

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

INFORMATION SHEET

Introduction

This information sheet is provided to assist individuals and organisations wishing to make a submission to the inquiry of General Purpose Standing Committee No 1 into personal injury compensation legislation in NSW. The information sheet provides further information in relation to three issues raised in the Committee's terms of reference:

- Public liability insurance and tort law reform in NSW
- The level and availability of compulsory third party motor accident insurance in NSW
- The changes to the workers' compensation scheme in 2001.

Public liability insurance and tort law reform in NSW

Public liability insurance protects individuals, businesses and organisations against the financial risk of being found liable to a third party for death or injury, loss or damage of property or pure economic loss resulting from negligence by the insured.

During late 2001 and early 2002, significant public concerns were raised in the community, the media and in Parliament over escalating public liability insurance premiums. In particular, sporting organisations and clubs, and small businesses specialising in high-risk activities such as adventure tourism, claimed that their businesses were being adversely affected by significant premium increases.

In response to the debate over public liability insurance premiums, the NSW Government introduced a series of tort law reforms, primarily via the *Civil Liability Act 2002* and the *Civil Liability Amendment (Personal Responsibility) Act 2002*. The principal reforms included:

- A cap on damages that may be awarded to a claimant for non-economic loss (such as pain and suffering) set at \$350,000 (indexed to average weekly earnings (AWE)), and a stipulation that this maximum amount may only be awarded in the most extreme cases. Where the severity of the non-economic loss is assessed as less than 15% of a most extreme case, no damages may be awarded. Where the severity of the non-economic loss is assessed as falling between 15% and 32% of a most extreme case, reduced damages may be awarded
- A cap on damages that may be awarded to a claimant for economic loss (such as loss of past and future income) at three times the rate of AWE (discounted 5% for lump sums)
- A limitation on the period for bringing personal injury cases to 3 years from discovery, and 12 years from the date of occurrence (with very limited exceptions for minors and people with a disability)

- Limitations on aggravated, exemplary or punitive damages
- A cap on the award of legal costs at the greater of 20% or \$10,000 for damages <\$100,000
- No damages may be awarded to a claimant where there is an obvious risk involved in a dangerous recreational activity. In addition, there is also no liability for harm resulting from a recreational activity that was the subject of a risk warning
- Damages are either not available or restricted for gratuitous attendant care services (such as nursing services of a domestic nature that aim to alleviate the consequences of an injury)
- Protection of volunteers doing work for community organisations from civil liability for acts or omissions in good faith
- Protection for 'good samaritans' who come to the assistance of a person in danger
- Protection for expressions of regret/apologies
- Provision to encourage and facilitate structured settlements (a structured settlement is an agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means)
- Provisions for proportionate liability for claims involving economic loss or property damage in non-personal injury matters, so that a person who is jointly responsible with some other person or persons will only be liable to the extent of their responsibility.

Similar tort reform legislation has been introduced by all jurisdictions in Australia over the past two or three years.

The Australian Competition and Consumer Commission (ACCC) has been requested by the Australian Government to collect data on the impact of the tort law reforms, including the cost of public liability insurance. Data from ACCC for all Australia indicates that:

- Average premiums in Australia in real terms (adjusted to 31 December 2003 dollars) were stable between 1997 and 1999 at around \$620, then increased substantially between 1999 and 2002. In 2003, premiums continued to increase to \$1,366, an increase of 17%. This increase was lower than the 44% increase observed in 2002.
- The average size of claims settled in real terms (adjusted to 31 December 2003 dollars) increased from \$10,800 to \$15,202 between 1997 and 2002. In 2003, the average size of claims settled increased by a further 17% to \$17,758.

The level and availability of compulsory third party motor accident insurance

In 1999, the NSW Government introduced the *Motor Accidents Compensation Act 1999* in response to a high level of community concern about the cost of compulsory third-party (CTP) premiums. The reforms were aimed at achieving a significant reduction in the cost of premiums and at improving the operation of the CTP scheme. The key reforms were:

- Early notification of injury through medical practitioners via an Accident Notification Form (ANF) and easier and faster access to payments for early treatment costs via the ANF (entitlement to treatments costs of up to \$500)

- Statutory provisions and guidelines to encourage early resolution of claims
- Medical guidelines to encourage early and appropriate treatment and rehabilitation
- Medical disputes determined through expert medical assessment
- A new system for early dispute resolution of claims
- Changes to damages, including the introduction of an objective threshold for assessing non-economic loss based on impairment
- Legal cost regulations established a reasonable cost framework for the payment of legal costs. Claimants and their solicitors are able to enter into costs agreements outside the regulated fee structure
- Medical and legal costs were regulated
- An increased regulatory role for the MAA to ensure insurer compliance with market practice and claim handling guidelines.

An advisory service was established by the MAA to assist claimants with the claims process, in particular with newly introduced assessment procedures.

Under the 1999 Act, claimants continue to be entitled to modified common law compensation where fault can be shown on the part of the owner or driver of a vehicle. However, the Act further modified access to some damages:

- The threshold test for access to non-economic loss damages was changed to an objective assessment of impairment – 10% permanent whole body impairment as defined by the MAA’s guidelines. The cap for non-economic loss remained.
- Economic loss entitlements are not paid for the first five days loss of earnings and a cap on loss of weekly earnings was introduced. The cap is indexed annually.

Changes to the workers’ compensation scheme in 2001

In December 2001, the NSW Government introduced a number of reforms to the NSW Workers’ Compensation Scheme through the *Workers Compensation Legislation Further Amendment Act 2001*. These reforms were introduced to give effect to the recommendations of the Commission of Inquiry into Workers’ Compensation Common Law Matters (the Sheahan Inquiry), following concerns about the financial state and long-term viability of the NSW workers’ compensation scheme.

The *Workers Compensation Legislation Further Amendment Act 2001* included a number of amendments to the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1988* and to other acts. In essence, these amendments rebalanced the relationship between the statutory NSW workers’ compensation scheme and common law remedies for workplace injuries caused by negligence. The principal amendments included:

- That no damages may be awarded at common law unless the injured worker suffers a degree of permanent impairment that is at least 15%
- That in awarding damages for future economic loss, courts are to disregard any earning capacity of the injured worker after age 65

- The abolition of the existing entitlement to recover common law damages for non-economic loss (such as pain and suffering)
- A threshold for lump sum statutory compensation in respect of permanent impairment resulting from primary psychological/psychiatric injury set at a level of 15% permanent impairment
- A threshold for lump sum statutory compensation for pain and suffering set at a level of 10% permanent impairment (except for psychological/psychiatric injury as set out above)
- An increase to \$200,000 in the maximum amount of statutory compensation available if the level of permanent impairment is greater than 75%.

The Act also introduced a pre-litigation process for common law work injury claims. This process requires that the parties exchange information, respond promptly to offers of settlement, and, wherever possible, settle matters without the necessity of filing proceedings in court.

Individuals and organisations wishing to make a submission to the inquiry

The Committee seeks the views of interested parties in response to the Committee's terms of reference.

Submissions to the inquiry can include facts, opinions, arguments and recommendations for action. There is no set format for a written submission. You can write a brief letter or a substantial research paper. If your submission is more than five pages, please include a brief summary and contents list.

The Committee will not accept anonymous submissions. If you wish your name to be kept confidential please indicate so clearly in a covering letter.

Additional information on making a submission is provided in the attached document 'Making a submission'.