

## INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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**Subject:**

**Summary**

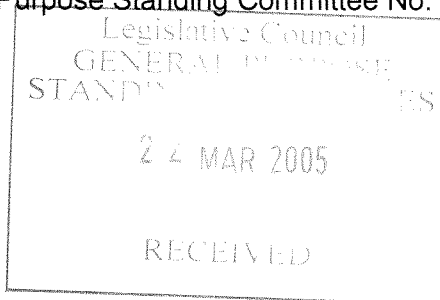


JARDINE LLOYD THOMPSON

16 March 2005

**Risk Services Division**

Rev the Hon. Gordon Moyes MLC,  
Legislative Council General Purpose Standing Committee No. 1  
Parliament House  
Macquarie Street,  
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Dear Rev Moyes

**Inquiry into the Operation and Outcomes of Personal Injury Compensation Legislation**

On behalf of the Board of Management of the NSW Local Government Mutual Liability Scheme (Statewide Mutual) and its member Councils, we wish to provide the attached submission for consideration by your Committee.

We welcome the opportunity of meeting with your Committee to discuss these issues further.

Yours sincerely,

John Attenborough  
Executive Officer, Statewide Mutual

**INQUIRY INTO THE OPERATION AND OUTCOMES OF  
PERSONAL INJURY COMPENSATION LEGISLATION**

**SUBMISSION TO THE LEGISLATIVE COUNCIL  
GENERAL PURPOSE STANDING COMMITTEE NO 1**

PREPARED BY

**JARDINE LLOYD THOMPSON PTY LIMITED**

**MARCH 2005**

## **INTRODUCTION**

The Legislative Council General Purpose Standing Committee No. 1, chaired by the Rev the Hon. Gordon Moyes MLC, has invited submissions from Councils, and other interested parties, to its inquiry into the operation and outcomes of all personal injury compensation legislation, approved by Parliament from 1999.

This submission is provided by Jardine Lloyd Thompson in our capacity as Insurance Broker to Local Government and managers of the NSW Local Government Mutual Liability Scheme – more commonly referred to as Statewide Mutual

The Liability Scheme has been operating since 1 December 1993 and currently provides Public Liability and Professional Indemnity cover of \$200,000,000 to the majority of Local Government Authorities throughout metropolitan, regional and rural NSW.

In the Local Government Sector, Statewide Mutual has arranged its insurance protection through the Lloyds and London Insurance market since June 1998, because there is no domestic Insurer willing to provide Public Liability and Professional Indemnity insurance for Councils. Prior to 1998, the Scheme carried a Self Insured Retention (SIR) of \$2,000,000 – again because there was no Insurer in Australia willing to provide cover for Local Government.

Those Councils in NSW that do not participate in the Statewide Mutual (approximately 19) are also insured through the London Market.

The SIR was in place for four years, during which time Statewide Mutual accumulated massive underwriting losses which have subsequently been financed with surpluses generated in the years since 1998. It is worthwhile commenting that, in the 2002/2003 Financial Year, Statewide Mutual had a Deficit of some \$47 million. As at June 2004, the

result was a surplus of \$4,016, due largely to the provision of a "profit share" included in the current London placement.

**Terms Of Reference 2**  
**Impact On Community Events And Activities,**  
**And Community Groups.**

Since the enactment of the NSW Civil Liability Amendment (Personal Responsibility) Act 2002 (“the Legislation”), Insurers are more willing to provide cover for community events and community groups because they gain comfort from the immunities provided to volunteers under the terms of Part 9, Clauses 59 – 61 of the Act.

A number of specialty Insurers have been established to offer Public Liability Insurance to community groups and not-for-profit organisations. Our experience is that these Insurers are offering cover at affordable rates, greatly reduced from those on offer prior to the Legislation being enacted.

In his Second Reading Speech when introducing the Civil Liability Bill to the NSW Legislative Assembly, Premier Carr said

*“Since I released the consultation draft of the bill I have met with many local government and community representatives. They have told me that the approach of the courts to public liability is unsustainable, and the Government agrees with them. We need to protect our beaches and parks. We need our roads and schools to operate free from unrealistic standards—standards imposed by the courts with hindsight and with no regard for the cost to the community.”*

A change in the immunity for volunteers may lead to Insurers reconsidering their provision of cover and the terms offered for community events.

**Terms Of Reference 3**  
**Impact On Insurance Premium Levels**  
**And Availability Of Cost-Effective Insurance**

When examining whether the rate of premium charged by the general Insurance Industry is fair and reasonable, a comparison might be the rate charged by other Financial Institutions in providing “a guarantee of funds” being made available for the client as the need arises.

For a Bank Guarantee of, say, \$2,000,000, the bank would require a fee of between 1% and 1.5% or \$20,000 to \$30,000. A Line of Credit for the same amount would incur a fee of approximately 10% or \$200,000, whether the amount is drawn down or not. These rates can vary, depending upon the size of the client’s operation and its relationship with the bank (ie rating factors).

The purpose of public liability insurance is to provide financial resources to compensate third parties who sustain a loss resulting from an accident caused by the Insured. The fortunes of the Insurer are very much in the hands of the Insured.

Insurance premiums are based on industry specific rating factors, size of the Insured and claims experience. Clients with adverse claims experience can expect to pay a higher premium than those with low experiences. Likewise, clients operating in low risk industries will pay less than those in the higher risk industries. The comparison with rating factors used by banks would appear to be a fair comparison.

The Bank Guarantee and Line of Credit are “one-off” payments – ie there is only one payment made by the bank which will eventually recoup what it has paid to its client. With public liability insurance of \$2,000,000, the Insurer is guaranteeing to pay up to \$2 million for

every negligent act, error or omission committed by the insured, with no upper limit on the number of claims incurred in a policy period. Taken to extremes, the insured could cause bodily injury or damage to property every day in a year and the Insurer is contractually liable to meet the cost of each claim. In this example, the exposure to the Insurer would be \$730m.

