Submission No 53

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

Organisation: The Cabinet Office

Name: Mr Roger Wilkins

Position: Director General

Telephone: 9228 3225

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Summary

NSW GOVERNMENT

SUBMISSION

PARLIAMENTARY INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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1. EXECUTIVE SUMMARY

1.1 Government submission

Between 1999 and 2003, important reforms to the laws of civil liability and compensation were introduced by the New South Wales Government (the Government) and approved by the New South Wales Parliament.

The Legislative Council General Purpose Standing Committee No. 1 (the Committee) is conducting an inquiry into those legislative reforms, 'in light of recent concerns expressed about high public liability insurance premiums'. The principal legislation to be considered by the Committee is the *Motor Accidents Act 1999,* the 2001 amendments to the *Workers Compensation Act 1987,* and the *Civil Liability Act 2002.*

The Committee is to report on the operations and outcomes of the legislation 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 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.

This is the Government's submission to the Committee. It is regarded as an opportunity to expound in a single document the rationale behind, the reason for, and the operation of, these important legislative reforms. It provides a basis from which to remind stakeholders of the pre-reform climate, and to review in the post-reform climate the significant achievements that have been made in reforming tort law and personal injury legislation in New South Wales.

1.2 Structure

This submission is divided into six sections:

Section 1 is the Executive Summary.

Sections 2-5 contain the substance of the submission grouped under the areas of civil liability, health care liability, motor vehicle accidents and workers' compensation. For each area of reform, commentary is given on the problems existing prior to the reforms, the principled measures taken by the Government to address those problems, and the underlying objectives behind the measures. It is demonstrated that the forces driving the changes and the responses to it were complex and multifaceted. Using the data available in 2005, the impacts of the reforms are analysed with reference to the relevant inquiry terms of reference.

Section 6 concludes by recognising that ongoing Government oversight is required to ensure that the intended outcomes of the reforms continue to accrue. The measures by which to achieve this are outlined.

1.3 Findings

This submission clearly demonstrates that the legislative reforms introduced by the Government and approved by Parliament were worthwhile and are working successfully to achieve their intended objectives.

Civil liability and health care liability:

- Public liability premiums have started to decrease
- Professional indemnity premiums have started to decrease
- Availability of public liability and professional indemnity insurance coverage has increased, with specific coverage now available for not-for-profit organisations
- Payouts for damages have been limited to fair and sustainable levels
- Claims for minor injuries causing no ongoing impairment appear to have decreased, however people suffering from these types of injuries are still able to access financial and medical redress

Motor vehicle accidents:

- Compulsory Third Party premiums have decreased
- There is a greater emphasis on early treatment and rehabilitation of motor accident victims
- The claims process has been streamlined. It is less adversarial and more claimant-friendly
- Transaction costs have been reduced
- There is increased Scheme efficiency (ie more of the premium dollar is available to claimants for compensation)

Workers' compensation:

- The Scheme deficit has been significantly reduced, and premiums have remained affordable
- Transaction costs have been reduced
- There have been improvements in claims administration and return to work rates

- There have been improvements in support to employers and workers
- A reduction in disputes has occurred
- The compensation available under the statutory Scheme has been improved

2. CIVIL LIABILITY

2.1 The problem

2.1.1 Insurance climate

A series of international and domestic, cyclical and structural forces caused a dramatic and unsustainable increase in the cost of public liability insurance in late 2001 and during 2002. The forces driving the premium increases were varied and included:

- Increase in claim numbers[1]
- Increase in claim costs[2]
- Expansion, particularly in the lower courts, of what constitutes negligence together with more generous damages awards
- Insufficient insurer attention to pricing risk / past underpricing of premiums
- Industry rationalisation and reduction in competition
- The collapse of HIH
- Global impact of the World Trade Centre – September 11 attacks
- Cyclical factors

In response to significant underwriting losses, the insurance industry made the commercial decision to significantly increase premiums and / or withdraw from the public liability market altogether. Consumers were accordingly

[1] Australian Prudential Regulation Authority (APRA) Selected Statistics show that between December 1998 and December 2000 claims increased from 48,000 a year to 89,000 a year – an increase of 85%. The Queensland Government Liability Taskforce Report (February 2002) concluded that the increasing number of public liability claims was a major driver of increasing public liability insurance premiums.

[2] Claims costs include the actual amount paid to the claimant and the costs of pursuing the claim such as legal fees, investigation and administration costs. The Queensland Government Liability Insurance Taskforce Report found that claims costs were growing at an average rate of 22% per year during the period 1996 to 1999. Australian Competition and Consumer Commission (ACCC) price surveys found that between 1997 and 2002, average claims costs (in 2003 dollars) increased 40% overall and in 2003, average claims costs increased by a further 17%.

confronted with a situation where liability insurance was either unaffordable or unavailable.

The effects of this were serious and far-reaching. Volunteer organisations, community groups, sporting organisations and clubs, tourism operators, small businesses and local councils were suffering. The media regularly reported on the cancellation of community, recreational and sporting events, the closure of horse riding schools and adventure tourist sites, and the withdrawal of services (such as medical and welfare services) as a result of the insurance crisis.

Organisations were forced to either cease their activities or, more problematically for consumers, continue their operations uninsured. Some feared imminent job loss, most agreed that the effect on employment would be adverse, particularly in rural and regional areas. They made urgent representations to the Government seeking assistance.

In its 2002 submission[3], the Local Government and Shires Association summarised the impact of the insurance crisis on its members:

> *"In the simplest of terms:*
>
> - *Many councils and local non-government groups cannot pay the increases for public liability insurance and/or simply cannot get public liability for certain types of events/activities at all*
> - *Many councils and local non-government groups are cancelling a wide variety of events and this weakens the local 'social capital' or community cohesion raising the spectre of more dysfunctional communities*
> - *For the councils and non-government groups that can get public liability coverage and can pay the increased premiums, the cost*

[3] Local Government and Shires Association of NSW *Submission on Public Liability from Local Government* March 2002

means sacrificing or compromising some existing service functions."

It was clear that the Government needed to respond decisively and effectively in order to address the crisis.

2.1.2 Negligence cases in the courts

At the same time, a number of high profile negligence court cases were resulting in multi-million dollar awards to plaintiffs. In some circumstances verdicts were awarded where the community perceived that the plaintiff had largely contributed to his or her own injury. The public and the Government became concerned that court verdicts were unreasonable and were being financed by increasingly burdensome insurance premiums.

According to a report by the Commonwealth Treasury[4], between 1979 and 2001 inflation totalled 212 percent while the highest award for personal injury went from $270,000 to $14.2 million[5] – an increase of more than 5,000 percent.

Of equal concern was the increasing frequency and size of awards in the small to medium range. In the ten years to 2002, annual inflation in Australia averaged 2.5 percent; awards for personal injury increased in the same period by an average annual rate of ten percent.[6] In this bracket of claim particularly, the costs of determining liability and assessing compensation (including the fees of medical witnesses and experts) often exceeded the costs of treating the injuries. A significant proportion of the payouts were being consumed by legal costs.

