 June 2005, p8

³²⁶ The Committee understands that under an amendment introduced in February 2000, the loss of a foetus after 17 weeks was no longer an assessable injury automatically under the 10% threshold. See Mr Goudkamp, Evidence, 6 June 2005, p18

13.10 The Committee notes that Mr and Mrs Harris gave evidence to the Committee during its hearing on 6 June 2005, and conveyed to the Committee the anguish and suffering that they have gone through as parents losing an unborn child.³²⁷

13.11 During his evidence to the Committee on 2 May 2005, Mr Slattery QC, Senior Vice President of the NSW Bar Association, also addressed the use of the AMA Guides:

The real difference between the medical assessment under the *Workers Compensation Act* and the *Motor Accidents Compensation Act* - whole person impairment - and the *Civil Liability Act* assessment is that the whole person impairment is simply a measure of the mechanical impairment of the joint, or whatever it may be, in relation to the whole person. What the *Civil Liability Act* at least retains is that it measures the individual as an individual in relation to their particular disabilities, whatever they may be, as a person against a range of other individuals up to 'a most extreme case'. It is at least an attempt to reflect that core ingredient of the old common law which simply says that in an action for personal injuries people should be judged by their individual circumstances, not according to formulae or tables, and that if a judge or jury believes that person is suffering more in their life as a result of a particular impairment than someone else, they may be entitled to more compensation. Although the impairment may be objectively the same, their way of life is different and it affects them differently.³²⁸

13.12 Similarly, Mr Tom Goudkamp, President of the Australian Lawyers Alliance, also argued that judicial assessment is a better system for assessing pain and suffering, because it takes into account how an individual is affected by an injury, including pain, distress and destruction of lifestyle, by reference to a percentage of 'a most extreme case' (the maximum being applied for extreme injuries such as paraplegia, quadriplegia and gross brain damage).³²⁹

13.13 Unions expressed similar concerns during the inquiry about the operation of the AMA Guides.

13.14 In its written submission, the Australian Manufacturing Workers' Union (AMWU) noted that the AMA Guides have been widely criticised for focussing on impairment rather than disability and the ways that impairment affects the ability of individual workers to undertake various activities. Accordingly, the AMWU opposed the use of the AMA Guides and the WPI system, advocating a model based upon assessment of an injured worker's ability to continue to perform their duties.³³⁰

13.15 Similarly, in its written submission, the Construction Forestry Mining and Energy Union (CFMEU) criticised the AMA Guides as a 'blinkered yardstick' by which to determine compensation rights.³³¹ This was reiterated by Mr Andrew Ferguson, Secretary of the CFMEU, during his evidence on 2 May 2005:

³²⁷ Mr and Mrs Harris, Evidence 6 June 2005, pp17-18

³²⁸ Mr Slattery QC, Senior Vice President, NSW Bar Association, Evidence, 2 May 2005, p14

³²⁹ Mr Goudkamp, President, Australian Lawyers Alliance, Evidence, 6 June 2005, pp4-6

³³⁰ Submission 37, AMWU, ppi, 2

³³¹ Submission 39, CFMEU, p1

In terms of the WorkCover guidelines, far from compensating workers fairly, the WorkCover guidelines by which an injured worker's disability is measured result often in lower compensation than they would have received in the past.³³²

- 13.16** Mr Mark Lennon, Assistant Secretary of Unions NSW, presented similar evidence during the hearing on 20 June 2005.³³³

The calculation of WPI

- 13.17** The Committee notes that in its supplementary written submission, the Bar Association provided a detailed analysis of the provisions of the MAA Medical Assessment Guidelines and the WorkCover Guidelines. While the Committee is not in a position to cite that analysis in full, the Bar Association provided the following summary of the provisions of the guidelines:

- To the extent that the MAA Medical Assessment Guidelines and WorkCover Guidelines amend the AMA Guides (4th and 5th edition) on which they are based, the amendments disadvantage injured people compared even with the application of the AMA Guides.
- The Guides frequently exclude X-ray, scan and electro-diagnostic testing from the assessment process, when these tools would otherwise be used by medical practitioners as a sound basis for making the same judgements in medical practice. This exclusion has the effect of eliminating findings of impairment which would be principally made on the basis of such testing.
- The Guides frequently exclude from the assessment process any allowance for probable future deterioration of an injury, such as through arthritis. As a result, injured people are assessed on the basis of an unrealistically optimistic picture of the person's probably impairment.
- The Guides frequently prevent medical assessors from reaching a figure for WPI based on addition of all the individual impairment factors which would be added together in ordinary clinical practice by the same medical assessor not operating under the Guides.
- The Guides exclude pain and inorganic features associated with physical injury which would, if accepted as genuine, usually be taken into account by medical practitioners in ordinary professional practice when making the same assessments.³³⁴

Consistency and objectivity

- 13.18** Given the concerns expressed about the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines, the basic argument of the Government in favour of their use is that they provide for consistency and objectivity in the assessment of injury and eligibility for non-

³³² Mr Ferguson, Secretary, CFMEU, Evidence, 2 May 2005, p21

³³³ Mr Lennon, Assistant Secretary, Unions NSW, Evidence, 20 June 2005, pp41-42

³³⁴ Submission 29b, The NSW Bar Association

economic loss damages (according to the 10% WPI threshold). In essence, the use of the Guidelines takes the process away from the legal sphere and places it in the medical sphere.

- 13.19** In its written submission on behalf of the NSW Government, The Cabinet Office argued that the Motor Accidents Compensation Scheme enables injured motorists to get quick and independent decisions on treatment, rehabilitation and care outside of the court system through the use of the Medical Assessment Service (MAS). MAS doctors use the MAA Medical Assessment Guidelines in their assessment of injury. The Cabinet Office submitted:

The MAS provides an independent medical assessment procedure to resolve interim medical disputes and has ended the costly and wasteful use of ‘duelling doctors’ in the claims process.³³⁵

- 13.20** Similarly, The Cabinet Office argued that the Government’s 2001 amendments to the NSW Workers Compensation Scheme have incorporated objective assessment of accident victims through the use of the WorkCover Guidelines, as assessed by Approved Medical Specialists (AMS). The Cabinet Office submitted:

Since 1 January 2002, assessments of permanent impairment are conducted by medical specialists who are trained in the use of the WorkCover Guidelines for the Evaluation of Whole Person Impairment.

The Guides were developed by medical specialists in NSW who reviewed and adapted the American Medical Association Guide to introduce a consistent, reliable and clinically defensible means of assessing permanent impairment.³³⁶

- 13.21** Insurers also supported the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines. In evidence on 6 June 2005, Mr Alan Mason, Executive Director of the Insurance Council of Australia (ICA), argued that assessment of the degree of injury impairment by the medical profession using the guides is superior to assessment by the legal profession.³³⁷

- 13.22** Similarly, in its written submission, QBE argued that MAS provides an objective assessment of medical issues, based on an objective impairment measure. In particular, QBE highlighted that the medical experts are appointed by the MAA, as opposed to being engaged by the parties, thereby increasing the independence of the system.³³⁸ This was reiterated by Ms Robyn Norman, General Manager of CTP Insurance with QBE Australia, during evidence:

My observation of the CTP scheme in New South Wales, and I have been involved with it for the last 32 years, is that it is the first time that I can actually recall where the right person, in my mind, is making the decision. That has been with the appointment of the MAS doctors, who are medical professionals making decisions about medical issues. I think that is correct.³³⁹

³³⁵ Submission 53, The Cabinet Office, p34

³³⁶ Submission 53, The Cabinet Office, p40

³³⁷ Mr Mason, Executive Director, ICA, Evidence, 6 June 2005, p46

³³⁸ Submission 45, QBE, Part 1, pp4-5

³³⁹ Ms Norman, General Manager, CTP Insurance, QBE Australia, Evidence, 20 June 2005, p39

- 13.23** However, other parties to the inquiry contested the Government's contention that the MAA Medical Assessment Guidelines and WorkCover Guidelines have delivered consistency and objectivity in decision making. The Committee examines claims of inconsistency under both the MAS and AMS systems below.

Claims of inconsistency under the MAS system

- 13.24** In its written submission, the Australian Lawyers Alliance disputed claims that the MAS system has led to greater certainty and consistency in decision making, citing the case of Mr David Catsicas, reproduced below, as an example of so-called 'doctor shopping'.

The Case of Mr David Catsicas

David Catsicas was injured in a motor vehicle accident on 27 March 2001. As part of his claim, David was examined by MAS assessor, Dr Apler, on 7 August 2002, on referral from the MAA. Using the AMA Guides as required, Dr Apler certified David's whole person impairment (WPI) as 30%. His report and certificate were forwarded to the MAA on 9 August 2002. On 29 October 2002, the MAA 'wrote to Dr Apler requesting a review of sections of his report that require some amendments'. Part of the letter reads:

'1) on page 5, point 12, paragraph two of your report, you referred to his unusual presentation and of his carrying a list of the symptoms with him to medical appointments. Unfortunately, the parties may see this as bias and the whole paragraph is best removed from your report.

2) with regard to your assessment of impairment, page 7, social functioning, from MAA descriptors this sounds like it could be class 2? Could you please elaborate why you have assessed this as class 3 or change to class 2 upon your review?

3) on the bottom line of your table you have omitted to include %WPI. Could you please include?'

In his revised report, Dr Apler complied with all the directions in the letter from the MAA, including that regarding the social functioning assessment. The change from class 3 to class 2 resulted in a decrease in his WPI assessment from 30% to 11%.

On 4 February 2004, following another examination by a doctor retained by the defendant insurer, David was again examined by Dr Apler. Again Dr Apler prepared a draft report and a certificate, which were provided to the MAA. Again the MAA wrote to the doctor requesting that he review the draft.

'On page 9 of your report, under concentration, persistence and pace, you have rated the claimant as class 2. I note that the claimant maintained memory and concentration throughout the appointment of one and a half hours duration, and that persistence and pace may be affected by the claimant's physical complaints. Given this information, the parties may question the rating given. Could you please expand on the reasons behind your decision.'

Again Dr Apler heeded the direction from the MAA, changing his report to rate concentration, persistence and pace as class 1 rather than 2. The result of this last report was that David's WPI was now assessed as less than 10%. The 10% rating meant that David was not entitled to general damages.

Source: Submission 23, Australian Lawyers Alliance, p3

- 13.25** In its written submission, the Bar Association also cited the case of Mr David Catsicas, which went to court in *Catsicas v Mullaney*³⁴⁰, as an example of the MAS system operating unjustly, inconsistently and to the point of capriciousness in its outcomes. The Bar Association noted that the outcome of *Catsicas v Mullaney* was that Judge Sidis set aside the MAS certificate pursuant to s.61(4) of the *Motor Accidents Compensation Act 1999* on the basis that the correspondence from MAA ‘constituted an absence of procedural fairness in the process of medical assessment of the Plaintiff’. Judge Sidis also found the correspondence to be ‘beyond power and unauthorised’ and ‘suggestive of bias on the part of MAA’.³⁴¹
- 13.26** The NSW Bar Association also noted in its written submission that during 2004, the MAA commissioned the Justice Policy Research Centre to survey users of the MAS system. The survey report made the following comment:

A significant minority voiced disquiet about the 10% WPI threshold describing it as unjust, arbitrary and difficult to apply with precision.³⁴²

- 13.27** Accordingly, the NSW Bar Association called for the repeal of MAS, arguing that it has proved to be time consuming, inconsistent and unjust. Far from being objective, the Association submitted that the AMA Guides have produced continuing inconsistency and uncertainty.³⁴³

Claims of inconsistency by AMSs

- 13.28** During the hearing on 20 June 2005, the Committee took evidence from Dr Ian Incoll, a member of the Australian Society of Orthopaedic Surgeons, and an appointed AMS.
- 13.29** In his evidence to the Committee, Dr Incoll suggested that variations in the assessment of a patient when using the AMA Guides are inevitable, depending on the doctor assessing the patient and variations in the patient from day to day. He argued that AMS doctors may find variations in WPI of up to 15% in any one case, although he argued that this would be unusual, and that in simple cases, variations tend to be minimal.³⁴⁴
- 13.30** The issue of inconsistency in doctors’ interpretations and findings was highlighted by the case of Ms Sonia Fadlallah, a registered nurse and a member of the NSW Nurses’ Association, who appeared along with representatives of Unions NSW at the Committee’s public hearing on 20 June 2005. Ms Fadlallah received injuries at work which were assessed at 24% WPI by an insurance company doctor, 30% by her own doctor, but 0% by the AMS appointed by the

³⁴⁰ Newcastle District Court, No. 17 of 2003, Reasons for Judgement on Notice of Motion, 30 July 2004, referred to in Submission 23, Australian Lawyers Alliance, p3.

³⁴¹ Cited in submission 29, NSW Bar Association, p25

³⁴² Cited in submission 29, NSW Bar Association, p25

³⁴³ Submission 29, NSW Bar Association, p25

³⁴⁴ Dr Incoll, Medical practitioner, Australian Society of Orthopaedic Surgeons, Evidence, 20 June 2005, pp46-47

Workers Compensation Commission. Although the matter is being appealed, the appeal is expected to take up to nine months to finalise.³⁴⁵

- 13.31** During the hearing on 20 June 2005, the Committee also took evidence from Mr Stephen Milgate, National Coordinator of the Australian Society of Orthopaedic Surgeons. Mr Milgate indicated his concern about the role of AMSs and the use of the WorkCover Guidelines:

The Australian Society of Orthopaedic Surgeons has long held that orthopaedic surgeons should not be the final determiners of a percentage of whole body impairment. We prefer that this particular final determination be made by a judicial officer. There will be differences in expert medical opinions.³⁴⁶

- 13.32** Mr Milgate subsequently expanded on this statement, noting that a number of members of the Australian Society of Orthopaedic Surgeons are not comfortable with being the final decision makers (allowing for appeals) in determining the compensation to be made available to injured workers. ‘They are not comfortable with giving the final verdict’.³⁴⁷

- 13.33** Similarly, Dr Incoll also advocated the oversight of a judicial officer in the assessment of compensation to be made available to injured workers, on the basis that many doctors do not wish to be placed in the position of making a final decision on a worker’s entitlement to damages.³⁴⁸

- 13.34** In its written submission, the Australian Manufacturing Workers’ Union (AMWU) argued that there are many areas of the AMA Guides that are highly subjective, and it is very rare for medical practitioners to agree amongst themselves as to the WPI of injured workers.³⁴⁹

- 13.35** The Committee believes that it is important at this point to reiterate that AMSs are only the final arbiters of whether an injured worker is entitled to non-economic loss damages (as opposed to economic loss damages) when an injury falls below the 10% WPI threshold. As indicated, above the 10% WPI threshold, Arbitrators with the Workers Compensation Commission have discretion in determining non-economic loss damages payable to the injured worker under s.67 of the *Workers Compensation Act 1987*, subject to the \$50,000 cap.

Committee comment

- 13.36** A key element of both the NSW Motor Accidents Scheme and the NSW Workers Compensation Scheme is the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines in determining a measure of WPI, which is in turn used to assess whether an injured person qualifies for non-economic loss damages according to a 10% WPI

³⁴⁵ Ms Fadlallah, NSW Nurses’ Association, Evidence, 20 June 2005, p53. See also Mr Lennon, Assistant Secretary, Unions NSW, Evidence, 20 June 2005, p42

³⁴⁶ Mr Milgate, National Coordinator, Australian Society of Orthopaedic Surgeons, Evidence, 20 June 2005, p43

³⁴⁷ Mr Milgate, Evidence, 20 June 2005, p44-45

³⁴⁸ Dr Incoll, Evidence, 20 June 2005, pp43, 46-47

³⁴⁹ Submission 37, AMWU, p2. See also Mr Bastian, State Secretary, AMWU, Evidence, 4 July 2005, pp2,3

threshold. The use of the guidelines is intended to deliver consistency and objectivity in the assessment process.

13.37 However, during the inquiry, many parties argued that the use of the AMA Guides should be discontinued, on the basis that:

- Assessment of whether an injured person exceeds the 10% WPI threshold in order to access non-economic loss damages must take into account broader considerations of disability such as changes in lifestyle as a result of the injury, pain, depression and future deterioration, rather than simply impairment
- The use of AMA Guides may not have delivered the greater consistency and objectivity of assessment that the Government intended.

13.38 The Committee supports these arguments. The Committee is strongly of the view that the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines in assessing whether an injured individual is entitled to non-economic loss damage is simply inappropriate. Assessment of eligibility for compensation should be based on disability, not impairment.

13.39 For example, the loss of a finger by a talented 19-year-old violinist with a scholarship to play for the Sydney Symphony Orchestra is simply not commensurate with the loss of a finger by a 64-year-old office worker on the point of retirement. However, under the AMA Guides, they are treated the same – neither would be able to pass the 10% WPI threshold and thereby gain compensation for non-economic loss.

Recommendation 4

That the Government:

- discontinue the use of the MAA Medical Assessment Guidelines based on the AMA Guides (4th edition) under the *Motor Accidents Compensation Act 1999*
 - discontinue the use of the WorkCover Guidelines, based on the AMA Guides (5th edition) under the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*.
-

13.40 As indicated previously, the alternative to medical assessment using the AMA Guides for the determination of damages, notably non-economic loss damages, is judicial assessment. The Committee examines alternative judicial mechanisms for assessing access to damages in the following chapter.

Chapter 14 Alternative judicial review mechanisms

As indicated in the previous chapters, the Committee believes that the Government should discontinue the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines, in favour of judicial mechanisms for determining personal injury compensation claims, including access to non-economic loss damages. Importantly, this would require assessment of non-economic loss damages using a percentage of ‘a most extreme case’ test.

This chapter examines two alternative mechanisms for determination of claims. They are:

- A return to judicial decision making through the court system, consistent with the provisions of the *Civil Liability Act 2002*. This option was promoted by the representative legal associations.
- Expanding the role of Claims Assessment and Resolution Service (CARS) assessors within the Motor Accidents Authority (MAA) and Arbitrators within the Workers Compensation Commission to determine compensation claims.

Judicial assessment through the courts

14.1 In their evidence to the inquiry, the representative legal associations promoted as an alternative to the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines a return to judicial assessment of eligibility for compensation, in line with the provisions of the *Civil Liability Act 2002*.

14.2 For example, in its written submission, the NSW Bar Association submitted that the *Civil Liability Act 2002* more closely represents current community standards for the making of damages awards than the *Motor Accidents Compensation Act 1999* and *Workers Compensation Act 1987*, simply because it retains the use of juries.³⁵⁰ Accordingly, the Association advocated that workers’ rights to compensation for work-related injury should be determined in the courts, with full access to legal representation. Arbitration could be used to assist in the resolution of less complex cases.³⁵¹

14.3 Similarly, representatives of the Law Society of NSW also supported the greater use of juries in the determination of personal injury compensation claims, on the basis that they are in the best position to reflect what the community believes a claim for compensation should be worth.³⁵² As stated in evidence by Mr John McIntyre, President of the Law Society of NSW:

If you reintroduce more broadly for large claims the concept of a jury, in our view, or in my view particularly, you restore the concept of public acceptability to those verdicts, because if you have got a jury of four or six people who are determining liability it is very hard to criticise the Santa Claus judge because he holds for the plaintiff.³⁵³

³⁵⁰ Submission 29, NSW Bar Association, p40

³⁵¹ Submission 29, NSW Bar Association, p37

³⁵² See Mr McIntyre and Mr Bryden, Law Society of NSW, Evidence, 20 June 2005, pp6,9

³⁵³ Mr McIntyre, Evidence, 20 June 2005, p11

- 14.4 During the hearing on 20 June 2005, the Committee questioned Mr McIntyre as to whether the use of juries would be more expensive than the current arrangements under the statutory workers' compensation and motor accidents schemes. In response, Mr McIntyre argued that juries are not an inherently expensive adjunct to proceedings if a case is already going before a judge, but that in any case, the advantage of having juries in terms of public perception would outweigh any small disadvantage in either higher jury fees or slightly longer trials.³⁵⁴
- 14.5 In its written submission, the Australian Workers' Union also expressed concern at the use of Approved Medical Specialists by the Workers Compensation Commission for the purposes of determining degrees of impairment, rather than allowing such matters to be determined by judges as provided under the *Civil Liability Act 2002*.³⁵⁵

The Dust Disease Tribunal model

- 14.6 In its supplementary written submission, the Law Society of NSW raised the possibility of the Parliament creating a single dispute resolution forum and procedure for resolving disputes in personal injury matters, using the current processes of the Dust Disease Tribunal as an appropriate blueprint. The Law Society cited the following advantages of the Dust Disease Tribunal model:
- it emphasises early resolution of disputes through 'front end loading'
 - it empowers mediators to make certain determinations
 - the tribunal provides for judicial determination of disability based on independent medical assessment
- 14.7 The Law Society further submitted that an appropriate dispute resolution forum based on the Dust Disease Tribunal blueprint would be an Injury Compensation Division within the District Court. The Society cited several advantages to such a system:
- it would allow the collection of a consolidated set of injury compensation statistics on all areas of tort law in New South Wales
 - it would reduce administrative overlaps and duplication
 - it would allow the injured to be compensated more fairly and consistently
 - it would restore the public's confidence in determinations on the severity of injury by taking them out of the hands of 'unaccountable bureaucracies'.³⁵⁶

Expanding the role of the MAA and Workers Compensation Commission

- 14.8 The Committee notes that a second alternative dispute resolution mechanism for determining personal injury compensation claims is to expand the role of CARS assessors with the MAA and Arbitrators within the Workers Compensation Commission to consider all claims for

³⁵⁴ Mr McIntyre, Evidence, 20 June 2005, p12

³⁵⁵ Submission 46, Australian Workers' Union, p1

³⁵⁶ Submission 41a, Law Society of NSW, p15

damages. This would include claims for non-economic loss damages, assessed according to a percentage of 'a most extreme case' test.

- 14.9** This option clearly raises issues about the jurisdiction of the MAA and Workers Compensation Commission. The Committee examines some potential issues relating to this below.³⁵⁷

The jurisdiction of the MAA

- 14.10** As indicated in Chapter 3, all disputes concerning motor accident claims are passed to CARS assessors within the MAA. CARS assessors may either determine that the matter is too complex, and refer it to the courts under s.92 of the *Motor Accidents Compensation Act 1999*, or they may assess the claim themselves to determine liability and the quantum of damages under s.94 of the Act.

- 14.11** As indicated in Chapter 13, under s.94, CARS Assessors have discretion to determine the amount of non-economic loss damages to be paid to an injured motorist, subject to the cap of \$359,000, where the motorist is assessed as exceeding 10% WPI. Section 94 states in part:

(1) The claims assessor is, in respect of a claim referred to the assessor for assessment, to make an assessment of:

- (a) the issue of liability for the claim (unless the insurer has accepted liability), and
- (b) the amount of damages for that liability.

(2) Such an assessment is to be made having regard to such information as is conveniently available to the claims assessor, even if one or more of the parties to the assessment does not co-operate or ceases to co-operate.

(3) The assessment is to specify an amount of damages.

- 14.12** In assessing claims for compensation, CARS assessors are guided by the *Claims Assessment Guidelines*, issued by the MAA under the provisions of s.69(1) of the *Motor Accidents Compensation Act 1999*.³⁵⁸

- 14.13** Accordingly, the Committee believes that the role of CARS Assessors under the MAA scheme could be expanded to determine compensation claims, including claims for non-economic loss damages using a percentage of 'a most extreme case' test, based on medical advice about the extent of an injury from the MAS. The Committee notes that they are essentially doing this already where an injury exceeds 10% WPI.

³⁵⁷ The Committee wishes to acknowledge the research assistance provided by the NSW Parliamentary Library in this matter. See NSW Parliamentary Library, 'Response to request for information', 28 July 2005

³⁵⁸ MAA, *Claims Assessment Guidelines*, p8

The jurisdiction of the Workers Compensation Commission

- 14.14** The Workers Compensation Commission is an independent statutory tribunal for the resolution of workers' compensation disputes. The jurisdiction of the Workers Compensation Commission is set out in s.105 of the *Workplace Injury Management and Workers Compensation Act 1988*, which states in part:
- (1) Subject to this Act, the Commission has exclusive jurisdiction to examine, hear and determine all matters arising under this Act and the 1987 Act.
 - (2) The Commission does not have that jurisdiction in respect of matters arising under Part 5 (Common law remedies) of the 1987 Act except for the purposes of and in connection with the operation of Part 6 of Chapter 7 of this Act.
- 14.15** The Committee notes that the proliferation of tribunals, such as the Workers Compensation Commission, has become increasingly controversial in recent years, and has prompted opposition from particular groups, especially the judiciary. However, tribunals have in many ways become an integral part of contemporary government, and have come to be seen as 'court substitutes, as alternatives to the traditional courts'.³⁵⁹
- 14.16** Once again, the Committee notes that the Workers Compensation Commission is already determining personal injury compensation claims, including access to non-economic loss damages for an injured worker where their WPI exceeds the 10% threshold, subject to the \$50,000 cap. Accordingly, the Committee believes that there would be no impediment to an expansion of the role of Arbitrators under the Workers Compensation Commission to incorporate assessment of all damages claims, including claims for non-economic loss damages using a percentage of 'a most extreme case' test, based on medical advice about the extent of an injury from appointed AMs.

Committee comment

- 14.17** As indicated in the previous chapters, the Committee believes that the Government should discontinue the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines (based on the AMA Guides) under the statutory motor accident and workers' compensation schemes, in favour of a return to judicial assessment of damages. This included judicial assessment of access to non-economic loss damages, using a percentage of 'a most extreme case' test.
- 14.18** The Committee believes that there is scope within the current statutory arrangements to extend the jurisdiction and role of CARS claims assessors within the MAA and Arbitrators with the Workers Compensation Commission to give them increased discretion in determining personal injury compensation claims, including access to non-economic loss damages under the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* using a percentage of 'a most extreme case' test.

³⁵⁹ See K.Ryan, 'Judges, courts and tribunals', Paper presented to the Australian Judicial Conference Symposium on Judicial Independence and the Rule of Law at the Turn of the Century, Australian National University, 2-3 November 1996.

- 14.19** However, the Committee's preferred position is that the Government should create a new personal injury compensation tribunal, based on the current processes of the Dust Disease Tribunal, for the determination of all statutory and common law compensation claims made under the *Motor Accidents Compensation Act 1999*, the *Workers Compensation Act 1987*, and also, importantly, the *Civil Liability Act 2002*. Currently, claims under the *Civil Liability Act 2002* are heard in the District Court. Under this model, the role of CARS and Arbitrators within the Workers Compensation Commission would be abolished.
- 14.20** The advantage of creating a new single body with jurisdiction over all areas of personal injury law is that it would help promote consistency in the determination of damages payable according to severity and impact, regardless of whether injury was suffered in a motor accident, the workplace or in a public place. At present there is no such means of ensuring consistency across the various legislative arrangements.
- 14.21** The Committee believes that the new personal injury compensation tribunal should operate with the same independence as any other court of law, and with the same powers as the Supreme Court of NSW. The focus of the tribunal should be on the expeditious hearing of cases.

Recommendation 5

That the Government create a new personal injury compensation tribunal, based on the current processes of the Dust Disease Tribunal, for the determination of statutory and common law compensation claims made under the *Motor Accidents Compensation Act 1999*, the *Workers Compensation Act 1987* and the *Civil Liability Act 2002*. This tribunal should replace existing mechanisms for determining disputed claims.

- 14.22** In making this recommendation, the Committee wishes to emphasise its strong belief that the proposed new personal injury compensation tribunal should operate as a claim resolution mechanism alongside current statutory arrangements under the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987*. For example, the Committee supports:
- The continuation of rehabilitation benefits available to workers under the statutory workers' compensation scheme, including the provision of weekly compensation payments, medical treatment and retraining, regardless of fault.
 - The ongoing use of the Accident Notification Form (ANF) system under the statutory motor accidents scheme, together with nominal defendant arrangements and claims-management obligations on CTP insurers in the *Motor Accidents Compensation Act 1999* and the accompanying guidelines.
- 14.23** The Committee also recommends the development of an independent medical service, similar to that provided by doctors appointed to the MAS under the motor accidents scheme and AMSs under the workers' compensation scheme. This service should be available to the proposed new personal injury compensation tribunal to provide independent medical assessment of claimants' injuries.

Recommendation 6

That the Government develop a new medical service to provide independent medical assessment of claimants' injuries for the proposed new personal injury compensation tribunal.

PART 5

DAMAGES

Chapter 15 Access to non-economic loss damages

As indicated in Chapter 2, the various areas of personal injury compensation law in New South Wales all incorporate thresholds to restrict access to non-economic loss damages (see Table 2.1 for details). The aim of these thresholds is to limit the number of small or ‘minor’ claims for non-economic loss damages, thereby directing the pool of available funds to the more seriously injured.

The Committee notes that the use of these thresholds is the single most contentious aspect of the Government’s personal injury compensation law reforms since 1999. Put simply, the use of the thresholds means that in some instances, injured individuals are ineligible for compensation for pain and suffering where community standards may suggest that they deserve financial recompense. At the same time, as examined in Chapter 11, there is a perception, well founded or not, that insurers are translating the reduced compensation payments to the injured into excessive profits.

What is the aim of personal injury compensation?

15.1 Underlying any discussion of the availability of damages, particularly non-economic loss damages, for personal injury is the question of what is the role of personal injury compensation.

15.2 The position of the representative legal associations presenting evidence during the inquiry was that the aim of personal injury compensation must be to restore a seriously injured individual to his or her pre-injury position, to the extent that monetary compensation can do so. This is the so-called ‘full compensation principal’, as outlined by the NSW Bar Association in its written submission:

Any manifestly just and equitable system of compensation aims to put a person injured by a wrongful act in the same position, as far as money can do, as if the wrongful conduct had not occurred. This is what a common law assessment of damages for the benefit of an injured person seeks to do. Compensation for wrongful injury based upon this or analogous principles is a fundamental component of the rights of citizens in most developed societies. To the extent that the 1999-2002 Legislation modified this principle it did so by preferring the interests of policy holders, green slip holders or the reduction of accumulated debt in the workers’ compensation system, to the common law entitlements of the injured. An adjustment now needs to be made to restore some of the rights of the injured.³⁶⁰

15.3 However, tempering this position, the Committee also notes the argument made by Mr Alan Mason, the Executive Director of the Insurance Council of Australia (ICA), that compensation for personal injury must reflect what society is able to afford:

In our view, tort law reform is all about balancing the needs of seriously injured people to ensure they receive appropriate treatment and compensation, with the wider needs of society to have available and affordable insurance cover. When insurance is compulsory, it is particularly necessary for governments to take this role, as the community cannot avoid the cost. While public liability insurance is not compulsory, it is nevertheless essential for people running public events, community activities and

³⁶⁰ Submission 29, NSW Bar Association, pp8-9

businesses. That is why we believe it is necessary for government to get the balance right between the interests of the different stakeholders, and it is our view that the New South Wales Government has achieved this balance.³⁶¹

- 15.4** In its written submission on behalf of the NSW Government, The Cabinet Office argued that the civil liability reforms have sought to strike a balance between fair and reasonable compensation for the injured on the one hand, and the community's ability to pay for that compensation through affordable premiums on the other.³⁶²

Criticism of the current thresholds

- 15.5** As indicated in Chapter 2, thresholds are used in all personal injury compensation legislation in New South Wales to determine access to non-economic loss damages:

- Under the *Workers Compensation Act 1987* and the *Motor Accidents Compensation Act 1999*, the threshold is 10% WPI, as assessed using the MAA Medical Assessment Guidelines and WorkCover Guidelines (based on the AMA Guides).
- Under the *Civil Liability Act 2002*, the threshold is 15% of 'a most extreme case', as assessed judicially.

- 15.6** The fundamental criticism of the use of these thresholds, particularly the 10% WPI threshold under the *Workers Compensation Act 1987* and the *Motor Accidents Compensation Act 1999*, is that they have acted to exclude thousands of individuals who have been seriously injured from accessing non-economic loss damages in compensation for pain and suffering. As stated by Mr John McIntyre, President of the Law Society of NSW:

The legislative amendments that were enacted from 1999 onwards have significantly reduced claim numbers and overall claims costs. There is little doubt about that, but they have done so by largely reducing in some cases and in many cases totally eliminating compensation payments to injured persons.³⁶³

- 15.7** Similarly, the Committee notes the following comment made by the NSW Bar Association in its written submission:

All the schemes operate too harshly and exclude legitimate claims for damages which the community would expect to be met. Senior judges have commented adversely that the schemes are operating unfairly to bar the genuine claims of severely injured people. The insurers participating in these schemes are now earning sustained super profits from them.³⁶⁴

- 15.8** Both the NSW Bar Association and Law Society of NSW also cited the following comment of the Chief Justice of New South Wales, the Hon Justice Spigelman AC, made in September 2004:

³⁶¹ Mr Alan Mason, Executive Director, ICA, Evidence, 6 June 2005, p31

³⁶² Submission 53, The Cabinet Office, pp23,46

³⁶³ Mr John McIntyre, President, Law Society of NSW, Evidence, 20 June 2005, p2

³⁶⁴ Submission 29, NSW Bar Association, p4

... the introduction of caps on recovery and thresholds before recovery – an underwriter driven, not principled change – has led to considerable controversy. The introduction of the requirement that a person be subject to 15% of whole of body impairment – that percentage is lower in some states³⁶⁵ – before being able to recover general damages has been the subject of controversy. It does mean that some people who are quite seriously injured are not able to sue at all. More than any other factor I envisage this restriction will be seen as much too restrictive.

