Submission No 49

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Subject:

Summary

24 March 2005

The Hon Rev. Gordon Moyes MLC
Chair
General Purpose Standing Committee No1
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Reverend Moyes

GPSC No 1 INQUIRY INTO PERSONAL INJURY REFORMS

We are pleased to provide you with the Insurance Council of Australia's submission to your committee's current inquiry into the efficacy of personal injury reforms in NSW since 1999.

The submission, which is in two parts, is attached. Hard copies have been forwarded by mail.

We trust the submission will be of interest to you and your colleagues and we would be pleased to address the Committee about the contents of the submission when hearing dates are set.

Yours sincerely

Allan Hansell
Manager for NSW and ACT
Insurance Council of Australia

INSURANCE COUNCIL OF AUSTRALIA

ICA Submission to NSW Parliament's General Purpose Standing Committee No.1 into Personal Injury Reforms in NSW

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1 Introduction

The Insurance Council of Australia (ICA) is the representative body of the general insurance industry in Australia. Its members account for over 90 percent of total premium income written by private sector general insurers. ICA members provide non life insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisation (such as product and public liability insurance, workers compensation, commercial property, and directors and officers insurance).

ICA members, both insurers and reinsurers, are regulated and licensed by the Australian Prudential Regulation Authority (APRA) and are a significant part of the financial services system. Recently published statistics from APRA show that the private sector insurance industry generates direct premium revenue of $25.9 billion per annum and has assets of $80.6 billion.[1] The industry employs about 25,000 people.

ICA members issue more than 41 million insurance policies annually and deal with 3.5 million claims each year. On average, ICA members pay $55 million in claims per working day.

2 Executive Summary

General Purpose Standing Committee No.1 has referred to itself a review of the efficacy of personal injury law reforms in NSW since 1999. The main areas affected by reform include public liability insurance and the Compulsory Third Party (CTP) / Motor Accidents and Workers' compensation schemes.

The reforms are, as they affect CTP and public liability, nothing short of a success story. CTP prices are at their lowest levels for years while innovations have been developed to assist injured persons to be rehabilitated (when this is feasible) more quickly. The public liability crisis, where community groups and businesses had their legitimate activities placed at risk because they either could not source insurance or not afford public liability premiums, has been largely diffused with insurers re-entering the market following tort reforms by the Commonwealth, States and the Territories. Prices are also now falling. Importantly, seriously injured persons covered by public liability policies are getting the care they need.

The Workers' Compensation system is also on the mend with the Government reporting that the scheme's liabilities are being reduced thanks to improved investment returns and scheme reforms. These same reforms have delivered improved outcomes for injured persons being dealt with under this system.

Where insurers privately underwrite products they constantly assess risks and, where relevant, adjust their pricing models based on a range of factors including the legislative environment and legal environment.

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[1] APRA, *Quarterly General Insurance Performance, September 2004*. Note: Premiums refer to direct insurance only and exclude reinsurance. Assets refer to total industry assets.

The industry asks, above all else, for certainty so that it can rationally and confidently price the products it underwrites and/or assist government to obtain optimal performance from its insurance schemes. The aim is to ensure that genuinely injured persons get the care they need while proper consideration of and attention to the necessary commercial realities that come with providing these forms of insurance is made.

Uncertainty still remains in the Court's interpretations of recent public liability reforms. Insurers believe that, while Government and the Parliament should monitor trends flowing from the Courts in their interpretations of the Civili Liability Act in particular, it would be premature for Parliament to change the rules until a clearer picture of these legal trends is achieved.

The submission is divided into two sections. The first deals with personal injury legislation and issues as they relate to NSW only. The second section of the submission 'Insurers response to Tort Reform – Update on Availability and Affordability of Public liability Insurance' takes an in-depth look at the tort law reform debate, and the benefits of tort law reform affecting public liability insurance, nationally.

3 Compulsory Third Party (CTP)

The State's Compulsory Third Party Insurance scheme applies as a compulsory insurance product for the owners of all vehicles registered in NSW. The scheme is overseen by a statutory body – the Motor Accidents Authority of NSW (MAA). The MAA also regulates the pricing of greenslips. The scheme operates on an at fault basis where liability for a claim lies with the policy that covers the vehicle at fault.

Section 207 of the Motor Accidents Compensation Act (MAC Act) constitutes a Motor Accidents Council to monitor and review the operation of the scheme, and to report to the Motor Accidents Authority Board and the relevant Minister on any matter that the Council considers appropriate.

The Motor Accidents Council is made up of the Chairman and Deputy Chairman of the MAA Board, two legal practitioners and representatives of motorists, injured persons and consumers. Two insurer representatives are also members of the Council.

As the Committee would be aware, Section 210 of the MAC Act requires a standing Parliamentary Committee to monitor and review the Motor Accidents Compensation Scheme in this State. This function has been performed by the Legislative Council Standing Committee on Law and Justice. The Standing Committee has produced annual reviews of the Scheme since the 1999 legislation took effect.