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[4] Commonwealth Treasury *Reform of liability insurance law in Australia* February 2004 pg. 4, based on a study commissioned by the Australian Government and state and territory governments.

[5] The medical negligence case of *Simpson v Diamond* [2001] NSWSC 925. The full bench of the NSW Court of Appeal reduced the damages to $10,998,692: *Diamond v Simpson (No 1)* [2003] NSWCA 67.

[6] Commonwealth Treasury, op. cit pg. 4

Claims for minor injuries and claims with no prospect of success were on the rise, and taking up more and more court time. In addition, a community trend of people seeking compensation for injuries which were a result of their own carelessness or bravado was being reflected in court cases.

For example, a man fell onto a railway track after climbing over a guard rail to urinate and sued the Roads and Traffic Authority for negligence.[7] A woman sued the owner of a theatre for not warning of the dangers of retractable seats (she was injured when she tried to sit on a retractable seat without first pulling it down)[8]. A footballer, injured during a match, tried to sue the Australia Rugby League, the body responsible for the rules of the game, because he thought the rules were too dangerous[9]. A 16 year old boy who was refused entry into a hotel nightclub, decided to break into the upstairs flat where hotel manager and his wife lived. He sued the manager and the hotel for the injuries he received when he was discovered and assaulted by the manager.[10]

It was this culture of litigation – and its developing implications for Australia – that prompted a protest from the Premier in a submission to a parliamentary committee:

> *"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."*[11]

The courts were taking a broader view of what constitutes negligence and were more generous to the particular plaintiff before them. This was perhaps

[7] *Jackson v Roads and Traffic Authority of NSW* DC 6303/00
[8] *Mitchell v The University of Wollongong* DC 348/99
[9] *Green v Australian Rugby Football League Ltd & Ors* [2003] NSWSC 749
[10] *Fox v Newton & Ors* DC 4318/00
[11] Bob Carr MP, submission to an inquiry to the NSW Legislative Council Standing Committee on Law and Justice into a bill of rights, 3 October 2001.

fostered by the growth of the insurance industry, and the widely held view that defendants with deep pockets would suffer no ruinous hardship from a successful action for damages. This trend was described by Professor P.S Atiyah as "stretching the law".[12] It was what the Chief Justice of New South Wales, the Honourable J.J. Spigelman AC, was referring to in his 2002 address to a conference of legal practitioners when he described the law of negligence and public liability as "the last outpost of the welfare state." [13]

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 – "sometimes compulsory but ubiquitous even 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."[14]

Justice McHugh went further in the High Court judgment of *Tame v New South Wales* in 2002: "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."[15]

2.2 Objectives of reforms

When insurance is unaffordable or unavailable, the insurance market is no longer performing its vital function of sharing risk across the economy. [16] The significant and serious impact of the insurance crisis on the community necessitated an urgent Government response.

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[12] P.S. Atiyah, *The Damages Lottery,* Hart Publishing, Oxford 1997.
[13] Honourable J.J. Spigelman AC *Negligence: The Last Outpost to the Welfare State* 27 April 2002.
[14] Ibid.
[15] *Tame v New South Wales* (2002) 211 CLR 317 at 354 per McHugh J.
[16] Commonwealth Government *Reform of liability insurance law,* February 2004, pgs 3-4.

On 20 March 2002, the New South Wales Government took the first of several initiatives for change by announcing principled measures to improve the insurance climate and address the public insurance crisis. One week later, the Commonwealth, State and Territory ministers convened the first of four meetings that year to address the issue on a national level. All nine Federal, State and Territory Governments agreed on the need for reform, broadly consistent with the New South Wales approach.

While there were a multitude of factors driving the insurance price increases, one obvious domestic factor which impacts on premiums and is generally within the control of governments was the cost of claims.[17] Principled reforms aimed to restore predictability to claims costs and thereby improve the affordability and availability of insurance.

By November, all governments in Australia were in agreement on a package of reforms guided by the 61 recommendations of the expert panel chaired by Justice David Ipp of the New South Wales Court of Appeal (the Ipp Report). The reforms were designed to have a significant impact on the public liability crisis, while restoring balance to a system in which the public had lost confidence. The reforms balanced the needs of the community with the legitimate rights of injured persons to seek redress for their injuries.

The *Civil Liability Act 2002* implemented the first stage of the New South Wales reforms. These stage one reforms had already been tried in the areas of health care and motor accidents. They had been tested and found to be fair and workable.

The reforms were designed to limit payouts for damages to fair and sustainable levels; to remove smaller, less serious claims from the system; to contain legal costs by capping lawyers' fees for smaller claims; and to block frivolous and time-wasting cases by barring actions with no prospect of success.

[17] ibid

The features of the Act are:

- Upper limits for non-economic loss ($350,000 – indexed annually on 1 October) and lost future earnings (three times average weekly earnings)
- The application of a threshold of 15 percent of the most extreme case in respect of general damages
- New interest calculations (ten year bond rate or as determined by regulation) and discount rates (five percent unless prescribed by regulation)
- The abolition of punitive, exemplary and aggravated damages
- Legal costs in claims under $100,000 capped at $10,000, or 20% of the amount claimed by the plaintiff (whichever is the greater)
- Penalties for lawyers who act for clients making unmeritorious claims

The Government's civil liability reforms were not only, however, a response to the problems regarding insurance, and about reducing premiums. The *Civil Liability Amendment (Personal Responsibility) Act,* passed by Parliament on 20 November 2002, implemented the second stage of the New South Wales reforms and went to the heart of the Government's concerns about a litigation culture. This legislation unashamedly sought to restore the principle of personal responsibility.

While recognising that there will always be times when just claims for damages must be pursued, the Act introduced stricter tests of what constitutes negligence and sought to discourage claims on frivolous and exaggerated grounds. The reforms were designed to give courts statutory guidance when determining the liability of a defendant. The Act:

- Establishes a realistic duty of care (for example, no duty to protect people from the obvious risks of dangerous recreational activities)

- Clarifies the scope of reasonable foreseeability (for example plaintiffs can no longer rely on the mere fact that a risk was easily avoidable and a risk has to be “not insignificant”)
- Allows waivers to be effective by providing for the voluntary assumption of risk (there is no duty to protect people from a risk of a recreational activity if there is a sign warning people of the risk or if participants sign a waiver)
- Establishes a peer acceptance defence for professionals
- Provides new limitation periods for personal injury claims
- Provides protection for volunteers and ‘good samaritans’
- Allows structured settlements
- Allows the limited financial and other resources available to a public or other authority to be considered when determining the authority’s duty of care and breach of that duty
- Provides proportionate liability for economic loss (a person jointly responsible with some other person(s) will be liable only to the extent of their own responsibility for causing the plaintiff’s loss)
- Ensures that saying ‘sorry’ does not constitute an admission of guilt
- Limits claims for nervous shock
- Allows drugs and alcohol to be taken into account in assessing negligence
- Prohibits the recovery of damages where the person was engaging in criminal activity

2.3 Impact of reforms

2.3.1 Impact on insurance premium levels and the availability of cost-effective insurance

Affordability

In 2005, it is clear that the Government’s tort reforms have restored a level of certainty in relation to claims costs, in turn reducing premiums and reducing the risk that insurers will withdraw from the liability market altogether. The

positive impact of the reforms has been acknowledged by insurers, and is starting to be reflected in premium prices.