Small claims raise very real issues about transaction costs. Nevertheless, there is likely to be a growing body of persons who have suffered injury which they believe to be significant and who resent their inability to receive compensation.³⁶⁶

- 15.9** Based on such evidence, legal and union representatives participating in the inquiry argued that there is scope, given the profitability of the insurance industry, to increase the compensation available to the injured through downward adjustment of the various non-economic loss thresholds under New South Wales personal injury compensation law.³⁶⁷

***The Motor Accidents Compensation Act 1999* threshold**

- 15.10** Under s.131 of the *Motor Accidents Compensation Act 1999*:

No damages may be awarded for non-economic loss unless the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10%.

- 15.11** Once the 10% threshold has been exceeded (ie 11% WPI or more), damages are assessed by CARS Claims Assessors, subject to the cap which is indexed annually on 1 October and is currently \$359,000.

- 15.12** In its written submission, the Law Society of NSW argued against the ‘harshness and arbitrary nature’ of the 10% WPI threshold, citing MAA statistics that very few motor accident victims will satisfy the threshold. As of March 2002, of 634 completed cases which involved physical injuries, 537 were ‘permanent’. Of those 537, the Medical Assessment Service (MAS) assessed only 60 as involving a permanent WPI of greater than 10%. Accordingly, given that only disputed claims go before the MAS, the Law Society submitted that a very high percentage of motor accident victims do not meet the threshold, and therefore do not receive any damages for non-economic loss.³⁶⁸

³⁶⁵ As indicated previously, the *Motor Accidents Compensation Act 1999* and *Workers Compensation Act 1987* in NSW impose a 10% WPI threshold for access to non-economic loss damages.

³⁶⁶ The Hon Justice Spigelman AC, ‘The New Liability Structure in Australia – Swiss Re Liability Conference, 14 September 2004, cited in submission 29, NSW Bar Association, pp13-14. See also Mr Slattery QC, Evidence, 2 May 2005, p3 and submission 41a, Law Society of NSW, p7

³⁶⁷ Submission 41, Law Society of NSW, pp5,44. See also submission 29 NSW Bar Association, p4

³⁶⁸ Submission 41, Law Society of NSW, Annexure H, p40

15.13 The Law Society also cited in its submission the judgement of Heydon JA in the NSW Court of Appeal in *Hodgson v Crane*³⁶⁹, in which sections 131-134 of the *Motor Accidents Compensation Act 1999* were subject to appeal. In his judgement, Heydon JA found:

- It was common ground between the parties that the 10% WPI threshold established by s.131 of the *Motor Accidents Compensation Act 1999* is extremely difficult to satisfy. Counsel agreed that leaving aside cases involving children, quadriplegics and paraplegics, only about 10 people per annum had, at that time, exceeded the s.131 threshold.
- The use of the threshold ignored the dramatic effect on some plaintiffs of relatively minor injuries.
- The threshold does not take into account the fact that the loss of a finger, which might involve a very low percentage of permanent impairment on a WPI basis, constituted a far greater loss to a great violinist or skilled craftsman than to a barrister, accountant or businessperson.
- The threshold treats a young adult who has lost part of the function of a leg as having the same WPI percentage as a very old person with the same injury, even though the loss by the former will be experienced for a much longer period and to a much greater extent than by the latter.
- Once a plaintiff has exceeded the greater than 10% WPI threshold, the court is to assess damages for non-economic loss in accordance with common law principles. There is nothing in ss.131-134 of the *Motor Accidents Compensation Act 1999* about importing into them the concept of proportionality as regards the most serious injuries vis-à-vis the less serious injuries.³⁷⁰

15.14 The Australian Lawyers Alliance also argued that the operation of the 10% WPI threshold under the *Motor Accidents Compensation Act 1999* is unjust. In support, it cited the case of Mr Matt Davis, reproduced below.

³⁶⁹ [2002] NSWCA 276 (22 August 2002)

³⁷⁰ Submission 41, Law Society of NSW, Annexure H, pp41-42

The case of Mr Matthew Davis

In May 2002 Matt Davis was travelling home from school by bus near Albury. He was 15 years old.

The bus driver suffered an epileptic fit and lost consciousness. The bus left the road and struck a tree at over 100km/h. The impact was so violent that the chairs were ripped from the floor of the bus. When rescuers arrived they found all the children piled up at the front of the bus, tangled amid a wreckage of torn steel. Four children died in the accident.

Matt snapped the femur of his right leg and his left shoulder. He suffered an injury to his right shin that doctors call 'de-gloving'. A blunt object entered his leg just below the knee and travelled under the skin down to the ankle. The result was a portion of loose skin and flesh into which you could put your arm. It was full of grit from the accident and became infected. Matt was in surgery for four hours on the night of his accident. At one point the surgical team called for a priest, he was so close to death.

Matt subsequently spent seven weeks in hospital and underwent nine operations. The treatment of his right leg and left shoulder involved the insertion of steel plates and screws. Matt was in a wheelchair for three months and had to have the plates in his leg re-fitted when his recovery did not proceed as hoped, and he suffered a further fracture. The de-gloving of his leg required skin grafts.

As a consequence of his injuries, this fit young man is no longer able to do the things he enjoys. He can't climb or bushwalk or play sport the way he used to. He can't help out with heavy work on the family farm. He has an ugly and embarrassing scar the length of his right thigh and below the right knee. The injuries and their treatment are very painful. Matt continues to suffer pain from his injuries every day.

Matt's injuries were assessed according to NSW law, under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the AMA Guides). He rated 8%. When they heard this figure, Matt and his parents couldn't believe it. Neither could his treating orthopaedic surgeon. Because he didn't rate more than 10%, Matt is not entitled to damages for pain and suffering.

Matt Davis was a kid coming home from school like thousands of others every day across NSW. He did nothing wrong. Somebody else made the mistake that caused his painful and debilitating injuries. After a fight with the insurer, Matt recovered some money for his parents' out-of-pocket medical expenses. Despite evidence that the bus company knew that the driver was prone to epilepsy, the insurance company is denying liability, calling the accident an act of god. Matt is still fighting the insurance company. If he wins in court, he might be compensated for the reduced work options he will have later in life.

But Matt's pain, the time he has had to spend in hospital, his scarring and the effect his disability will have on all aspects of the rest of his life are all worth nothing under current NSW law.

Source: Submission 23, Australian Lawyers Alliance, p2

- 15.15** Mr Davis gave evidence during the Committee's hearings in Wagga Wagga on 23 May 2005, and conveyed to the Committee the devastating impact that his injuries have had on his education and future employment prospects.³⁷¹
- 15.16** The Committee also received a written submission from Border Attorneys in Albury, writing on behalf of their client Mr Mark Griffin, who was injured on 12 May 2000 in a motor vehicle accident. Border Attorneys indicated that as a result of his accident, Mr Griffin was unable to return to his pre-injury occupation as a shearer and woodcutter, losing his position as a store-person as a result of his injuries and suffering a breakdown in his relationship with his then fiancé. However, he was assessed as having 0% WPI, and as a result received nothing in non-economic loss damages.³⁷²
- 15.17** Finally, the Committee notes that following the disastrous and widely reported Waterfall train crash of January 2004³⁷³, the Government announced that the victims of the accident would have access to compensation under the *Civil Liability Act 2002*, and not the *Motor Accidents Compensation Act 1999*, as would normally be the case. In evidence, Mr Timothy Abbott, a solicitor with a practice in Wagga Wagga, cited this as confirmation that the Government recognises that the provisions of the *Motor Accidents Compensation Act 1999* are unjustly harsh and arbitrary.³⁷⁴

Psychological injury

- 15.18** Under s.133 of the *Motor Accidents Compensation Act 1999*, a motor accident victim with both physical and psychiatric injuries is only able to exceed the 10% WPI threshold by reference to either their physical or their psychological injuries, not a combination of both. Section 133 states in part:
- (3) In assessing the degree of permanent impairment under subsection (2) (b), regard must not be had to any psychiatric or psychological injury, impairment or symptoms, unless the assessment of the degree of permanent impairment is made solely with respect to the result of a psychiatric or psychological injury.
- 15.19** The Committee's attention was drawn to the restriction on combining physical and psychiatric injury by the case of Mr Matt Davis. Mr Davis suffered both physical and psychological injury as a result of his accident. However, because the injuries were assessed separately under the provisions of the *Motor Accidents Compensation Act 1999*, he was unable to pass the 10% WPI threshold.
- 15.20** Mr Tom Goudkamp, President of the Australian Lawyers Alliance, commented on the separation of physical or psychological injuries in his evidence:

³⁷¹ Mr Davis, Evidence, 23 May 2005, pp55-58

³⁷² Submission 26, Border Attorneys, pp1-2

³⁷³ The Waterfall train crash occurred on 31 January 2004 when four carriages of a rail commuter service derailed on the Illawarra line, between Waterfall and Helensburgh stations - 40km south of Sydney. Seven people died, including the train driver.

³⁷⁴ Mr Timothy Abbott, Solicitor, Wagga Wagga, Evidence, 23 May 2005, p48. See also Dr Morrison, Australian Lawyers Alliance, Evidence, 6 June 2005, p13

We say that is grossly unfair and highly discriminatory towards claimants who have suffered mental and behavioural injuries. Furthermore, the diagnosis of recognised medical psychiatric disorders – such as schizophrenia, depression, anxiety disorders – appear to have no bearing on the whole person impairment value.³⁷⁵

- 15.21** The Committee notes that the restrictions that apply on combining physical and psychological injury under the *Motor Accidents Compensation Act 1999* do not apply under the *Civil Liability Act 2002*, which as before measures eligibility for non-economic loss damages according to a percentage of ‘a most extreme case’.

The *Workers Compensation Act 1987* statutory lump sum benefits

- 15.22** Injured workers who suffer injury are entitled to non-economic loss damages for pain and suffering of up to \$50,000 under s.67 of the *Workers Compensation Act 1987*. Section 67 of the *Workers Compensation Act 1987* states:

A worker who receives an injury that results in a degree of permanent impairment of 10% or more is entitled to receive from the worker’s employer as compensation for pain and suffering resulting from the permanent impairment an amount not exceeding \$50,000. Pain and suffering compensation is in addition to any other compensation under this Act.

- 15.23** In addition, workers with permanent impairment are entitled to lump-sum compensation for permanent impairment under s.66 of the *Workers Compensation Act 1987*, which provides for damages of up to \$200,000 where the degree of WPI is greater than 75%. This is assessed as follows:

- (1) A worker who receives an injury that results in permanent impairment is entitled to receive from the worker’s employer compensation for that permanent impairment as provided by this section. Permanent impairment compensation is in addition to any other compensation under this Act.

- (2) The amount of permanent impairment compensation is to be calculated as follows:

(a) if the degree of permanent impairment is not greater than 10%, the amount of permanent impairment compensation is to be calculated as follows:

$D \times \$1,250$

(b) if the degree of permanent impairment is greater than 10% but not greater than 20%, the amount of permanent impairment compensation is to be calculated as follows:

$\$12,500 + [(D-10) \times \$1,500]$

(c) if the degree of permanent impairment is greater than 20% but not greater than 40%, the amount of permanent impairment compensation is to be calculated as follows:

³⁷⁵ Mr Goudkamp, President, Australian Lawyers Alliance, Evidence, 6 June 2005, p9

$$\$27,500 + [(D-20) \times \$2,500]$$

(d) if the degree of permanent impairment is greater than 40% but not greater than 75%, the amount of permanent impairment compensation is to be calculated as follows:

$$\$77,500 + [(D-40) \times \$3,500]$$

(e) if the degree of permanent impairment is greater than 75%, the amount of permanent impairment compensation is \$200,000,

where D is the number derived by expressing the degree of permanent impairment as D%.

- 15.24** Importantly, there is no threshold for accessing statutory lump-sum compensation under the provisions of s.66. As a result, an injured worker who is assessed as having 1% WPI is entitled to \$1,250 in compensation. An injured worker who is assessed as having 10% WPI is entitled to \$12,500 in compensation.
- 15.25** Based on the provisions of ss. 66 and 67, the maximum amount that an injured worker can receive in statutory lump sum compensation for permanent impairment and pain and suffering is \$250,000. The Committee notes that this combined amount was increased from \$171,000 under the 2001 workers' compensation law amendments.
- 15.26** Prior to the implementation of the WorkCover Guidelines under the 2001 amendments to the *Workers Compensation Act 1987*, workers' entitlement to damages for permanent impairment under s.66 of the *Workers Compensation Act 1987* was determined using the Table of Disabilities. This Table allocated compensation for permanent disability using a percentage estimate of the loss of efficiency of a given body part.
- 15.27** In its written submission, the AMWU argued that the use of the WorkCover Guidelines, replacing the Table of Disabilities, has resulted in many injured workers receiving less in lump-sum damages.³⁷⁶ In support, the AMWU cited in the annexure to its submission the following cases of various workers who were assessed for lump sum statutory compensation under both the Table of Disabilities in use prior to 2002 and the AMA Guides in use in 2002.

³⁷⁶ Submission 37, AMWU, p2

Table 15.1 Pre and post 2002 comparisons of statutory lump sum compensation

| Position | Injury | Pre-2002 | Post-2002 |
|--------------------|--|----------|-----------|
| Mechanic | Left shoulder, right wrist | \$23,500 | \$14,250 |
| Printer | Back | \$11,250 | \$6,250 |
| Panel beater | Back, left leg | \$22,500 | \$16,000 |
| Mechanic | Right arm | \$16,000 | \$8,750 |
| Laundress | Left leg | \$11,250 | \$1,250 |
| Printer | Left thumb | \$1,300 | \$1,250 |
| Process worker | Back, legs | \$33,750 | \$10,000 |
| Labourer | Back, legs | \$27,000 | \$17,000 |
| Process worker | Back, legs | \$34,500 | \$21,500 |
| Fitter | Back | \$15,000 | \$8,750 |
| Mechanic | Back, L5-S1 disc protrusion | \$15,000 | \$10,000 |
| Fitter/welder | Right leg (knee) | \$11,250 | \$7,500 |
| Printer | Lumber disc lesion and referred leg pain | \$15,850 | \$8,750 |
| Maintenance fitter | Back, right leg | \$30,000 | \$10,000 |

Source: Submission 37, AMWU, Annexure A

- 15.28** Similarly, Mr Paul Macken, a practising solicitor, submitted that the benefit levels paid to workers under the statutory system have been substantially reduced as a result of the 2001 reforms.³⁷⁷
- 15.29** By contrast, in her evidence to the Committee, Ms Vicki Telfer, General Manager of Strategy and Policy Division with WorkCover, cited the case of a worker who was injured prior to the reforms of 2001 but was not entitled to receive any compensation under the table of disabilities, despite his injuries leading to permanent impairment of his jaw. By contrast, under the reforms introduced in 2001, this worker could have received payment up to a maximum of \$112,500 for permanent disability, coupled with entitlement to damages for pain and suffering of up to \$50,000.³⁷⁸

Psychological injury

- 15.30** The Committee notes that as with s.133 of the *Motor Accidents Compensation Act 1999*, s.65A of the *Workers Compensation Act 1987* places limits on access to non-economic loss damages under both ss.66 and 67 of the Act for psychological and psychiatric injury. Section 65A states in part:

(3) No compensation is payable under this Division (either as permanent impairment compensation or pain and suffering compensation) in respect of permanent

³⁷⁷ Submission 25, Mr Macken, p2

³⁷⁸ Ms Telfer, General Manager, Strategy and Policy Division, WorkCover, Evidence, 4 July 2005, p16

impairment that results from a primary psychological injury unless the degree of permanent impairment resulting from the primary psychological injury is at least 15%.

Note. If more than one psychological injury arises out of the same incident, section 322 of the 1998 Act requires the injuries to be assessed together as one injury to determine the degree of permanent impairment.

(4) If a worker receives a primary psychological injury and a physical injury, arising out of the same incident, the worker is only entitled to receive compensation under this Division in respect of impairment resulting from one of those injuries, and for that purpose the following provisions apply:

- (a) the degree of permanent impairment that results from the primary psychological injury is to be assessed separately from the degree of permanent impairment that results from the physical injury (despite section 65 (2)),

15.31 As before, the Committee notes that the restrictions that apply on combining physical and psychological injury under the *Workers Compensation Act 1987* do not apply under the *Civil Liability Act 2002*, which measures eligibility for non-economic loss damages according to a percentage of ‘a most extreme case’.

Hearing loss

15.32 The Committee notes that s.69A of the *Workers Compensation Act 1987* sets out a number of provisions dealing with the payment of non-economic loss damages to victims of hearing loss. In particular, s.69A(1) provides that no compensation is payable if the degree of a worker’s total hearing loss is less than 6%.

The *Civil Liability Act 2002* threshold

15.33 Under s.16 of the *Civil Liability Act 2002*, damages for non-economic loss are payable as follows:

- (1) No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.
- (2) The maximum amount of damages that may be awarded for non-economic loss is \$350,000, but the maximum amount is to be awarded only in a most extreme case.
- (3) If the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, the damages for non-economic loss are to be determined in accordance with the following Table:

| Severity of the non-economic loss (as a proportion of a most extreme case) | Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss) |
|--|---|
| 15% | 1% |
| 16% | 1.5% |
| 17% | 2% |
| 18% | 2.5% |
| 19% | 3% |
| 20% | 3.5% |
| 21% | 4% |
| 22% | 4.5% |
| 23% | 5% |
| 24% | 5.5% |
| 25% | 6.5% |
| 26% | 8% |
| 27% | 10% |
| 28% | 14% |
| 29% | 18% |
| 30% | 23% |
| 31% | 26% |
| 32% | 30% |
| 33% | 33% |
| 34-100% | 34-100% respectively |

- (4) An amount determined in accordance with subsection (3) is to be rounded to the nearest \$500.

15.34 The Committee notes that:

- A judge generally arrives at the percentage of ‘a most extreme case’ by considering the most extreme result possible given the plaintiff’s injuries. In many cases quadriplegia or gross traumatic brain injury will constitute the most extreme case.³⁷⁹
- The \$350,000 cap on non-economic loss damages under the *Civil Liability Act 2002* is indexed, and increased to \$416,000 from 1 October 2005.

15.35 A number of parties to the inquiry argued that the threshold for accessing non-economic loss damages under the *Civil Liability Act 2002*, set at 15% of ‘a most extreme case’, is a more appropriate threshold than the thresholds used under the *Workers Compensation Act 1987* and *Motor Accidents Compensation Act 1999*.³⁸⁰ For example, Mr Slattery QC, Senior Vice President of the NSW Bar Association, stated in evidence:

It really comes down to this: the Bar Association says that the *Civil Liability Act 2002* was not all bad; that the *Civil Liability Act* to the extent that it set a benchmark at the time in respect of claims for non-economic loss and entitlement to non-economic loss on the basis of a percentage of ‘a most extreme case’ got close to getting it right. It

³⁷⁹ Submission 23, Australian Legal Alliance, p16

³⁸⁰ The Committee understands that the MAA Guides were not adopted for use under the *Civil Liability Act 2002* because they were deemed too costly and cumbersome. See Negligence Review Panel, *Review of the Law of Negligence Final Report*, September 2002, p191

needs to be more closely looked at and possibly adjusted in a direction to provide access to more claimants. On the other hand that is the benchmark which we say should be applied to workers' compensation and to motor accidents cases. A very, very different measure is used in those cases which is much more restrictive.³⁸¹

- 15.36** Mr Slattery subsequently countenanced some future relaxation of the provisions of s.16 of the *Civil Liability Act 2002*. However, he argued that before any examination of this issue, the priority for the Parliament should be to achieve consistency in the law between the provisions of the *Civil Liability Act 2002* and the provisions of the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987*.³⁸²
- 15.37** However, other parties expressed stronger concerns that the 15% of 'a most extreme case' threshold is still an excessively tough benchmark.
- 15.38** For example, in its written submission, the Law Society of NSW argued that the 15% of 'a most extreme case' threshold and other provisions of the *Civil Liability Act 2002* are seriously disadvantaging a large number of people in the community, either by completely barring their access to damages, or substantially reducing the amount of compensation they can receive.³⁸³ In support, the Law Society cited in Annexure G to its submission the cases of a large number of individuals, from infants through to retirees, who have been adversely affected by the restrictions on access to non-economic loss damages under the *Civil Liability Act 2002*.³⁸⁴
- 15.39** Similarly, in its written submission, the Australian Lawyers Alliance argued that the *Civil Liability Act 2002* unfairly restricts access to non-economic loss damages. While the threshold for accessing non-economic loss damages is 15% of 'a most extreme case', even at 27% of 'a most extreme case', the maximum amount of damages that may be paid is only \$40,000 (10% of \$400,000³⁸⁵).³⁸⁶
- 15.40** The Australian Lawyers Alliance also argued that the 15% of 'a most extreme case' threshold operates particularly harshly in the medical negligence field, because proving hard-fought cases against doctors or hospitals is a comparatively expensive legal exercise.³⁸⁷
- 15.41** By contrast, in its written submission on behalf of the NSW Government, The Cabinet Office defended the 15% of 'a most extreme case' threshold:
- the Trowbridge Consulting and Deloitte Touche Tohmatsu report entitled *Public Liability Insurance – Analysis for meeting of ministers 27 March 2002*, prepared for the first ministerial meeting on public liability on 27 March 2002, found that the growth in

³⁸¹ Mr Slattery QC, Evidence, 2 May 2005, p8

³⁸² Mr Slattery QC, Evidence, 2 May 2005, p10

³⁸³ Submission 41, Law Society of NSW, p38

³⁸⁴ Submission 41, Law Society of NSW, Annexure G

³⁸⁵ This was the cap on non-economic loss damages under the *Civil Liability Act 2002* prior to the adjustment to \$416,000 on 1 October 2005.

³⁸⁶ Submission 23, Australian Legal Alliance, pp16-17

³⁸⁷ Submission 23, Australian Lawyers Alliance, p17

small to medium claims during the 1990s was largely driven by growth in non-economic loss damages and corresponding legal costs, and was not sustainable.

- the threshold was adopted following its successful use in the previous *Health Care Liability Act 2001* and *Motor Accidents Compensation Act 1988*.³⁸⁸

Support for the current non-economic loss thresholds

- 15.42 In response to concerns about the operation of the thresholds for accessing non-economic loss damages, supporters of the Government's reforms argued during the inquiry that all accident victims who suffer injury continue to have access to economic loss damages, while the severely injured also continue to receive non-economic loss damages. These arguments are examined below.

Accident victims continue to have access to economic loss damages

- 15.43 In its written submission, the ICA noted that the various thresholds under New South Wales personal injury law only apply to compensation for non-economic loss (pain and suffering), not to compensation for economic loss (loss of income, medical expenses and the like).³⁸⁹

- 15.44 This position was stated clearly by Mr Douglas Pearce, Group Executive of Insurance Strategy with Insurance Australia Group (IAG), in evidence on 6 June:

All claimants, as I understand it, both in workers' compensation and CTP, receive full and fair compensation for all medical expenses, all care, whether that be short-term or long-term care – and I will say that it is long-term care that is the most significant cost in the CTP schemes – economic loss, both past and future, and all out-of-pocket expenses. What we are talking about is pain and suffering – the pain and suffering of non-economic loss award. That is the thing that the threshold applies to. It does not apply to anything else, and it is very important. The lawyers would have us believe that these people do not receive compensation. That is not true.³⁹⁰

- 15.45 Similar positions were expressed by Vero Insurance in its written submission and by Ms Robyn Norman, General Manager of CTP Insurance with QBE Australia in her evidence on 20 June 2005.³⁹¹

- 15.46 The Cabinet Office also addressed this issue in its written submission on behalf of the NSW Government. The Cabinet Office acknowledged that the use of thresholds to determine non-economic loss damages has been criticised for excluding legitimate claims, and that concerns have been expressed that the thresholds give preference to policyholders over the injured, leaving injured people without any entitlement to compensation. However, The Cabinet Office highlighted that people whose injuries are assessed as not meeting the non-economic

³⁸⁸ Submission 53, The Cabinet Office, p23

³⁸⁹ Submission 49, ICA, Appendix C, p29

³⁹⁰ Mr Pearce, Group Executive, Insurance Strategy, Insurance Australia Group, Evidence, 6 June 2005, p61

³⁹¹ Submission 38, Vero Insurance, p8. See also Ms Norman, Evidence, 20 June 2005, p38

loss threshold tests are still entitled to seek damages for economic loss, including full recovery of all reasonable and necessary hospital, medical and rehabilitation expenses, past and future loss of earnings (up to three time AWE) and other out-of-pocket expenses.³⁹²

15.47 At the same time, The Cabinet Office also commented:

The Government is concerned about anecdotal evidence emerging of injured people with legitimate claims being advised by their lawyer not to pursue the claim as it is “not worth it”. When receiving this advice, some clients appear to be left with the impression that they have no entitlement to compensation. In fact, even where the injury is minor, the person is still entitled to reimbursement of any “out of pocket” expenses, medical costs and lost income. As a result, it would appear that injured people with legitimate claims may be missing out on what they are entitled to as a result of this confusion. This appears to arise because it is “not worth it” to the lawyer to pursue their claim, not because the claim is invalid or unimportant to the person.³⁹³

15.48 Mr Laurie Glanfield, Director General of the Attorney General’s Department, reiterated this concern during the Committee’s hearing on 14 October 2005.³⁹⁴

The severely injured continue to receive non-economic loss damages

15.49 During the inquiry, it was also argued that the use of thresholds to restrict access to non-economic loss damages does not affect the severely or catastrophically injured because they exceed the threshold.

15.50 For example, in its written submission, Suncorp Group argued that whilst the Government’s reforms have resulted in a reduction in small (low value) claims being made, the benefits provided to those who have been more seriously injured remain unaffected. Referring specifically to the *Civil Liability Act 2002*, Suncorp observed:

- The reduction of access to general damages affects only those who do not reach the threshold of 15% of ‘a most extreme case’ or those who fall between 15 and 25% of ‘a most extreme case’. Catastrophically injured persons do not face any restrictions.
- The reforms do not affect future needs for those who are catastrophically injured.³⁹⁵

15.51 In its written submission on behalf of Statewide Mutual, Jardine Lloyd Thompson also argued that the thresholds in the *Civil Liability Act 2002* do not penalise those plaintiffs who have sustained serious injury. In support, Stateside Mutual highlighted the following damages awards that have recently been achieved by plaintiffs:

- \$3.75 million in *Swain v Waverly Municipal Council* in February 2005

³⁹² Submission 53, The Cabinet Office, pp23-24. See also Mr Glanfield, Director General, Attorney General’s Department, Evidence, 4 July 2005, pp14,23; Mr Bowen, General Manager, MAA, ‘Opening comments’, Tabled document, 4 July 2005, p11

³⁹³ Submission 53, The Cabinet Office, p24. See also Mr Glanfield, Evidence, 4 July 2005, p23

³⁹⁴ Mr Glanfield, Evidence, 14 July 2005, p9

³⁹⁵ Submission 22, Suncorp, pp11-12

- \$4.33 million in *Watt v Copmanhurst Shire Council* in February 2005
- \$5.6 million in *Ballerini v Berrigan Shire Council* in September 2004.³⁹⁶

15.52 The Insurance Council of Australia (ICA) expressed a similar position in its written submission.³⁹⁷ At the same time, the ICA submitted:

The price of re-establishing a commercially viable public liability market was the reduction in general damages compensation paid for minor injury and impairment. The reforms are mostly in place, availability and affordability of liability insurance are improving and application of liability principles has become more rational. The community is now getting the liability cover it needs.³⁹⁸

15.53 The Committee also notes the following comment of Mr Glanfield:

I appreciate that thresholds are a difficult thing, because no matter upon which basis they are determined, by their very nature some people will come in beneath them. I also understand that this Committee has been presented with evidence in which people are alleged to have come beneath those thresholds. However, given the limited and finite resource of compensation that is contributed to by all of us, it is simply not possible to give non-economic loss awards to everyone. I note that in some civil law jurisdictions, there is no such thing as an award for pain and suffering. The Government believes that within these parameters an appropriate balance has been struck between the rights of injured people to compensation and the ability of the rest of the community to pay for that compensation.³⁹⁹

Committee comment

15.54 The various areas of personal injury compensation law in New South Wales all incorporate thresholds to restrict access to non-economic loss damages for the less seriously injured, on the basis that the pool of capital available to fund such damages should be directed towards the severely or catastrophically injured.

15.55 In principle, the Committee endorses the use of these thresholds, and the direction of the pool of capital available to fund damages payments towards the severely or catastrophically injured. The Committee also acknowledges that the thresholds on access to non-economic loss damages do not in any way affect the access of an injured individual to compensation for economic loss damages, such as payment of lost income, medical expenses and the like.

15.56 However, the Committee is concerned as to whether the various non-economic loss thresholds used in New South Wales personal injury law are currently set at appropriate levels. As indicated, considerable concern was expressed during this inquiry that injured individuals are being denied access to compensation for pain and suffering where community standards may suggest that they deserve financial recompense. The Committee finds the Government's

³⁹⁶ Submission 43, Jardine Lloyd Thompson, p9

³⁹⁷ Submission 49, ICA, p7

³⁹⁸ Submission 49, ICA, Attachment C, p28

³⁹⁹ Mr Glanfield, Evidence, 4 July 2005, pp14-15

decision that victims of the Waterfall train crash of January 2004 would have access to compensation under the *Civil Liability Act 2002*, and not the *Motor Accidents Compensation Act 1999*, to be somewhat cynical.

- 15.57** In the previous chapters, the Committee recommended discontinuation of the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines under the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987*, in favour of a return to judicial assessment. Consistent with this, the Committee further recommends that the current 10% WPI thresholds for accessing non-economic loss damages under the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* should be discontinued, in favour of the test used in the *Civil Liability Act 2002*, namely a threshold of 15% of ‘a most extreme case’, coupled with a sliding scale of damages until the severity of the non-economic loss reaches 33% of ‘a most extreme case’, as judicially assessed. Importantly, this measure encompasses an assessment of disability, not just impairment. It also addresses the issue of psychological injury.
- 15.58** The Committee does not propose any changes to the provisions of the *Workers Compensation Act 1987* dealing with the payment of non-economic loss damages to victims of hearing loss.

Recommendation 7

That the Government amend the *Motor Accidents Compensation Act 1999* to replace the existing 10% WPI threshold for the recovery of non-economic loss damages under s.131 of the Act with the same threshold as is used for claims for non-economic loss damages under the *Civil Liability Act 2002* – namely 15% of ‘a most extreme case’, coupled with a sliding scale of damages until the severity of the non-economic loss reaches 33% of ‘a most extreme case’.

Recommendation 8

That the Government amend the *Workers Compensation Act 1987* to replace the existing 10% WPI threshold for the recovery of non-economic loss damages under s.67 of the Act with the same threshold as is used for claims for non-economic loss damages under the *Civil Liability Act 2002* – namely 15% of ‘a most extreme case’, coupled with a sliding scale of damages until the severity of the non-economic loss reaches 33% of ‘a most extreme case’.

Recommendation 9

That the Government ensure that implementation of the recommendations in this report does not affect the current provisions of the *Workers Compensation Act 1987* dealing with the payment of non-economic loss damages to victims of hearing loss.

Chapter 16 Access to economic loss damages

This chapter examines access to economic loss damages under the provisions of the *Civil Liability Act 2002* and the *Motor Accidents Compensation Act 1999*. In particular, it examines the 5% discount rate on damages for economic loss paid as a lump sum under both acts. The Committee was presented with evidence that this provision discriminates against the severely and catastrophically injured, those most in need of financial support.

The Committee examines access to economic loss damages and the availability of income support for injured workers under the *Workers Compensation Act 1987* separately in the following chapter. This is due to the complexity of the arrangements under the *Workers Compensation Act 1987*.