Banks are reporting record profits in the \$ billions while Insurers are only recently starting to see bottom line profits from their public liability insurance portfolios. Insurers, in the years leading up to the enactment of the Legislation, have sustained substantial underwriting losses. There can be no better example of this than Statewide Mutual itself, which has been operating for over 11 years and has only just returned to a modest surplus of \$4,016, as at 30 June 2004. Given that Statewide is a Mutual and has no profit motive, it is difficult to see where insurers involved in public liability are attracting huge profits. The facts speak otherwise.

Since the Legislation, the results have improved, but it is early days yet, because of the long-tail nature of liability claims. Additionally, Insurers must still recoup the losses in past years to be in a position to continue into the future. However, the signs are there that premiums will reduce in the future, provided the Legislation remains unchanged, and provided the Courts abide by its intention.

## **REDUCTION IN PREMIUMS**

In addition to cover for public liability and professional indemnity risks, Statewide Mutual provides Local Government with cover for Industrial Special Risks (property) and Fidelity Guarantee (employee misappropriation or embezzlement). Since inception of each of these Schemes, any surplus generated in a year is rebated to the Member Councils. To date, rebates exceed \$3 million.

This has not been possible under the Liability Scheme because of the deficit incurred in prior years. However, now that a surplus has been achieved, the Board of Management has



determined that Member Councils will receive a distribution of surplus (\$4 million), to a maximum of 10% of their contribution (premium), subject to performance in the areas of risk management and claims incurred. In this way, there is incentive to perform, while at the same time providing Statewide Mutual with sufficient funds to meet its liabilities. Premium reductions are offered at the “back end” rather than at the beginning of the period of cover.

## LEGAL COSTS

Quoting further from Premier Carr’s Second Reading Speech in relation to a cap on legal fees on court awards of less than \$100,000:-

*“The cap will not be a standard fee for lawyers to charge their clients. It is the maximum fee which applies unless there is a costs agreement. **In many cases the Government expects lawyers to charge significantly less.** Bills of costs will still be subject to the normal costs assessment rules in the Legal Profession Act. Lawyers will not be permitted to inflate their costs up to the cap.*

*The cap on fees will promote efficiency on the part of the legal profession and help to contain claims costs.”* (emphasis added)

These caps only relate to claims where the amount awarded does not exceed \$100,000. There is no cap on claims exceeding that amount. Unfortunately, experience shows that the Legal Profession has not reacted in the way in which Government anticipated. Legal fees continue to rise and, in many instances, greatly exceed the amount awarded to the claimant.

The newspapers regularly carry stories of legal fees amounting to millions of dollars incurred in running a matter. A prime example involving Local Government and the State of NSW, both of which successfully defended the claim, is found in the matter of *Graham Barclay Oysters Pty Ltd v Ryan; Ryan v Great Lakes Council; State of New South Wales v Ryan [2002] HCA 54 (5 December 2002)*.

In this matter which was finally resolved in the High Court, the plaintiff, Ryan, was awarded \$25,000 in compensation for contracting hepatitis as a result of consuming contaminated oysters. Legal costs incurred by Council and the State amounted to over \$2.5 million. Barclays and Ryan would have incurred similar costs – a staggering \$6 million total. Costs were awarded against Ryan in favour of Council and the State, but prospects of recovery are slim.

Council's legal costs incurred in the coronial inquest into the Thredbo landslip exceeded \$950,000, and yet no claim eventuated.

Compare the hourly rates of between \$260 and \$300 charged by a lawyer (Senior Associate), with those of a Registered Nurse at under \$50.

#### **DETERMINATION OF DAMAGES FOR NON-ECONOMIC LOSS**

Clause 16 of the Civil Liability Act introduced a threshold for damages for non-economic loss. In his Second Reading Speech, Premier Carr said

*“Our actuarial advice shows that the threshold will exclude smaller claims for general damages and will discourage people from bringing smaller claims. But, importantly, our actuarial advice shows that the threshold will lead to increased general damages for the more seriously injured plaintiffs. These are the people who have suffered the most and they will get more because of the threshold.”*

The Local Government and Shires Associations, in conjunction with Jardine Lloyd Thompson, provided a submission to the Public Bodies Review Committee (PBRC), chaired by Milton Orkopoulos MP, in 2000, which set out the difficulties faced by Local Government, particularly in regard to the number of “small” claims arising from footpath falls, and the high expectation of claimants for a windfall settlement, driven at times by solicitors who listed “innovative” heads of damage to increase the quantum of the claim.

The PBRC issued a report in November 2000, titled "*Public Liability Issues Facing Local Councils*" and we recommend it to the Standing Committee.

Since the introduction of the NSW Civil Liability Act 2002, the expectation of windfall settlements has dramatically reduced, and injured plaintiffs are more willing to accept reimbursement of "out of pocket" expenses in settlement of their claims against Councils.

Any amendment to the current threshold limits will see a return to the windfall mentality, bringing with it an increase in claims cost with a commensurate increase in insurance and reinsurance premiums.

The threshold table as contained in the Legislation does not penalise those plaintiffs who have sustained serious injury. Major claims still occur and the seriously injured plaintiff will still receive substantial compensation when the defendant is found to be negligent. The following awards have recently been achieved by plaintiffs:-

Swain v Waverley Municipal Council	\$3.75 million	February 2005
Watt v Copmanhurst Shire Council	\$4.33 million	February 2005
Ballerini v Berrigan Shire Council	\$5.6 million	September 2004