Actuarial advice given to all governments at the time of the reforms indicated that the reforms should result in a 13.5 percent reduction in premiums.

The recent Australian Competition and Consumer Commission (ACCC) *Public Liability and Professional Indemnity Insurance – Fourth Monitoring Report*[18] has shown that public liability premiums have reduced by 15 percent in the six months to June 2004.[19] The ACCC also reported expectations of further premium reductions in 2005. Subsequent to the June 2004, CGU Insurance announced that it would reduce commercial public liability rates by ten percent in response to the tort law reforms. These results are welcomed by the Government, as being consistent with the desired outcomes of the legislative reforms.

Some have claimed that the insurance industry has profited as a direct result of the reforms. Fuelled by the insurance industry's recent return to profit, they have characterised insurers as the "winners" of the tort law reforms. Insurers, while acknowledging that tort reforms have reduced uncertainty around liability claim costs, attribute their recent return to profit to a number of factors including better pricing of risk, stricter prudential regulation by APRA and long periods of dry weather.[20] Insurers also argue that in light of the statistic that public liability represents less than eight percent of their total revenue[21], it is unreasonable to claim that the reforms have generated significant profits for them.

The Government has consistently made it clear that it expects insurers to pass on the benefits of tort law reforms to the community in the form of more

[18] January 2005. Published 15 February 2005.
[19] It is noted that this report was released after the announcement of the current inquiry. It is also noted that the reductions are not just a result of the tort law reforms, but are attributable to a variety of factors.
[20] Insurance Council of Australia *Briefing Note – Public Liability – myths and facts* 9 March 2005 pg 1.
[21] Ibid

affordable and available insurance. This has been impressed upon insurers from the start. While the Government has welcomed the recent reduction in premiums, it expects to see the savings of tort reform continuing to be reflected in the pricing of premiums into the future. Ongoing monitoring is being undertaken, and the Government will continue to pay close attention to the Australian Competition and Consumer Commission reports to ensure that tort law reform benefits are being passed on to the community.

Availability

On the basis of evidence available to the Government and consultation with stakeholders, it is clear that volunteer organisations, community groups, sporting organisations and clubs, tourism operators, small businesses and local councils which were previously unable to meet the spiralling costs of premiums during the insurance crisis (or could not find an insurer prepared to underwrite their risk), now have improved access to insurance[22].

The Insurance Council of Australia reported that Insurance Enquiries and Complaints Ltd received, on average, 56 calls per week during 2002 from policy holders having difficulties obtaining public liability cover. During 2003, the volume dropped to six to eight calls per fortnight, a reduction of over 90 percent.

The availability of cost-effective insurance has significantly improved for not for profit organisations. As a result of the reforms, insurers now appear to be more willing to provide this type of cover than ever before.

Community Care Underwriting Agency has been established specifically to provide public liability insurance to not for profit organisations. It is a joint venture between Allianz Australia Insurance Limited, Insurance Australia Group and QBE Insurance (Australia) Limited. Since the time of its launch in December 2002, over 6000 groups have registered with the Scheme, 4000

[22] The Government is aware, however, that there may be some organisations who are still encountering problems obtaining cost-effective insurance.

quotes have been written and in excess of 1800 policies have been issued to not for profit organisations around Australia.

The Government is advised that Community Care Underwriting is currently looking after over 1500 annually renewable policies, including:

- Riding for the Disabled
- Greek Orthodox Community of NSW
- Warrandyte Festival
- Community Living and Support Services
- Over 70 Arts Councils in NSW
- Playgroups NSW in excess of 1200 groups in NSW
- Green Gully Traffic Safety Centre
- Uncle Project – Byron Bay
- Marulan Youth and Sports Club Inc

The Council of Social Service of New South Wales (NCOSS) Insurance Program has been operational for over two years. NCOSS Community Cover (which is brokered by Aon Risk Services) was launched on 27 April 2004 by the Special Minister of State. It provides broad insurance cover specifically aimed at organisations providing social services in New South Wales. In a media release on 27 April 2004, NCOSS Director Gary Moore said, "Aon and NCOSS are hopeful that NCOSS Community Cover will provide access to good quality cover at affordable prices for many community bodies."[23] A recent evaluation of the NCOSS Insurance Program[24] demonstrates the considerable success of the Scheme in realising its objectives.

The Government is also aware that Suncorp has increased the availability of its Public and Products liability insurance to eligible not for profit organisations. Prior to the commencement of these reforms, Suncorp did not offer insurance to these types of organisations at all.

[23] NCOSS Media Release, *Major Insurance Initiative for the NSW Community Sector,* 27 April 2004.
[24] NCOSS, *NCOSS Insurance Program Evaluation* November 2004

The Government welcomes these initiatives which are consistent with the objectives of the reforms.

Statewide Mutual, the self-insurance Scheme that covers most local councils in NSW, advised in August 2004 that the civil liability reforms have reduced the total cost of claims and have had a significant impact on the reduction of its deficit:

> *"As this trend becomes regular and predictable, then the Board will be in a stronger position to renegotiate its Reinsurance Scheme which will be necessary at the expiration of the current Scheme in June 2006…Local Government throughout New South Wales will now also be secure in the knowledge that it has long term security in respect of its Public Liability Insurance…Would you please pass on the appreciation of Statewide and its Member Councils to your Government."*[25]

For local councils in particular, the *Civil Liability Amendment (Personal Responsibility) Act 2002* has been a large contributor to this position.

In examining availability, the point to be reiterated is that the reforms encouraged insurers to maintain a presence in the liability market. This has had an obvious and direct impact on the availability of insurance for consumers. The availability of insurance is also inextricably linked to the affordability of insurance, in that when insurance becomes more affordable it usually becomes more available to those who previously did not have the resources to pay for it. This has been the case under the civil liability reforms.

[25] Letter from Mr Terrey Kiss, General Manager, Statewide Mutual, to the Hon. Tony Kelly MLC dated 11 August 2004.

2.3.2 Impact on employment in rural and regional communities

The capacity for community and other events to proceed, and for businesses to obtain insurance and thus continue to operate as a result of the reforms, is likely to have had a positive effect on employment. This is particularly true of rural and regional communities where the insurance problem was exacerbated.

Any real consideration of the benefits of reform should not, however, be confined to an examination of the direct impact on employment rates and the ability of businesses being able to continue to operate. It should extend to an examination of the benefits realised by business and community groups as a result of reduced premiums; and the benefits realised as a result of costs avoided due to premium stabilisation.