On this latter point, we note the current review of the MAA by the Law and Justice Committee as part of its statutory obligations. We also note observations by the MAA in evidence to the Committee on 15 March 2005, about improved trends in injury management within the CTP scheme and associated reductions in cost components of the scheme. There is no doubt that reforms to motor accident compensation have led to lower claims costs and lower premiums for NSW motorists while achieving better health outcomes for injured people. This reflects the objectives of the Government when the 1999 reforms were introduced.

While insurers do not control or set the framework for the operation of the Motor Accidents' scheme, they constantly scan for developments and trends that may undermine pricing models, and require adjustments to premiums.

ICA believes it is highly desirable for the Parliament to promote confidence and certainty in pricing, by maintaining the current framework unless and until it can be clearly demonstrated, on the basis of available data that change is warranted, and the proposed change can be carefully assessed and costed. Given the long term nature of claims under the CTP scheme, which can take many years to crystallise, the full experience of the 1999 reforms may still not have been realised.

4 Workers' Compensation Insurance

The NSW Workers' Compensation system is administered by WorkCover NSW, a statutory authority that reports to the Minister for Industrial Relations.

Insurers do not privately underwrite the NSW system, nor do they set pricing – their role is restricted to being licensed to issue policies and to manage claims.

Section 29 of the Workplace Injury management and Workers' Compensation Act 1988 constitutes the Workers Compensation and Workplace Occupational health and Safety Council of NSW. The Council consists of an independent chair, representatives of employers and employees, and members with expertise in law, medicine, other health care, insurance, injury management and rehabilitation, occupational health and safety.

The Council provides advice to the Minister on any matters of concern to the scheme participants.

The Legislative Council General Purpose Standing Committee also conducted extensive inquiries in the NSW Workers' Compensation Scheme, and major reports were tabled in 2002 following those inquiries. Since those reports were tabled, the Government has released the McKinsey review of workers compensation in NSW.

As a result of these reports, major changes to the Workers Compensation scheme are in the course of being implemented by the Government.

It appears that recent reforms are having the effect of reducing liabilities associated with the Workers' Compensation scheme. To this extent, the 2001 reforms, as reported to ICA from its members, appear to be restraining the costs of the system through their replication of aspects of the CTP scheme. However, like CTP and public liability, the long term nature of this business also means that the full experience of the 2001 reforms may not yet be realised.

ICA expects the implementation of further reforms to the Workers' Compensation scheme, flowing from the McKinsey review, will result in better outcomes for injured persons while delivering more efficient financial returns for the system.

Our view is that the workers' compensation system would benefit most from underwriting by the private sector. Private underwriting gives employers choice of insurer and the underwriting provided encourages a more immediate reflection of proactive occupational health and safety management and the employer's commitment to genuine injury management and early return to work. We believe, however, our members would be reluctant to take on private underwriting of the scheme, and its associated debt, while the level of unfunded liabilities remains at its current high levels.

5 Public Liability – the NSW Tort Reform Experience

5.1 Low Quantum Claims Are Down

There is no doubt that the reforms to liability insurance, as embodied by the Civil Liability Act in NSW, are starting to have an effect on claims costs.

The main impact of the reforms has been a reduction in low quantum claims. The intent of the Government's legislation was to remove these small claims from the system and to engender greater personal responsibility by individuals for their own actions.

In 2001, Civil listings reached their highest point in the NSW District Court. Since 2001 new civil listings fell between 2001 and 2003 by:

- 61 percent overall;
- 70 percent in Major Country venues;
- 75 percent in Parramatta which had the highest reduction.

Between 2002 and 2003 listings in this jurisdiction decreased by a further 38 percent, seeing a slowing of the trends recorded above but further reductions nevertheless.

The Supreme Court also experienced a reduction in civil listings between 2002 and 2003 in the order of 25 percent. While this decline in listings was not as significant as drop experienced in the NSW District Court, the jurisdictional differences between the two courts is thought to explain why the drop in listings was not as sharp. Despite this, the Supreme Court reductions are still of note.

Court listings are one indicator of claims experience and this is discussed in more detail below under *5.3 Settlements and Other Claims.*

5.2 Why Are Low Quantum Claims Down?

Insurers believe low quantum claims are down for three reasons. The first is introduction of the 15 percent General Damages threshold which is a threshold where one can claim for General Damages (ie non economic losses such as "pain and suffering") only if one's non-economic losses are more than 15 percent of a most extreme case.

Prior to the Civil Liability reforms small trip and fall claims were attracting General Damages for things such as pain and suffering producing inflation over and above what most people in the community would consider appropriate compensation. The 15 percent threshold has been a considered response to this phenomenon, introduced as a mechanism to better regulate the awarding of General Damages.

The second reason why low quantum claims are down significantly has been the introduction of new rules with regard to what plaintiff solicitors can recover. The Civil Liability Act now provides that costs recovery by plaintiff lawyers is precluded for claims under $10,000.