The 5% discount rate on damages for future economic loss

- 16.1** Section 14 of the *Civil Liability Act 2002* and s.127 of the *Motor Accidents Compensation Act 1999* sets a 5% discount rate on damages for future economic loss paid as a lump sum.
- 16.2** As before, this discount rate is intended to acknowledge that a plaintiff awarded a lump sum in lieu of lost income or large future medical costs gains control of that money straight away, allowing the plaintiff to invest the money and gain interest. In effect, the 5% discount rate assumes that after tax and inflation, an injured person will be able to invest their lump sum and earn a real rate of return of 5%.
- 16.3** In its supplementary submission to the inquiry, the Australian Lawyers Alliance cited the following Table 16.1, showing the effects of a 3% and 5% discount rate on a lump sum payment to a quadriplegic child, calculated on the basis that the child has a life expectancy of 50 years at a real care cost of \$4,000 per week.

Table 16.1 Illustration of the effect of the discount rate

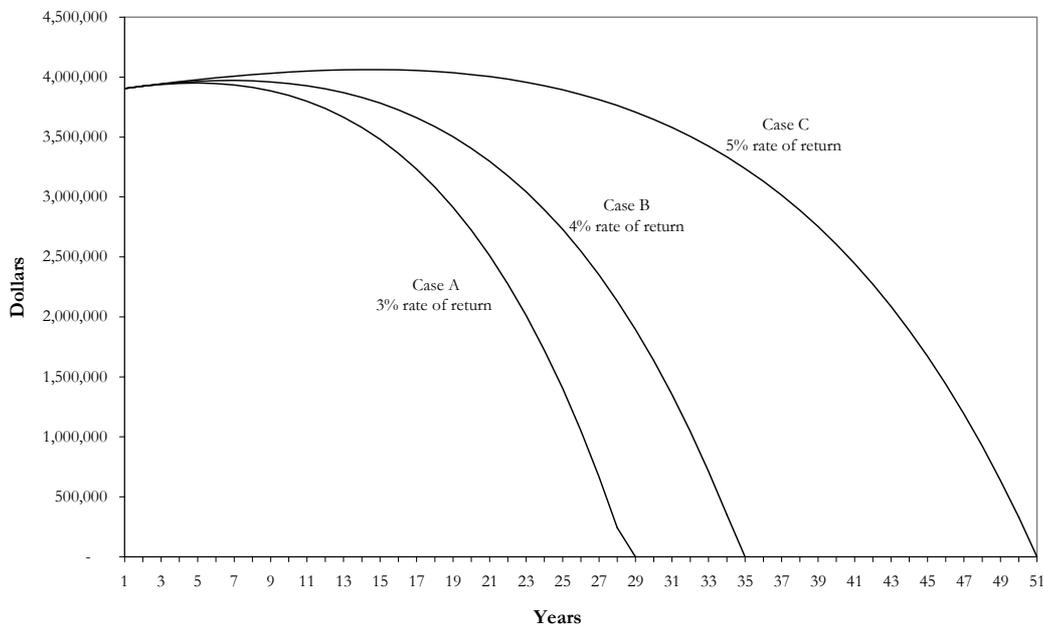
| | Ref. | No discounting | Discount Rate | |
|------------------------------|--------------|----------------|---------------|-------------|
| | | | 3% | 5% |
| Weekly cost | A | \$4,000 | \$4,000 | \$4,000 |
| Number of years | B | 50 | 50 | 50 |
| Number of weeks | C | 2,600 | 2,600 | 2,600 |
| Discount rate* | D | | 1,362.8 | 976.1 |
| Calculation | | | | |
| - No discounting | A x C | \$10,400,00 | | |
| - 3% discount rate | A x D | | \$5,451,200 | |
| - 5% discount rate | A x D | | | \$3,904,400 |
| Difference to no discounting | | | \$4,948,800 | \$6,495,600 |
| Difference between 3% and 5% | | | | \$1,546,800 |

* Figures derived from actuarial tables.

Source: Australian Lawyers Alliance, Submission 23d, p1

- 16.4** Based on Table 16.1, the Australian Lawyers Alliance highlighted that the size of the initial lump sum payout is ‘profoundly affected’ by the discount rate applied – 3% or 5%. As indicated, based on the assumptions that the quadriplegic child has a 50-year life expectancy and real care costs of \$4,000 per week, the lump sum payment the child would receive at a 3% discount rate is \$5,451,200, whereas the lump sum payment at a 5% discount rate is \$3,904,400.
- 16.5** In turn, if the child or his or her guardian fails to achieve a 5% real rate of return, then their lump sum is likely to run out well before 50 years. This is shown in Figure 16.1, which illustrates how long the child’s lump sum will last according to different rates of return.

Figure 16.1 Impact of the rate of return on the lifetime of a lump-sum payment



Note: Chart assumes an earnings rate of 10%, a taxation rate of 40% and 3% inflation for Case A, 2% inflation for Case B and 1% inflation for Case C.

Source: Submission 23C, Australian Lawyers Alliance, p3

- 16.6** Based on Figure 16.1, the Australian Lawyers Alliance submitted that using current earnings expectations, a person with 50 years of care at the rate of \$4,000 per week, with their lump sum discounted at a rate of 5%, could find their lump sum pay-out expiring at least two decades earlier than intended.⁴⁰⁰
- 16.7** The Australian Lawyers Alliance also noted that the discount rate on economic loss damages paid as a lump sum was raised by the High Court in *Todorovic v Waller*⁴⁰¹, in which the court commented that 3% was an appropriate reduction. A recent review of the rate in the UK

⁴⁰⁰ Submission 23d, Australian Lawyers Alliance, p3

⁴⁰¹ (1981) 150 CLR 402

prompted the Lord Chancellor to reduce the relevant rate from 2.5% to 2%. The *Final Report of the Review of the Law of Negligence* (the Ipp Report) recommended 3%.⁴⁰²

- 16.8 The Alliance also submitted that while most of the reforms in the *Civil Liability Act 2002* were targeted at so-called small or ‘minor’ claims for damages, the 5% discount rate is likely to affect most the seriously injured in the greatest need of assistance. This is contrary to the Government’s policy of targeting the tort law reforms at potential claimants with less serious injuries.⁴⁰³ As stated in evidence by Dr Andrew Morrison from the Australian Lawyers Alliance:

The people who are affected by this are quadriplegics, paraplegics, severely brain-damaged people, and infants with major disabilities – not people with whiplash injuries, and not people with even moderate injuries. It is the most catastrophically injured who are grossly affected.⁴⁰⁴

- 16.9 In its written submission, the NSW Bar Association similarly argued that the 5% discount rate is unfair on any current actuarial assessment of investment returns, and advocated a 3% discount rate.⁴⁰⁵

Other provisions of the *Motor Accidents Compensation Act 1999*

No damages for loss of earning capacity for the first five days

- 16.10 In their written submissions, both the Law Society of NSW and the NSW Bar Association highlighted the provisions of s.124 of the *Motor Accidents Compensation Act 1999*. Under this section, motor accident victims are not eligible for damages for loss of earning capacity in respect of the first five days during which loss was suffered. The presumption is that this loss is usually covered by sick leave.
- 16.11 Both representative legal associations submitted that this section hurts those least able to afford it (such as those who do not have sick leave), and that injury victims covered by other legislation are not subject to this five-day restriction.⁴⁰⁶

Maximum damages for loss of earnings

- 16.12 In its written submission, the Law Society of NSW highlighted the inconsistency in the capping of economic loss damages between the *Motor Accidents Compensation Act 1999* and the *Civil Liability Act 2002*. Under s.125 of the *Motor Accidents Compensation Act 1999*, when awarding economic loss damages, CARS assessors and the courts are to disregard the amount

⁴⁰² Submission 23, Australian Lawyers Alliance, pp18-19. See also Dr Morrison, Evidence, 6 June 2005, p13

⁴⁰³ Submission 23, Australian Lawyers Alliance, pp18-19.

⁴⁰⁴ Dr Morrison, Evidence 6 June 2005, p14

⁴⁰⁵ Submission 29, NSW Bar Association, pp5,29

⁴⁰⁶ Submission 41, Law Society of NSW, Annexure E, submission 29, NSW Bar Association, p43

by which the injured or deceased person's weekly earnings would have exceeded \$2,500 (indexed and currently \$3,296). By comparison, under s.12 of the *Civil Liability Act 2002*, the courts are to disregard the amount by which the claimant's weekly earning would have exceeded an amount that is three times the average weekly earnings (AWE) at the date of the award.⁴⁰⁷

Committee comment

- 16.13** The Committee is concerned that the current 5% discount rate on damages for economic loss paid as a lump sum under the *Civil Liability Act 2002* and the *Motor Accidents Compensation Act 1999* is too high, and is contrary to the Government's intention that the pool of capital available to fund damages should be targeted at the severely or catastrophically injured. The Committee believes that a 3% discount rate would be more appropriate, consistent with the recommendation of the Ipp Report.
- 16.14** The Committee also believes that the provisions of the *Motor Accidents Compensation Act 1999* dealing with the payment of damages for loss of earning capacity for the first five days and the maximum damages for loss of earnings, should be brought into line with the provisions of the *Civil Liability Act 2002* in the interests of consistency and fairness.

Recommendation 10

That the Government amend s.14 of the *Civil Liability Act 2002* to reduce the current 5% discount rate on damages for future economic loss paid as a lump sum to a 3% discount rate.

Recommendation 11

That the Government amend the *Motor Accidents Compensation Act 1999*:

- to reduce the current 5% discount rate on damages for future economic loss paid as a lump sum under s.127 of the Act to a 3% discount rate
 - to repeal s.124 of the Act preventing the award of damages for loss of earning capacity in respect of the first five days during which loss was suffered
 - to change the maximum amount of economic loss damages that may be awarded for loss of net weekly earnings under s.125 of the Act to an amount that is three times the average weekly earnings at the date of the award, consistent with s.12 of the *Civil Liability Act 2002*.
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⁴⁰⁷ Submission 41, Law Society of NSW, Annexure E

Chapter 17 The adequacy of income support provisions for injured workers

This chapter examines the adequacy of the statutory and common law income support provisions for injured workers under the *Workers Compensation Act 1987*. As indicated in Chapter 4, under the statutory no-fault NSW Workers Compensation Scheme, the primary form of benefit available to injured workers is a weekly payment for the period that they are incapacitated. In addition, injured workers may be entitled to access economic loss damages at common law under the provisions of Part 5 of the *Workers Compensation Act 1987*.

During the inquiry, the Committee was presented with evidence that injured workers are particularly poorly treated under the *Workers Compensation Act 1987*, when compared with the damages available to injured motorists under the *Motor Accidents Compensation Act 1999* and members of the public and medical patients under the *Civil Liability Act 2002*.

The adequacy of statutory weekly compensation payments

Injured workers who are totally incapacitated

- 17.1** As previously indicated in Chapter 4, under the provisions of s.36 of the *Workers Compensation Act 1987*, injured workers who are totally incapacitated are entitled to receive weekly compensation payments at their pre-injury rate of pay for the first 26 weeks, subject to a cap indexed every April and October and currently \$1,449.50 per week.⁴⁰⁸
- 17.2** However, if after that initial 26 week period an injured worker remains totally incapacitated, weekly compensation payments are governed by s.37 of the act, which provides in part that:
- (2) The weekly payment of compensation to an injured worker in respect of any period of total incapacity for work (not being a period during the first 26 weeks of incapacity) shall be:
 - (a) 90 per cent of the worker's average weekly earnings, except that:
 - (i) the payment shall not exceed \$235.20 per week,
 - (ii) in the case of a worker who is over 21 years of age at the time of payment—the payment shall not be less than \$187.10 per week, and
 - (iii) in the case of a worker whose average weekly earnings do not exceed \$170 per week—the payment shall be 100 per cent of those earnings or \$153, whichever is the lesser amount,
 - (b) in addition, \$62 per week in respect of:

⁴⁰⁸ WorkCover, 'Weekly Benefits Payable', cited at <http://www.workcover.nsw.gov.au/WorkersCompensation/WorkplaceInjuries/Benefits/weekly.htm>, (accessed 26 August 2005)

- (i) a dependent wife or dependent husband of the worker, or
- (ii) if there is no dependent wife or dependent husband at any time during which weekly payments are payable—any one dependent de facto spouse or other family member of the worker, and

(b) in addition:

- (i) in respect of the dependent children of the worker, the following amounts per week:

| No of dependent children | Additional amount per week |
|------------------------------|---|
| 1 dependent child | \$44.30 |
| 2 dependent children | \$99.10 |
| 3 dependent children | \$164.16 |
| 4 dependent children | \$230.90 |
| 5 or more dependent children | \$230.90 plus \$66.60 for each child in excess of 4 |

17.3 The Committee notes that the basic cap on weekly compensation payments to an injured worker without dependents set out above at \$235.20 per week is indexed every April and October and currently sits at \$340.90 per week. Other rates have similarly been adjusted over time.⁴⁰⁹

17.4 In its written submission, the Construction Forestry Mining and Energy Union (CFMEU) argued that this restriction on weekly compensation payments after the first 26 weeks of injury can result in substantial net reductions in income for injured workers. That reduction can be in the order of \$500 or even \$1000 a week, which can be for the remainder of their working lives.⁴¹⁰

17.5 This was reiterated by Mr Andrew Ferguson, Secretary of the CFMEU, during the hearing on 2 May 2005:

The current system does not allow seriously injured workers, who are incapacitated for work long term, to have a meaningful life. The consequences of the current system are a loss of self-esteem and human dignity. We have single workers who have been off work for more than six months, who only receive a statutory wage of \$334.10⁴¹¹ gross per week, and it is impossible for any single workers to survive on that miserable form of compensation.⁴¹²

17.6 In support of its position, the CFMEU cited in its submission the cases of eight workers who suffered workplace injuries, and in many cases have been faced with substantial reductions in weekly take home income as a result. Five of these workers also appeared before the

⁴⁰⁹ WorkCover, 'Weekly Benefits Payable', cited at <http://www.workcover.nsw.gov.au/WorkersCompensation/WorkplaceInjuries/Benefits/weekly.htm>, (accessed 26 August 2005)

⁴¹⁰ Submission 39, CFMEU, p2

⁴¹¹ This was the previous basic rate of weekly compensation payments to an injured worker without dependents prior to the adjustments on 1 October 2005 to the current \$340.90.

⁴¹² Mr Ferguson, Secretary, CFMEU, Evidence, 2 May 2005, p21

Committee during its public hearing on 2 May 2005. They were Mr Grant Wakefield, Mr Bruce Eton, Mr Daniel Reeves, Mr Tomo Susac and Mr Peter Sore.⁴¹³ The Committee acknowledges their courage in coming forward and telling the Committee of their experiences.

17.7 Although for brevity the Committee does not cite the cases of all eight injured workers advanced by the CFMEU, the Committee notes below as a representative example the case of Mr Tomo Susac.

The case of Mr Susac

- 61 year old carpenter who immigrated to Australia in the 1960s and has spent his working life since then in the building industry.
- In 2001 at age 57, he suffered a serious injury at work to his right shoulder whilst attempting to hold a 4.5 metre timber beam being passed down to him.
- He has had major surgery on his right shoulder including a subacromial decompression and extensive hydro-cortisone treatment. His pathology includes a significant rotor cuff tear in his right shoulder. His dominant arm is his right arm.
- All doctors and treating specialists who have seen him agree that he is totally unfit for any heavy manual work involving his right arm. His educational background is limited having left school at about age 16. He speaks English, however he has a very limited command of reading and/or writing English.
- His lawyers obtained a lump sum of \$30,000 for him from the workers' compensation insurer in respect of the loss of use of his right arm and pain and suffering. The Workers Compensation Commission Approved Medical Specialist (AMS) doctor determined that he has only 11% whole of person impairment. This decision is binding on the worker. The worker is effectively unemployable given his background, age and disability to his right arm. He and his wife are forced to live off statutory payments of weekly compensation of the sum of \$415 gross per week (less tax) until age 66. Prior to his accident in 2001 when he hurt his right arm, he was earning around \$900 to \$1,200 gross per week.
- The Workers Compensation Commission finding of 11% WPI means he will not be entitled to any damages for his loss of earning capacity or even a buyout of his rights to weekly compensation.

Source: Submission 39, CFMEU, p10

⁴¹³ Evidence, 2 May 2005, pp26-39

Injured workers who are partially incapacitated

17.8 As indicated in Chapter 4, an injured worker who is partially incapacitated is provided with weekly income support under the provisions of s.38 of the *Workers Compensation Act 1987*, which provides in part:

(2) Maximum period of entitlement

The maximum total period for which the worker may be so compensated is 52 weeks.

(3) Rate of compensation

When a worker is so compensated, the compensation is payable at the relevant rate prescribed by this Act for the period of incapacity concerned. However, after the first 26 weeks of incapacity, the rate is the greater of the following rates:

(a) 80% of the worker's current weekly wage rate (that is, 80% of the rate prescribed by this Act for the first 26 weeks of incapacity),

(b) the statutory indexed rate (that is, the rate prescribed by this Act for a period of incapacity after the first 26 weeks).

(4) Worker to seek suitable employment

Compensation is not payable to a worker in accordance with this section during any period unless the worker is seeking suitable employment during that period (as determined in accordance with section 38A).

17.9 During the inquiry, the Committee received a written submission from Mr Keith Blanch, writing in a private capacity. Mr Blanch injured his shoulder at work on 11 December 2002. He was 60 years old at the time, and was working in the food industry, employed as a plant operator.

17.10 Following his accident, Mr Blanch received rehabilitation assistance, and resumed work on reduced hours. However, on 19 May 2004 he was retrenched, without ever having returned to work on a full-time basis. Prior to his retrenchment, Mr Blanch was being paid 80% of his pre-injury salary under s.38 of the *Workers Compensation Act 1987*. In May 2005, a year after his retrenchment, his weekly statutory rate was due to drop to \$328.90⁴¹⁴. Mr Blanch submitted:

I was employed in a job earning approximately \$1,300 per week and after the 12 months is up under s.38 receiving 80% of my salary I am looking at the prospect of being put back to the statutory rate of approximately \$328.00 less tax per week with the loss of a high income through no fault of my own. No one thinks that you might have certain commitments with no hope of meeting them when through no fault of your own your salary drops \$972 a week. You are planning for your retirement down the track and due to injury you are on the scrap heap 5 years prior with your quality of life completely undermined on a limited income.⁴¹⁵

⁴¹⁴ This was the previous basic rate of weekly compensation payments to an injured worker without dependents prior to the adjustments in April and October 2005 to the current \$340.90.

⁴¹⁵ Submission 30, Mr Blanch, p3

17.11 The Committee notes that similar concerns about the loss of income of injured workers were also expressed by the AMWU in its written submission, and by Mr Peter Mooney and Ms Mary Yaager, representing Unions NSW, during the hearing on 20 June 2005.⁴¹⁶

Commutation of compensation

17.12 As noted in Chapter 4, under Division 9 of Part 3 (s.87E) of the *Workers Compensation Act 1987*, a weekly compensation payment or compensation for medical, medical and rehabilitation expenses can be commuted to a lump sum with the agreement of the injured worker. Under s.87EA of the Act, preconditions to commutation include:

- (a) the injury has resulted in a degree of permanent impairment of the injured worker that is at least 15% (assessed as provided by Part 7 of Chapter 7 of the 1998 Act), and
- (b) permanent impairment compensation and pain and suffering compensation to which the injured worker is entitled in respect of the injury has been paid, and
- (c) a period of at least 2 years has elapsed since the worker's first claim for weekly payments of compensation in respect of the injury was made

17.13 One consequence of commuting a liability is that the injured worker ceases to be eligible for all ongoing compensation in respect of the liability in question. This includes payments for medical, medical and rehabilitation expenses and weekly income payments.

17.14 During the hearing on 14 October 2005, the Committee raised with Ms Telfer, General Manager of Strategy and Policy Division with WorkCover, the availability of commutations to seriously injured workers. Ms Telfer commented that the availability of commutations needs to be structured in such a way as to:

- ensure that employers make a genuine attempt to return an injured worker to work, rather than simply relying on a commutation
- ensure that an injured worker is not disadvantaged by taking a commutation and being precluded from accessing other assistance.

17.15 Accordingly, Ms Telfer cautioned against regarding commutations as a simple solution to the problem of providing adequate income support to the seriously injured workers.⁴¹⁷

The common law threshold for accessing economic loss damages

17.16 As indicated in Chapter 4, under s.151G of the *Workers Compensation Act 1987*, the only common law damages that may be awarded to injured workers are damages for past and future economic loss. Damages for non-economic loss cannot be brought at common law. In addition, under s.151H of the *Workers Compensation Act 1987*:

⁴¹⁶ Submission 37, AMWU, ppi,ii. Mr Mooney, Unions NSW, Evidence, 20 June 2005, p49. Ms Yaager, Unions NSW, Evidence, 20 June 2005, p57

⁴¹⁷ Mr Telfer, Evidence, 14 October 2005, p14

No (economic loss) damages may be awarded unless the injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is at least 15%.

- 17.17** During the inquiry, various parties argued strenuously that the *Workers Compensation Act 1987*, unlike the *Civil Liability Act 2002*, effectively precludes access to common law damages for injured workers, virtually forcing them to rely on the statutory workers' compensation scheme.
- 17.18** For example, in Annexure I to its written submission, the Law Society of NSW argued that the 15% WPI threshold operates as a *de facto* abolition of workers' common law rights, because very few workers will meet such a threshold.⁴¹⁸
- 17.19** Moreover, the Law Society noted that as a further disincentive to pursuing a common law claim, especially for a seriously injured worker, recovery of common law damages means that the worker ceases to be entitled to any further compensation or to participation in any injury management program provided under the workers' compensation system. This means that the future medical costs of a seriously injured worker will have to be met by the worker. Section 151A of the *Workers Compensation Act 1987* states:
- (1) If a person recovers damages in respect of an injury from the employer liable to pay compensation under this Act then (except to the extent that subsection (2), (3) or (4) covers the case):
 - (a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid), and
 - (b) the amount of any weekly payments of compensation already paid in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the compensation, and
 - (c) the person ceases to be entitled to participate in any injury management program provided for under this Act or the 1998 Act.
- 17.20** The Committee notes that the Australian Lawyers Alliance and NSW Bar Association expressed similar opposition to the common law provisions of the *Workers Compensation Act 1987*.⁴¹⁹
- 17.21** In his written submission, Mr John Potter, partner with Commins Hendriks Solicitors, cited the case of Mr Michael Logan as an example of the difficulties faced by injured workers accessing common law damages.⁴²⁰ The Committee cites the case of Mr Logan below.

⁴¹⁸ Submission 41, Law Society of NSW, Annexure I, p43

⁴¹⁹ Submission 23, Australian Lawyers Alliance, p11. See also Dr Morrison, Australian Lawyers Alliance, Evidence 6 June 2005, p10. Submission 29, NSW Bar Association, pp33-35

⁴²⁰ Submission 58, Mr Potter, p13. See also Mr Potter, Evidence, 23 May 2005, p42

The case of Mr Logan

Mr Logan was born on 11 November 1966. He was employed as a labourer at abattoirs from 1992.

In 1995 he became ill and was diagnosed with Q fever which he contracted at work. He had three months off work and his weight declined from 90kg to 60kg. He returned to work on light duties but was unable to continue with his employment and changed his employment on two occasions until he became self employed in a takeaway store in 1999 which he operated with his wife.

In 2002, Mr Logan's fever symptoms of tiredness and breathlessness continued to the point where he was unable to work. He attended his doctor and was admitted to Wagga Wagga Base Hospital and was then flown by air ambulance to St Vincent's Hospital where he was informed that his aortic valve had been destroyed by the Q fever. The aortic valve was replaced and after a lengthy convalescence he returned to part time work in the takeaway shop.

Because of his inability to work additional employees have had to be employed in the business and as this has become uneconomic Mr Logan and his wife are now being forced to sell the shop.

Mr Logan's treating cardiologist, Associate Professor Kuo, has assessed his whole person impairment at 49%.

As at 23 May 2005, Mr Logan is required to pay additional wages in respect of replacement labour in excess of \$500.00 per week and he requires considerable assistance with the heavier domestic tasks around his home.

Further, Mr Logan continues to spend large sums of money on medication and this medication is currently in excess of \$50.00 per week.

The prognosis of Mr Logan is that his heart condition will deteriorate notwithstanding that he is 39 years of age. It is suggested that he may require a total heart transplant in approximately five years' time and the cost of that transplant would be approximately \$45,000. His prospects post surgery are unknown.

The difficulties that Mr Logan faces are that he wishes to sue his employer at common law. He has been advised that he should not do so as the substantial ongoing treatment costs, domestic assistance and heart transplant would not be paid for by the workers' compensation insurer and that he would have to provide that treatment from any amount that he was awarded for future economic loss.

The inability to bring a common law claim leaves our client and his family no other option than to sell their only current means of income.

Again we have a seriously injured worker who is placed in a 'no win situation' under the current system.

Source: Submission 58, Mr Potter, pp16-17

17.22 Mr Logan's position is very difficult. While he does meet the 15% WPI threshold, and is entitled to common law compensation, by accessing common law compensation, he would forgo his right to costs for medical treatment in the future. This is particularly problematic for Mr Logan because he is likely to need to go on the heart transplant list within the next five years. In the meantime, however, by remaining on weekly workers' compensation payments, Mr Logan is unable to support his business and family.⁴²¹

17.23 The Committee notes that Mr Logan appeared before it during its hearing in Wagga Wagga. The Committee understands and regrets the very difficult position in which he is placed.⁴²²

17.24 The Committee also received a written submission from Mr Paul Macken, a solicitor with Leigh Virtue & Associates, in which he questioned the tighter restrictions on access to common law damages imposed on injured workers under the *Workers Compensation Act 1987* when compared with the *Civil Liability Act 2002*. As stated by Mr Macken:

A person who sustains an injury in circumstances giving rise to a public liability claim generally has no prior relationship or connection with the person against whom the claim existed ...

On the other hand, a worker who sustains injury in circumstances which would otherwise give rise to the possibility of a common law claim for damages (ie where there is negligence on the part of the employer) clearly sustains injury while providing a service to the employer. I would submit that both morally and rationally, the access to common law damages should be more freely available to injured workers as opposed to those sustaining injuries to which the motor accident or civil liability legislation applies.⁴²³

17.25 Unions expressed similar concerns during the inquiry about access to common law damages under the *Workers Compensation Act 1987*. In its written submission, Unions NSW argues that the 2001 workers' compensation amendments had effectively abolished common law damages for 95% of injured employees with valid claims in New South Wales. This has resulted in seriously injured employees being put on weekly payments under the statutory scheme which do not compensate them for loss of wages, let alone other heads of damages such as pain and suffering, medical expenses and nursing care.⁴²⁴

17.26 In addition, Unions NSW reiterated that recovery of common law damages means that the worker ceases to be entitled to any further compensation. Unions NSW submitted:

This is a grossly unfair system. When an employee does obtain damages they are not allowed to claim ongoing medical expenses against the statutory scheme.⁴²⁵

⁴²¹ Mr Potter, Evidence, 23 May 2005, p42

⁴²² Mr Logan, Evidence, 23 May 2005, pp40-43

⁴²³ Submission 25, Mr Macken, p1

⁴²⁴ Submission 51, Unions NSW, pp6-7

⁴²⁵ Submission 51, Unions NSW, pp7-8

17.27 Similar positions were expressed by the AMWU,⁴²⁶ the Australian Workers' Union⁴²⁷ and the CFMEU in their written submissions.⁴²⁸ The Committee notes in particular the evidence of Mr Paul Bastian, State Secretary of the AMWU:

The guidelines are discriminatory in that the thresholds are higher than those that exist in other legislation such as motor accidents and civil liabilities legislation. As well, unlike other legislation, common law claims, if made under the 2001 reforms, are restricted only to economic loss, with injured workers' rights to ongoing medical care being extinguished. Surely the cost of supporting yourself and your family are the same, regardless of where the negligence occurred.⁴²⁹

17.28 In response to these concerns, The Cabinet Office, on behalf of the NSW Government, cited the following conclusions of the Commission of Inquiry into Workers Compensation Common Law Matters (the Sheahan Inquiry):

- It is unarguable that the objective of obtaining from the NSW Compensation Scheme the maximum possible award of common law damages conflicts with the statutory objectives of the Scheme. Swift and effective treatment, rehabilitation, and early return to work at maximum earning capacity, do not sit comfortably with a tax-free lump sum based upon an extended period of provable past economic loss, and estimated likely future losses and costs, and the intangible consequences of injury, such as pain and suffering and loss of "amenity of life".
- The increasing focus on gaining a maximum lump sum, especially one offering the prospect of recovering large common law damages for economic loss, is seen to encourage "illness behaviour" rather than "wellness behaviour", and transforms the expected focus on support, recovery and an early return to safe productive work into an adversarial relationship which is costly, in terms of money, time and Scheme objectives, and eats into the funds available for the assistance of all injured workers.⁴³⁰

Common law claim numbers

17.29 In its written submission, QBE Insurance presented data on the frequency of common law workers' compensation claims within its portfolio per 1,000 claims lodged. This is shown in Table 17.1 below.

Table 17.1 Frequency of common law claims under the WorkCover Scheme: QBE insurance

| Period ending June | 1998 | 1999 | 2000 | 2001 | 2002 |
|--|-------|------|------|------|------|
| <i>Frequency rate per 1,000 claims</i> | 3.2 | 8.1 | 12.7 | 13 | 5.7 |
| <i>Average days duration from injury to common law claim lodgement</i> | 1,183 | 926 | 603 | 333 | 829 |

Source: Submission 45, QBE Insurance, Part 2, p8

⁴²⁶ Submission 37, AMWU, pp11,4

⁴²⁷ Submission 46, Australian Workers' Union, p2

⁴²⁸ Submission 39, CFMEU, p2

⁴²⁹ Mr Bastian, Evidence, 4 July 2005, pp2-3

⁴³⁰ Cited in submission 53, The Cabinet Office, p42

- 17.30** Table 17.1 shows a marked increase in common law claims as a proportion of all claims lodged with QBE from just over 8% of claims in 1999 to 13% of claims in 2001. This rate subsequently dropped away to as low as 2.1% in early 2002 before rising to 5.7%. However, QBE Insurance also submitted that with the increasing time lag for lodgement of claims cited in the table above, the rate of common law claims could return to 1999 levels.⁴³¹

The age 65 ceiling on damages for economic loss

- 17.31** Section 151IA of the *Workers Compensation Act 1987* provides that common law damages for economic loss should not be paid to an injured worker beyond the age of 65:

In awarding damages for future economic loss due to deprivation or impairment of earning capacity or (in the case of an award of damages under the *Compensation to Relatives Act 1897*) loss of expectation of financial support, the court is to disregard any earning capacity of the injured worker after age 65.

- 17.32** In its written submission, Unions NSW recommended that the provisions of s.151IA be removed on the basis that all workers are being urged by both Commonwealth and State Governments to remain in employment past the age of 65.⁴³²
- 17.33** Similarly, in its written submission, the Country Women's Association of NSW submitted that this provision is discriminatory, divisive and unfair. The Association noted that the Prime Minister, amongst others, has been encouraging workers to keep working well into their 70s.⁴³³

The 5% discount rate on damages for future economic loss

- 17.34** The Committee notes that like s.14 of the *Civil Liability Act 2002* and s.127 of the *Motor Accidents Compensation Act 1999*, s.151J of the *Workers Compensation Act 1987* sets a 5% discount rate on damages for future economic loss paid as a lump sum.

The Government's commitment to workers in 2001

- 17.35** In its written submission to the inquiry, the AMWU argued that at the time of the amendments to the *Workers Compensation Act 1987* in 2001, the Government promised unions that the changes would not lead to injured workers being worse off. This position was reiterated by Mr Bastian, State Secretary of the AMWU, during his evidence on 4 July 2005:

When introducing the 2001 reform to workers compensation the New South Wales Government gave a commitment that no worker would be worse off under its reform proposals. After nearly four years of these reforms the AMWU maintains that this pledge, given to the workers of New South Wales, does not ring true.⁴³⁴

⁴³¹ Submission 45, QBE Insurance, Part 2, p9

⁴³² Submission 51, Unions NSW, p8

⁴³³ Submission 17, Country Women's Association of NSW, p2

⁴³⁴ Mr Bastian, State Secretary, AMWU, Evidence, 4 July 2005, p2

17.36 Based on this position, the AMWU called for an independent review of the implementation and effects of the Government's 2001 legislative amendments.⁴³⁵

17.37 The Committee notes that the AMWU did not specifically cite evidence that the Government had promised that injured workers would not be worse off. However, the Committee did raise the matter with Ms Telfer during the hearing on 14 October 2005. Ms Telfer commented:

If you are talking about the workers' compensation reforms, we have checked very closely any correspondence that was sent, and have also gone through our collective memories. I think it would be fair to say that the Government acknowledged, in May 2001, union concerns that injured workers should not be disadvantaged under guidelines and thresholds for workers' compensation. There were a number of concerns raised, as you know, particularly around common law, and in mid-2001 an independent inquiry was undertaken into common law provisions.⁴³⁶ That committee included a range of people from various unions and employer groups. There were also some people from our advisory council on that committee and they went through the common law provisions. I do not think the Government did say at any time that no workers would be disadvantaged; it did acknowledge concerns about some of the provisions and consulted about those provisions.⁴³⁷

Committee comment

17.38 During the inquiry, considerable concern was expressed about the access of injured workers to appropriate compensation. Put simply, it was argued that injured workers are significantly worse off than injured motorists or members of the public who have access to compensation under the *Motor Accidents Compensation Act 1999* or the *Civil Liability Act 2002*.