In a Sydney Morning Herald article entitled *Lawyers in job void as claims drop*[26], it was claimed that "two in five suburban and rural [legal] practices will close, and a third of barristers will become unemployed or underemployed within the next year" as a result of the Government's tort reforms.

The Government recognises that the reforms have had some adverse impact on the volume of personal injury work available to lawyers, including for lawyers in rural and regional areas. It is possible that some may have had to downsize or retrain in new areas.

As an indicator, between 2001 and 2003 civil listings in the District Court fell by 62 percent overall, and by 70 percent in major country venues.

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, restored the principle of personal responsibility) to be premised on a

[26] 8 May 2004

desire to keep personal injury lawyers in profitable employ. To this end the Premier 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.[27] The Government makes no apology for this.

2.3.3 Impact on community events and activities, and community groups

During late 2001 and 2002, there were almost daily reports about community festivals and celebrations, arts and cultural programs, and sporting events under threat or being cancelled due to the insurance crisis. One headline characterised the situation – not unfairly – as "the death of fun".[28] The Local Government and Shires Association of NSW wrote that to see such events under threat or cancelled:

> *"… is to see the communities' cement being eroded.*
>
> *As observed by Young Shire Council 'the smaller the town the more noticeable the impact, which is not to say the effect on larger towns will not be equally felt. In many of the smaller towns and villages the only thing holding them together is community spirit and the desire to maintain and expand their communities. The issue of insurance has the potential to have more detrimental effect on rural Australia than the … withdrawal of Government (and commercial) services' (Meeting of H Division, 22.02.02)"*[29]

In relation to sporting activities, in 2002 the then General Manager of Country Rugby League warned that the crisis was putting at risk the future of rugby league in rural NSW.[30] Similarly, the former AFL Chief Executive warned that if nothing was done to address the problem, football teams and even entire

[27] See for example debate in the Legislative Assembly on 4 June 2002.
[28] Daily Telegraph, 8 March 2002, pg. 1.
[29] Local Government and Shires Association of NSW, op. cit pg. 8.
[30] Geesche Jacobsen, *Clubs, Charities Cripple As Premiums Soar,* Sydney Morning Herald, 31 October 2001, pg. 3.

regional competitions would disappear.[31] The crisis was even causing weekend children's sport to be cancelled.

As a result of the civil liability reforms, the threat to many community groups, local councils, sporting associations and tourism operators has been averted. This can also be expected to have had a significant impact on social cohesion.

The positive response to the Government's reforms from community groups, sporting associations and tourism operators has been overwhelming. The Premier cited some responses in Parliament on 4 September 2002:

> *"The Managing Director of Glenworth Valley Horse Riding, Barton Lawler, said this about the package we announced:*
>
> > *'I believe that the State Government has now done all it can reasonably be expected to do to solve this problem and the next step is up to the Federal Government. The horse riding industry is particularly grateful to the Government for its resolve and excellent handling of the issue.'…*
>
> *… the Mayor of Cobar … said:*
>
> > *'This initiative recognises the different needs of country towns and cities ... I commend the Premier for thinking of us, and responding to a new situation in a thoughtful way.'*
>
> *The ultimate commendation comes from the proprietors of the Big Banana. Marie Rubie, wife of the owner, Kevin Rubie, said:*
>
> > *'That's the sort of thing we've been looking for ... We've been lobbying for this for some time-finally someone has listened. It's great.'*
>
> *… The President of Australian Horse Riding Centres (New South Wales), Trevor Knowles, deserves to be heard. He said the reforms:*
>
> > *'…will go a long way in ensuring that operators of horse riding establishments may continue to offer traditional horse related activities. The commonsense approach taken on this issue will benefit all operators.'*

[31] *AFL plan to solve insurance crisis dilemma,* The Australian, 22 March 2002, pg. 1.

In a letter dated 4 September the Executive Member of the Outdoor Recreation Council of Australia [ORCA], John Norman, said:

> *'The proposed amendments ... have addressed the major issues that those operating in the Outdoor Recreation, Outdoor Education and Community Recreation arena have faced.'*

…the response from all parts of the community to our legislative initiative has been gratifying."

At this stage direct statistics are unavailable on the number of community events and activities now taking place that would otherwise have been cancelled if the reforms had not been introduced. Ad hoc information and anecdotal evidence provided to the Government, however, demonstrates that the impact of the reforms on community events and activities, and community groups has been very positive.

A review of the policies already issued by the Community Care Underwriting Agency reflects this. The Government is advised that cover has been provided for one day events such as:

- Italian Carnivale
- Tamworth Independent Artists
- Valvebounce Motorsport and Performance Car Association
- Walgett Aboriginal Medical Service Co-op
- The 9th Festival of Polish Visual and Performing Arts
- Macquarie Valley Landcare – Crossing the Divide
- Opera in the Shire
- Sydney Country Music Aboriginal Corporation
- West Coast Cattlemen's Bicentenary

In contrast to the period leading up to the reforms where the Government received daily representations from community groups and sporting associations regarding lack of affordability and availability of insurance, the Government now receives very few, if any, representations on the issue each

year. Community groups, events and activities have clearly benefited from the reforms.

2.3.4 Any other issue the Committee considers to be of relevance to the inquiry

Thresholds

The use of thresholds to determine damages has been criticised for excluding legitimate claims.[32] The general damages threshold contained in the *Civil Liability Act* is a principled reform, based on precedents in health care liability and motor vehicle accidents. Evidence had shown that the growth in small and medium claims over the 1990s was driven mainly by general damages (damages for non-economic loss such as pain and suffering) and corresponding legal costs.[33] The cost to the community of damages for non-economic loss in smaller claims was no longer sustainable.

Particularly in the case of smaller claims, it appeared likely that a larger proportion of any lump sump awarded for general damages was being used by the plaintiff to pay for his or her legal costs.

The civil liability reforms accordingly sought to strike a balance between fair and reasonable compensation for injured people and the community's ability to pay for that compensation through affordable premiums. The reforms sought to legislatively institute the community's desire to ration a finite resource (compensation). To this end, the *Civil Liability Act 2002* provides that general damages can only be awarded where the severity of the loss is assessed as being 15 percent or more of that for the most extreme case.

Some have alleged that the threshold for general damages gives preference to the policyholders over the injured, and leaves injured people without any entitlement to compensation. This is not the case.

[32] Criticism has been in the context of the civil liability reforms, and in the context of the health care liability and motor accidents reforms upon which the civil liability thresholds were based.
[33] Trowbridge Deloitte, *Public Liability Insurance, Analysis for Meeting of Ministers,* 27 March 2002.

People whose injuries are assessed at less than 15 percent are still entitled to seek damages for economic loss. In simple terms, injured people with less serious but nonetheless valid claims can still seek full recovery of all reasonable and necessary hospital, medical, rehabilitation expenses, past and future loss of earnings (up to three times average weekly earnings) and other out-of-pocket expenses. Nothing in the Government's reforms limits the ability of a person to recover these things.