Finally, one of the prime objects of the Civil Liability Act was to promote the notion of personal responsibility. The sharp decline in small claims would indicate that this objective has been achieved with individuals not countenancing legal actions for personal injuries for which they have suffered no major physical harm or where they know they are responsible for the manifestation of the injury itself.

5.3 Settlements and Other Claims

Court listings are, of course, only one indicator of the potential claims experience. Claims are also regularly paid under the terms of policies and in line with legislation. There is also a trend to settlements because the Court of Appeal often requires a settlement to take the place of an appeal. Further, the Civil Liability Act now requires plaintiff lawyers to sign a statement of reasonable prospects that says their case has a reasonable prospect of success. If the matter then goes forward into the court and it is later ruled that it did not have reasonable prospects of success, there is a personal costs order against the plaintiff's solicitor. As a result plaintiff lawyers are opting to push for settlements. Caps on legal costs as mentioned earlier are also seeing a trend toward settlements.

5.4 Catastrophic Injury (and Large) Claims Not Affected by Liability Reforms

The provision of appropriate damages to the catastrophically injured so that injured persons can receive the care they require was never meant to be a target of the Civil Liability Act reforms.

As mentioned above, the intention of Parliament was to curtail small claims.

Consistent with the will of the Parliament, insurers have reported that catastrophic and large claims have not been impacted by the liability reforms.

While limitations have been placed on gratuitous care damages whereby a family member will provide gratuitous care by acting as a defacto nurse or carer to the injured person, the cap on this component of damages has resulted in a move to uncapped paid damages for a qualified carer to provide the same kind of service. The care remains but the provider of the care has shifted from family member to paid nurse.

The wage cap of three times the weekly wage, which equates to about a $150,000 per year annual salary, has had no impact either. It is presumed the level of average salary is set at this point because most people affected by a catastrophic injury would not earn this annual salary level so the wage cap does not apply to their situation. The cap does provide protection against large claims by people who have the means and capacity to insure their own income stream.

In addition, as a result of the reductions to number of small claims filtering through the system, plaintiff lawyers now have a lot more time to spend on bigger cases and the experience of insurers is that they are presenting these cases much better.

5.5 Court Interpretations – A Case Study

The most contentious issues, with respect to the interpretation of the Courts of the Civil Liability Act revolved around two matters – the treatment of non-economic loss and future economic loss.

This case study is provided to illustrate the issues.

The case of Parks V Penrith City Council eventuated after a woman fell and injured her little finger on her right hand, although she happened to be left hand dominant. She was off work for 14 weeks and then she went back to work at full employment. The first aspect of the woman's circumstances to be considered is her non-economic loss.

The District Court evaluated her non-economic loss at 28 percent of a most extreme case, which equates in New South Wales to $55,000. The Penrith City Council did not agree with the 28 percent non-economic loss finding particularly given the injury was for the woman's non-dominant hand. They appealed and on appeal the Court agreed, finding that the injury only equated to 15 percent which is $3,500. There was a significant saving – $51,000 – by taking up that particular claim, so the appeal was proven.

On the second matter of future economic loss, also a component discussed in the Parks case, a buffer was recognised.

What the Court in the Parks case said was that it did not think tort reform disallowed a buffer so the Court looked at the evidence and found that Mrs Parks may not work as long and may not get the opportunities for advancement because of her finger problem, even though she's fully employed right now. Therefore the Court allowed the buffer. The financial impact in the case was the awarding of an additional $15,000

It is worth noting that while Compulsory Third Party reforms have been transferred into the liability system in certain key areas by tort law reform, the future economic loss buffer is not one of these as buffers are not allowed as part of the CTP scheme.

5.6 The Need for Vigilance

An objective and fully informed overview of the performance of the NSW Civil Liability Act and whether or not the Act is meeting its stated aims will only be achieved overtime given the long tail nature of public liability claims and the time it takes the Courts to make an interpretation of the laws as they now stand.

Insurers and Government (and regulators) must be vigilant in monitoring the experience of tort law reform affecting professional indemnity and public liability insurances. The Australian Competition and Consumer Commission recently announced its intention to monitor the insurer response to tort reform annually for a further 3 years. The Australian Prudential Regulation Authority (APRA) is also establishing its National Claims and Policies Database for public liability and professional indemnity with insurers providing their first supply of data to the database in February 2005 with APRA providing its first report based on database information in May 2005.

Insurers, for their part, will continue to monitor the strength of the Civil Liability Act in the Courts. This will involve, where appropriate, challenging interpretations of the law which they believe are not in the spirit or intent of the reforms so that the advances that have been made are protected. These advances include having availability and affordability of premiums return to the public liability market, while ensuring more seriously injured persons get the care they need.

6 Appendix A – Insurers Response to Tort Reform – Update on Availability and Affordability of Public Liability Insurance