17.39 The Committee shares these concerns.

17.40 The Committee notes that under current arrangements, injured workers who are totally or partially incapacitated are entitled to weekly payments for 26 weeks at or near to their pre-injury salary, during which time the vast majority are successfully rehabilitated and return to work. The Committee supports continuation of these arrangements.

17.41 However, the Committee is concerned that following this initial 26-week period:

- Where a worker continues to receive weekly compensation payments under the statutory scheme, weekly payments drop considerably and are unlikely to be commensurate with the injured worker's pre-injury rate of pay
- Injured workers are not entitled to economic loss damages, except under the common law system, which is very difficult to access, and precludes access to other heads of damages.

⁴³⁵ Mr Bastian, Evidence, 4 July 2005, p2

⁴³⁶ The Commission of Inquiry into Workers Compensation Common Law Matters (the Sheahan Inquiry) which commenced on 18 June 2001 and reported on 31 August 2001.

⁴³⁷ Ms Telfer, General Manager of Strategy, Policy Division, WorkCover, Evidence, 14 October 2005, p1

- 17.42 The Committee believes that these provisions of the *Workers Compensation Act 1987* are fundamentally unfair. The Committee notes that the vast majority of injured workers return to work within the initial 26-week period after their injury. However, for those workers who are seriously injured, and cannot return to work during this period (estimated at approximately 6% of workers), the Committee believes the restrictions on access to economic loss damages are excessively harsh.
- 17.43 Accordingly, the Committee makes the following recommendation to amend Part 5 of the *Workers Compensation Act 1987* to increase the availability of economic loss damages to those seriously injured workers who are unable to return to work within 26 weeks of their injury.

Recommendation 12

That the Government amend the common law provisions of Part 5 of the *Workers Compensation Act 1987*:

- so that persons who recover economic loss damages in respect of an injury under s.151A of the Act may continue to be able to access future compensation for medical expenses under the workers' compensation system
 - so that persons accessing future compensation for medical expenses may be able to negotiate the commutation of their ongoing medical expenses as a lump sum
 - so that economic loss damages cannot be accessed under s.151H of the Act unless the injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is at least 15% of 'a most extreme case' (as assessed judicially in the proposed personal injury compensation tribunal)
 - so that when calculating economic loss damages under s.151I of the Act, the proposed personal injury compensation tribunal is to disregard the amount (if any) by which the injured worker's net weekly earnings would have exceeded an amount that is three times the average weekly earnings at the date of the award
 - to reduce the current 5% discount rate on damages for future economic loss paid as a lump sum under s.151J of the Act to a 3% discount rate
 - to amend the provisions of s. 151IA of the Act to provide that damages for economic loss should not be paid to an injured worker beyond the official age for accessing the aged pension in Australia.
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Chapter 18 Additional technical issues related to the payment of damages

This chapter examines additional technical issues raised during the inquiry in relation to the payment of damages under the *Civil Liability Act 2002*, the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987*.

Access to *Sullivan v Gordon*⁴³⁸ type damages

18.1 The Committee received correspondence from the NSW Bar Association concerning so-called *Sullivan v Gordon* type damages. *Sullivan v Gordon* type damages are damages that may be recovered by a seriously or catastrophically injured person in compensation for the loss of their capacity to provide care for others. Common examples where *Sullivan v Gordon* type damages could apply include:

- A parent who was caring for young children prior to injury
- A parent who was caring for a grown child with a disability prior to injury
- A partner who was caring for a sick or disabled spouse prior to injury
- A son or daughter who was caring for a sick or disabled parent prior to injury.⁴³⁹

18.2 *Sullivan v Gordon* was handed down in the NSW Court of Appeal in 1999. However, on 21 October 2005, the High Court handed down its decision in *CSR Ltd v Eddy*⁴⁴⁰ in which it overruled *Sullivan v Gordon*. Although the High Court did not reject the awarding of *Sullivan v Gordon* type damages, the Court found that it was more appropriate that parliament consider whether such damages should be payable, and if so, that it should legislate accordingly. As stated by the High Court:

The respondents' arguments then, are not necessarily to be rejected for flaws in the policy reasoning on which they rest; they are to be rejected because they rest on policy reasoning which is more appropriate for legislatures to weigh than for courts.⁴⁴¹

18.3 In its correspondence, the NSW Bar Association advocated that parliament should indeed legislate to reinstate *Sullivan v Gordon* type damages, on the basis that catastrophic injuries affect not only the primary victims but those who are dependent upon them. In support, the NSW Bar Association cited the following case of "Sue".

⁴³⁸ (1999) 47 NSWLR 319

⁴³⁹ Correspondence from Mr Slattery QC, President, NSW Bar Association, to Chair, 24 November 2005, p2

⁴⁴⁰ [2005] HCA 64

⁴⁴¹ [2005] HCA 64 at para 66, cited in correspondence from Mr Slattery QC, President, NSW Bar Association, to Chair, 24 November 2005, p3

The case of “Sue”

Sue was walking down a city street when poorly erected scaffolding collapsed and a falling board struck her on the back causing her spinal chord injury. As a consequence, Sue is a paraplegic. There is no doubt as to the liability of the company that erected the scaffolding.

Sue is going to require assistance for various tasks she is no longer able to perform. Damages can be recovered for the nursing assistance Sue requires, to compensate for the fact that Sue can no longer clean her house or assist with other necessary domestic tasks.

At the time of her accident Sue was not working but rather caring for her two young children. Sue’s husband Bill worked full time to support the family.

Applying the principles from *Sullivan v Gordon*, Sue would have been entitled to recover further damages for the additional assistance she requires in trying to look after her two young children from a wheelchair. Sue could have recovered damages for extra assistance required in doing the childrens’ washing, tidying up after the kids, making their meals and driving them to and from school.

With the demise of *Sullivan v Gordon*, Sue is no longer entitled to recover any damages, despite the family’s clear need for such assistance. The children and Sue’s husband do not have any course of action they can pursue. Sue’s husband certainly cannot afford to give up work to replace his wife as primary carer for the two children.

Source: Correspondence from Mr Slattery QC, President, NSW Bar Association, to Chair, 24 November 2005, pp3-4

18.4 The Bar Association also noted the policy justification of Justice Mason, President of the NSW Court of Appeal, for *Sullivan v Gordon* type damages in the *Sullivan v Gordon* decision:

- For many women and some men their own needs extend to care for other members of the family as naturally as they extend to the capacity to attend to their own personal functions. To draw a distinction only serves to discriminate against those who devote themselves to the care of others within the family household (usually women).
- It is difficult and unreal to disentangle the domestic duties performed by a household member in fulfilment of compelling moral duties owed to another member.
- Acknowledgement of the role of carers in the household is part of the law’s belated recognition of the economic value of domestic work.⁴⁴²

18.5 In addition, the NSW Bar Association supported its position by noting that three Australian jurisdictions – Queensland, Victoria and the ACT – have already legislated to enshrine *Sullivan v Gordon* type damages.⁴⁴³ The Committee notes in particular the provisions of s.100 of the *Civil Law (Wrongs) Act 2002* (ACT), which provides in part:

⁴⁴² *Sullivan v Gordon* (1999) 47 NSWLR 319 at 322, cited in correspondence from Mr Slattery QC, President, NSW Bar Association, to Chair, 24 November 2005, pp4-5

⁴⁴³ See s.59(3) of the *Civil Liability Act 2003* (QLD), s.28ID of the *Wrongs Act 1958* (VIC) and s.100 of the *Civil Law (Wrongs) Act 2002* (ACT).

1. A person's liability for an injury suffered by someone else because of a wrong includes liability for damages for any resulting impairment or loss of the injured person's capacity to perform domestic services that the injured person might reasonably have been expected to perform for his or her household if he or she had not been injured.
2. In an action for the recovery of damages mentioned in sub-section (1), it does not matter:
 - (a) Whether the person performed the domestic service for the benefit of other members of the household or solely for his or her own benefit; or
 - (b) That the injured person was not paid to perform the services; or
 - (c) That the injured person has not been, and will not be, obliged to pay someone else to perform the services; or
 - (d) That the services have been, or are likely to be performed (gratuitously or otherwise) by other people (whether members of the household or not).⁴⁴⁴

18.6 Finally, the NSW Bar Association also submitted that recognition in legislation of an entitlement to *Sullivan v Gordon* damages would not lead to an increase in public liability insurance premiums because insurers should have been setting premiums since 1999 on the basis that *Sullivan v Gordon* was correct.

Rescuers

18.7 In its written submission, the NSW Bar Association noted that at present, rescuers who assist at the scene of an accident can only recover damages for psychological trauma if they witness the accident first-hand, not if they arrive and assist following the accident. Furthermore, even a rescuer who witnesses an accident first-hand can have his or her damages reduced as a consequence of any contributory negligence on the part of the injured or deceased to whom they provide assistance.

18.8 Section 30 of the *Civil Liability Act 2002* provides:

- (1) This section applies to the liability of a person (the defendant) for pure mental harm to a person (the plaintiff) arising wholly or partly from mental or nervous shock in connection with another person (the victim) being killed, injured or put in peril by the act or omission of the defendant.
- (2) The plaintiff is not entitled to recover damages for pure mental harm unless:
 - (b) the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril, or
 - (c) the plaintiff is a close member of the family of the victim.

⁴⁴⁴ Section 100 of the *Civil Laws (Wrongs) Act 2002* (ACT), cited in correspondence from Mr Slattery QC, President, NSW Bar Association, to Chair, 24 November 2005, p6

(3) Any damages to be awarded to the plaintiff for pure mental harm are to be reduced in the same proportion as any reduction in the damages that may be recovered from the defendant by or through the victim on the basis of the contributory negligence of the victim.

- 18.9** The NSW Bar Association recommended that the provisions of s.30 of the *Civil Liability Act 2002* be amended so that rescuers who arrive at the scene of an accident after its occurrence are entitled to recover damages where they suffer serious psychological injuries, and are not penalised for the contributory negligence of the victim to whom they provide assistance.⁴⁴⁵
- 18.10** The Committee also acknowledges comparable evidence in relation to this issue of Dr Andrew Morrison, representing the Australian Lawyers Alliance, during the hearing on 6 June 2005.⁴⁴⁶

The *Motor Accidents Compensation Act 1999*

Death benefits for parents

- 18.11** In its written submission, the Law Society of NSW noted that for over 10 years, the UK has had a scheme which provides a lump sum death benefit for parents who suffer nervous shock as a result of the loss of a child or children in a motor accident where they would not otherwise qualify for damages. Due to the difficulty of parents achieving damages in NSW under the current 10% WPI threshold, the Law Society recommended that a similar scheme be introduced in NSW.⁴⁴⁷

Other transport accidents

- 18.12** In its written submission, the NSW Bar Association noted that an anomaly exists whereby some rail and ferry services fall within the scope of the *Motor Accidents Compensation Act 1999* and others do not – the legislation applies to public transport accidents where the Government would be liable.
- 18.13** The NSW Bar Association submitted that if the compulsory third party (CTP) scheme is to be maintained as a separate and independent statutory scheme, then principle and consistency would dictate that all other transport accidents (where no CTP premium is involved) should be dealt with under the *Civil Liability Act 2002*.⁴⁴⁸

The definition of a motor vehicle

- 18.14** In its written submission, the NSW Bar Association noted that the *Motor Accidents Compensation Act 1999* applies to all motor vehicle accidents. Motor vehicles are broadly defined to include

⁴⁴⁵ Submission 29, NSW Bar Association, pp30-31

⁴⁴⁶ Dr Morrison, Australian Lawyers Alliance, 6 June 2005, p14

⁴⁴⁷ Submission 29, Law Society of NSW, p31

⁴⁴⁸ Submission 29, NSW Bar Association, p30

golf carts, go-carts, ride-on lawn mowers, motorised scooters and the like. Because most of these vehicles are not registered, the Association submitted that where no CTP insurer is involved, these claims should logically be dealt with under the *Civil Liability Act 2002* rather than the *Motor Accidents Compensation Act 1999*.⁴⁴⁹

Committee comment

- 18.15** In relation to the issue of *Sullivan v Gordon* type damages, the Committee agrees with the position of the NSW Bar Association that the Parliament should legislate to enshrine in statute access to damages by a seriously or catastrophically injured person, in compensation for the loss of their capacity to provide care for others. Such a measure would ensure that just compensation is available not only to the primary victims of catastrophic injury, but also those who are dependent upon them.
- 18.16** The Committee further believes that *Sullivan v Gordon* type damages should be available to all victims of personal injury in New South Wales, whether injured in a motor accident, in the workplace, in a public place or during a medical procedure. The Committee suggests that s.100 of the *Civil Law (Wrongs) Act 2002* (ACT) provides an appropriate legislative model for adoption in New South Wales.
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Recommendation 13

That the Government amend the *Civil Liability Act 2002*, the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* to provide for the recovery of *Sullivan v Gordon* type damages, possibly based on the provisions of s.100 of the *Civil Law (Wrongs) Act 2002* (ACT).

- 18.17** In relation to the issue of rescuers who assist at the scene of an accident, the Committee endorses the recommendation of the NSW Bar Association that s.30 of the *Civil Liability Act 2002* be amended so that rescuers who arrive at the scene of an accident after its occurrence are entitled to recover damages where they suffer serious psychological injuries, and are not penalised for the contributory negligence of the victim to whom they provide assistance.
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Recommendation 14

That the Government amend the nervous shock provisions under s.30 of the *Civil Liability Act 2002* so that rescuers who arrive at the scene of an accident after its occurrence are entitled to recover damages where they suffer serious psychological injuries, and are not penalised for the contributory negligence of the victim to whom they provide assistance.

- 18.18** The Committee also endorses the proposal of the NSW Bar Association that where no CTP insurer is involved in a motor vehicle accident claim, it should logically be dealt with under the *Civil Liability Act 2002* and not the *Motor Accidents Compensation Act 1999*.

⁴⁴⁹ Submission 29, NSW Bar Association, p29

Recommendation 15

That the Government amend the *Motor Accidents Compensation Act 1999* to change the definition of motor vehicles so that transport accidents (where no CTP insured vehicle is involved) are assessed under the *Civil Liability Act 2002*.

Chapter 19 Containment of costs

This chapter examines proposals to contain claim costs under the *Civil Liability Act 2002*, the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987*.

As the Committee indicated in Chapter 11, the Committee believes that there is scope for a reassessment of some of the public liability and motor accident law reforms made in New South Wales since 1999, based on the long-term profitability of the CTP and public liability insurance lines. In addition, the Committee also believes that the improving financial position of the NSW Workers Compensation Scheme would support the provision of greater assistance to injured workers in certain circumstances.

However, the Committee recognises that its recommendations in this report – in particular its recommendations to discontinue the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines, to decrease the 5% discount rate on damages for future economic loss paid as a lump sum to 3% and to increase access to economic loss damages for injured workers – will increase costs significantly. These costs must be at least partially offset if the schemes are to remain viable and if premiums for workers' compensation, CTP and public liability insurance are to remain stable or fall further.

The potential cost impact of discontinuing the use of the AMA Guides

- 19.1** The Committee notes that the MAA Medical Assessment Guidelines and WorkCover Guidelines were introduced into personal injury law in New South Wales with the specific objective of containing claims for non-economic loss damages under the motor accident and workers compensation schemes. Accordingly, under the Committee's recommendation for the repeal of the MAA Medical Assessment Guidelines and WorkCover Guidelines, in favour of judicial assessment using a 15% of a 'most extreme case' threshold, there is the potential for a significant increase in non-economic loss damages payments.
- 19.2** In evidence, Mr David Bowen, General Manager of the MAA, indicated to the Committee that a threshold to limit access to non-economic loss damages to the most seriously injured has been part of the motor accidents scheme since 1988 under the previous *Motor Accidents Compensation Act 1988*. However, he argued that the introduction of the use of the AMA Guides (the modified MAA Medical Assessment Guidelines) in 1999 was necessary because, under the previous scheme, which used a judicial threshold of 15% of 'a most extreme case', approximately 40% of claimants, including those with simple soft-tissue injuries, were getting non-economic loss compensation. This was obviously driving up considerably the cost of CTP insurance, and was, Mr Bowen submitted, 'not sustainable'.
- 19.3** By contrast, under the current *Motor Accidents Compensation Act 1999*, using the 10% WPI threshold test, only approximately 10% of motor vehicle accident victims are able to access non-economic loss damages. This has clearly reduced costs under the CTP scheme.⁴⁵⁰

⁴⁵⁰ Mr Bowen, 'Opening comments', Tabled document, 4 July 2005, p11. See also Mr Bowen, Evidence, 14 October 2005, p11

The future judicial interpretation of 15% of ‘a most extreme case’

- 19.4** Furthering concerns of a significant increase in non-economic loss damages as a result of the discontinuation of the use of the MAA Medical Assessment Guidelines and WorkCover Guidelines, the Committee was presented with evidence during the inquiry that the legal profession is attempting to widen the judicial interpretation of the 15% of ‘a most extreme case’ threshold under the *Civil Liability Act 2002*.
- 19.5** In its written submission, the Community Care Underwriting Agency (CCUA) argued that plaintiff lawyers are proving ‘creative’ in an attempt to undermine the intent of s.16 of the *Civil Liability Act 2002*. For example, CCUE argued that plaintiff lawyers are seeking to include relatively significant psychological injury connected with a very minor physical injury in order to get over the threshold 15% of ‘a most extreme case’ threshold (which is based on the total impact of both types of injury added together).
- 19.6** In turn, CCUA raised concerns that the courts may allow claimants to either exceed injury thresholds or provide additional damages to claimants under other heads of damages, in effect undermining the intent of the *Civil Liability Act 2002*.⁴⁵¹
- 19.7** Similarly, Suncorp Group argued in its written submission that judicial precedent will largely determine the effectiveness of the *Civil Liability Act 2002*. Suncorp submitted that the awarding of new heads of damages, allowing claims to cross non-economic loss thresholds and providing additional flexibility within current heads of damage, would have the effect of eroding the controls built into the reforms.⁴⁵²
- 19.8** Finally, Vero Insurance also noted the increase in claims containing a psychiatric impairment component, possibly as a means of augmenting the severity of injuries to achieve the necessary threshold for accessing non-economic loss damages.⁴⁵³

The UK Guidelines for the Assessment of General Damages in Personal Injury Cases

- 19.9** The Committee notes that one mechanism to limit the potential for a widening of the scope of the 15% of ‘a most extreme case’ threshold is to develop guidelines for the assessment of non-economic loss damages.
- 19.10** In its September 2002 *Review of the Law of Negligence Final Report* (the Ipp Report), the Negligence Review Panel made particular reference to the UK *Guidelines for the Assessment of General Damages in Personal Injury Cases*, which is administered by the UK Judicial Studies Board. The UK guidelines contain upper and lower limits of awards of non-economic loss damages in relation to many types of injuries, intended to reflect current consensus about the appropriate award for different types of injuries. At the same time, the guidelines facilitate settlements and promote consistency and certainty in the assessment of non-economic loss damages.

⁴⁵¹ Submission 7, CCUA, p3. This evidence was reiterated by Mr Brow, Solicitor, UNITED, during the hearing on 2 May 2005. See Mr Brown, Evidence, 2 May 2005, p53

⁴⁵² Submission 22, Suncorp Group, p14

⁴⁵³ Submission 38, Vero Insurance, p7

19.11 The Ipp Report suggested that the UK *Guidelines* have been ‘markedly successful’ in bringing about consistency in non-economic loss damages throughout the country. Accordingly, it recommended the development of similar guidelines in Australia. The report noted, however, that to do so would require legislation to overturn the 1968 decision of the High Court in *Planet Fisheries Pty Ltd v La Rosa*⁴⁵⁴. This decision prevents counsel from referring to awards of non-economic loss damages in earlier cases involving similar injuries in an attempt to establish an appropriate award for the case in hand.⁴⁵⁵

The potential cost impact of expanding access to non-economic loss damages

19.12 The Committee notes that the maximum in lump sum payments available to injured workers under the provisions of ss.66 and 67 of the *Workers Compensation Act 2002* is \$250,000, compared to:

- \$416,000 under s.16 of the *Civil Liability Act 2002*
- \$359,000 under s.131 of the *Motor Accidents Compensation Act 1999*

19.13 The Committee raised this discrepancy with the Government representatives during the hearing on 14 October 2005. In reply, Ms Vicki Telfer, General Manager of Strategy, Policy Division, WorkCover, commented that while it may on the face of it appear inconsistent that workers are entitled to less in non-economic loss damages than other personal injury victims, the scheme is very different because workers do not have to prove fault in order to access a lump-sum payment.⁴⁵⁶

19.14 Mr Anthony Lean, Policy Manager, Legal Branch, The Cabinet Office, also commented:

If you kept a no-fault scheme for workers’ compensation and you added on the civil liability scheme for determining common law liability, there is one of two ways that you can pay for that. You can either increase workers’ compensation premiums for employers or you can cut the benefits in the no-fault scheme for injured workers. So the 98 per cent or 99 per cent of people who get their benefits from the no-fault scheme, and only from the no-fault scheme, will have their benefits reduced.⁴⁵⁷

Committee comment

19.15 As indicated, the Committee believes that there is scope for a reassessment of some of the tort law reforms made in New South Wales since 1999, based on the long-term profitability of the CTP and public liability insurance lines. The Committee also believes that the improving financial position of the NSW Workers Compensation Scheme would support the provision of greater assistance to injured workers in certain circumstances.

⁴⁵⁴ (1968) 119 CLR 118.

⁴⁵⁵ Negligence Review Panel, *Review of the Law of Negligence Final Report*, September 2002, pp187-188

⁴⁵⁶ Ms Telfer, Evidence, 14 October 2005, p16

⁴⁵⁷ Mr Lean, Evidence, 14 October 2005, p16

- 19.16** However, the Committee accepts that the reforms recommended in this report would, without other measures, lead to a significant blow-out in personal injury insurance costs and premiums across New South Wales.
- 19.17** To address this, the Committee believes that the NSW Government, through the proposed new personal injury compensation tribunal, should look to develop guidelines for the assessment of non-economic loss damages in personal injury cases similar to those administered by the UK Judicial Studies Board. The Committee believes that this would be a valuable mechanism in maintaining consistency in the awarding of damages across all areas of personal injury law in New South Wales and in helping to prevent any escalation in the number of people being awarded damages for non-economic loss, as occurred under the former *Motor Accidents Compensation Act 1988*.

Recommendation 16

That the NSW Government legislate if necessary to overturn the 1968 decision of the High Court in *Planet Fisheries Pty Ltd v La Rosa*⁴⁵⁸ in order to facilitate the development by the proposed new personal injury compensation tribunal of guidelines for the assessment of non-economic loss damages in personal injury cases in New South Wales.

- 19.18** In addition, the Committee believes that adjustments should be made to the caps on non-economic loss damages under the *Civil Liability Act 2002*, the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* in order to contain costs. The current caps under the three Acts are:
- \$416,000 under s.16 of the *Civil Liability Act 2002*⁴⁵⁹
 - \$359,000 under s.131 of the *Motor Accidents Compensation Act 1999*
 - \$50,000 under s.67 of the *Workers Compensation Act 1987* (but with an additional \$200,000 available for permanent impairment under s.66 of the Act)
- 19.19** The Committee believes that the caps on non-economic loss damages under s.16 of the *Civil Liability Act 2002* and s.131 of the *Motor Accidents Compensation Act 1999* should be reduced to \$300,000. Allowing for inflation, this figure is essentially consistent with the recommendation of the 2002 *Final Report of the Review of the Law of Negligence* (the Ipp Report), which recommended that the cap on the award of non-economic loss damages should be set nationwide at \$250,000.⁴⁶⁰
- 19.20** While the Committee acknowledges that a cap of \$300,000 is a significant reduction on the current caps on non-economic loss damages under the *Civil Liability Act 2002* and *Motor*

⁴⁵⁸ (1968) 119 CLR 118.

⁴⁵⁹ Under the *Civil Liability Act 2002*, the \$416,000 cap not only puts a ceiling on maximum compensation payments, but is used in the calculation of damages payable according to the sliding scale of damages where the severity of non-economic loss is between 15% and 33% of a most extreme case. As previously indicated, the Committee recommends that this test be adopted under all of the above pieces of legislation.

⁴⁶⁰ Negligence Review Panel, *Review of the Law of Negligence Final Report*, September 2002, pp195-196

Accidents Compensation Act 1999, the Committee believes that it is more important to ensure that people's financial needs are met through adequate economic loss damages than that they are compensated for intangible non-economic loss harm. By its nature, non-economic loss is impossible to measure. Pain and suffering is a matter of subjective experience. As has previously been stated:

.. damages awards could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today.⁴⁶¹

Recommendation 17

That the Government reduce the caps on non-economic loss damages available under s.16 of the *Civil Liability Act 2002* and s.131 of the *Motor Accidents Compensation Act 1999* to \$300,000.

19.21 The Committee also believes that s.66 of the *Workers Compensation Act 1987* should be repealed, while increasing the damages available under s.67 to \$300,000. Currently, s.66 damages are available to all injured workers, regardless of their level of injury. Repealing the provisions of s.66 in favour of increased damages under s.67 will mean that damages payouts are restricted to injured workers who are most seriously injured and meet the 15% of 'a most extreme case' test. All less seriously injured workers will continue to receive weekly payments.

Recommendation 18

That the Government amend the *Workers Compensation Act 1987*:

- to increase the cap on non-economic loss damages available under s.67 of the Act to \$300,000
 - to repeal s.66 of the *Workers Compensation Act 1987*.
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⁴⁶¹ Professor Atiyah, cited in Negligence Review Panel, *Review of the Law of Negligence Final Report*, September 2002, pp186

PART 6

OTHER ISSUES

Chapter 20 Fault as a basis for compensation

As indicated previously, the NSW Workers Compensation Scheme operates on a no-fault basis: injured workers do not have to prove that their employer was at fault in order to access statutory compensation. This reflects the difficulty of proving fault in many workplace accidents. In addition, the Government has announced the introduction of a no-fault 'Life Time Care and Support Scheme' for individuals catastrophically injured in motor vehicle accidents in New South Wales, to commence on 1 January 2007.

This chapter examines the viability of extending no-fault compensation in New South Wales to all motor vehicle accident claims and other personal injury claims covered by the *Civil Liability Act 2002*. Such an arrangement would be similar to the arrangement in New Zealand, which has had a universal statutory no-fault compensation scheme since 1 April 1974 called The New Zealand Accident Compensation Scheme. Proponents of no-fault compensation argue that it entails simplicity and efficiency with minimum administrative overheads, together with consistency of access to compensation for every injured individual. Opponents argued that the removal of fault from compensation removes the incentive to minimise risk, thereby leading to a proliferation of injuries.

The no-fault New Zealand Accident Compensation Scheme

- 20.1 In 1967, the New Zealand Government appointed a Royal Commission under a High Court Judge, Sir Owen Woodhouse, to investigate workers' compensation arrangements in New Zealand.
- 20.2 The report of the Commission, published in 1967, controversially recommended the adoption of a universal no-fault injury compensation scheme in New Zealand, to replace the existing common law system for accident victims.
- 20.3 This recommendation was subsequently adopted by the New Zealand government in 1972 with the passage of the *Accidents Compensation Act 1972*, implementing a universal no-fault compensation scheme. The scheme came into operation on 1 April 1974.
- 20.4 The New Zealand Accident Compensation Scheme is administered by the Accident Compensation Corporation (ACC) and covers all New Zealand citizens and residents. In order to receive compensation under the scheme, an injury must, with some exceptions, have been caused by an accident (that word being closely defined) or by medical misadventure (ie medical error or mishap).
- 20.5 Under the scheme, every New Zealand citizen who suffers a loss of earnings for longer than seven days as a result of injury is entitled to be compensated. The amount of compensation is, in the first instance, 80% of the earnings lost, but this is subject to abatement if the victim is able to engage in paid employment. The compensation is also subject to a maximum and minimum rate. Those who are injured and incapacitated before entering the workforce and hence do not have a pre-injury rate of earnings are entitled to compensation at a rate equivalent to the minimum wage at the time of the injury. A victim may also be entitled to a lump sum payment for permanent impairment.

- 20.6** In return for these benefits, individuals forego the right to sue for personal injury where damages are available under the scheme. However, whilst injured persons in New Zealand are precluded from suing for personal injury, they retain the right to sue for exemplary damages. Exemplary damages are not awarded as compensation. They are usually ordered as a form of punishment where the court believes the defendant acted in complete disregard for the rights of the plaintiff, or if the court feels a need to impose exemplary damages to deter others from such conduct.
- 20.7** The scheme is funded primarily by levies payable by employers and the self-employed, owners of motor vehicles and health care professionals. These levies seek to cover the cost of work-related injuries, road accidents and medical misadventure respectively. Money is also appropriated from consolidated revenue to support the cost of compensation and rehabilitation for injuries not provided for in the above categories.
- 20.8** As the scheme has replaced common law action for damages, employers, motorists and others are no longer required to take out insurance against being sued in court for damages for personal injury. Thus in effect the scheme is partly funded by transferring the insurance premiums that were previously being paid to various insurance companies into the ACC reserves.⁴⁶²
- 20.9** The Committee notes that the New Zealand scheme has both advantages and disadvantages. The advantages which are most often spoken about include speedy and simple settlement of claims, universal and consistent access for all and the 'no fault' provision. The disadvantages include limitations on claims for mental injury and trauma, and limitations on the allowances payable to non-income earners, who are limited to an independence allowance, medical and rehabilitation costs.⁴⁶³

No-fault injury compensation schemes in other countries

- 20.10** The Committee notes that many other countries also have no-fault compensation schemes in one form or another, particularly in relation to workers' compensation or motor accidents:
- In Canada, various no-fault schemes operate in Quebec, Ontario, Saskatchewan and Manitoba
 - No-fault compensation schemes for babies with birth-related neurological injuries were introduced in the US in Virginia and Florida in the late 1980s in response to the increasing cost of compensation for such cases and growing insurance premiums for obstetricians
 - No-fault compensation schemes for medical injury are common in Sweden, Denmark, Norway and Finland.
- 20.11** The National Office of Medical Accident Compensation was established in France in October 2002 to pay compensation in relation to: medical accidents; problems resulting from an

⁴⁶² Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, pp33-35

⁴⁶³ Source: John Miller, *Compensating Crime Victims within New Zealand's No Fault Accident Compensation Scheme: The Advantages and Disadvantages*, Australian Institute of Criminology web site, <http://www.aic.gov.au/publications/proceedings/27/miller.pdf> (accessed 9 March 2005)

intervention by a medical practitioner; and infection occurring during the course of treatment.⁴⁶⁴

An Australian no-fault injury compensation scheme?

20.12 In 1973, the newly elected Whitlam Government established a National Committee of Inquiry into a National Rehabilitation and Compensation Scheme for Personal Injury in Australia. Sir Owen Woodhouse, who chaired the New Zealand inquiry, chaired the Committee.