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 lawyers to pursue their claim, not because the claim is invalid or unimportant to the person.

3. HEALTH CARE LIABILITY

3.1 The problem

The problems experienced in the medical indemnity insurance market were similar to those found more broadly in the general insurance sector. A dramatic and unsustainable increase in the cost of medical indemnity insurance was caused by:

- Increase in claim numbers[34]
- Increase in claim costs[35]
- Expansion, particularly in the lower courts, of what constitutes negligence together with more generous damages awards[36]
- The need for some medical indemnity insurance organisations to build reserves to meet unfunded liabilities incurred in past years but not yet reported as claims
- The break down of the traditional cross-subsidy that existed between low-risk and high-risk medical practice[37]

When the medical insurer United Medical Protection (UMP-AMIL) made call-ups equivalent to a year's subscription on its members and sharply increased its premiums in 2001, doctors were angry and refused to pay. In response to

[34] Between 1980 and 1990, the number of claims reported for every 1000 doctors each year doubled, and doubled again between 1990 and 2000.
[35] The cost of litigation almost tripled between 1980 and 2000 due to higher process costs and greater awards and settlements: Data provided by the Medical Indemnity Protection Society to the Australian Competition and Consumer Commission *Second Insurance Industry Market Pricing Review* September 2004 pg. 68.
[36] In late 2001, record damages of $14.2 million dollars 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 reduced the damages to $10,998,692: *Diamond v Simpson (No 1)* [2003] NSWCA 67.
[37] Medical indemnity has always been precariously balanced between high and low-risk areas. Traditionally, the premiums of the relatively small number of doctors practising in high-risk specialities such as obstetrics and neurosurgery were supported by inflating the premiums paid by other doctors – a form of cross-subsidy that helped contain the costs of high-risk services. These arrangements, however, began to break down.

concern about affordability and availability of insurance, doctors refused to work in rural areas where conditions were thought to be more risky. Some ceased performing more risky practices and procedures. For example, subscriptions for some obstetricians had risen from $2000 in 1988 to $42,000 in 2000 and were reported as being likely to increase to $70,000 in 2001. Many threatened to resign from working in hospitals until the Government resolved the situation.

As the then Minister for Health said in his Second Reading Speech on the *Health Care Civil Liability Bill* on 19 June 2001:

> *"Since November last year every rural, regional, metropolitan and national media outlet has carried stories about the medical indemnity crisis. In the overwhelming majority of cases that have been reported the Government is satisfied that the concerns are real. I can table literally hundreds of press clippings, media statements and items of correspondence which detail the distress of communities as diverse as Mudgee and Marrickville, Cowra and Coonamble, Tamworth and Tweed, Murwillumbahh and Mullumbimby, Glen Innes and Gunnedah, and Nyngan and Nowra, to name just a few, as their doctors alerted their communities about their inability to continue practising unless there was major structural reform to the circumstances surrounding medical negligence claims.*
>
> *What is more distressing are the several dozen letters of resignation that I have received from country doctors who presently operate in the public hospital system. If anyone believes that this is just an Australian Medical Association beat-up … they need only read the clippings to understand that the doctors who tendered their resignation are deadly serious. The challenge for this Parliament is to determine whether we can unite to protect communities, especially country communities, by maintaining the medical services they presently receive."*

The Government recognised from the outset that short-term measures, even the expenditure of large funds to subsidise indemnity insurance for doctors, would not be sufficient to lower premiums and stabilise costs on a sustainable long-term basis. Fundamental tort law and industry reform were needed.

3.2 Objectives of reforms

The chief instrument of the reform was the *Health Care Liability Act 2001.* The *Health Care Liability Act* was passed by the Parliament on 29 June 2001. Its broad aims were to contain escalating medical indemnity insurance premiums by limiting to fair and reasonable levels the amount of compensation payable in cases of relatively minor injury, while preserving principles of full compensation for those with more serious injuries involving ongoing impairment.

Many of the provisions of the *Health Care Liability Act 2001,* including limitations on the amounts payable for damages, were later subsumed into the *Civil Liability Act 2002,* and have already been dealt with in section two of this submission. They will not be revisited here. An important feature not covered earlier, however, is that doctors are required to be insured, with provision for the Medical Board to suspend a doctor if satisfied that he or she does not have the requisite insurance cover. This is an important consumer protection measure which was able to be introduced as part of the broader package of reforms.

3.3 Impact of reforms

3.3.1 Impact on insurance premium levels and the availability of cost-effective insurance

The Government's reforms have stabilised the medical indemnity environment and resulted in medical indemnity insurance being more affordable and more available.

The recent Australian Competition and Consumer Commission (ACCC) *Medical Indemnity Insurance – Second Monitoring Report*[38] has shown that the cost of medical indemnity insurance premiums has fallen by an average of 12 percent to $5,549 per annum.[39]

United Medical Protection has stated that its ability "to reduce premiums earlier than may generally have been expected is the result to a significant extent of the substantial tort reforms undertaken by state governments…The benefits of reduced claims have resulted in … the ability to pass on these savings through lower premiums."[40]

3.3.2 Impact on employment in rural and regional communities

As noted by the Minister for Health at that time, the Government's reforms resulted in all doctors who tendered their resignation withdrawing them. The doctors who walked off the wards as a result of the medical indemnity insurance crisis also returned. As the crisis was exacerbated in rural and regional communities, the positive impacts of the reforms on employment in rural and regional communities were welcomed.

Importantly, however, the people from rural and regional communities no longer faced the real possibility that the only obstetrician or general practitioner within their vicinity would cease to practice on the basis that he or she could just not justify or meet the costs of escalated insurance premiums.

3.3.3 Any other issue the Committee considers to be of relevance to the inquiry

In addition to the benefits outlined above, consumers are now better protected as a result of the health care liability reforms. The Medical Board has the

[38] December 2004. Published 28 December 2004.
[39] It is also noted that the reductions are attributable to a variety of factors, including Commonwealth measures.
[40] UNITED Group submission *Medical Indemnity Industry Competitive Neutrality Review,* 28 January 2005, pg. 6.

power to suspend a doctor if it is satisfied that he or she does not have the requisite indemnity insurance cover. Practising without insurance is now deemed unprofessional conduct.

At the same time, medical practitioners, nurses and other health practitioners are now protected from civil liability when voluntarily providing care to injured persons in an emergency. This is a vital measure to ensure that these professionals are not dissuaded from coming to the aid of an injured person in an emergency.

4. MOTOR VEHICLE ACCIDENTS

4.1 The problem

Prior to the introduction of the *Motor Accidents Compensation Act 1999,* there was no provision for early payment of medical costs for motor accident victims and litigation was the only mechanism by which a dispute could be resolved.

Research undertaken by the Motor Accidents Authority of NSW demonstrated extensive public concern about the process an injured person had to go through in order to obtain compensation. Specifically, concern was expressed about the time taken for an injured person to reach a settlement with an insurance company; the cost of the legal process; and the number and cost of the medical examinations an injured person was required to undergo.

Also of concern to the public was the cost of Green Slips, which had been steadily increasing over the four years leading up to 1999. By June 1999 the average Sydney metropolitan premium was $441 (excluding GST). Due to the compulsory nature of the Scheme, premiums must be reasonably affordable for all vehicle owners.

4.2 Objectives of reforms

Recommendations for reform were developed through the appointment of an expert facilitator in discussion with an advisory group comprised of experts from all Scheme service providers and the Motor Accidents Authority. The Government was guided by those recommendations in developing the *Motor Accidents Compensation Act 1999.*

The *Motor Accidents Compensation Act 1999* was assented to on 8 July 1999. The Act was designed to reduce the number of matters going to litigation and to emphasise early treatment and rehabilitation of injured people. In doing so, the *Motor Accidents Compensation Act 1999* sought to

limit transaction costs including legal costs, medico-legal costs and investigation costs, thereby increasing the Scheme's efficiency (meaning that as much as possible of the premium dollar is available to claimants for compensation). The Act was also intended to make Green Slips more affordable for NSW Compulsory Third Party (CTP) policy holders.

The features of the Act are:

- early notification of injury through medical practitioners via an Accident Notification Form (ANF)
- statutory provisions and guidelines to encourage the early resolution of compensation claims
- medical guidelines to encourage early and appropriate treatment and rehabilitation
- medical disputes determined through independent medical assessment by the Medical Assessment Service (MAS)
- a new system for early dispute resolution (The Claims Assessment and Resolution Service - CARS)
- changes to damages, including the introduction of an objective threshold for access to non-economic loss damages based on an assessment of impairment (10% permanent, whole body impairment as defined by the MAA guidelines)
- regulation of legal costs
- establishment of the Claims Advisory Service to assist claimants with the claims process
- increased regulatory role for the MAA to ensure insurer compliance with the market practice and claims handling guidelines.

4.3 Impact of reforms

4.3.1 Impact on insurance premium levels and the availability of cost-effective insurance

The *Motor Accidents Compensation Act 1999* has been successful in reducing CTP premium costs in NSW. The average premium for a Sydney metropolitan passenger vehicle dropped from $441 in June 1999 to $332 in the June 2004 quarter. This represents a saving of $109.

Premium prices have fallen while average weekly earnings have increased. As a proportion of average weekly earnings, the weighted best price[41] for a Green Slip has dropped from 50 percent of average weekly earnings before the reforms to 32 percent of average weekly earnings in June 2004.

An efficient CTP Scheme is one where as much as possible of the premium dollar is returned to injured people as compensation. The *Motor Accidents Compensation Regulations* have contributed to a more efficient CTP Scheme by reducing transaction costs incurred to administer the Scheme (including legal costs, medico-legal costs and investigation costs). 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 in a comparable period.

The return to the claimant under the new Scheme has averaged 61.3 percent of total premiums compared to 58 percent under the old Scheme. In terms of actual payments, the proportion paid to claimants has increased from 80 percent of total payments to 86 percent. This is due to the reduction in the level of legal and investigation expenses.

[41] Weighted best price is based on the lowest prices offered to drivers in the 30-54 age group, weighted by insurers' market share.

4.3.2 Any other issue the Committee considers to be of relevance to the inquiry

Timing and service delivery

The introduction of Accident Notification Forms (ANFs) under the *Motor Accidents Compensation Act 1999* has shortened the time taken for an injured person to formally seek compensation from an insurer and for compensation payments to be made[42]. Under the ANF, insurers now have ten days from the time they are notified of an injury to advise injured people whether they accept provisional liability. Previously it could take six months or longer for liability to be determined. When provisional liability is accepted, the insurer pays for the injured person's treatment in accordance with the treatment guidelines, up to an amount of $500. These changes are ensuring that more people are treated promptly.

In the first 45 months of the new Scheme, 43 percent of claimants (21,836 people) used the newly introduced ANF to notify insurers of their claim for compensation. By the end of the 45 month period, 51 percent (11,032) of ANFs had converted to full claims[43].

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 percent across all claims and ANFs. The average time to finalise a claim dropped by 22 percent and the number of matters finalised in the same period increased from 47 percent to 58 percent.

Considering full claims alone, there were improvements in the average time of notification, determining liability and finalising the claim. The main improvement was the reduced time taken for insurers to decide liability, which decreased by 25 percent. These trends indicate that injured people are now able to lodge their claims more quickly, and to have their claims settled more quickly. This in turn helps to maximise recovery.

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[42] *Review of the Motor Accidents Compensation Act,* page 23.

[43] ANFs permit a payment to the claimant of up to $500. If the claim exceeds that amount, a full claim needs to be made.

Medical Assessment Service (MAS)

There is a new emphasis under the *Motor Accidents Compensation Act 1999* on letting injured people get quick and independent decisions on treatment, rehabilitation and care outside the court system. Disputes over treatment, rehabilitation and care can now be referred to the Medical Assessment Service. Disputes about the degree of permanent impairment must be referred for such assessment. The Medical Assessment Service 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.

Claims Assessment Resolution Service

It is well known that few road accidents involve difficult legal issues and accordingly few of them should end up being decided in court. Prior to the reforms, however, a large number of claimants were commencing court proceedings, with the requisite legal costs. With the introduction of the *Motor Accidents Compensation Act 1999,* these claims are now being resolved outside the court system in a non-adversarial way, meaning improved and earlier assistance for persons injured in motor vehicle accidents.

Under the *Motor Accidents Compensation Act 1999,* an insurer who has admitted liability is required to pay the injured person's medical and related expenses pending settlement of the claim. When the insured person's condition has stabilised, and he or she has provided the insurer with details about the claim, the insurer can make an offer. If the matter cannot then be settled, either party may take the claim to the Claims Assessment and Resolution Service (CARS) for an assessment. The CARS procedures are intended to be flexible with an emphasis on dealing with matters on the papers or at conference rather than at formal hearing.

Assessments by CARS of the amount of compensation are binding immediately on the insurer. An assessment is binding on the injured person if that person accepts the assessment within 21 days. An injured person who does not accept the assessment may take a claim to court. No case can

proceed to court until it has been through CARS, however where there are difficult legal issues or complex matters of fact to decide, CARS may issue an exemption that allows the parties to proceed directly to court.

Changing adversarial nature of compensation

Comparing the experience of the first accident year of the new Scheme, from its start to the end of June 2004, with the experience of the last year of the old Scheme as at the end of June 2003:

- Of injured people lodging full claims, 61 percent were legally represented compared to 68 percent of claimants in the last year of the old Scheme.

- Five percent of Year one claims involved litigation compared to 25 percent of claims in relation to the last year of the old Scheme at the same stage of development.

These trends suggest that the reforms are succeeding in changing the adversarial nature of compensation and in reducing the level of legal costs.