20.13 The National Committee of Inquiry tabled its report in July 1974 (the Australian Woodhouse Report). The report was very critical of legal systems based on the ability to prove fault. It argued:

... the fault system fails to accept the philosophy that is said to support it. It does nothing at all for the innocent victims of no-fault accidents. By compulsory insurance it removes all personal responsibility from those who are supposed to bear the cost of fault accidents. It operates by shifting onto the broad shoulders of the general community the losses of carefully selected plaintiffs. And paradoxically, without the obligation of insurance, its attraction for both plaintiffs and defendants would disappear.⁴⁶⁵

20.14 The Committee of Inquiry also highlighted the risks and delays associated with litigation, and the perceived inverse relationship between litigation and rehabilitated. It argued that the concept of negligence 'is used not to assist the injured but to avoid payments to numbers of them on the grounds of economy.'⁴⁶⁶

20.15 Accordingly, the Committee of Inquiry proposed a national no-fault compensation scheme for Australia.

20.16 In response to the Australian Woodhouse Report, the Whitlam Government moved to introduce a national no-fault compensation scheme through the National Compensation Bill 1974. However, the Bill was delayed in the Senate, and was subsequently withdrawn from the Federal Parliament for redrafting. Prior to its reintroduction, the Whitlam Government was dismissed in November 1975.⁴⁶⁷

No-fault compensation in Australian state and territory jurisdictions

20.17 The Committee notes that whilst moves to adopt a national no-fault statutory compensation scheme in Australia in the 1970s were unsuccessful, the various state and territory jurisdictions have all moved to adopt no-fault compensation in their various workers' compensation schemes. This reflects the difficulty of proving fault in many workplace accidents

⁴⁶⁴ Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, pp43,47

⁴⁶⁵ National Committee of Inquiry, *Compensation and Rehabilitation in Australia*, July 1974, p245 cited in Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, p20

⁴⁶⁶ National Committee of Inquiry, *Compensation and Rehabilitation in Australia*, July 1974, p43 cited in Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, p20

⁴⁶⁷ Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, p22

- 20.18** In addition, Victoria and Tasmania introduced no-fault motor accident schemes in the early 1970s at the time that the Whitlam Government was pushing for change at a national level. The Northern Territory subsequently introduced a similar scheme in 1979.
- 20.19** The Victorian no-fault motor accident scheme is operated by the Victorian Transport Accident Commission (TAC). The scheme has a number of features:
- Loss of earnings: the TAC will pay compensation at a rate of up to 80 per cent of pre-accident income, subject to a maximum weekly payment, which is indexed. This payment is available for up to three years from the date of the accident, although a seriously injured person may be entitled to compensation for longer than three years.
 - Permanent impairment: A motorists still suffering greater than 10% WPI 18 months after an accident is entitled to compensation for permanent impairment.
 - Common law damages: There is a limited right to sue at common law for economic and non-economic loss damages for the seriously injured. Impairment must exceed 30% WPI.⁴⁶⁸

The history of no-fault injury compensation in New South Wales

- 20.20** Statutory no-fault compensation for injured workers was first introduced in a limited form in New South Wales in 1910 with the introduction of workers' compensation legislation then in force in the United Kingdom. Subsequently, in 1926, no-fault compensation was extended with the passage of the *Workers Compensation Act 1926*. As indicated previously in this report, no-fault statutory workers compensation remains in force today under the current *Workers Compensation Act 1987*.⁴⁶⁹
- 20.21** By contrast, statutory compensation for injured motorists has remained on the basis of fault. The *Motor Vehicles (Third Party Insurance) Act 1942* introduced for the first time compulsory third party insurance and payments for any damages awarded in New South Wales. However, access to damages was contingent on an injured motorist being able to prove negligence. This continues to be the case under the *Motor Accidents Compensation Act 1999*.⁴⁷⁰

The 1984 NSW Law Reform Commission report

- 20.22** On 12 November 1981, the NSW Government referred to the NSW Law Reform Commission terms of reference for an inquiry into the extent to which compensation should be payable in respect of death or personal injury, with particular reference to whether no-fault compensation should be payable.

⁴⁶⁸ Law Institute of Victoria, 'Motor Vehicle Accidents', <http://www.liv.asn.au/public/legalinfo/mva/mva-Motor.html> (accessed 9 August 2005)

⁴⁶⁹ Parliamentary Library Research Service, Briefing Paper No 039/95, *Workers Compensation and Motor Accidents Compensation in NSW*, p7

⁴⁷⁰ Parliamentary Library Research Service, *Workers Compensation and Motor Accidents Compensation in NSW*, p18

20.23 The Law Reform Commission published its report entitled *Accident Compensation: A Transport Accidents Scheme for NSW* in 1984. The report acknowledged a number of arguments both for and against no-fault compensation and retaining an action for negligence under the common law. However, the Commission found ‘no reliable evidence to support the assertions concerning the connection between fault, community justice and deterrence’, and noted further that ‘inherent in the concept of fault is the failure to compensate a substantial proportion of accident victims at all and a further proportion at less than the full extent of the injury on grounds of contributory negligence’. The Commission was also critical of the cost of the fault-based system and argued that:

No modification of the common law negligence action can overcome its most serious deficiency, namely, its failure to compensate a substantial number of transport accident victims. This can only be remedied by supplementing the common law action, or replacing it altogether, with a no-fault system of compensation.

20.24 The Commission subsequently proposed that a no-fault transport accident scheme be implemented in New South Wales. It indicated its preference for a pure no-fault scheme rather than a dual scheme of statutory no-fault and common law entitlements, as operates in Victoria and Tasmania, as it was believed this would ensure that costs could be controlled.⁴⁷¹

20.25 In response to the Law Reform Commission report, the NSW Labor Government made a number of significant changes to the workers’ compensation and motor accidents scheme. Common law rights in relation to workers’ compensation were abolished by the *Workers Compensation Act 1987* as part of an attempt to reduce the cost and other problems of the workers’ compensation scheme. Similarly, the *Transport Accidents Compensation Act 1987* implemented some of the recommendations of the Law Reform Commission to restructure the benefits of the motor accidents scheme in favour of the seriously injured. The common law negligence action was abolished and a statutory scheme was established in its place. However, the fault principle was retained.

20.26 The abolition of common law rights in respect of motor accidents and workers’ compensation was controversial. As indicated previously in this report, following its election in 1988, the Coalition Government made a number of amendments to both schemes. Notably, the *Workers Compensation (Compensation Court Amendment) Act 1989* reinstated access to common law damages for injured workers in particular situations, and the *Motor Accidents Act 1988* restored modified common law rights to injured motorists.⁴⁷²

The 1997 report of the Law and Justice Committee

20.27 In 1997, the Legislative Council’s Standing Committee on Law and Justice released a report on the motor accidents scheme and various aspects of the long term care of victims of motor vehicle accidents entitled *Report on the Inquiry into the Motor Accidents Scheme (Compulsory Third Party Insurance): Second Interim Report*.

⁴⁷¹ NSW Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for NSW*, 1984, cited in Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, pp24-25

⁴⁷² Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, p25

- 20.28** In its report, the Committee recommended that a no-fault motor accident scheme be developed for New South Wales, and proposed that the scheme be fully funded by a dedicated levy on motorists as part of the premium for compulsory third party insurance. The levy would go into a pooled fund prior to being invested and administered by an independent statutory authority. A tribunal of independent assessors would determine eligibility for benefits.⁴⁷³
- 20.29** In response to the report, in his second reading speech of the Motor Accidents Compensation Bill in 1999, the Hon John Della Bosca MLC indicated that whilst the introduction of a no-fault long term care scheme was seen as achievable sometime in the future, more discussion with interest groups was required.⁴⁷⁴

The proposed catastrophic motor accidents injury scheme

- 20.30** As indicated in Chapter 2, the former NSW Premier, the Hon Bob Carr, announced on 11 June 2005 a proposed 'Life Time Care and Support Scheme' for individuals catastrophically injured in motor vehicle accidents in New South Wales, to commence on 1 January 2007.
- 20.31** The Committee notes that the *Sydney Morning Herald* had previously reported the development of such a scheme on 10 February 2005.⁴⁷⁵
- 20.32** In its written submission made in March 2005, prior to the announcement of the Life Time Care and Support Scheme, the Council of Social Services of NSW (NCOSS) opposed the implementation of a catastrophic injury scheme, arguing in favour of a wider or universal no-fault accident compensation scheme, such as the New Zealand Accident Compensation Scheme. NCOSS did not support a scheme that dealt only with catastrophic injuries. NCOSS also expressed concern about reports that such a scheme could possibly be funded through increased compulsory third party vehicle premiums.⁴⁷⁶
- 20.33** Similarly, in evidence on 6 June 2005, Ms Catherine Cleary from the Country Women's Association opposed such a catastrophic injury scheme, on the basis that it should be funded by the whole of the community, and not just compulsory third party premiums.⁴⁷⁷
- 20.34** The Committee notes that since the proposed catastrophic motor accident injury scheme was announced, significant concerns have been raised about the practical implementation of the scheme, notably the cut-off point at which an injured individual deemed at fault in an accident is judged to have suffered injuries of insufficient severity for them to access the scheme.

⁴⁷³ Standing Committee on Law and Justice, *Report on the Inquiry into the Motor Accidents Scheme (Compulsory Third Party Insurance): Second Interim Report*, December 1997, recommendation 3, cited in Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, p27

⁴⁷⁴ Hon John Della Bosca, Legislative Council, New South Wales, Hansard, 22 June 1999, p1042

⁴⁷⁵ Parliamentary Library Research Service, Briefing Paper No 6/05, *No-fault Compensation*, p 1

⁴⁷⁶ Submission 19, NCOSS, p5

⁴⁷⁷ Mr Cleary, Country Women's Association, Evidence, 6 June 2005, p25

The merits of a universal no-fault injury compensation scheme in NSW

20.35 In his private written submission, Mr Ian Johnstone advocated that NSW and Australia abolish common law claims for damages and expand existing no-fault personal injury compensation schemes to cover all accident victims, regardless of whether their injuries were received at work, in the car or in a public place.⁴⁷⁸

20.36 In support, Mr Johnstone cited the operation of the NZ no-fault Accident Compensation Scheme, the no-fault schemes in the various Canadian provinces, and the previous proposals for no-fault compensation here in Australia. He attributed the failure up until now to achieve a universal no-fault compensation scheme in Australia to five factors:

- Belief that it would be ‘sacrilegious, heretical, or at least unthinkable’ to abolish common law negligence claims for damages for personal injuries in order to substitute a legislative scheme
- The tendency to consider blame and compensation as inseparable, rather than to consider each matter individually
- Concerns that there are insurmountable constitutional impediments to the enacting of a national compensation scheme, although Mr Johnstone submitted that if there are any impediments (which he doubted), they could be circumvented by the states agreeing to pass complimentary enabling legislation
- The lucrative nature of common law systems for plaintiff lawyers, prompting legal associations to lobby against any changes to current arrangements
- The aversion of both conservative and labor governments to establishing government-run welfare schemes.⁴⁷⁹

20.37 Mr Johnstone continued:

A comprehensive no-fault scheme has been referred to as a radical reform, but it is really only curing an anomaly. We are strangely and illogically inconsistent in the way we provide government help for our sick, unemployed and needy and those disabled in an accident. If I am sick, I am treated under Medicare regardless of my fault in bringing about my own sickness, even if my problems come from obesity or addictions to alcohol, nicotine or other drugs. When I am old, or in need of a pension, again the government comes to my aid, subject to my means of supporting myself. Again fault is not a factor in deciding my eligibility for any pension, sickness benefit, disability allowance, supporting parent pension or unemployment benefit, except, of course, when my unemployment is virtually self-inflicted. However, when I am disabled by injuries in an accident, or someone I depend on financially is killed accidentally, the government virtually turns its back on me and leaves me to the mercy of the courts and lawyers. I must take my luck in the lottery of litigation and sue for damages for negligence, except if I am entitled to workers’ compensation which is a no-fault scheme.

But why does it matter so much how I was disabled? What difference should it make if it was in an accident at work, in a car, plane, helicopter, bicycle etc. In law at

⁴⁷⁸ Submission 1, Mr Johnstone, p3

⁴⁷⁹ Submission 1, Mr Johnstone, pp3-5

present it makes a huge difference, both in what compensation I can receive and also whether I can receive any compensation at all.⁴⁸⁰

20.38 By contrast, however, in its written submission the Law Society of NSW argued that the removal of fault-based compensation for negligence undermines both personal responsibility and corporate responsibility by removing or reducing the legal duty of care. In effect, a no-fault system shifts the cost of paying penalties, sending a message that careless behaviour by an individual or corporation resulting in injury to another person will not attract as great a penalty, if any.⁴⁸¹

20.39 For example, the Law Society of NSW submitted that the NZ no-fault scheme has led to a reduction in workplace safety, as the system has lifted the compensation onus off the parties responsible for workplace safety and placed it on the taxpayer. In support, the Law Society cited the following comments by Chief Justice Goddard on the NZ scheme:

The abolition of the right of action for breach of duty of care in practice also abolished that duty, except where it was independently supported by criminal sanctions. Those sanctions, however, had no teeth, and a resurgence of workplace injuries soon assumed epidemic proportions.

... it is necessary also to take great care to guard against unwanted social consequences of the displacement of legal duty of care and its replacement with a responsibility vacuum.⁴⁸²

20.40 The Committee raised the merits of a universal, no-fault motor accidents scheme with Government representatives during the hearing on 14 October 2005. In response, Mr Bowen, General Manager of the MAA, indicated that it was examined briefly as an option prior to the 1999 reforms. At the same time, he noted that it would probably require Government underwriting of the scheme, and would require detailed costing to be conducted.⁴⁸³

Committee comment

20.41 The Committee believes that there could be merit in investigating moving to a universal no-fault statutory compensation scheme in New South Wales:

- A no-fault scheme could be simple and efficient to run, with limited overheads. Recent research has found that it costs about 7c for the ACC in New Zealand to deliverer \$1 in benefits. The Committee believes that this compares favourably with systems where liability needs to be proved.⁴⁸⁴

⁴⁸⁰ Submission 1, Mr Johnstone, p5

⁴⁸¹ Submission 41, Law Society of NSW, p20

⁴⁸² Chief Justice Thomas Goddard, 'No-fault Accident Compensation and Workplace Safety in New Zealand', cited in Submission 41, Law Society of NSW, pp20-21

⁴⁸³ Mr Bowen, Evidence, 14 October 2005, p9

⁴⁸⁴ S.Todd, 'Negligence liability for personal injury: a perspective from New Zealand', *University of New South Wales Law Journal Forum*, Vol 8, No 2, November 2002, p58

- A no-fault scheme could promote improved health outcomes. As before, the evidence before the Committee is that speedy and efficient resolution of compensation claims minimises stress and anxiety for the injured, and ultimately leads to the best health outcomes.
- A universal no-fault scheme could achieve consistency in access to economic and non-economic loss damages for injured persons in New South Wales, regardless of whether their injury occurred in the workplace, in the car or in a public place.
- The payment of a statutory rate of compensation regardless of fault, for example a rate set at 80% of pre-injury income as in NZ, could avoid problems in determining compensation payments through mechanisms such as the AMA Guides or the courts.
- A no-fault scheme could remove insurers from the CTP and public liability insurance markets in New South Wales, thereby eliminating insurers' profit margins which are currently factored into CTP and public liability premiums.
- New South Wales already has a no-fault workers' compensation scheme, and is also proposing the implementation of a no-fault catastrophic motor accident injury scheme.

20.42 The Committee also does not accept the argument that the removal of fault-based compensation for negligence undermines personal responsibility by sending a message that careless behaviour by an individual or corporation resulting in injury will not attract a penalty. Under the current fault-based arrangements, an adventure tourism company with a poor safety record or a dangerous motorist is not personally or corporately liable for injuries they may cause. Rather, their insurer meets the cost of their poor safety record, although they may pay an insurance premium for the poor safety record. This is no different from the no-fault workers' compensation system in New South Wales, under which employers with a poor safety record at work pay a higher premium than they would otherwise.

20.43 However, the Committee recognises that there are significant impediments to the adoption of a universal no-fault personal injury compensation scheme in New South Wales. In particular, the NSW Government is unlikely to be willing to fund out of consolidated revenue the cost of compensation and rehabilitation for injuries not covered under CTP, medical and workers' compensation levies, as is the case in NZ. As discussed earlier, the Commonwealth Government undoubtedly provides support to a large number of injured persons in Australia through Medicare, the pharmaceutical benefits scheme, the disability support pension, sickness benefits, unemployment benefits and other forms of social security benefit. However, there seems little prospect of a transfer of funding from the Commonwealth to New South Wales to support a state-based no-fault scheme covering public liability, even though ultimately the cost is borne by the public purse regardless.

20.44 Nevertheless, the Committee believe that the NSW Government should examine moving to abolish fault as a basis for compensation for injured motorists and workers, rather than limiting it to the proposed catastrophic motor accidents injury scheme.

20.45 The Committee notes that this proposal has been made before, most recently by the Legislative Council's Standing Committee on Law and Justice in the 1997 *Report on the Inquiry into the Motor Accidents Scheme (Compulsory Third Party Insurance): Second Interim Report*. In the Committee's opinion, this is an idea for which the time has come. The difficulty of proving

fault in motor accidents – accidents that often occur in the space of a split second – makes this a sensible move. A no-fault motor accidents compensation scheme also operates successfully in Victoria.

Recommendation 19

That the Government examine and publish a report on the merits or otherwise of introducing universal, no-fault compensation under the NSW Motor Accidents Scheme.

- 20.46** The Committee also believes that that the Government should re-examine whether actions for economic loss damages under Part 5 of the *Workers Compensation Act 1987* should continue to be on the basis of fault. Clearly, this is an issue that is particularly controversial. However, the Committee believes that the removal of fault under Part 5 of the *Workers Compensation Act 1987* would complement the Committee's recommendations in Chapter 17 to increase the access of injured workers to economic loss damages. At the same time, there would be a need to re-introduce some form of exemplary, punitive or aggravated damages where injury or death to a worker is caused by negligence.

Recommendation 20

That the Government examine and publish a report on the merits or otherwise of universal, no-fault access to economic loss damages under the provisions of Part 5 of the *Workers Compensation Act 1987*.

Chapter 21 The cap on legal costs where an award of damages is less than \$100,000

As indicated in Chapters 2 and 5, the *Legal Profession Act 1987*, as amended by the *Civil Liability Act 2002*, imposes a cap on the recovery of legal costs by a successful claimant from a defendant where an award for damages is less than \$100,000. This chapter examines the impact of this cap on the bringing of personal injury compensation claims in New South Wales.

Public liability cases

21.1 As indicated in Chapter 5, the *Civil Liability Act 2002* amended the *Legal Profession Act 1987* to impose a cap on the recovery of costs from a defendant by a successful claimant for personal injury damages. Under s.198D of the *Legal Profession Act 1987*, where an award is less than \$100,000, the maximum amount of costs recoverable by a legal practitioner is 20% of the awarded amount or \$10,000, whichever is greater. Section 198D states in part:

(5) If the amount recovered on a claim for personal injury damages does not exceed \$100,000, the maximum costs for legal services provided to a party in connection with the claim are fixed as follows:

(a) in the case of legal services provided to a plaintiff maximum costs are fixed at 20% of the amount recovered or \$10,000, whichever is greater,

(b) in the case of legal services provided to a defendant maximum costs are fixed at 20% of the amount sought to be recovered by the plaintiff or \$10,000, whichever is greater.

21.2 In its written submission, the Australian Lawyers Alliance argued that the use of the cap may render the bringing of meritorious personal injury damages claims financially unviable. As an example, the Alliance raised the scenario where a clear case of negligence was nevertheless vigorously defended. Such a case could involve a three-day trial in the District Court, costing the plaintiff up to \$30,000. However, if the injury was assessed under s.16 of the *Civil Liability Act 2002* as having a low severity as a proportion of 'a most extreme case', damages for non-economic loss of less than \$100,000 could be awarded. In that case, the plaintiff's claim for legal costs against the other side would be limited to \$10,000 or 20% of the awarded damages, possibly making the case financially unviable.

21.3 In support, the Alliance cited the case of Mrs Pat Skinner, reproduced below.

Case of Mrs Pat Skinner

In 2001 Pat Skinner booked herself into St George hospital in Sydney for a routine operation to remove polyps in her intestinal tract. A healthy woman, Pat planned a European backpacking holiday for later in the year. But Pat didn't make it to Europe. Instead she spent 18 months in mysterious pain.

Pat's GP finally referred her for x-rays. Nothing could have prepared her for what she was about to see.

Pat was immediately returned to St George hospital to remove the scissors that had been left inside her abdomen 18 months earlier. Leaving hospital, Pat wondered if anyone was going to tell her how such a dreadful accident had occurred and what they were going to do to ensure that it never happened again. It was to be a long battle. In the end, it seems that only threatened court action and media scrutiny caused the authorities to pay attention to Pat's case.

In commencing legal action, Pat was alarmed to learn of some recent changes to the law. Her claim for damages for the 18 months of pain she had endured was limited by the *Civil Liability Act 2002*. A judge would have to assess her injury as a percentage of the worst case. If she rated less than 15%, she would get no compensation, and only limited compensation if less than 34%.

Because Pat was a retiree at the time of the accident, and accessed public health throughout, she had incurred only limited out-of-pocket expenses. This produced a bizarre and unfair result. Because her claim was almost entirely for pain and suffering, which is limited, there was a real possibility that Pat's claim would amount to less than \$100,000. In such 'minor' claims, only limited legal costs can be recovered, even if you win. Pat was worried that the hospital and its insurer would fight her all the way, inflating her legal bill. She faced the real possibility that she could win her case, but ultimately lose out financially.

Pat's case illustrates how recent changes to the law discriminate against children, retirees, students and the unemployed. Thankfully, Pat had the courage to fight her claim and achieved real change in the health system. But she took a big risk in doing so, one that recent changes to the law have made that much more severe.

Source: Submission 23, Australian Lawyers Alliance, p1

- 21.4** In his evidence to the Committee on 6 June 2005, Mr Anthony Scarcella from the Australian Lawyers Alliance further submitted that because of the operation of the cap on legal costs, even in straightforward cases of liability involving claims of less than \$100,000, insurers are preferring to take the matter to court, rather than to settle prior to litigation, possibly in an attempt to 'wear down' the plaintiff. Mr Scarcella argued that this is particularly onerous in cases that involve children, retirees and stay-at-home parents who have little or no claim to damages for economic loss or out-of-pocket expenses, but still have a significant impairment.⁴⁸⁵

- 21.5** The Alliance reiterated this concern in its supplementary written submission:

⁴⁸⁵ Mr Scarcella, Australian Lawyers Alliance, Evidence, 6 June 2005, p16

The changed rules have introduced scope for tactical game playing that is opposed to the interests of all stakeholders, the premium paying public, the courts and the injured. The intention of these provisions was to lower costs. They do precisely the opposite.⁴⁸⁶

- 21.6** Accordingly, the Australian Lawyers Alliance argued that there is no sound principle for the granting of a limited immunity from the usual legal costs where an award is less than \$100,000.⁴⁸⁷
- 21.7** Similarly, the NSW Bar Association argued in its written submission that the arbitrary limitation of costs may result in many people either losing the opportunity to recover damages altogether, or being forced into otherwise unfavourable settlements. Accordingly, the Bar Association recommended that the cap on legal costs under the *Legal Profession Act 1987* be removed and the question of costs left to the trial judge or a cost assessor, who is in the best position to assess whether the costs have been properly incurred.⁴⁸⁸
- 21.8** Mr Slattery QC, Senior Vice President of the NSW Bar Association, reiterated this evidence during the hearing on 2 May 2005. Mr Slattery accepted that the Government has an objective to reduce legal fees payable, however he argued that at the same time, the Government has made personal injury compensation law ‘eye-glazingly complex’, especially in the area of workers’ compensation law, necessitating the involvement of lawyers.⁴⁸⁹

A cap on costs for appealed decisions

- 21.9** During the inquiry, Mr Bruce McCann, Principal Solicitor with B.E.McCann and Co, raised with the Committee the issue whether the capping of legal practitioner costs should be extended to cover the costs payable where a court decision is reversed on appeal and damages are awarded against the original plaintiff.
- 21.10** Mr McCann was injured on 3 June 1999 in an accident at a large retail store in Blacktown when a box weighing 25kg fell on his head. Negligence was admitted by the retail store.
- 21.11** Following an initial hearing before the District Court Arbiter, Mr McCann was awarded \$224,843.00 on 16 June 2003. Subsequently, following an application for a re-hearing by the defendant’s solicitor, Mr McCann was awarded \$238,542.23 plus costs in the District Court on 17 November 2003.
- 21.12** The defendant’s solicitor in turn appealed the matter to the NSW Court of Appeal. The Court of Appeal subsequently overturned the decision of the District Court and made a judgement of \$95,478.73 in favour of Mr McCann as plaintiff, but ordered that Mr McCann pay the Appellant/Defendant’s costs of the appeal, on the basis that Mr McCann had essentially ‘lost’ the appeal (given the reduction in his damages).

⁴⁸⁶ Submission 23c, Australian Lawyers Alliance, p7

⁴⁸⁷ Submission 23, Australian Lawyers Alliance, p20

⁴⁸⁸ Submission 29, NSW Bar Association, p7,51

⁴⁸⁹ Mr Slattery QC, Senior Vice President, NSW Bar Association, Evidence, 2 May 2005, p5

- 21.13** As a result of this decision, the Committee understands that Mr McCann's damages payment of \$95,478.73 has been entirely consumed by legal costs that he is required to pay to the Appellant/Defendant solicitors, together with an additional \$5,121.27 that he has been required to pay out of his own pocket.⁴⁹⁰
- 21.14** To address this apparent anomaly, Mr McCann argued that the capping of legal practitioner costs must be extended to cover the costs payable from a plaintiff to an Appellant/Defendant in circumstances such as his own where the Court of Appeal reduces damages below \$100,000 and awards costs of the Appeal to the successful Appellant/Defendant on an uncapped basis. Mr McCann reiterated this position in his evidence to the Committee on 6 June 2005.⁴⁹¹
- 21.15** The Committee notes as an aside that Mr McCann has written to the Premier and the Attorney-General in relation to his particular circumstances seeking an ex-gratia payment to ensure that he at least breaks even.⁴⁹²

Medical negligence cases

- 21.16** In its written submission, the NSW Bar Association argued that the cap on the recovery of legal costs where an award for damages is less than \$100,000 is particularly onerous in medical negligence cases, which are particularly difficult to prepare because of the modern complexity of medical scientific knowledge and procedures.
- 21.17** The Association further noted that the *Final Report of the Review of the Law of Negligence* (the Ipp Report) recommended that limits on the recovery of costs should only apply to awards of damages of \$50,000 and less.
- 21.18** Accordingly, subject to its recommendation cited earlier in this chapter that the \$100,000 cap on costs be removed, the NSW Bar Association submitted that as a fall back position, a cap on the recovery of legal costs where an award for damages is less than \$50,000 would be more appropriate.⁴⁹³

Committee comment

- 21.19** As part of its 2002 civil liability reforms, the Government imposed a cap on the recovery of legal costs by a successful claimant from a defendant where an award for damages is less than \$100,000.
- 21.20** The Committee supports the use of this cap, on the basis that it has helped to eradicate small claims and the erosion by legal fees of damages payable under a verdict. However, the Committee believes that the cap should only apply to awards for damages up to \$50,000, as recommended by the Ipp Report. This would also be consistent with Queensland and ACT legislation.

⁴⁹⁰ Mr McCann, 'Statement by Bruce McCann', Tabled document, 6 June 2005, p2

⁴⁹¹ Mr McCann, Principal Solicitor, B.E.McCann and Co Evidence, 6 June 2005, p23

⁴⁹² Submission 18, Mr McCann, pp1-4

⁴⁹³ Submission 29, NSW Bar Association, pp7,38-39

Recommendation 21

That the Government amend the cap on the recovery of legal costs by a successful claimant from a defendant under s.198D of the *Legal Profession Act 1987* to apply only to awards of damages of up to \$50,000, rather than the current \$100,000.

- 21.21** The Committee is also concerned about the case of Mr McCann, which is clearly a miscarriage of justice. Mr McCann recommended that the capping of legal practitioner costs must be extended to cover the costs payable in circumstances such as his own where the Court of Appeal reduces damages below \$100,000 and awards costs of the appeal to the successful appellant (previously the defendant) on an uncapped basis. The Committee endorses Mr McCann's position.
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Recommendation 22

That the Government amend the cap on the recovery of legal costs by a successful claimant from a defendant under s.198D of the *Legal Profession Act 1987* so that it also applies in circumstances where the Court of Appeal reduces damages below \$50,000 and awards costs of the appeal to the successful appellant (previously the defendant) on an uncapped basis.

Chapter 22 The changes to the duty of care and the establishment of liability

As indicated in Chapter 2, the *Civil Liability Act 2002* incorporated a number of changes to the law dealing with the duty of care and the establishment of liability. For example, the Act now allows people who choose to take part in inherently risky activities, such as dangerous recreational activities, to voluntarily assume the risk by signing effective waivers of liability.

However, concerns were raised during the inquiry that the *Civil Liability Act 2002* does not achieve a satisfactory balance between personal responsibility on the one hand, and corporate and government responsibility on the other. This concern was expressed particularly in relation to children and young people, who cannot be expected to exercise the personal responsibility of an adult, but who have been affected by the removal of various safeguards under the Government's reforms.

The changes to the duty of care

22.1 The following section examines concerns arising in relation to the duty of care provisions of the *Civil Liability Act 2002*. These concerns were raised during the inquiry by the NSW Bar Association, the Australian Lawyers Alliance and Chase Lawyers, together with Mr Stuart Gregory⁴⁹⁴ and Mr Peter Johnson⁴⁹⁵ who made individual submissions focussing on the protection of minors and young people.

Division 4 – Assumption of risk

22.2 Division 4 of Part 1A of the *Civil Liability Act 2002* deals with the assumption of risk, including the meaning of 'obvious risk'. Section 5I of Division 4 of the Act provides in part:

A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

22.3 In its written submission, the Australian Lawyers Alliance cited as an example of the perverse operation of this Division the notional case of a member of staff of a company who was injured during a compulsory staff training exercise where there was an obvious risk of injury. If in this scenario an accident occurred as part of the negligence of the company or person organising the training, the Alliance questioned what rationale there could be for insulating the company or person organising the training from any liability on the basis of obvious risk.⁴⁹⁶

⁴⁹⁴ Mr Gregory is an Articled Clerk, making a submission in a private capacity.

⁴⁹⁵ Mr Johnston is a solicitor and parent of a child attending a public school.

⁴⁹⁶ Submission 23, Australian Lawyers Alliance, p19

Section 5L – Dangerous recreational activities and obvious risk

22.4 Section 5L of the *Civil Liability Act 2002* states:

- (1) A person (the defendant) is not liable in negligence for harm suffered by another person (the plaintiff) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.
- (2) This section applies whether or not the plaintiff was aware of the risk.

22.5 In its written submission, the NSW Bar Association argued that the effect of s.5L is to place no responsibility whatsoever on the corporate supplier of recreational activities. For example, a recreational parachutist must be aware of the obvious risk of a parachute failing to open. However, the Bar Association cited the scenario where the parachute supplied to the parachutist by the company organising the activity was improperly packed, as a result of which the plaintiff was killed or badly injured. In this scenario, the Bar Association argued that the application of s.5L would result in there being no liability on the part of the company organising the parachuting despite its clear gross negligence. The Bar Association submitted that whilst it may be fair to expect the plaintiff to assume the risk associated with accidental parachute failure, it is perfectly legitimate to ask why the plaintiff should bear all the risk associated with such a case of gross corporate negligence.⁴⁹⁷

22.6 Similarly, in his written submission, Mr Gregory argued that s.5L raises the difficulty of deciding what a court will consider to be an ‘obvious risk’. Potentially, the courts could effectively negate the existence of a duty of care on the part of providers of dangerous recreational activities. It is also possible that a risk, which is not ‘obvious’, is also not foreseeable, and would not attract liability.

22.7 Either way, Mr Gregory highlighted that the operation of s.5L of the *Civil Liability Act 2002* could be interpreted in a way that is contrary to the common law, which accepts that children are liable to act with less than ideal consideration of their own safety.⁴⁹⁸ Accordingly, Mr Gregory recommended that s.5L of the *Civil Liability Act 2002* should not apply to anyone under 18 years of age, on the basis that minors may not appreciate risks which are obvious to adults.⁴⁹⁹

Section 5M – Risk warnings

22.8 Whereas s.5L of the *Civil Liability Act 2002* is limited to ‘dangerous recreational activities’, s.5M provides that a recreational service provider does not owe a duty of care to a customer in relation to a particular risk if a ‘risk warning’ is delivered. Section 5M of *Civil Liabilities Act 2002* provides in part:

- (1) A person (the defendant) does not owe a duty of care to another person who engages in a recreational activity (the plaintiff) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.

⁴⁹⁷ Submission 29, NSW Bar Association, pp44-45

⁴⁹⁸ Submission 16, Mr Gregory, p8

⁴⁹⁹ Submission 16, Mr Gregory, p5

(2) If the person who suffers harm is an incapable person, the defendant may rely on a risk warning only if:

(a) the incapable person was under the control of or accompanied by another person (who is not an incapable person and not the defendant) and the risk was the subject of a risk warning to that other person, or

(b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the control of or accompanied by the parent).

(3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.

(4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).