5. WORKERS COMPENSATION

5.1 The problem

5.1.1 High disputation rates

Workers' compensation was designed as a no-fault Scheme to provide immediate assistance to workers without requiring them to prove that someone else was to blame for their injury. The Scheme's other objectives were to reduce the risk of injury by encouraging safer workplaces; to ensure prompt payment of benefits and treatment for injuries; and to keep the premiums paid by employers affordable. Good dispute prevention and resolution were the key to the Scheme's performance.

New South Wales, however, was experiencing a much higher level of disputes than other states. The disputes were caused by a number of factors:

- Complexity of the legislation – many workers, employers, and insurers often did not know what was required of them
- Failure of insurers to manage claims in a timely fashion – claims not being processed within the required timeframes
- Lack of coordination between injury management and claims management.

Claims that should have been straightforward were turning into long-running disputes. Furthermore, If the insurer disputed the claim the worker usually had to attend court. In New South Wales, 45 percent of major claims (that is, claims where the worker is away from work for five days or more) were disputed. In such cases there was a long wait for workers to receive any benefits, sometimes years. None of this was conducive to the worker's injury management, rehabilitation and early return to sustainable employment.

5.1.2 Legal fees consuming Scheme resources

A large proportion of the resources of the NSW workers' compensation Scheme were being consumed by legal fees. This was at the expense of the payment of benefits to injured workers. Legal payments had risen from $200 million per annum in 1996/97 to $350 million per annum in 2000/01.

In some cases the lawyers' fees ended up being considerably higher than the final award to the injured worker. During debate on the *Workers Compensation Legislation Amendment Bill (No. 2)* on 28 June 2001, the Special Minister of State provided specific examples:

> *"In a statutory Scheme a worker recently filed a claim for loss of hearing. The matter was finalised in November 1996, three years and three months later. The worker received $30,000 and the legal costs were estimated at $58,800—$20,000 more than the worker received.*
>
> *Another injured worker received some of his settlement in August 1992. The common law claim was not notified until October 1996 and was settled in September 1997. The worker received damages of $30,000, and legal costs for the injured worker were estimated to be $45,000—again the lawyers got 50 per cent more than the worker.*
>
> *A worker lost partial use of his left arm in July 1994. Three years later the worker received $46,400, and legal costs were estimated to be $55,000.*
>
> *A worker who suffered permanent impairment of the back in 1996 received common law compensation four years later. The worker received $80,000 and his solicitors received $40,000.*
>
> *A worker suffered an injury to her upper arm in 1988 and finally received a common law settlement 10 years later. The worker received an $85,000 settlement, and of that $42,625 was paid in legal costs to*

the worker's solicitor—the solicitor got a few dollars more than the worker.

Another worker received a payout for psychological injury of $120,000 in compensation four years after the injury, and $80,000 of that was paid to the worker's solicitors.

A worker received multiple injuries in 1988 and the matter was finally settled seven years later. The worker received an award of $130,000 and it was estimated that the legal bills for the matter were $150,000. Another worker who received a permanent impairment to the neck in 1993 received common law compensation three years later. The worker received a settlement of $154,000, of which $137,000 was paid in legal costs."

5.1.3 Scheme deficit

The independent WorkCover actuary reported in mid 2000 that the New South Wales workers' compensation Scheme deficit was increasing at $1 million per day. The actuary had also projected that the Scheme deficit would reach $6 billion by June 2007. It was clear that the Government's 1998 reforms had reached their full potential and would be unlikely to achieve further significant savings, nor progress the fundamental objectives of the Scheme.

5.2 Objectives of reforms

In 2001 the Government introduced reforms to enhance the performance of the system and ensure that injured workers are provided with the treatment and support they need to return to work.

The reforms were contained in the *Workers Compensation Legislation Amendment Act 2001,* the *Workers Compensation Legislation Further*

Amendment Act 2001, and regulations and guidelines under the provisions of those Acts.

Improving Claims Administration and Providing Support to Employers and Workers:

The 2001 reforms to improve claims administration and provide support to employers and workers include provisional liability, the WorkCover Assistance Service and WorkCover Assist.

- Provisional liability:

Provisional liability streamlined injury notification and claims processing by requiring insurance companies to begin weekly compensation payments and injury management within seven days of notification of injury, unless there is a 'reasonable excuse' (eg. when there is insufficient medical information or the injury is not work related).

The aim is to facilitate timely decision-making, ensure the prompt management of claims and ensure that injured workers return to work as quickly and safely as possible.

- Claims Assistance Service:

Prior to the 2001 reforms a high proportion of workers compensation disputes concerned the payment of benefits and injury management. To help workers and employers navigate the system more easily and receive impartial advice concerning the payment of benefits and injury management the Government established the Claims Assistance Service.

The Claims Assistance Service provides information and assistance to injured workers and employers about claims for workers compensation, particularly resolution of potential disputes.

Dispute Prevention and Resolution:

The 2001 reforms to improve dispute prevention and resolution include the establishment of the Workers Compensation Commission, objective assessment of medical impairment and the regulation of legal fees.

- Establishment of Workers Compensation Commission:

The Workers Compensation Commission commenced operations on 1 January 2002 and provides a transparent, flexible and independent forum for the appropriate, fair, just, timely and cost effective resolution of workers compensation disputes.

The Commission's system of conciliation and arbitration dispute resolution directly involves the parties in an accountable and accessible process. It is aimed at ensuring injured workers obtain a fair and quick resolution of disputes about their workers compensation entitlements.

- Objective Assessment of Permanent Impairment:

Where a worker suffers permanent impairment from a work related injury, the degree of that impairment is a medical matter requiring assessment by a medical specialist.

Since 1 January 2002, assessments of permanent impairment are conducted by medical specialists who are trained in the use of the WorkCover Guides for the Evaluation of Whole Person Impairment.

The Guides were developed by medical specialists in NSW who reviewed and adapted the American Medical Association Guides to introduce a consistent, reliable and clinically defensible means of assessing permanent impairment.

If there is a dispute about the level assessed, the matter can now be resolved by an independent medical specialist appointed by the Workers Compensation Commission.

The Approved Medical Specialists undergo a rigorous selection process, with the medical colleges attesting to their standing in the medical community, and representatives of employers and unions confirming their independent status.

- Regulation of Legal Fees:

A new approach to the recovery of legal costs was an integral component of the 2001 reforms and a costs table was established to reflect the new procedures for dispute resolution in the Workers Compensation Commission.

The costs table is based on an events based approach to ensure that legal practitioners are rewarded for work done rather than time spent. This promotes efficiency in the handling of matters.

Reforms to the Benefits Structure:

The benefits and support provided to injured workers under the Scheme are extensive and need to be viewed as a whole. Rather than simply being a system of compensation, the primary objective of the Scheme is to rehabilitate injured workers and enable them to return to suitable, safe and durable employment as quickly as possible.

The benefits available under the Scheme can be broadly classified into three categories:

1. Weekly benefits (economic loss) compensation;
2. Medical re-imbursement; and
3. Non-economic loss (pain and suffering, permanent impairment) compensation.