22.9 In its written submission, the NSW Bar Association argued that s.5M creates a regime whereby a defendant who provides a broad warning of a risk associated with a recreational activity cannot be deemed negligent. In addition:

- A risk warning is deemed to be understood even though the person concerned may not have actually understood a written warning. For example, adults with literacy problems are nonetheless deemed to have comprehended a written warning. Similarly, those who cannot read English are also deemed to understand the English language warning.
- Children are caught by the risk warning provided they are capable of understanding the words of a warning sign even though they may not appreciate the legal rights they forsake by undertaking the activity concerned.⁵⁰⁰

22.10 Accordingly, the Bar Association submitted that s.5M allows sporting and recreational organisations to waive all responsibility and liability by providing a generalised warning as to the risk of harm. As such, s.5M does not even attempt to strike a balance between personal and corporate responsibility – the onus is shifted entirely onto the individual and away from the corporation.⁵⁰¹

22.11 Similarly, Dr Andrew Morrison, representing the Australian Lawyers Alliance, commented during the hearing on 6 June 2005:

Why should a blind person or an illiterate person or a child or a visitor who cannot read English, someone from another country, be bound by a warning sign in the English language – which does not comply with the Australian standard, because the Australian standard requires a visual symbol, and yet our Act says they are bound by that warning sign?⁵⁰²

⁵⁰⁰ Submission 29, NSW Bar Association, p45

⁵⁰¹ Submission 29, NSW Bar Association, p46

⁵⁰² Dr Morrison, Australian Lawyers Alliance, Evidence, 6 June 2005, p11

- 22.12** In turn, Mr Gregory recommended that Parliament should establish clear minimum standards to ensure that risk warnings be explicit and written in plain English, and should only be effective to the extent that a person has a understanding of the contents of that warning. In many cases, minors cannot be expected to understand a risk warning.⁵⁰³
- 22.13** Mr Johnson also addressed the provisions of s.5M in his written submission. Mr Johnson argued that as a result of this section, providers of school recreational activities are now requiring schools to ask parents to sign forms to relieve them of their duty to take reasonable care of their children. This advantages the providers of recreational activities and unintentionally disadvantages schools and parents:
- First, schools are put in the position where, in order for the excursion to proceed, they need to ask parents to consider signing the provider's form, and must inform the parents that if they fail to do so, their child will be excluded from the excursion. This tends to leave the parents with little choice.
 - Second, where risk warnings and contractual waivers have been used by the provider, liability for any accidents is borne solely by the school unless it also has relied upon a risk warning or asked parents to sign a waiver. Clearly, however, most schools would be reluctant to ask parents to allow the school to contract out of its duty of care to their children.
 - Third, once the risk warning is given, the provider can be lax about safety without fear of legal consequences. As a result, the unintended effect of the legislation may be to lessen the safety standards of the providers of recreational activities, which is of most concern where the activities are provided for children.⁵⁰⁴
- 22.14** Accordingly, Mr Johnson advocated that school organised recreational activities should be exempt from the risk warning and waiver of contractual duty provisions of s.5M of the *Civil Liability Act 2002*.⁵⁰⁵

Section 5N – Waivers and the ‘chilling effect’

- 22.15** Section 5N of the *Civil Liability Act 2002* allows the use of contractual waivers in respect of negligence when providing a recreational service. Section 5N states in part:
- (1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.
- 22.16** In its written submission, the NSW Bar Association argued that the provisions of s.5N effectively allows suppliers of recreational activities to write contracts in a manner to specifically exclude any liability for a failure to provide the activities with reasonable care and skill. As a result, the Bar Association argued that the effect of s.5N is once again to place responsibility for personal safety solely on the consumer, removing any burden on the

⁵⁰³ Submission 16, Mr Gregory, p5

⁵⁰⁴ Submission 20, Mr Johnson, p1

⁵⁰⁵ Submission 20, Mr Johnson, p1

corporate supplier. This is the case even where the contractual waiver is entered into by a person who is young, illiterate, blind or infirm.⁵⁰⁶

22.17 Similarly, in his written submission, Mr Gregory argued that the availability of a waiver under s.5N is again likely to be disadvantageous to children. While the limited contractual capacity of children means that such contractual waivers will generally be ineffective, nevertheless, Mr Gregory argued that the increased use of such waivers under the *Civil Liability Act 2002* may result in a “chilling effect” – the discouragement of minors or their parents from bringing an action against a negligent service provider, even where a contractual waiver is unenforceable.⁵⁰⁷ Accordingly, Mr Gregory recommended that the Government should:

- Prohibit a person from asking a minor or their parent to sign a contractual waiver, or from representing that such a waiver is valid.
- Provide that a risk warning under s.5N of the *Civil Liability Act 2002* is ineffective against anyone under 18. At present, a risk warning under s.5N can be effective if delivered to a parent of a minor, or if the minor (perhaps a teenager) is capable of understanding it.⁵⁰⁸

The ‘custody of parent rule’ under the *Limitations Act 1969*

22.18 In his submission, Mr Gregory also cited the ‘custody of the parent rule’ under s.50F(2)(a) of the *Limitations Act 1969*. Section 50F(2)(a) states:

- (1) If a person has a cause of action for which a limitation period has commenced to run and the person is under a disability, the running of the limitation period is suspended for the duration of the disability.
- (2) A person is under a disability while the person:
 - (a) is a minor, but not while the minor has a capable parent or guardian,

22.19 Mr Gregory argued that several law reform commissions have recommended against the ‘custody of the parent rule’. Well-intentioned parents may fail, inadvertently or otherwise, to pursue their child’s rights. It may also be argued that it is an unreasonable imposition on the autonomy of a child to allow his or her legal position to be adversely altered by a third party, however closely related or well intentioned.⁵⁰⁹

22.20 Accordingly, Mr Gregory recommended the abolition of the ‘custody of the parent rule’.⁵¹⁰

⁵⁰⁶ Submission 29, NSW Bar Association, p47

⁵⁰⁷ Submission 16, Mr Gregory, p7

⁵⁰⁸ Submission 16, Mr Gregory, pp4-5

⁵⁰⁹ Submission 16, Mr Gregory, p5

⁵¹⁰ Submission 16, Mr Gregory, p5

The changes to the establishment of liability

22.21 The following section examines concerns expressed by the Bar Association in its written submission that various sections of the *Civil Liability Act 2002* place an emphasis on personal responsibility in the determination of negligence, but abandon any concept of corporate and government responsibility.⁵¹¹

Section 44 – Public authorities

22.22 Section 44 of the *Civil Liabilities Act 2002* provides in part:

- (1) A public or other authority is not liable in proceedings for civil liability to which this Part applies to the extent that the liability is based on the failure of the authority to exercise or to consider exercising any function of the authority to prohibit or regulate an activity if the authority could not have been required to exercise the function in proceedings instituted by the plaintiff.

22.23 In its written submission, the NSW Bar Association noted that the definition of ‘public authorities’ in regulations now includes both government and non-government schools. Accordingly, a broad interpretation of s.44 could be that schools cannot incur any civil liability for failing to supervise students.⁵¹²

22.24 Dr Morrison expanded on this during evidence on 6 June 2005:

Supposing in a government school or in a private school, during the lunch hour, there is a teacher on duty, as there are invariably is, and that teacher is watching children play a dangerous game – for example, a game that is prohibited in all government and private schools without proper supervision, tackle football. Suppose it is being played on a hard surface and a child is rendered quadriplegic. Section 44 says no liability. ...

There is a very large area of the duties of public authorities that are now wholly exempt from liability. I suspect, speaking as parent myself, that most parents would be scandalised to know that schools are not liable for failure to supervise pupils.⁵¹³

Section 45 – The nonfeasance rule

22.25 Section 45 of the *Civil Liability Act 2002* introduces full nonfeasance protection for road authorities in New South Wales. Section 45 states in part:

- (1) A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

⁵¹¹ Submission 29, NSW Bar Association, p40

⁵¹² Submission 29, NSW Bar Association, pp48-49

⁵¹³ Dr Morrison, Evidence, 6 June 2005, p12

- 22.26** In its written submission, the NSW Bar Association argued that this section actually has the perverse effect of discouraging local councils and road authorities from undertaking road inspections, since when council has no actual knowledge of a particular risk, it is not liable in civil liability proceedings.⁵¹⁴
- 22.27** Once again, the Committee also notes the comment of Dr Morrison on this issue:

A road authority that knows of the problem on its roads and takes no action is liable for the consequences. But, think of this: Road authorities, a council or the Roads and Traffic Authority, know that after heavy rain certain areas of road will develop potholes and become dangerous – there are structural problems throughout the State and it is well-known. If the road authority chooses not to check those roads, it is not liable; if it does check them, finds the deficiency and does not remedy it, it is.⁵¹⁵

Section 50 – No recovery where person intoxicated

- 22.28** Section 50 of the *Civil Liability Act 2002* provides that a court is not to award damages in respect of liability to an intoxicated person unless the court is satisfied that death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated. Section 50 states in part:

(2) A court is not to award damages in respect of liability to which this Part applies unless satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated.

(3) If the court is satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated, it is to be presumed that the person was contributory negligent unless the court is satisfied that the person's intoxication did not contribute in any way to the cause of the death, injury or damage.

(4) When there is a presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced on account of contributory negligence by 25% or a greater percentage determined by the court to be appropriate in the circumstances of the case.

- 22.29** In its submission, the NSW Bar Association cited the case of *Russell v Edwards*⁵¹⁶ in which the plaintiff, a 16 year-old boy, had suffered injury after diving into the shallow end of a backyard swimming pool at the home of a friend during a birthday party. At the time the plaintiff was affected by alcohol, some of which was provided by the defendant homeowner but most of which was provided by another friend who had brought a bottle of bourbon to the party.
- 22.30** The judge in the case found that had the case been determined at common law, the plaintiff would have been successful in gaining damages, albeit with a deduction for contributory

⁵¹⁴ Submission 29, NSW Bar Association, p50

⁵¹⁵ Dr Morrison, Evidence, 6 June 2005, p12

⁵¹⁶ Unreported NSW District Court at Newcastle, judgement of Sidis DCJ of 23 November 2004

negligence which was assessed at 25%. However, applying s.50 of the *Civil Liability Act 2002*, the judge found that there was no liability as the plaintiff's intoxication had led to his injury.

- 22.31** Whilst the Bar Association submitted that reasonable minds would regard the 16 year-old in this case as possibly irresponsible, the Association questioned: What if the Plaintiff had only been 12 and was nonetheless intoxicated on liquor that had been exclusively supplied by the party host? Is it still the intention of the Parliament that the plaintiff should be denied any claim to damages?⁵¹⁷
- 22.32** The Committee also received a written submission from Chase Lawyers in which it cited the provisions of ss.47, 48, 49 and 50 of the *Civil Liability Act 2002* dealing with the effect of intoxication on liability. Chase Lawyers argued that these sections of the *Civil Liability Act 2002* should be amended to exclude from their operation cases involving minors who were injured whilst intoxicated. This would bring the *Civil Liability Act 2002* into line with s.114 of the *Liquor Act 1982*, which provides that it is an offence to sell or supply alcohol to a minor.
- 22.33** Chase Lawyers also argued that such amendments should be retrospective, to be consistent with the retrospective amendments to the *Civil Liability Act 2002* dealing with accidents and incidents that pre-date the introduction of the Act.⁵¹⁸

Committee comment

- 22.34** The Committee notes that the *Civil Liability Act 2002* incorporates a number of changes to the law dealing with the duty of care and the establishment of liability.
- 22.35** While the Committee acknowledges evidence cited earlier in this report that these changes have led to a positive change in the culture of litigation in society, the Committee is nevertheless concerned about the impact of some of the changes. The Committee is particularly concerned about the duty of care owed by service providers to children and young people.
- 22.36** In its written submission, the NSW Bar Association advocated a wholesale review of the duty of care provisions of the *Civil Liability Act 2002*, on the basis that the issues highlighted in this chapter cannot be dealt with piecemeal. The Bar Association also noted that there are other examples of the potentially unjust working of the Act that it did not highlight in its submission.⁵¹⁹
- 22.37** The Committee endorses the NSW Bar Association's position, and believes that the New South Wales Law Reform Commission would be a suitable body to conduct a review of the duty of care provisions of the *Civil Liability Act 2002*.

⁵¹⁷ Submission 29, NSW Bar Association, pp50-51

⁵¹⁸ Submission 5, Chase Lawyers

⁵¹⁹ Submission 29, NSW Bar Association, p51

Recommendation 23

That the Government commission a review by the New South Wales Law Reform Commission of the duty of care and establishment of liability provisions of the *Civil Liability Act 2002*, particularly as they affect children and young people.

Chapter 23 Medical negligence compensation law

This chapter examines a number of legal issues raised during the inquiry in relation to medical negligence claims under the provisions of the *Civil Liability Act 2002*.

The modified *Bolam* rule

23.1 As indicated in Chapter 6, s.5O of the *Civil Liability Act 2002* restores a modified Bolam rule for determining cases of medical negligence. Section 5O states:

- (1) A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
- (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

23.2 In its written submission, the NSW Bar Association argued that the Bolam or ‘peer opinion’ test for medical negligence was rejected in the previous *Health Care Liability Act 2001* on the basis that it was ‘medically paternalistic’, had ‘ceased to be acceptable’ and was recognised as ‘not in the interests of safeguarding the community’. The Bar Association submitted that the effect of re-introducing the Bolam rule under s.5O of the *Civil Liability Act 2002* may in the long term permit another Chelmsford Hospital⁵²⁰ to occur, without the victims having the right of redress.

23.3 The Bar Association also noted that the legislature sought to attenuate any damage from the restoration of the Bolam rule under s.5O of the *Civil Liability Act 2002* by adding a statutory rider in s.5O(2) that peer professional opinion cannot be relied upon if the court considers that the opinion is ‘irrational’. The Association submitted that this rider is of no assistance and simply created further uncertainty and a risk of random results.

⁵²⁰ Between 1964 and 1979, Chelmsford Psychiatric Hospital was involved in the controversial use of ‘deep sleep’ therapy, induced by narcotics, for patients suffering from depression, anxiety and insomnia. It is estimated to have caused the death of at least 24 people. Though concerns were raised about practices at the hospital over many years, no serious investigation was undertaken until a Royal Commission was finally appointed in 1990, which recommended that three of the four doctors responsible be prosecuted. The fourth doctor committed suicide in 1985.

- 23.4 Accordingly, the Bar Association argued that s.50 of the *Civil Liability Act 2002* should be repealed.⁵²¹
- 23.5 Similarly, in his written submission, Mr Timothy Abbott, Partner with Walsh and Blair Lawyers, argued that reversion to the Bolam or ‘peer opinion’ test for medical negligence had effectively limited the rights of individuals injured through medical negligence.⁵²²

Evidentiary alterations in respect of failure to warn (informed consent) claims

- 23.6 In its written submission, the Australian Lawyers Alliance noted that some claims in medical negligence cases are made following the materialisation of an inherent risk in a procedure or treatment. In such cases, there is no negligence on the part of medical practitioners unless they failed to warn their patient of the risk, and to obtain properly informed consent. If plaintiffs bring a case that they were not warned of the inherent risk in a procedure or treatment, then the onus lies on them to prove that the alleged negligence caused them loss or damage – in effect that they would not have continued with the procedure or treatment if they had been properly informed.
- 23.7 Historically, the way to prove this causation was simply to ask the plaintiff what they would have done had they been properly advised of the risk. However, s.5D(3) of the *Civil Liability Act 2002* provides as follows:
- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
 - (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
 - (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

- 23.8 The Australian Lawyers Alliance submitted that this provision unfairly prevents injured individuals from telling the court about their own intentions, and about their own expectations about the procedure or treatment, on the basis of which they decided how to instruct their medical practitioner.⁵²³

The restriction on damages where injury is caused by the mentally ill

- 23.9 Section 54A of the *Civil Liability Act 2002* limits damages that may be recovered where the injury was caused through criminal acts, or by a person suffering a mental illness. The section provides in part:

⁵²¹ Submission 29, NSW Bar Association, p38

⁵²² Submission 57, Mr Abbott, p1

⁵²³ Submission 23, Australian Lawyers Alliance, p14

- (2) If a court awards damages in respect of a liability to which this section applies, the following limitations apply to that award:
 - (a) no damages may be awarded for non-economic loss, and
 - (b) no damages for economic loss may be awarded for loss of earnings.

23.10 In its written submission, the Australian Lawyers Alliance noted that this provision would apply even in circumstances where the acts of the mentally ill person occurred through the negligent treatment or inadequate care of a medical practitioner or institution. In such circumstances, the Australian Lawyers Alliance submitted that to deny compensation to the injured in such circumstances is manifestly unfair, and ignores the fact that only poor treatment of the condition allowed the commission of the deemed ‘offence’.⁵²⁴

The restriction on damages for the cost of raising an unintended child

23.11 Section 71 of the *Civil Liability Act 2002* places a restriction on the awarding of damages against a medical practitioner who fails to perform an effective sterilisation operation leading to the birth of an unintended child. Section 71 states in part:

- (1) In any proceedings involving a claim for the birth of a child to which this Part applies, the court cannot award damages for economic loss for:
 - (a) the costs associated with rearing or maintaining the child that the claimant has incurred or will incur in the future, or
 - (b) any loss of earnings by the claimant while the claimant rears or maintains the child.

23.12 In its written submission, the Australian Lawyers Alliance noted that under this provision, mothers who choose to seek medical treatment (for example, sterilisation) and pay a medical practitioner for the competent performance of that service, are deprived of the major component of any compensation, regardless of how egregious the negligence may be.⁵²⁵

The restriction on damages for non-essential medical procedures

23.13 The Australian Lawyers Alliance also raised in its written submission the issue of medical practitioners advertising non-essential medical procedures such as liposuctions, breast surgery, facelifts, botox injections and laser eye surgery.

23.14 The Alliance submitted that the provisions of the *Civil Liability Act 2002*, designed to insulate the medical profession and government health agencies from a perceived increase in ‘minor’ claims, should not operate to protect entrepreneurial medical practices that provide cosmetic and other non-essential treatments. For example, the effect of the 15% non-economic loss threshold effectively removes any civil liability for a negligently performed breast augmentation operation. As a result, the Alliance submitted that there is an unavoidable

⁵²⁴ Submission 23, Australian Lawyers Alliance, p15

⁵²⁵ Submission 23, Australian Lawyers Alliance, p15

tension between the legal requirement to inform the client of the risk of a procedure or product, and the desire to sell the procedure or product for profit.

The definition of the term ‘professional’

23.15 Finally, the Australian Lawyers Alliance also noted in its written submission that the term ‘professional’ as used in Division 6 of Part 1A of the *Civil Liabilities Act 2002* is not defined, rendering application of the law uncertain. Does the term extend to iridologists, naturopaths, alternative medicine practitioners and the like? The Alliance submitted that as the public increasingly embraces these areas of alternative medicine, it is important for the legal status of such practitioners be clear.⁵²⁶

Committee comment

23.16 During the inquiry, a number of legal issues were raised in relation to medical negligence claims under the provisions of the *Civil Liability Act 2002*.

23.17 The Committee is very concerned about some of the provisions of the *Civil Liability Act 2002* relating to medical negligence. In particular, the Committee recognises that the modified *Bolam* rule remains a contentious area of the law. However, other areas of the law, such as the restriction on damages where injury is caused by the mentally ill, are also of concern to the Committee.

23.18 At the same time, the Committee does not feel that it has sufficient evidence to come to firm recommendations in this area. Accordingly, the Committee believes that the Government should commission the New South Wales Law Reform Commission to also conduct a review of the medical negligence claims provisions of the *Civil Liability Act 2002*, including:

- Whether the modified *Bolam* rule is operating successfully
- The restriction on damages where injury is caused by the mentally ill
- The restriction on damages for the cost of raising an unintended child
- The restriction on damages for non-essential medical procedures
- The definition of medical professionals.

⁵²⁶ Submission 23, Australian Lawyers Alliance, p14

Recommendation 24

That the Government commission a review by the New South Wales Law Reform Commission of the medical negligence claims provisions of the *Civil Liability Act 2002*, including:

- Whether the modified Bolam rule is operating successfully
 - The restriction on damages where injury is caused by the mentally ill
 - The restriction on damages for the cost of raising an unintended child
 - The restriction on damages for non-essential medical procedures
 - The definition of medical professionals.
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Chapter 24 The management of injured workers by insurance companies

This chapter examines the performance of insurance companies in their management of injured workers who are unable to return to their previous job, including concerns about delays in the provision of weekly compensation payments and the delivery of appropriate retraining. It also examines WorkCover's proposed reforms to the management of claims through its new Request for Proposals for Workers Compensation Claims and Policy Services.

The performance of insurance companies in injury management

24.1 Significant concerns were raised during the inquiry in relation to the performance of insurance companies in their management of injured workers.

24.2 In its written submission, the Forestry, Furnishing, Building Products and Manufacturing division (FFPD Division) of the CFMEU, NSW Division Branch cited a Project Evaluation Report prepared by the Return to Work Facilitator of the FFPD Division for WorkCover in June 2004. The report identified a number of problems in the performance of insurers in their injury management role:

- First, a tendency on behalf of insurers to engage in 'doctor shopping' in the course of determining liability, with the purpose of finding a medical practitioner who will provide a report giving the insurer an excuse to deny liability.
- Second, delays in payments of weekly benefits, despite properly completed WorkCover medical certificates being supplied on time. In many cases this leaves injured workers and their families, many of whom live week to week and have no savings, without an income for prolonged periods.
- Third, situations where injured workers are not getting paid their average weekly earnings (AWE) as defined by s.43 of the *Workers Compensation Act 1987*, including missed overtime, bonuses and other additional payments that a worker was accustomed to earning prior to injury.
- Fourth, apparent errors or unreasonable interpretations in determining an injured worker's weekly benefits based on their previous earning capacity. The Project Evaluation Report cited a particular case of an injured worker undertaking a four-day a week TAFE course who was advised that her weekly benefit would be reduced to \$108.00 per week.⁵²⁷

24.3 The Committee examines some of these issues below.

⁵²⁷ Project Evaluation Report cited in submission 48, CFMEU FFPD Division, Attachment A, pp7-8, 19. See also Mr Ellwood, Return to work facilitator, CFMEU FFPD Division, Evidence, 2 May 2005, p40

Delays in the payment of weekly benefits to injured workers

24.4 In its written submission, the CFMEU indicated that at present it receives an inordinate number of complaints from injured workers who fail to receive their compensation payments on time, with cheques from the insurers often received many weeks late and in arrears.⁵²⁸ This was reiterated by Mr Andrew Ferguson, Secretary of the CFMEU, during the hearing on 2 May 2005:

We have got insurance companies that deal with injured workers in a dismissive way. We have got insurance companies that refuse to reimburse workers promptly for expenses they incur. They are sometimes travel expenses, sometimes they are medical expenses, and those workers feel no power in trying to deal with this lack of reimbursement. We have insurance companies that refuse to deposit compensation to workers by electronic funds transfer (EFT).⁵²⁹

24.5 Mr Ferguson subsequently noted that the primary sanction against insurance companies that are not supportive of genuinely injured workers is the loss of their operating licence. However, Mr Ferguson noted that he is not aware of this ever happening, and downplayed the likelihood of it happening given the powerful position of insurance companies.⁵³⁰

24.6 In response to the issue of EFT of payments, the Insurance Council of Australia (ICA) indicated that the use of electronic payments varies between insurers, but suggested that some insurers would like to see an extension to the use of EFT, and are exploring this issue.⁵³¹

24.7 In her evidence to the Committee, Ms Jacqueline Johnson, Head of Risk Management Services with Insurance Australia Group (IAG), indicated that IAG is planning to move to electronic payment of funds in the near future.⁵³²

Make-up pay for partially incapacitated workers

24.8 The CFMEU FFPD Division also raised the issue of make-up pay for partially incapacitated workers performing suitable duties, as governed by s.40 of the *Workers Compensation Act 1987*. The Return to Work Facilitator of the FFPD Division found in the Project Evaluation Report that of the 28 CFMEU FFPD Division members with whom the facilitator had contact between 5 June 2004 and 22 March 2005, 23 were not being paid make-up pay to average weekly earnings. Of the five employers who were paying make-up pay, all cases involved previous intervention by the CFMEU. Put simply, a majority of employers did not know about their legislative responsibility to pay make-up pay and to claim this amount back from their insurer.⁵³³

⁵²⁸ Submission 39, CFMEU, p3

⁵²⁹ Mr Ferguson, Secretary, CRMEU, Evidence, 2 May 2005, p21

⁵³⁰ Mr Ferguson, Evidence, 2 May 2005, p24

⁵³¹ ICA, Response to questions on notice, 6 July 2005, p3

⁵³² Ms Johnson, Head of Risk Management Services, IAG, Evidence, 6 June 2005, pp58-59

⁵³³ Submission 48, CFMEU FFPD Division, p1. See also Mr Ellwood, Return to work facilitator, CFMEU FFPD Division, Evidence, 2 May 2005, p40

- 24.9** In response to this problem, the CFMEU FFPD Division contended that insurers contracted by WorkCover have a responsibility to educate employers about their legislative responsibilities in general, and in particular with regard to s.40 of the *Workers Compensation Act 1987*, to ensure that correct make-up pay entitlements are paid in a timely fashion. The CFMEU FFPD Division highlighted in particular the case of one worker who had been underpaid \$222.37 per week for more than 18 months.⁵³⁴

The delivery of appropriate re-education programs to injured workers

- 24.10** Concern was expressed during the inquiry whether appropriate rehabilitation programs are being delivered to injured workers.
- 24.11** For example, in his evidence to the Committee, Mr Ellwood from the CFMEU FFPD Division submitted that in many instances, injured workers are being sent on inappropriate training courses:

What I found was that there was always a push to find a quick solution. There are no quick solutions for some of the gentlemen we met here earlier and there is no quick solution for someone from a non-English-speaking background who is unable to do physical work; they need to learn English; they need to develop English literacy, even if that takes years. These people are being given up on.⁵³⁵

- 24.12** In Chapter 17, the Committee cited from the CFMEU submission the case of Mr Tomo Susac. That case study continued with a description of his ongoing rehabilitation program since his injury.

⁵³⁴ Submission 48, CFMEU FFPD Division, pp1-2.

⁵³⁵ Mr Elwood, Evidence, 2 May 2005, p42

The case of Mr Susac (continued)

- Up until recently, Mr Susac had been required to continue to see his doctor for “WorkCover Certificates” although there is no prospect of any further medical treatment that will improve his condition so that he may continue to receive his payments of weekly compensation. He is also required, in accordance with a request made by the insurer, to continue to fill out statutory declarations and “job logs” of attempts he is making to find “suitable light work”.
- It is over four years since the original injury and despite Mr Susac having undergone substantial medical treatment, surgery and rehabilitation, the insurer has now requested that he attend a new “rehabilitation course”. The insurer is requiring Mr Susac to travel 50 kilometres back and forth from his home each day to attend this “rehabilitation course” where they are attempting to teach him computer skills. He has been doing this course now for 10 weeks straight and has been told that there is another 10 weeks of this course to go. Mr Susac is doing his best but is frustrated by the process given that he has already gone through rehabilitation and made numerous *bona fide* attempts to find work.
- Mr Susac has been effectively told that if he does not attend this 20 week course, his statutory weekly compensation will be stopped. The worker is not entitled to receive Centrelink payments under a disability support pension or Newstart allowance as he has entitlements under law to weekly workers’ compensation. Mr Susac is effectively worse off under the workers’ compensation system than under the Commonwealth social security system.
- Mr Susac’s treating general practitioner has serious reservations and doubts about the value and costs of this most “recent” rehabilitation program given Mr Susac’s age, his education and occupational background and substantial extent of his injury, and that it is over four years since the accident.
- Mr Susac and his doctor do not believe there is any further treatment that will improve his condition. Mr Susac is pessimistic about the chances of anyone realistically offering him a job given his present situation.
- How much is this 20-week rehabilitation program for a 61-year old former carpenter with limited English and loss of use of his right arm costing the WorkCover system (the insurer is not paying for it)? Who is it assisting?

Source: Submission 39, CFMEU, pp10-11

The high turnover of case managers

- 24.13** Another issue of concern raised during the inquiry in relation to the performance of insurance companies was the high turnover of staff, particularly in workers’ compensation case management. This in turn makes it very difficult for injured workers having to deal constantly with new employees.
- 24.14** In her evidence, Ms Johnson from IAG acknowledged that the high turnover of staff is a problem, and that there are often difficulties in finding the right employees with the right training to bring into the industry.⁵³⁶

⁵³⁶ Ms Johnson, Head of Risk Management Services, IAG, Evidence, 6 June 2005, pp58-59

- 24.15** Similarly, the ICA acknowledged that some insurers are experiencing high turnover, due to a skills shortage in the industry. The ICA submitted that companies are attempting to combat this problem through the recruitment of health professionals into the industry.⁵³⁷

The Request for Proposals for Workers Compensation Claims and Policy Services

- 24.16** The Committee notes that WorkCover is looking to improve the delivery of services to injured workers through a separation of the current functions undertaken by insurers, including claims-management, thereby allowing specialist service providers to tender for these roles.
- 24.17** Under WorkCover's new Request for Proposals for Workers Compensation Claims and Policy Services scheme, agents will be appointed to provide claims and policy services under the workers' compensation scheme under commercial contractual arrangements. Contracts will be awarded for an initial period of three years, with an option for renewal for up to a further three years based on agent performance.
- 24.18** Remuneration for scheme services will be largely performance based. Agents will receive service fees for demonstrating capacity and core competencies and performing key activities. Operating profits will be dependent on an agent meeting specific targets for their portfolio and also meeting key scheme benchmarks in the areas of return to work and financial outcomes.
- 24.19** In addition, key performance indicators have been included as contractual requirement for agents. Some of the key performance indicators include:
- the conduct of initial assessment of notifications within five business days and the completion the majority within 10 business days
 - the assessment of provisional liability within seven business days in accordance with legislative requirements
 - the completion of reviews within ten business days of schedules set out in the Injury Management Plan
 - the provision of continuing weekly compensation payments due to workers and employers within five business days of the date the payment was due to be made
 - the provision of payments to third party service providers in accordance with the relevant fee schedules
 - the submission of accurate data, including minimal errors in claims and policy data sets, and 99% accuracy of data submissions
 - the determination and calculation of premiums correctly, and the collection of all premiums and premium related debts.
- 24.20** If agents fail to achieve these key performance indicators, they will be subject to a hierarchy of performance management penalties, specified within their contract. This may include

⁵³⁷ ICA, Response to questions on notice, 6 July 2005, p3

sanctions up to and including prohibiting the agents from writing any new business or the transfer of claims to a better performing agent.⁵³⁸

- 24.21** In her evidence on 14 October 2005, Ms Vicki Telfer, General Manager of Strategy, Policy Division, WorkCover, indicated that the successful tenderers for the scheme are expected to be announced in October or early November 2005, with contracts in place by 1 January 2006.⁵³⁹

Committee comment

- 24.22** During the inquiry, a number of reservations were expressed about the performance of insurance companies in their management of injured workers.
- 24.23** The Committee is particularly concerned by some of this evidence. Most importantly, the Committee is alarmed by evidence that workers are in some circumstances not receiving their weekly benefits on time, leaving them and their families without income for an uncertain period. Often this comes at a time when they are most in need of financial support.
- 24.24** The Committee believes that electronic fund transfer of compensation payments to injured workers by insurance companies must be made mandatory, with payments to be made on the exact date that they are due. With modern financial systems, there should be no impediments to this whatsoever.

Recommendation 25

That the Government move immediately to mandate electronic fund transfer of compensation payments to injured workers by the insurance companies, with payments to be made on the exact date that they are due.

- 24.25** The Committee is also concerned that injured workers have in some instances been obliged to undertake inappropriate retraining programs. While the Committee fully supports the objective of returning injured workers to the workforce through appropriate retraining, clearly the provision of appropriate and relevant training requires sensitivity and expertise amongst case managers. In some instances, there is evidence that case managers lack such skills, due possibly to the high turnover of case managers in the industry.
- 24.26** Accordingly, the Committee welcomes WorkCover's new Request for Proposals for Workers Compensation Claims and Policy Services. This scheme has the potential to improve the delivery of services to injured workers through the inclusion of a number of key performance standards. At the same time, the Committee anticipates that the scheme will need to be rigorously policed to ensure that the rights of injured workers are not subordinate to the commercial considerations of agents appointed to provide claims and policy services.