These benefits are generally delivered to workers through lump sums or periodic payments.

Concerned about the financial state and long-term viability of the New South Wales workers' compensation Scheme, the Government appointed Justice Terry Sheahan to conduct an inquiry into common law issues relating to workers' compensation (the Sheahan Inquiry). Among other things, the inquiry considered proposals for a threshold for common law claims, noting both the need to make proper restitution to workers who can prove negligence and the need to care for all workers regardless of fault. The Sheahan Inquiry concluded among other things that:

- 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"; and

- 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.[44]

The Government subsequently reformed the benefits structure to ensure that:

[44] *Commission of Inquiry into Workers Compensation Common Law Matters* at p18

- benefits are targeted to the most seriously injured;
- that injured workers are adequately compensated for their injuries and lost earning capacity; and
- delivery mechanisms provide employers, workers and service providers with incentives to return injured workers to sustainable employment as quickly and as safely as possible.

The 2001 reforms to the benefits structure included:

- Significantly increasing maximum amounts of statutory compensation – specifically increasing the maximum lump sum payment for permanent impairment and pain and suffering under sections 66 and 67 from $171,000 to $250,000.
- Providing that damages for economic loss will be calculated to age 65 for both men and women, by modifying the common law presumption that the normal retirement age is 60 years for women and 65 years for men.
- Providing for a broader class of injury, including psychological injuries, to be compensated by the statutory no-fault Scheme. The former Table of Disabilities which was used to identify impairment, did not compensate all permanent injuries, leaving those who were not compensated to pursue fault-based common law action. The assessment of permanent impairment is now made by reference to whole person impairment as provided for in the WorkCover Guides issued for that purpose, which cover nearly all permanent injuries.
- Extending compensation to include permanent impairment from psychological/psychiatric injury subject to a threshold of 15 percent permanent impairment.
- Providing that compensation for non-economic loss is only available through the statutory Scheme.

5.3 Impact of reforms

5.3.1 Impact on insurance premium levels and the availability of cost-effective insurance

The 2001 workers' compensation reforms were designed to address the growing Scheme deficit, while avoiding the need to increase premiums or reduce benefits. The reforms allowed the Scheme to maintain the target premium rate at 2.57 percent of wages.

It is important to point out that Scheme income is funded by employer premiums and investment returns on those premiums. Scheme expenditure is spent on benefits for injured workers and the administration of the Scheme. Accordingly, reform savings cannot have any direct bearing on insurer profits or Government consolidated revenue because they do not underwrite the Scheme.

5.3.2 Impact on the WorkCover Scheme if changes had not been implemented in 2001

Importantly, the 2001 workers' compensation reforms have had a significant impact on reducing the Scheme deficit. The independent WorkCover Scheme Actuary, PricewaterhouseCoopers, has estimated that:

- the 2001 reforms have saved $1,793 billion, the vast majority (more than 80 percent) as a result of reduced legal and related costs; and
- without the 2001 reforms the deficit would be over $6 billion by June 2007.

Recent figures from PricewaterhouseCoopers show that the Scheme deficit is calculated at $1.6 billion, a fifty percent reduction from the $3.2 billion deficit of December 2002.

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.

5.3.3 Any other issue the Committee considers to be of relevance to the inquiry

The 2001 reforms have also achieved the following significant improvements:

Improvement in claims administration and return to work rates:
There has been a sustained improvement in the timely determination of claims and a significant improvement in return to work rates. The average reporting time for an injury has been halved and injured workers are therefore getting access to injury management and return to work programs more quickly.

Over 62 percent of injured workers now receive their weekly benefits within seven days of their injury being notified to the insurer, compared to 53 percent under the previous arrangements.

Improvement in support to employers and workers:
In 2003/04, the Claims Assistance Service handled 5,611 cases, an increase of almost 12 percent on 2002/03, with a resolution rate of almost 81 percent.

Increased claims payments:
The maximum lump sum payment for permanent impairment and pain and suffering under sections 66 and 67 has significantly increased from $171,000 to $250,000.

Reduction of legal disputes:
Prior to the 2001 reforms NSW had the highest rate of disputed claims in Australia. Approximately 32,000 or 45 percent of major claims were referred for conciliation in the 2000 year.

Disputes have reduced by nearly 60 percent, from 8,000 per quarter to around 3,300.

6. CONCLUSION

By any test, remarkable progress has been achieved in every Australian jurisdiction in reforming tort law and personal injury legislation. As the Commonwealth Treasury paper observed: “Such extensive law reform in a limited time frame is unprecedented in the history of Australian insurance law and, taking into account the complexity of Australia’s multiple jurisdictions, perhaps a first in the common law world.”[45]

In all of its reforms the Government has sought to be principled, and to bring rationality and fairness to the compensation of accident victims and others with claims for hurt or injury. It has aimed to strike a proper balance between fair and reasonable compensation for injured people and the community’s ability to pay for that compensation through affordable premiums.

This submission demonstrates that the objectives of the legislative reforms are being achieved. It demonstrates that the legislation is operating consistently with the legislative intent.

That being said, the Government appreciates that an ongoing commitment is required to ensure that the intended outcomes of the reforms continue to accrue. In recognition of this, a brief outline follows of some of the mechanisms used to monitor results.

The Government is watching with interest the way in which the courts are interpreting the civil liability legislation. It would seem that the courts are beginning to apply the language and spirit of the Government’s legislation. This is particularly so in the New South Wales Court of Appeal.

The insurance climate has improved as a result of the Government’s reforms. Importantly, we are now seeing the benefits of tort reform being passed on to the community in the form of reduced premiums and increased availability of

[45] Commonwealth Treasury op. cit pg.11.

insurance, leading to the restoration of community and other events. As stated earlier in this submission, the Government will continue to impress upon insurers the importance of passing on any savings to the community.

The Australian Competition and Consumer Commission (ACCC) monitoring of public liability, professional indemnity and medical indemnity insurance is an effective accountability mechanism, and one which the Government applauds. The Government closely reviews the ACCC reports, and is committed to ensuring that the benefits of tort reform continue to be passed on to the community as intended. The Commonwealth Assistant Treasurer's recent announcement that the ACCC's monitoring role for public liability and professional indemnity insurance has been extended for a further three years, reporting at 12-month intervals, is welcomed.

A National Claims and Policies Database is currently being compiled by the Australian Prudential Regulation Authority. All Australian insurers are required to provide wide-ranging and detailed policy, premium and claims data for the purposes of the Database. Reports will be issued on a six-monthly basis, with the first report due for release in May 2005. This is another initiative by which accountability and transparency of the insurance industry is promoted. It should provide an even clearer picture of the effect of tort law reform, and the extent to which savings are being passed on to the community. The Government awaits the release of the first report.

With an appreciation of the complex and multifaceted problems underlying the need for reform, and the principled measures by which the Government and Parliament chose to address those problems, it is clear that any efforts to undermine the achievements of the legislative reforms should be resisted.