⁵³⁸ The Cabinet Office, Response to questions on notice from 4 July 2005, pp4-6

⁵³⁹ Ms Telfer, Evidence, 14 October 2005, pp16-17

Chapter 25 Other issues

This chapter examines the following additional issues raised during the inquiry:

- The impact of the reforms on the legal profession
- A proposed change to the civil burden of proof
- The liability for injuries of not-for-profit equine industry organisations

The impact of the reforms on the legal profession

- 25.1** As indicated previously in Chapter 9, the tort law reforms implemented by the NSW Government since 1999 have decreased the volume of personal injury cases going through the courts, significantly affecting the volume of work available to personal injury lawyers.
- 25.2** This in turn has led to suggestions that legal firms and representative legal associations are motivated by self-interest in seeking to turn back some of the reforms to personal injury law in New South Wales.
- 25.3** The Committee notes the comments of representatives of the major legal associations on this issue.
- 25.4** In his evidence to the Committee, Mr Slattery QC, Senior Vice President of the NSW Bar Association, acknowledged that some members of the NSW Bar Association have seen a reduction in their salaries as a result of the legislative changes to personal injury law in New South Wales, but indicated that in many instances, barristers had simply extended their practices into other areas. At the same time, however, Mr Slattery argued that the Bar Association's concern in its evidence to the inquiry was to represent the interests of the injured that have no advocate other than members of the Bar (acknowledging that injured workers may also be represented by the union movement).⁵⁴⁰
- 25.5** Similarly, Mr John McIntyre, President of the Law Society of NSW, acknowledged in evidence that the reforms had undoubtedly affected the income of many legal firms, but he also argued that many had simply moved on to other fields of work. Mr McIntyre also stated:

We are not here trying to return the situation to where it was five or six years ago so that they can all give up those areas and go back to doing personal injury. A lot of them probably would not do that. The bottom line is if you are going to have a detailed inquiry into, for example, the public hospital system in New South Wales would you not ask the doctors to come along and give some evidence about it? Are they not the best placed persons to make some comments? That is why New South Wales solicitors are here.⁵⁴¹

⁵⁴⁰ Mr Slattery QC, Senior Vice President, NSW Bar Association, Evidence, 2 May 2005, pp8,11. This position reiterates the NSW Bar Association submission. See submission 29, NSW Bar Association, p12

⁵⁴¹ Mr McIntyre, President, Law Society of NSW, Evidence, 20 June 2005, p15

- 25.6** Mr Ben Cochrane, Legal and Policy Advisor with the Australian Lawyers Alliance, also responded in evidence to claims that the legal industry is motivated by self interest in its submissions to the inquiry:

In our view, the most important response is simply that no union represents people who have been injured in motor vehicle accidents, people who suffer injury through medical error or people who suffer unfortunate accidents in public. Our members see these people on a daily basis, they cannot help but feel affected by their experiences and they feel some kind of obligation to speak on their behalf.

That said, it is still open to the Committee to infer that we earn an income from doing so and to suggest that a certain self-interest brings us here. I put it to you that personal injury is not the most lucrative area of the law in which to work. If any of these gentlemen here wished to be making a motza they would perhaps practise in taxation law or in intellectual property. They tend not to do so, in part out of a vocation to assist people who have been injured. I ask you to consider that when you are also considering that perhaps we speak only out of self-interest.⁵⁴²

Legal services in rural and regional areas

- 25.7** Particular concerns were also expressed during the inquiry about the ongoing availability of legal services in rural and regional areas of New South Wales as a result of the Government's reforms.
- 25.8** In his written submission to the inquiry, Mr Terence O'Riain, a sole practitioner in a personal injury firm in Albury, argued that personal injury legal services may in future not be available to country residents due to the unprofitability of personal injury law practices since the reforms. In support, Mr O'Riain argued that the average age of litigation lawyers in country towns is rising, and that young people are not being attracted to the law.⁵⁴³
- 25.9** Mr O'Riain also cited the reforms to personal injury law as a general attack on the integrity of the law:

... if the public see the judges that sit on cases as being suspect and the lawyers in front of them all running suspect cases then it is going to follow that the public will lose trust in the rule of law. Is this what politicians want? A bummed out Bench, a burnt out Bar and insolvent solicitors will be a lot more susceptible to manipulation than a body that enjoys high esteem from the public.⁵⁴⁴

- 25.10** Mr O'Riain also presented his position during the Committee's hearing on 23 May 2005, noting in particular the service that many lawyers in rural and regional areas provide to the community, and the disadvantage faced as a result of the tort law reforms by 'ordinary' people in rural and regional areas. Mr O'Riain commented:

I was greatly influenced by the book by Harper Lee "To Kill a Mocking Bird". I think a lot of people are. They read it and think, "I want to be like Atticus Finch", who does

⁵⁴² Mr Cochrane, Legal and Policy Advisor, Australian Lawyers Alliance, Evidence, 6 June 2005, p4

⁵⁴³ Submission 26, Mr O'Riain, p1

⁵⁴⁴ Submission 26, Mr O'Riain, p3

a bit of this and a bit of that, but at the end of the day he is there to act for somebody who really would not otherwise have a hope because he feels that it is his duty. That is why my colleague John Potter and I like working in country towns. We feel we have a connection. We are there to step in. I think you will find we are like most people; we generally like most of our clients. With some, it is a bit of hard work, but often their injuries have got a lot to do with that. I feel the current system is causing problems with access to justice generally, it is causing particular problems for injured people, and it is creating a lot of hardship.⁵⁴⁵

- 25.11** The Committee notes that a similar position was expressed by Mr John Potter, partner with Commins Hendriks Solicitors, in his evidence on 23 May 2005:

Living and working in a country environment such as Wagga provides a legal practitioner with exposure to a wide variety of work and situations. Further, it imposes on a legal practitioner an obligation to participate in and be involved in community organisations of various kinds, and creates an awareness and understanding of the impact upon such organisations of things like the so-called insurance crisis. The legal profession always labours under the criticism that opposition to changes in personal injury legislation which have occurred since 1999 and before are solely motivated by self-interest. Obviously, there is an element of self-interest in any of those sorts of arguments. However, in my opinion, it is the legal profession who are in the best position to understand the wants and needs of persons injured through negligent acts in our community, and for that reason it is the legal profession that needs to be a voice representing those injured persons when clear injustice and inequality exists ...⁵⁴⁶

- 25.12** In its written submission on behalf of the NSW Government, The Cabinet Office also acknowledged that the tort law reforms have had an adverse impact on the volume of personal injury work available to lawyers, including lawyers in rural and regional areas, and that some may have had to downsize or retrain in new areas. The Cabinet Office continued:

The Government accordingly appreciates some of the reasons that have prompted lawyers' associations to lobby for the winding back of tort law reforms in the interests of their members. It would be improper, however, for the substance of the personal injury compensation laws (which, among other things, restore the principle of personal responsibility) to be premised on a desire to keep personal injury lawyers in profitable employ. To this end the Premier⁵⁴⁷ repeatedly asserted in debate on the legislation that he would not put the protection of personal injury lawyer incomes before the needs of the community. The Government makes no apology for this.⁵⁴⁸

- 25.13** The Committee also notes the following comment of Mr Laurie Glanfield, Director General of the Attorney General's Department:

With due respect, it is not difficult to see why the lawyers do not like the workers' compensation, the motor vehicle accident reforms and, to a lesser extent, the civil liability reforms, but it is also interesting to consider this: lawyers are currently

⁵⁴⁵ Mr O'Riain, Solicitor, Evidence, 23 May 2005, p34

⁵⁴⁶ Mr John Potter, Partner, Commins Hendriks Solicitors, Evidence, 23 May 2005, p37

⁵⁴⁷ The former Premier, the Hon Bob Carr.

⁵⁴⁸ Submission 53, The Cabinet Office, pp19-20

protesting against the profits they say are being received by insurers. Some might say, however, that the clients of lawyers – the injured, for example – may equally protest against the profits that they regard lawyers as taking in the form of the fees they charge for running their cases. This begs the question: who should profit in the area of personal injury compensation – the insurer or the lawyer? The Government’s view is that while it is, of course, in everyone’s interests for both insurers and lawyers to return some sort of profit in order to remain financially viable, it is undesirable for either to “profiteer” from personal injury.⁵⁴⁹

- 25.14** In response to this issue, the Committee accepts that the reforms to personal injury law in New South Wales have had an adverse impact on the income of some legal firms, although the Committee notes the evidence that many legal firms that have faced a reduction in personal injury claims-management have simply moved into other areas of the law.
- 25.15** Inevitably, during the inquiry, the perception was raised that the legal profession is seeking to change personal injury compensation law in New South Wales in its own interests. The Committee does not want to enter into this debate. In this report, the Committee has sought to look beyond claims of self interest made by both the legal profession and the insurance industry, to focus on the delivery of appropriate compensation and support to the injured.

A proposed change to the civil burden of proof

- 25.16** The Committee notes that it received a private written submission from Dr John Graham in which he advocated a change to the burden of proof required in civil courtroom tort law cases. Dr Graham proposed that the current burden of proof – on the balance of probabilities – barely amounts to more than a toss of a coin, meaning that instances of bad luck and instances of errors of judgement are routinely found to be instances of negligence in the courts.
- 25.17** In place of the current burden of proof in the civil courts, Dr Graham advocated adoption of the criminal court burden of proof – beyond reasonable doubt – in the resolution of personal injury claims in New South Wales. Dr Graham argued that this would restore justice to the consideration of any allegations of negligence.
- 25.18** Dr Graham further submitted that in the event that negligence could be established beyond reasonable doubt, the damages awarded should be those reasonable to fully compensate for the economic and non-economic hardship sustained. At the same time, Dr Graham submitted that any form of capping could most probably be phased out, whilst still enabling a very substantial lowering of insurance premiums, notably in relation to professional liability cover.⁵⁵⁰
- 25.19** In response to this proposal, the Committee notes that one of the difficulties with personal injury law, especially in the workplace, is the difficulty of proving negligence. It is for this reason that the statutory no-fault workers’ compensation scheme was introduced. Accordingly, to change the civil burden of proof, presumably with a reversion to a fault-based system, could potentially lead to many injured workers, motorists and members of the public

⁵⁴⁹ Mr Glanfield, Director General, Attorney General’s Department, Evidence 4 July 2005, p14

⁵⁵⁰ Submission 44, Dr John Graham, pp1-2

being denied compensation and rehabilitation following injury. Accordingly, the Committee does not support this proposal.

The liability for injuries sustained in not-for-profit equine industry organisations

- 25.20** The Committee received a written submission from Peacocke Dicksons & Price advocating the adoption of legislation to exempt or limit the liability of not-for-profit organisations and businesses involved in equine activities from personal injury damages claims, unless they had intentionally injured a participant or engaged in grossly negligent behaviour. Without such legislation, it was argued, insurance costs would become unreasonable for a number of businesses and charitable or not-for-profit organisations involved in the equine industry.
- 25.21** The common law principal of negligence presupposes that equine activity sponsors have a duty of care to each participant and should be able to foresee any incidents that may occur. However, Peacocke Dicksons & Price argued that this fails to acknowledge the propensity of a horse to behave in a way that may result in injury or death to those around it and the unpredictability of a horse's reactions.
- 25.22** Peacocke Dicksons & Price further noted that such legislation was adopted by the ACT Legislative Assembly in 2003, through an amendment to the *Civil Law (Wrongs) Act 2002* Schedule 3, that reproduced legislation adopted in Tennessee, USA, word for word.⁵⁵¹
- 25.23** The Committee does not have sufficient evidence to make a judgement on this issue. The Committee is concerned that exempting or limiting the liability of not-for-profit organisations and businesses involved in equine activities from personal injury damages claims could lead to the adoption of less safe training practices in the equine industry. The Committee does, however, believe that the Government should examine this issue further.

Recommendation 26

That the Government examine whether there would be merit in adopting legislation in New South Wales similar to Schedule 3 of the Australian Capital Territory's *Civil Law (Wrongs) Act 2002* dealing with liability for injury or death of participants in equine activities.

- 25.24** The Committee recognises that there may be other industries with similar issues to those raised by Peacocke Dicksons & Price upon which the Committee did not receive any evidence.

⁵⁵¹ Submission 14, Peacocke Dickens & Price, p10

Appendix 1 Submissions

| No | Author |
|-----|--|
| 1 | Mr Ian Johnstone |
| 2 | Mr Douglas Coleman |
| 3 | Mr Mark Peterlin |
| 4 | Mr Tom Port |
| 5 | Ms Monica Ros-Maranik (Chase Lawyers) |
| 6 | Mr George Cooper (Injuries Australia) |
| 7 | Mr Phil Turner (Community Care Underwriting Agency) |
| 8 | Mr Geoff Smede (MBT Lawyers of Coffs Harbour) |
| 9 | Ms Rhona Macleod |
| 10 | Mr D J Blackwood |
| 11 | Mr Peter Bartley |
| 12 | Dr John Simone |
| 13 | Ms Margaret Reynolds |
| 14 | Ms Kim O'Donnell (Peacocke Dickens & Price) |
| 15 | Mr Owen Rogers (Society of St Vincent de Paul) |
| 16 | Mr Stuart Gregory |
| 17 | Mr Colin Coakley (Country Women's Association of NSW) |
| 18 | Mr Bruce McCann (B.E.McCann & Co) |
| 19 | Ms Sandra Handley (Council of Social Service of New South Wales) |
| 20 | Mr Peter Johnson |
| 21 | Mr Les MacDonald (NSW Meals on Wheels Association Inc) |
| 22 | Mr Neil Singleton (Suncorp Group) |
| 23 | Mr Ben Cochrane (Australian Lawyers Alliance) |
| 23a | Mr Ben Cochrane (Australian Lawyers Alliance) |
| 23b | Mr Ben Cochrane (Australian Lawyers Alliance) |
| 23c | Mr Ben Cochrane (Australian Lawyers Alliance) |
| 23d | Mr Ben Cochrane (Australian Lawyers Alliance) |
| 24 | Ms Josephine Ridge (Sydney Festival) |
| 25 | Mr Paul Macken (Leigh Virtue & Associates) |
| 26 | Mr Terence O'Riain (Border Attorneys) |
| 26a | Mr Terence O'Riain (Border Attorneys) |
| 27 | Mr Phillip Perram (Wagga Wagga City Council) |

| No | Author |
|-----------|--|
| 27a | Mr Phillip Perram (Wagga Wagga City Council) |
| 28 | Mr John Norman (Outdoor Recreation Industry Council NSW Inc) |
| 29 | Mr Philip Selth (The NSW Bar Association) |
| 29a | Mr Philip Selth (The NSW Bar Association) |
| 29b | Mr Philip Selth (The NSW Bar Association) |
| 30 | Mr Keith Blanch |
| 31 | Mr David Brown (United Medical Protection Group of Companies) |
| 32 | Ms Val Harrison (Leeton Shire Council) |
| 33 | Mr Peter Laird (Riverina Regional Organisation of Councils) |
| 34 | Mr Robert Lalor |
| 35 | Dr Barbara Carney (Insurance Australia Group) |
| 36 | Mr Craig Deasey (Dungog Shire Council) |
| 37 | Mr Paul Bastian (Australian Manufacturing Workers' Union) |
| 38 | Mr Paul Muir (Vero Insurance Limited) |
| 39 | Ms Rita Mallia (Construction Forestry Mining and Energy Union) |
| 40 | Mr Noel Baum (Local Government Association of NSW & Shires Association of NSW) |
| 41 | Mr Gary Dawson (Law Society of NSW) |
| 41a | Mr John McIntyre (Law Society of NSW) |
| 42 | Mr David Russell (Australian Industry Group) |
| 43 | Mr John Attenborough (Jardine Lloyd Thompson) |
| 44 | Dr John Graham |
| 45 | Ms Robyn Norman (QBE Workers Compensation) |
| 46 | Mr Russ Collison (The Australian Workers' Union) |
| 47 | Mr B Moore |
| 48 | Mr Craig Smith (CFMEU FFPD Division, NSW Divisional Branch) |
| 49 | Mr Allan Hansell (Insurance Council of Australia Limited) |
| 50 | Confidential |
| 51 | Ms Mary Yaager (Unions NSW) |
| 52 | The Hon Dr Arthur Chesterfield-Evans MLC |
| 53 | Mr Roger Wilkins (The Cabinet Office) |
| 54 | Mr Colin Campbell (Morton & Harris Lawyers) |
| 55 | Mr Ian Harris (Premier Orthopaedics) |
| 56 | Mr John Ellard |
| 57 | Mr Timothy Abbott (Walsh & Blair Lawyers) |

| No | Author |
|-----------|---|
| 58 | Mr John Potter (Commins Hendriks Solicitors) |
| 59 | Mrs Ekram Samaan |
| 60 | Mr Neville Goldspring (Department of Tourism, Sport and Recreation) |
| 61 | Mr Stephen Makin |
| 62 | Mr Mick Smith |
| 63 | Mr Tom Healy |

Appendix 2 Witnesses

| Date | Name | Position and Organisation |
|--------------------|------------------------|---|
| Monday 2 May 2005 | Mr Michael Slattery QC | Senior Vice President, NSW Bar Association |
| | Mr Philip Selth | Executive Director, NSW Bar Association |
| | Mr Andrew Ferguson | State Secretary, Construction, Forestry, Mining & Energy Union (CFMEU) |
| | Ms Rita Mallia | Senior Legal Officer, Construction, Forestry, Mining & Energy Union (CFMEU) |
| | Mr Ivan Simic | Solicitor, Construction, Forestry, Mining & Energy Union (CFMEU) and Scott Solicitors |
| | Mr Grant Wakefield | Injured worker |
| | Mr Bruce Eaton | Injured worker |
| | Mr Daniel Reeves | Injured worker |
| | Mr Tomo Susac | Injured worker |
| | Mr Peter Sore | Injured worker |
| | Mr Craig Smith | NSW Divisional Branch Secretary, Construction, Forestry, Mining & Energy Union (CFMEU)- Forestry, Furnishing, Building Products and Manufacturing Division, NSW Divisional Branch |
| | Mr Brett Ellwood | Return to work facilitator, Construction, Forestry, Mining & Energy Union (CFMEU)- Forestry, Furnishing, Building Products and Manufacturing Division, NSW Divisional Branch |
| | Mr Phil Turner | Manager, Community Care Underwriting Agency |
| | Mr David Brown | General Manager, Legal Services Division, United Medical Protection Group of Companies |
| | Mr Owen Rogers | CEO, Society of St Vincent de Paul |
| | Mr Carey Tobin | Insurance Coordinator, Society of St Vincent de Paul |
| | Mr Gary Moore | Director, Council of Social Services of NSW |
| | Ms Sandra Handley | Project Officer, NCOSS Insurance Program, Council of Social Services of NSW |
| | Monday 23 May 2005 | Mr Don Pembleton |
| Mr John Batchelor | | Director Corporate Services, Leeton Shire Council |
| Mr Hugh Milvain | | President, Yanco Hall Committee, Yanco Hall Markets |
| Mr Rick Priest | | Tumba Rail |
| Mr Bob Hay | | Secretary, Wagga Junior Rugby League |
| Mr Terence O'Riain | | CEO, Border Attorneys, Albury |
| Mr John Potter | | Partner, Commins Hendriks Solicitors, Wagga Wagga |
| Mr Michael Logan | | |
| Mr John Napier | | |

| Date | Name | Position and Organisation |
|---------------------|-----------------------|--|
| | Mr Raymond Wilkins | |
| | Mr Timothy Abbott | Partner, Walsh and Blair Lawyers, Wagga Wagga |
| | Mr Matt Davis | |
| | Mrs Sue Davis | |
| Monday 6 June 2005 | Mr Tom Goudkamp | President, Australian Lawyers Alliance |
| | Mr Anthony Scarcella | Secretary, NSW Branch Committee, Australian Lawyers Alliance |
| | Dr Andrew Morrison SC | NSW Branch Committee, Australian Lawyers Alliance |
| | Mr Ben Cochrane | Legal and Policy Advisor, Australian Lawyers Alliance |
| | Mrs Susan Harris | |
| | Mr Tim Harris | |
| | Mr Bruce McCann | Solicitor |
| | Ms Cathy Cleary | Secretary, Study and Investigation Committee, Country Women's Association |
| | Mr Alan Mason | Executive Director, Insurance Council of Australia |
| | Mr Allan Hansell | Manager for NSW/ACT, Insurance Council of Australia |
| | Mr Mark Coss | National Liability Manager, Suncorp Group |
| | Mr John Rogers | General Manager of Commercial Insurance, Suncorp Group |
| | Mr Douglas Pearce | Group Executive Insurance Strategy, Insurance Australia Group |
| | Ms Jacqueline Johnson | Head of Risk Management Services, Insurance Australia Group |
| | Mr Thomas Brennan | Head of Product and Underwriting, Insurance Australia Group |
| | Mr Peter Swan | Head of Compulsory Third Party Insurance, Insurance Australia Group |
| Monday 20 June 2005 | Mr John McIntyre | President, Law Society of NSW |
| | Mr Mark Richardson | CEO, Law Society of NSW |
| | Mr Robert Bryden | Injury Compensation Committee, Law Society of NSW |
| | Mr Brian Moroney | Injury Compensation Committee, Law Society of NSW |
| | Clr Genia McCaffrey | President, Local Government Association of NSW |
| | Mr Frank Loveridge | Legal Officer, Local Government Association of NSW and Shires Association of NSW |
| | Mr Ryan Fletcher | Director, Policy and Research, Local Government Association of NSW and Shires Association of NSW |

| Date | Name | Position and Organisation |
|------------------------|------------------------|---|
| | Mr Stephen Penfold | Board Member, Statewide Mutual |
| | Mr John Attenborough | Executive Officer, Board of Management, Statewide Mutual |
| | Ms Robyn Norman | General Manager, CTP, QBE Insurance |
| | Mr George Katsogiannis | Regional Manager, Workers Compensation NSW & ACT, QBE Insurance |
| | Ms Mary Yaager | OH&S and Workers Compensation Officer, Unions NSW |
| | Mr Mark Lennon | Assistant Secretary, Unions NSW |
| | Dr Ian Incoll | Orthopaedic Surgeon, Australian Society of Orthopaedic Surgeons |
| | Mr Stephen Milgate | National Co-ordinator, Australian Society of Orthopaedic Surgeons |
| | Mr Peter Mooney | Barrister |
| | Ms Sonia Fadlallah | Member, NSW Nurses |
| | Mr Jim O'Brien | Industrial Officer, NSW Nurses |
| Monday 4 July 2005 | Mr Paul Bastian | State Secretary, Australian Manufacturing Workers' Union |
| | Mr Peter Tyson | Partner, Turner Freeman Lawyers |
| | Mr Gaius Whiffen | Partner, Turner Freeman Lawyers |
| | Mr Laurie Glanfield | Director General, Attorney General's Department |
| | Mr David Bowen | General Manager, Motor Accidents Authority |
| | Mr Anthony Lean | Policy Manager, Legal Branch, The Cabinet Office |
| | Ms Vicki Telfer | General Manager, Strategy and Policy Division, WorkCover NSW |
| Friday 14 October 2005 | Mr Laurie Glanfield | Director General, Attorney General's Department |
| | Mr David Bowen | General Manager, Motor Accidents Authority |
| | Mr Anthony Lean | Policy Manager, Legal Branch, The Cabinet Office |
| | Ms Vicki Telfer | General Manager, Strategy and Policy Division, WorkCover NSW |

Appendix 3 Tabled Documents

Monday 2 May 2005

1. Personal injury compensation legislation case studies- *tendered by Mr Philip Selth on a confidential basis.*
2. Photos of injured person- *tendered by Mr Philip Selth on a confidential basis.*
3. Summary of the case of an employee seeking s.40 make-up pay- *tendered by Mr Brett Ellwood.*

Monday 23 May 2005

4. General comments relating to Yanko Village Markets- *tabled by Mr Hugh Milvain.*

Monday 6 June 2005

5. 'High insurer profits allow better benefits to the injured?' by Richard Cumpston of Cumpston Sarjeant Pty Ltd - *tabled by Mr Andrew Morrison.*
6. Personal Injury Litigation Tables, October 2004, by Goudkamp & Morrison- *tabled by Mr Andrew Morrison.*
7. Photograph of Susan and Tim Harris' stillborn infant- *tabled by Mrs Susan and Mr Tim Harris.*
8. Summary of chronology provided in his submission and additional events- *tabled by Mr Bruce McCann.*
9. APRA Public Liability Data: 1998- 2002- *tabled by Mr Alan Mason.*
10. ACCC Fourth Monitoring Report: Average Size of Personal Injury Claims: 1997- 2004- *tabled by Mr Alan Mason.*

Monday 20 June 2005

11. Examples of Persons Disadvantaged by New Public Liability Laws- *tabled by Mr Mark Richardson.*

Monday 4 July 2005

12. Opening comments by Mr Bowen, General Manager, MAA- *tabled by Mr David Bowen.*
13. 'Compensable Injuries and Health Outcomes' by The Australasian Faculty of Occupational Medicine, The Royal Australasian College of Physicians, Health Policy Unit- *tabled by Mr David Bowen.*

Appendix 4 Public liability insurance industry participants in Australia

Unpublished data from Australian Prudential Regulation Authority (APRA) shows that the 10 largest public liability insurers in Australia as at 31 December 2004 earned about 75% of total premium revenue, with the largest four earning about 48%. The largest 10 companies as at 31 December 2004 are listed below:

- Allianz Australia Insurance Limited
- CGU Insurance Limited
- Chubb Insurance Company of Australia Limited
- GIO General Limited, which is a wholly owned subsidiary of the Suncorp Group⁵⁵²
- Liberty Mutual Insurance Company
- Lumley General Insurance Limited
- Mercantile Mutual Insurance (Australia) Limited (now ING)
- QBE Insurance (Australia) Limited
- Vero Insurance Limited
- Zurich Australia Limited.

The remaining 25% of total public liability premium revenue was spread among 32 insurers, each with industry shares of 3% or less.⁵⁵³

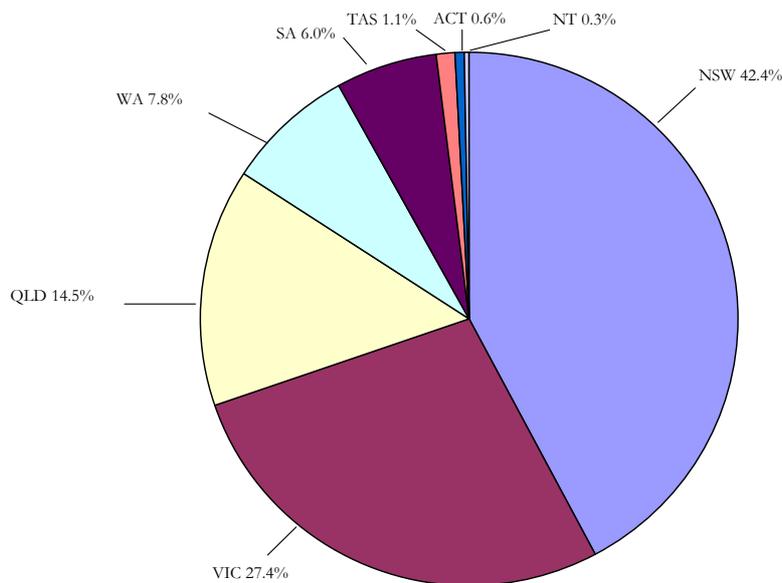
⁵⁵² The Suncorp Group, through GIO General Ltd is a licensed CTP insurer in NSW and provides public liability insurance to policy holders in NSW. Australia-wide, Suncorp's insurance market share is 23% home, 22% motor, 20% workers' compensation and 21% commercial. The group has total assets of over \$43 billion and over \$11 billion funds under management. Submission 22, Suncorp Group, p6

⁵⁵³ ACCC, *Third Monitoring Report on Public Liability and Professional Indemnity Insurance*, July 2004, p 16

Appendix 5 Distribution of premium revenue by state and territory

In its publication *Public liability and professional indemnity insurance: Third monitoring report*, dated July 2004, the Australian Competition and Consumer Commission cited unpublished data from the Australian Prudential Regulation Authority that shows the percentage of total premium revenue from the public liability insurance industry underwritten by all insurers in the year ending 31 December 2003. This is reproduced below.

Proportion of public liability insurance premium revenue by state and territory (year ending 31 Dec 2003) (per cent)



Source: ACCC, *Public liability and professional indemnity insurance: Third monitoring report*, July 2004, p 17

Appendix 6 Part 15.2 of the *ACT Civil Law (Wrongs) Act 2002*

Part 15.2 General reporting requirements of insurers

202 Who is an insurer for pt 15.2

In this part, an *insurer* is a person who carries on the business of insurance, or an activity declared by regulation to be the business of insurance, in relation to—

- (a) property located in the ACT; or
- (b) an act or omission happening in the ACT.

203 Insurers reporting requirements

- (1) On or before 31 July in each year, an insurer must, in accordance with this section, give a report to the Minister about insurance policies held by the insurer at any time in the financial year ending on the previous 30 June in relation to—
 - (a) property located in the ACT; or
 - (b) an act or omission happening in the ACT.

Maximum penalty: 100 penalty units.

- (2) The report must state for each class of policy prescribed by regulation—
 - (a) the premium paid to the insurer; and
 - (b) the number of claims; and
 - (c) the number of claims that were paid; and
 - (d) the number of claims that were refused; and
 - (e) anything else required under the regulations.
- (3) The report must be given in the way required by regulation.

204 Confidentiality of general reports of insurers

- (1) Information in a report under this part by an insurer is commercially sensitive and confidential.
- (2) A person must not use any confidential information obtained in carrying out the person's functions under this part to obtain, directly or indirectly, a financial or other advantage for himself or herself or anyone else.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

- (3) A person must not disclose any confidential information obtained in carrying out the person's functions under this part, except in accordance with subsection (4).

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

- (4) A person may disclose confidential information if—
- (a) the disclosure does not identify the insurer that supplied the information; or
 - (b) the disclosure is made in the exercise of a function under this Act or any other territory law permitting the disclosure; or
 - (c) the disclosure is made with the agreement of the insurer that supplied the information; or
 - (d) the disclosure is made in a legal proceeding at the direction of a court; or
 - (e) the information is already in the public domain; or
 - (f) the disclosure is to a person, or for a purpose, prescribed by regulation.

205 Report to Legislative Assembly

On or before 31 October in each year, the Minister must present to the Legislative Assembly a report about the key findings arising from the reports given to the Minister under section 203 in the financial year ending on the previous 30 June.

Appendix 7 Minutes

Minutes No 34

Wednesday 17 November 2004

At Parliament House, at 9.30am, Room 1153

1. Members Present

Revd Moyes (Chair)

Ms Cusack

Ms Griffin (Roozendaal)

Mr Primrose

Ms Rhiannon

Mr West

Mr Gallacher (Participating member)

2. Apologies

Ms Parker

3. Substitute member

The Chair advised that Ms Griffin would be substituting for Mr Roozendaal for the purposes of this meeting.

4. Participating member

The Chair advised that Mr Gallacher would be a participating member for the purposes of this meeting.

5. Confirmation of Minutes No 33

Resolved, on a motion of Ms Cusack, that Minutes Nos 33 be confirmed.

6. Correspondence

7. Proposed self-reference of inquiry into personal injury insurance

Resolved, on the motion of Ms Griffin, that the Committee defer consideration of the proposed self-reference until its next deliberative meeting.

8. Inquiry into workers compensation fraud

9. Budget Estimates 2004-2005

10. Adjournment

The Committee adjourned at 9.50am until Wednesday, 8 December 2004 at 9.30am.

Rachel Simpson

Clerk to the Committee

Minutes No 35

Wednesday 8 December 2004

At Parliament House, at 9.30am, Room 1153

1. Members Present

Revd Moyes (Chair)
Ms Griffin (Primrose)
Ms Rhiannon
Mr Roozendaal
Mr West
Mr Gallacher (Ms Parker)

2. Substitute member

The Chair advised that Mr Gallacher would be substituting for Ms Parker for the purposes of this meeting.

3. Confirmation of Minutes No 34

Resolved, on motion of Mr West: That Minutes No 34 be confirmed.

4. Correspondence

The Committee noted the following item of correspondence received:

- Letter from Ms Cusack re amendments to the proposed terms of reference of inquiry into personal injury compensation legislation (received 18 Nov 2004)

5. Proposed self-reference of inquiry into personal injury insurance

The Committee Director distributed a revised copy of the proposed terms of reference for the inquiry into personal injury compensation legislation, incorporating the amendments proposed by Ms Cusack in her letter of 18 Nov 2004.

Ms Griffin distributed the text of an additional item to be added to the terms of reference.

The Committee deliberated.

Ms Rhiannon moved: That the Committee adopt the following terms of reference:

That General Purpose Standing No 1 inquire into, and report on the operations and outcomes of all personal injury compensation legislation (including but not limited to: claims by persons injured in motor accidents, transport accidents, accidents in the workplace, at public events, in public places and in commercial premises but not including claims by victims injured as a result of criminal acts) approved by the Parliament of New South Wales from 1999, with particular reference to:

- 1. The impact on employment in rural and regional communities;*
- 2. The impact on community events and activities, and community groups;*
- 3. The impact on insurance premium levels and the availability of cost-effective insurance;*
- 4. The capacity of injured persons to recover fair and appropriate damages;*
- 5. The ratio of insurers profits to premiums and to payments to injured persons who have a claim under NSW personal injury compensation legislation;*
- 6. The feasibility of a State-supported insurance scheme to provide affordable insurance for community events and non-profit community groups; and*
- 7. Any other issue that the Committee considers to be of relevance to the inquiry.*

That the Committee hold public hearings within the next 12 months and report to the Legislative Council by 31 December 2005.

Question put.

Question resolved in the negative.

Resolved, on motion of Mr Roozendaal: That the Committee adopt the following terms of reference.

That General Purpose Standing Committee No 1 inquiry into, and report on the operations and outcomes of all personal injury compensation legislation (including but not limited to: claims by persons injured in motor accidents, transport accidents, accidents in the workplace, at public events, in public places and in commercial premises but not including claims by victims injured as a result of criminal acts) approved by the Parliament of New South Wales from 1999, with particular reference to:

1. *The impact on employment in rural and regional communities;*
2. *The impact on community events and activities, and community groups;*
3. *The impact on insurance premium levels and the availability of cost-effective insurance; and*
4. *Any other issue that the Committee considers to be of relevance to the inquiry.*

Resolved, on motion of Ms Griffin: That the Committee adopt the following additional term of reference:

The level and availability of Compulsory Third Party motor accident premiums required to fund claims cost if changes had not been implemented in 1999; and the impact on the WorkCover scheme if changes had not been implemented in 2001;

Ms Rhiannon moved: That the Committee adopt the following additional term of reference (original term of reference 4):

The capacity of injured persons to recover fair and appropriate damages

Question put.

Question resolved in the negative.

The Committee endorsed the proposed timetable for the conduct of the inquiry. It was agreed that Committee Members email to the Secretariat the names of any additional parties they believe should be invited to make a submission to the inquiry.

2. Inquiry into workers compensation fraud

3. Adjournment

The Committee adjourned at 10.05am *sine die*.

Stephen Frappell
Clerk to the Committee

Minutes No 36

Thursday 24 March 2005

At Parliament House, at 9.00am, Room 1108

1. Members Present

Revd Moyes (Chair)
Ms Griffin (Primrose)
Ms Rhiannon
Mr Roozendaal
Mr West
Ms Parker

2. Confirmation of Minutes No 35

Resolved, on motion of Mr West: That Minutes No 35 be confirmed.

3. Correspondence

The Committee noted the following item of correspondence received:

- Letter from Mr Steve Likar re inquiry into serious injury and death in the workplace
- Letter from Mr Brian Cassidy, ACCC, re making a submission to the inquiry into personal injury compensation legislation
- Letter from Mr Roger Wilkins, Director General, Cabinet Office re making a whole-of-government response to the inquiry into personal injury compensation legislation, which will not be available until 8 April 2005
- Letter from Mr Peter Anderson, ACCI, responding to the inquiry into personal injury compensation legislation
- Letter from Mr Bob Whyburn, Principal, Maurice Blackburn Cashman Lawyers, re extension to time for making a submission to the inquiry into personal injury compensation legislation
- Email from Mr Bruce McCann, Solicitor, indicating that he is happy for his submission (submission 18) to be made public
- Email from Mr Paul Muir, Insurance Risk Manager, Vero, indicated that Vero is happy for its amended submission (submission 38) to be made public
- Email from Mr Keith Blanch indicating that he is happy for his submission (submission 30) to be made public.

4. Inquiry into personal injury compensation legislation

Submissions

The Committee noted submissions 1-45, which had previously been circulated.

Resolved on the motion of Ms Rhiannon: That the Committee accept and publish submissions 1-45 (including supplementary submission 26a) with the exception of submission 8, and Table 1 of submission 45 which are to remain confidential.

Conduct of inquiry

Resolved on the motion of Ms Griffin: That the Committee hold a public hearing on 2 May, and that the secretariat circulate dates to the committee for additional hearings to be held after that date.

5. Inquiry into workers compensation fraud

6. Adjournment

The Committee adjourned at 9.15 until Monday, 2 May 2005 at 9.30am.

Steven Reynolds
Clerk to the Committee

Minutes No 37

Monday 2 May 2005

At Parliament House, at 9.00am, Room 814/815

1. Members Present

Revd Moyes (Chair)
 Mr Colless (Cusack)
 Ms Griffin (Primrose)
 Ms Parker
 Ms Rhiannon
 Mr Roozendaal
 Mr West

2. Public hearing – Inquiry into Personal Injury Compensation Legislation

Witnesses, the public and the media were admitted.

The Chair made an opening statement.

The following witnesses were sworn and examined:

- Mr Michael Slattery QC, Senior Vice President, NSW Bar Association
- Mr Philip Selth, Executive Director, NSW Bar Association

Mr Selth tendered the following documents to the Committee on a confidential basis:

- Personal injury compensation legislation case studies
- Photos of injured person

Mr Selth requested that if the Committee publish the case studies that it do so with personal details deleted.

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Andrew Ferguson, State Secretary, CFMEU
- Ms Rita Mallia, Senior Legal Officer, CFMEU
- Mr Ivan Simic, CFMEU solicitor, Taylor and Scott Solicitors
- Mr Grant Wakefield, injured worker
- Mr Bruce Eton, injured worker
- Mr Daniel Reeves, injured worker
- Mr Tomo Susac, injured worker
- Mr Peter Sore, injured worker

The evidence was concluded and the witnesses withdrew.

Resolved on motion of Mr Roozendaal: That the Committee accept and publish submission 48 from the CFMEU - Forestry, Furnishing, Building Products and Manufacturing Division.

The following witnesses were sworn and examined:

- Mr Craig Smith, NSW Divisional Branch Secretary, CFMEU – Forestry, Furnishing, Building Products and Manufacturing Division, NSW Divisional Branch

- Mr Brett Ellwood, Return to work facilitator, CFMEU – Forestry, Furnishing, Building Products and Manufacturing Division, NSW Divisional Branch

Mr Ellwood tendered the following document to the Committee:

- Summary of the case of an employee seeking s.40 make-up pay.

The evidence was concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Phil Turner, Manager, Community Care Underwriting Agency

The evidence was concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr David Brown, General Manager, Legal Services Division, United Medical Protection Group of Companies

The evidence was concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Owen Rogers, CEO, Society of St Vincent de Paul
- Mr Carey Tobin, Insurance Coordinator, Society of St Vincent de Paul

The evidence was concluded and the witnesses withdrew.

Witnesses, the media and the public withdrew.

3. Deliberative meeting – Inquiry into Personal Injury Compensation Legislation

Confirmation of Minutes No 36

Resolved on motion of Mr West: That Minutes No 36 be confirmed.

Submissions

The Committee noted submissions 46 - 55, which had previously been circulated.

Resolved on motion of Mr West: That the Committee accept and publish submissions 46, 47 and 49-55.

Tabled documents

The Committee Director tabled a version of the case studies document tendered by Mr Selth with personal details deleted.

Resolved on motion of Ms Griffin: That the documents tendered with the Committee during the public hearing be accepted and the following be published:

- The case study tendered by Mr Ellwood
- The case studies tendered by Mr Selth as amended by the secretariat.

Correspondence

The Committee noted the following item of correspondence received:

- Letter from Mr Philip Selth, NSW Bar Association re additional material for the inquiry into personal injury compensation legislation (received 29 March 2005)
- Letter from Mr Roman Marchlewski re the medical and legal systems and the inquiry into personal injury compensation legislation (dated 31 March 2004)

- Fax from Mr Marchlewski (received 6 April 2005)

The Committee noted the following item of correspondence sent:

- Letter to Mr Roman Marchlewski (dated 1 April 2005)

Public hearings in Wagga Wagga and the Hunter

Resolved on motion of Ms Griffin: That the Committee secretariat be authorised to make travel arrangements for inquiry hearings in Wagga Wagga and the Hunter.

4. Resumption of public hearing – Inquiry into Personal Injury Compensation Legislation

Witnesses, the public and the media were admitted.

The following witnesses were sworn and examined:

- Mr Gary Moore, Director, Council of Social Services of NSW
- Ms Sandra Handley, Project Officer, NCOSS Insurance Program Council of Social Services of NSW

The evidence was concluded and the witnesses withdrew.

The public hearing was concluded and the public withdrew.

5. Adjournment

The Committee adjourned at 4.10 pm until Monday, 23 May 2005 in Wagga Wagga.

Steven Reynolds
Clerk to the Committee

Minutes No 38

Monday 23 May 2005

Grand Ballroom, Country Comfort Motel, Wagga Wagga, at 9.30am

1. Members Present

Revd Moyes (Chair)
Mr Colless (Cusack)
Ms Parker
Ms Rhiannon
Mr Roozendaal
Mr West

2. Apologies

Ms Griffin (Primrose)

3. Public Hearing – Inquiry into Personal Injury Compensation Legislation

Witnesses, the public and the media were admitted.

The Committee noted receipt of response to question on notice from NCOSS.

Resolved on motion of Mr West: That the Committee accept and publish submission 23a, 27a, 56, 57 and 58.

The Chair made an opening statement.

The following witness was sworn and examined:

- Mr Don Pembleton, Risk Analyst, Wagga Wagga City Council

The evidence was concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr John Batchelor, Director Corporate Services, Leeton Shire Council

The evidence was concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Hugh Milvain, President, Yanco Hall Committee, Yanco Hall Markets

Mr Milvain tendered the following document to the Committee:

- General comments relating to Yanko Village Markets.

The evidence was concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Rick Priest, Tumba Rail

The evidence was concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Bob Hay, Secretary, Wagga Junior Rugby League

The evidence was concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Terence O'Riain, CEO, Border Attorneys, Albury

The evidence was concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr John Potter, Partner, Commins Hendriks Solicitors, Wagga Wagga
- Mr Michael Logan (private capacity)
- Mr John Napier (private capacity)
- Mr Raymond Wilkins (private capacity)

The evidence was concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Timothy Abbott, Partner, Walsh and Blair Lawyers, Wagga Wagga

The evidence was concluded.

The following witnesses were sworn and examined:

- Mr Matt Davis (private capacity)
- Mrs Sue Davis (private capacity)
- Mr Timothy Abbott, Partner, Walsh and Blair Lawyers, Wagga Wagga (previously sworn)

The evidence was concluded and the witnesses withdrew.

Witnesses, the media and the public withdrew.

4. Deliberative Meeting - Inquiry into Personal Injury Compensation Legislation

Confirmation of Minutes No 37

Resolved on motion of Mr West: That Minutes No 37 be confirmed.

Tabled documents

Resolved on motion of Ms Parker: That the Committee accept and publish the document tendered by Mr Milvain during the public hearing.

Correspondence

The Committee noted the following items of correspondence

Received

- Letter from Mr Carey Tobin, Society of St Vincent de Paul, re correction to his evidence of 2 May (received 16 May 2005)

Sent

- Letter to Mr Daryl Maguire MP, Member for Wagga Wagga, re the Committee's hearing in Wagga Wagga (dated 28 April 2005)

Injured workers accompanying CFMEU witnesses on 2 May 2005

Resolved on motion of Mr West: That the Committee write to the CEO of WorkCover, Mr Jon Blackwell, seeking an update on the outcome of the five injured workers who accompanied the CFMEU witnesses during the Committee's public hearing on 2 May 2005

5. Adjournment

The Committee adjourned at 4.20pm until the public hearing in Sydney on 6 June 2005.

Stephen Frappell

Clerk to the Committee

Minutes No 39

Monday 6 June 2005

Jubilee Room, Parliament House at 9.30am

1. **Members Present**

Revd Moyes (Chair)
 Mr Colless (Cusack)
 Mr Catanzariti (Roozendaal - after 2.00 pm)
 Mr Donnelly (Roozendaal - until 12.30 pm)
 Ms Griffin (Primrose)
 Ms Parker
 Ms Rhiannon
 Mr West

2. Substitute Members

The Chair advised that Mr Greg Donnelly would be substituting for Mr Eric Roozendaal for the morning session of the public hearing and Mr Tony Catanzariti would be substituting for Mr Eric Roozendaal for the afternoon session of the public hearing.

3. Public Hearing – Inquiry into Personal Injury Compensation Legislation

Witnesses, the public and the media were admitted.

Resolved on motion of Mr Ian West: That the Committee accept and publish submission 23b, 59, 60 and 61.

The Chair made an opening statement.

The following witnesses were sworn and examined:

- Mr Tom Goudkamp, President, Australian Lawyers Alliance
- Mr Anthony Scarcella, Secretary, NSW Branch Committee, Australian Lawyers Alliance
- Dr Andrew Morrison SC, NSW Branch Committee, Australian Lawyers Alliance
- Mr Ben Cochrane, Legal and Policy Advisor, Australian Lawyers Alliance

Dr Andrew Morrison tendered the following documents to the committee:

- 'High insurer profits allow better benefits to the injured?' by Mr Richard Cumpston of Cumpston Sarjeant Pty Ltd
- Litigation Tables October 2004
- A supplementary submission relating the discount rate applied to the award of damages

The following witnesses were sworn and examined:

- Mrs Susan Harris (private capacity)
- Mr Tim Harris (private capacity)

Mr and Mrs Harris tendered to the committee a photograph of their stillborn infant.

The evidence was concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Bruce McCann, Solicitor (appearing in a private capacity)

Mr McCann tendered the following document to the committee:

- 'Statement by Mr McCann'

The evidence was concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Cathy Cleary, Secretary, Study and Investigation Committee, Country Women's Association

The evidence was concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Alan Mason, Executive Director, Insurance Council of Australia
- Mr Allan Hansell, Manager for NSW/ACT, Insurance Council of Australia

Mr Mason tendered the following documents to the committee:

- Table of premium claims 1998 - 2002
- Table of personal injury claim sizes 1997 - 2004

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Mark Coss, National Liability Manager, Suncorp Group
- Mr John Rogers, General Manager of Commercial Insurance, Suncorp Group

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Douglas Pearce, Group Executive Insurance Strategy, Insurance Australia Group
- Ms Jacqueline Johnson, Head of Risk Management Services, Insurance Australia Group
- Mr Thomas Brennan, Head of Product and Underwriting, Insurance Australia Group
- Mr Peter Swan, Head of Compulsory Third Party Insurance, Insurance Australia Group

The evidence was concluded and the witnesses withdrew.

Witnesses, the media and the public withdrew.

4. Deliberative Meeting - Inquiry into Personal Injury Compensation Legislation

Confirmation of Minutes No 38

Resolved on motion of Mr West: That Minutes No 38 be confirmed.

Tabled documents

Resolved on motion of Mr West: That the Committee accept and publish the documents tabled during the public hearing.

Correspondence

The Committee noted the following items of correspondence

Received

- Letter from Mr Russ Collison, State Secretary, AWU, withdrawing from the public hearing on 6 June 2005 (received 1 June 2005)

Sent

- Letter to Mr Jon Blackwell, CEO, WorkCover re the five injured workers who presented evidence along with the representatives of the CFMEU on 2 May 2005 (dated 25 May 2005)

Hearing on 27 June 2005

The Committee agreed that it should hold the public hearing on 27 June 2005 in Sydney, and not in the Hunter as previously proposed.

5. Adjournment

The Committee adjourned at 4.45pm until the public hearing in Sydney on 20 June 2005.

Stephen Frappell
Clerk to the Committee

Minutes No 40

Monday 20 June 2005

Jubilee Room, Parliament House at 9.30am

1. Members Present

Revd Moyes (Chair)
Mr Colless (Cusack)
Mr Catanzariti (Primrose)
Ms Parker
Ms Rhiannon
Mr Roozendaal
Mr West

2. Substitute Members

The Chair advised that Mr Catanzariti would be substituting for Ms Primrose for the public hearing.

3. Public Hearing – Inquiry into Personal Injury Compensation Legislation

Witnesses, the public and the media were admitted.

The Chair made an opening statement.

The following witnesses were sworn and examined:

- Mr John McIntyre, President, Law Society of NSW
- Mr Mark Richardson, CEO, Law Society of NSW
- Mr Robert Bryden, Injury Compensation Committee, Law Society of NSW
- Mr Brian Moroney, Injury Compensation Committee, Law Society of NSW

Mr Mark Richardson tendered the following document to the committee:

- 'Examples of Persons Disadvantaged by New Public Liability Laws.'

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Clr Genia McCaffrey, President, Local Government Association of NSW
- Mr Frank Loveridge, Legal Officer, Local Government Association of NSW and Shires Association of NSW
- Mr Ryan Fletcher, Director, Policy and Research, Local Government Association of NSW and Shires Association of NSW

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Stephen Penfold, Board Member, Statewide Mutual
- Mr John Attenborough, Executive Officer, Board of Management, Statewide Mutual

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Robyn Norman, General Manager, CTP, QBE Insurance
- Mr George Katsogiannis, Regional Manager, Workers Compensation NSW & ACT, QBE Insurance

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Mary Yaager, OH&S and Workers Compensation Officer, Unions NSW
- Mr Mark Lennon, Assistant Secretary, Unions NSW

The following witnesses were sworn and examined:

- Dr Ian Incoll, Orthopaedic Surgeon, Australian Society of Orthopaedic Surgeons
- Mr Stephen Milgate, National Co-ordinator, Australian Society of Orthopaedic Surgeons

The following witness was sworn and examined:

- Mr Peter Mooney, Barrister

The following witnesses were sworn and examined:

- Ms Sonia Fadlallah, Member, NSW Nurses
- Mr Jim O'Brien, Industrial Officer, NSW Nurses

The evidence was concluded and the witnesses withdrew

Witnesses, the media and the public withdrew.

4. **Deliberative Meeting - Inquiry into Personal Injury Compensation Legislation**

Confirmation of Minutes No 39

Resolved on motion of Ms Rhiannon: That Minutes No 39 be confirmed.

Tabled documents

Resolved on motion of Mr West: That the Committee accept and publish the document tabled during the public hearing.

Responses to questions on notice received

The Committee noted the following responses to questions on notice received:

- Finity report provided by the insurance Council of Australia
- Copy of CFMEU correspondence re workers compensation
- Insurance coverage for Yanko Hall Market provided by Mr Hugh Milvain

Correspondence

The committee noted the following items of correspondence:

Received

- Letter from Mrs Ekram Samaan providing additional details of her case
- Letter from Law Council of Australia forwarding the Cumpston Report *High insurer profits allow better benefits to the injured?* and a speech by the President of the Law Council delivered at the Personal Injury and Compensation Forum organised by the Law Council on 3 June 2005.

5. **Adjournment**

The Committee adjourned at 4.15pm until the public hearing in Sydney on 4 July 2005.

Stephen Frappell

Clerk to the Committee

Minutes No 41

Monday 4 July 2005

Jubilee Room, Parliament House at 10.30am

1. Members Present

Revd Moyes (Chair)
Mr Colless (Cusack)
Ms Griffin (Primrose)
Ms Parker
Ms Rhiannon
Mr Roozendaal
Mr West

2. Public Hearing – Inquiry into Personal Injury Compensation Legislation

Witnesses, the public and the media were admitted.

The Chair made an opening statement.

The following witnesses were sworn and examined:

- Mr Paul Bastian, State Secretary, AMWU
- Mr Peter Tyson, Partner, Turner Freeman Lawyers
- Mr Gaius Whiffen, Partner, Turner Freeman Lawyers

The evidence was concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Laurie Glanfield, Director General, Attorney General's Department
- Mr David Bowen, General Manager, Motor Accidents Authority
- Mr Anthony Lean, Policy Manager, Legal Branch, The Cabinet Office
- Ms Vicki Telfer, General Manager, Strategy and Policy Division, WorkCover NSW

Mr Bowen tendered the following documents to the Committee:

- Opening comments by Mr Bowen, General Manager, MAA
- 'Compensable Injuries and Health Outcomes' by The Australasian Faculty of Occupational Medicine, The Royal Australasian College of Physicians, Health Policy Unit

The evidence was concluded and the witnesses withdrew.

Witnesses, the media and the public withdrew.

3. Deliberative Meeting - Inquiry into Personal Injury Compensation Legislation

Confirmation of Minutes No 40

Resolved on motion of Mr Colless: That Minutes No 40 be confirmed.

Tabled documents

Resolved on motion of Mr Colless: That the Committee accept and publish the documents tabled during the public hearing.

Additional submissions received

Resolved on motion of Mr Colless: That the Committee accept and publish submissions 62 & 63.

Reponses to questions on notice received

The Committee noted the following response to questions on notice received:

- Leeton Shire Council

Correspondence

The committee noted the following items of correspondence received:

- Fax from Dr John Ellard providing additional information in relation to his submission

Possible additional hearing

Resolved on motion of Mr Colless: That the Committee request that the representatives of the NSW Government respond to the questions on notice taken by the during the public hearing just concluded within 14 days (from the date of their provision by the Secretariat), with a decision on whether to invite the representatives of the NSW Government to a further public hearing to be taken by the Committee after receipt of the response.

4. Adjournment

The Committee adjourned at 1.40pm.

Stephen Frappell
Clerk to the Committee

Minutes No 43

Thursday, 11 August 2005

Room 1136, Parliament House at 2.30pm

1. Members Present

Revd Moyes (Chair)
Mr Colless
Mr Breen (Ms Rhiannon)
Ms Fazio (Mr Donnelly)
Ms Parker
Ms Griffin (Mr Primrose)
Mr West

2. Apologies

Ms Rhiannon
Mr Donnelly

3. Substitute Members

The Chair advised that Ms Fazio would be substituting for Mr Donnelly and Mr Breen would be substituting for Ms Rhiannon.

4. Deliberative meeting – Inquiry into Personal Injury Compensation Legislation.***Confirmation of Minutes***

Resolved on motion of Mr Colless: That Minutes 41 and 42 be confirmed.

Additional submissions received

Resolved on motion of Ms Fazio: That the Committee accept and publish submissions 23d, 29a, and 41a.

Reponses to questions on notice received

The Committee noted the following responses to questions on notice received:

- City of Wagga Wagga
- Insurance Council of Australia
- QBE
- StateWide Mutual
- The Cabinet Office.

Correspondence

The Committee noted the following items of correspondence received:

- Letter from QBE re evidence of Mr Raymond Wilkins in Wagga Wagga
- Letter from Mr John McIntyre, President Law Society of NSW, re supplementary submission

The Committee noted the following item of correspondence sent:

- Letter to Mr John McIntyre, President Law Society of MSW, re supplementary submission

Additional hearing

Ms Parker moved: That the Committee conduct a further half day hearing at Parliament House on the morning of Friday, 23 September, and that the following representatives of the NSW Government be invited to appear:

- Mr Laurie Glanfield, Director General, Attorney General's Department
- Mr David Bowen, General Manager, Motor Accidents Authority
- Mr Anthony Lean, Policy Manager, Legal Branch, The Cabinet Office
- Ms Vicki Telfer, General Manager, Strategy and Policy Division, WorkCover NSW

Question put.

The committee divided:
Ayes: Mr Breen, Mr Colless, Mr Moyes, Ms Parker,
Noes: Ms Fazio, Ms Griffin, Mr West

Question resolved in the affirmative.

5. Adjournment

The Committee adjourned at 3.00pm until a date to be determined.

Stephen Frappell
Clerk to the Committee

Minutes No 44

Wednesday, 14 September 2005

General Purpose Standing Committee No. 1

Room 1153, Parliament House at 1.35pm

1. Members Present

Revd Moyes (Chair)
Mr Colless (Ms Cusack)
Mr Donnelly
Ms Griffin (Mr Primrose)
Ms Parker
Ms Rhiannon
Mr West

2. Deliberative meeting

Confirmation of Minutes

Resolved on motion of Ms Parker: That Minutes 43 be confirmed.

Additional submission for the inquiry into personal injury compensation legislation

Resolved on motion of Mr Colless: That the Committee accept and publish submission 29b.

Correspondence

The Committee noted the following items of correspondence received:

- Letter from Mr Andrew Stoner MP in relation to the case of Mr Bill Kemsley and the handling of his workers compensation claim (received 22 August)
- Letter the Hon John Della Bosca MLC re the order of questioning by portfolio for the Budget Estimates Hearing of GPSC 1 on Thursday, 15 September 2005 at 8.00 pm (received 14 September).

Examination of portfolios for Budget Estimates

Additional hearing for the inquiry into personal injury compensation legislation

Ms Parker moved: That the Committee conduct a further half day hearing at Parliament House commencing at 9.00 am on Friday, 14 October 2005, and that the following representatives of the NSW Government be invited to appear:

- Mr Laurie Glanfield, Director General, Attorney General's Department
- Mr David Bowen, General Manager, Motor Accidents Authority
- Mr Anthony Lean, Policy Manager, Legal Branch, The Cabinet Office
- Ms Vicki Telfer, General Manager, Strategy and Policy Division, WorkCover NSW

Question put.

The committee divided:

Ayes: Ms Rhiannon, Mr Colless, Revd Moyes, Ms Parker

Noes: Mr Donnelly, Ms Griffin, Mr West

Question resolved in the affirmative.

Election of a new Deputy Chair

Resolved on motion of Mr Colless: That Ms Parker be elected Deputy Chair of the Committee.

3. Adjournment

The Committee adjourned at 1.50pm until Thursday, 15 September 2005 at 8.00pm in 814/815 for Budget Estimates.

Stephen Frappell
Clerk to the Committee

Minutes No 51

Friday, 14 October 2005

Rm 1108, Parliament House at 9.10 am

1. Members Present

Revd Moyes (Chair) – from 9.15 am
Ms Parker
Mr Colless (Cusack)
Mr Donnelly
Ms Griffin (Primrose)
Ms Rhiannon
Mr West

2. Public Hearing – Inquiry into Personal Injury Compensation Legislation

Witnesses, the public and the media were admitted.

The Deputy Chair made an opening statement.

The Hon Dr Gordon Moyes MLC took the chair.

The following witnesses on previous oath/affirmation were examined:

- Mr Laurie Glanfield, Director General, Attorney General's Department
- Mr David Bowen, General Manager, Motor Accidents Authority
- Mr Anthony Lean, Policy Manager, Legal Branch, The Cabinet Office
- Ms Vicki Telfer, General Manager, Strategy and Policy Division, WorkCover NSW

The evidence was concluded and the witnesses withdrew.

Witnesses, the media and the public withdrew.

3. Deliberative Meeting

Budget Estimates 2006-2006 – Supplementary hearings

Resolved on motion of Ms Griffin: That no further hearings be held for the Inquiry into Budget Estimates 2005-2006.

Confirmation of Minutes No 44-50

Resolved on motion of Mr West: That Minutes No 44-50 be confirmed.

Correspondence

The committee noted the following items of correspondence received:

- Letter from QBE re evidence of Mr Raymond Wilkins in Wagga Wagga on 23 May (received 14 September)
- Letter from Mr Jon Blackwell, CEO, WorkCover, re the cases of the five injured workers who appeared before the Committee on 2 May 2005.

4. Adjournment

The Committee adjourned at 11.00 am.

Stephen Frappell

Clerk to the Committee

Minutes No 52

Monday 28 November 2005

Room 1043 Parliament House at 11:00 am

1. Members Present

Revd Moyes (Chair)
 Ms Parker (Deputy Chair)
 Mr Colless (Cusack)
 Mr Donnelly
 Ms Griffin (Primrose)
 Ms Rhiannon
 Mr West

2. Deliberative meeting***Confirmation of minutes***

Resolved, on the motion of Mr West, that Minutes No.51 be adopted.

Correspondence

The Committee noted the following items of correspondence received:

- Email from Jo-Anne Barnes, Australian Lawyers Alliance, re discount rates (received 12 October 2005)
- Letter from the NSW Bar Association re *Sullivan v Gordon* damages (received 24 November 2005)

The Committee noted the following responses to questions on notice received:

- Local Government and Shires Association of NSW (received 28 October 2005)
- WorkCover (received 4 November 2005)

Chair's Draft Report – Personal Injury Law Legislation

The Committee considered the Chair's Draft Report, which had been previously circulated.

The Chair thanked Mr Stephen Frappell for his excellent work during the Committees inquiry.

The Committee agreed to make most of the amendments to the Chair's draft without the use of formal resolutions.

The Chair tabled the text of a proposed amendment to Chapter 18 drafted by the Secretariat in respect of the availability of *Sullivan v Gordon* damages.

The Chair tabled the draft of the Chair's Foreword.

The Committee considered the Chair's Report.

Ms Rhiannon moved that the following words be inserted after the first bullet point in Recommendation 11, pxxvii

- 'so that persons accessing future compensation for medical expenses may be able to negotiate the commutation of their future medical expenses as a lump sum'.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Ms Griffin, Revd Moyes, Ms Rhiannon, Mr West

Noes: Mr Colless, Ms Parker

The question was resolved in the affirmative.

Chapter One read.

Resolved, on the motion of Mr Colless, that Chapter One be adopted

Chapter Two read.

Resolved, on the motion of Mr Donnelly, that Chapter Two be adopted.

Chapter Three read.

Resolved, on the motion of Ms Parker, that Chapter Three, as amended, be adopted.

Chapter Four read.

Resolved, on the motion of Mr Donnelly, that Chapter Four, as amended, be adopted.

Chapter Five read.

Resolved, on the motion of Ms Rhiannon, that Chapter Five be adopted.

Chapter Six read.

Resolved, on the motion of Mr West, that Chapter Six be adopted.

Chapter Seven read.

Resolved, on the motion of Mr Colless, that Chapter Seven be adopted.

Chapter Eight read.

Resolved, on the motion of Ms Parker, that Chapter Eight be adopted.

Chapter Nine read.

Resolved, on the motion of Ms Griffin, that Chapter Nine, as amended, be adopted.

Chapter Ten read.

Resolved, on the motion of Ms Rhiannon, that Chapter Ten, as amended, be adopted.

Chapter Eleven read.

Resolved, on the motion of Mr Donnelly, that Chapter Eleven, as amended, be adopted.

Chapter Twelve read.

Resolved, on the motion of Ms Parker, that Chapter Twelve be adopted.

Chapter Thirteen read.

Resolved, on the motion of Ms Parker, that Chapter Thirteen, as amended, be adopted.

Chapter Fourteen read.

Resolved, on the motion of Ms Rhiannon, that Chapter Fourteen, as amended, be adopted.

The Committee deferred consideration of Chapter Fifteen.

Chapter Sixteen read.

Resolved, on the motion of Ms Rhiannon, that Chapter Sixteen, as amended, be adopted.

The Committee deferred consideration of Chapters Seventeen, Eighteen and Nineteen.

Chapter Twenty read.

Resolved, on the motion of Ms Griffin, that Chapter Twenty, as amended, be adopted.

Chapter Twenty One read.

Resolved, on the motion of Mr Donnelly, that Chapter Twenty One, as amended, be adopted.

Chapter Twenty Two read.

Resolved, on the motion of Mr Colless, that Chapter Twenty Two be adopted.

Chapter Twenty Three read.

Resolved, on the motion of Ms Parker, that Chapter Twenty Three be adopted.

Chapter Twenty Four read.

Resolved, on the motion of Mr Colless, that Chapter Twenty Four be adopted.

Chapter Twenty Five read.

Resolved, on the motion of Ms Griffin, that Chapter Twenty Five, as amended, be adopted.

Chair's Foreword read.

Resolved, on the motion of Mr West, that the Chair's Foreword, as amended, be adopted.

Chapter Eighteen read.

Resolved, on the motion of Mr Colless, that Chapter Eighteen, as amended, be adopted.

Chapter Seventeen read.

Resolved, on the motion of Ms Rhiannon, that Chapter Seventeen be adopted, subject to the Committee agreeing to amendments to be drafted and circulated by the Secretariat in respect of industrial deafness.

Chapter Fifteen read.

Resolved, on the motion of Ms Parker, that Chapter Fifteen be adopted.

Executive Summary read.

Resolved, on the motion of Ms Parker, that the Executive Summary, as amended, be adopted.

The Committee noted that Ms Rhiannon would circulate to Committee members by email a draft paragraph for inclusion in Chapter Nineteen regarding small claims.

The Committee thanked Mr Stephen Frappell for his work on the report.

3. **Adjournment**

The Committee adjourned at 1:35pm until Thursday 1 December 2005 at 9:30, in the Parkes Room.

Stephen Frappell
Clerk to the Committee

DRAFT Minutes No 53

Thursday, 1 December 2005

Parkes Room, Parliament House at 9.40 am

1. **Members Present**

Revd Moyes (Chair)
Ms Parker (Deputy Chair)
Mr Colless (Cusack)
Mr Donnelly
Ms Griffin (Primrose)
Ms Rhiannon
Mr West

2. **Deliberative meeting – Inquiry into personal injury compensation**

Confirmation of Minutes 52

Resolved, on the motion of Ms Rhiannon, that Minutes No.52 (as amended) be adopted.

Chair's Draft Report

Chapter Nineteen read.

Resolved, on the motion of Ms Parker, that Chapter Nineteen be adopted.

Chapter Fifteen read.

Resolved, on the motion of Mr Colless, that Chapter Fifteen, as amended, be adopted.

Resolved, on the motion of Ms Parker:

- That the Committee's report (as amended) be the report of the Committee and be signed by the Chair and presented to the House in accordance with Standing Orders 230 and 231, together with the minutes, answers to questions on notice, transcripts, correspondence and tabled documents.
- That pursuant to the provisions of section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* the Committee authorises the publication of all minutes, answers to questions on notice, correspondence, and tabled documents.
- That the Committee Secretariat be permitted to correct typographical, stylistic and grammatical errors in the report prior to tabling.

3. **Adjournment**

The Committee adjourned at 9.58 pm until a date to be determined.

Stephen Frappell
Clerk to the Committee