Submission No 57

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

Organisation: Walsh & Blair Lawyers

Name: Mr Timothy Abbott

Position: Partner

Telephone: 6926 8268

Date Received: 6/05/2005

Subject:

Summary

Legislative Council

General Purpose Standing Committee No. 1

Inquiry into Personal Injury Compensation Legislation

Submission by

Timothy James Abbott, Partner

Walsh and Blair Lawyers

May 2005

I ask you to accept this late submission. I note that the General Purpose Standing Committee will be in Wagga Wagga to receive further submissions on 23 May 2005 and I would appreciate being able to appear on that day. I note that the General Purpose Standing Committee would have received a large volume of material dealing with the severe curtailment of injured persons rights to compensation following a series of Tort Law Reform Statutory Enactments by the Carr Government following the collapse of HIH in 2001. Those Statutory Enactments have had the effect of:

(a) Severely restricting an injured person's rights in a motor vehicle accident to compensation particularly receiving any money for pain or suffering or non-economic loss because of the necessity to pass the 10% whole person impairment threshold. I **enclose** three (3) recent examples where claimants do not meet the threshold yet suffer serious injuries.

(b) All but removing an employee's right to sue for lump sum compensation, the exception being that a worker is entitled to seek compensation for economic loss if they are able to pass the threshold of being 15% or more whole person impaired in accordance with the 5th edition American Association Guide to the Evaluation of Permanent Impairment. Paraplegics, quadriplegics and very seriously injured workers have no common law rights. I **enclose** two (2) recent examples where workers do not exceed 15% WPI.

(c) Severely restricting claims against Councils and other road authorities.

(d) Limiting rights to persons who are injured through medical negligence by the removal of the Australian test enunciated by the High Court in *Rogers v Whitaker* and reverting to the English Peer Group Test enunciated in the case *of Boland -v- Friem Hospital Management Committee* (1957), WLR 582.

These changes have had a dramatic effect on the rights of injured persons to seek compensation. By way of an example in the District Court at Wagga Wagga, Civil Registry there has to 3 May 2005 been nineteen (19) Statement of Claims issued.

In 2001 there were more than 450 Statements of Claim issued. Wagga Wagga Registry is a central registry for a large area of south west New South Wales. It incorporates towns such as Young, Cootamundra, Narrandera, Gundagai, Tumbarumba and Junee. Of course it is trite to say that just because claims aren't being brought doesn't mean that the people are not being injured. On numerous occasions I have had to inform potential litigants, some with very serious injuries that they are not entitled to receive compensation because of the changes wrought by the Carr Government for the stated purpose of reducing insurance premiums. It is hard to measure the cost on a rural community of the inability to obtain lump sum compensation.

My view is that compensation recipients are extremely sensible in investing their lump sum. It was not uncommon following a District Court or Supreme Court sitting for a large number of injured people to purchase houses and therefore supporting the local real estate industry and the community.

The inability for injured people to receive lump sum compensation means they remained either on Social Security or weekly benefits of Workers Compensation. This has hindered their ability to rehabilitate and obtain employment for which they might be fit. Obviously there is a much increased burden by the community meeting social security payments for injured people. Insurance companies making record profits, are being propped up by ordinary tax payers who have to finance social security disability payments.

I want to deal with one particular matter which has not been dealt with in other submissions that is the effect on liability premiums for non for profit and sporting organisations in the local community.

History

It is well documented that following the collapse of HIH and the terrorism attack in September 2001, that public liability premiums rocketed. This is said to have been caused by amongst other things the fall out in the reinsurance market causing difficulty in obtaining adequate reinsurance.

In 1984 in New South Wales, the *Association Corporation Act 1984* was passed. This legislation allowed non for profit, sporting and other organisations who committees were exposed to being sued personally to incorporate to obtain the protection of the Corporate veil.

When the legislation was first introduced, Section 44 required Public Liability Insurance to be taken out in accordance with the Regulations. In fact the *Association Corporation Regulation of 1999* required an Incorporated Association to hold public liability insurance cover for at least two million dollars. This of course became a real burden on small non-profit charitable sporting and other organisations when the public liability premium blew out.

In December 2002, the Carr Government passed the *Civil Liability (Amendment Personal Responsibility)* Act. This legislation modified the law and makes it in my view almost impossible for an injured participant in any recreational activity (which is defined in the legislation including sporting or organised activity for the purpose of enjoyment, relaxation, or leisure) to sue for damages for personal injuries sustained when participating in that activity when the sporting organisation gives a risk warning to the participants and/or when that participant or their parent or guardian has signed a waiver releasing the organisation from any claim. Furthermore the sporting organisation is not liable in negligence for harm suffered by a participant as a result when the materialisation of obvious risks where the sport or recreation activity involves a significant risk of physical harm.

It is fair to say that before the *Civil Liability (Amendment Personal Loss of Responsibility) Act,* claims against sporting organisations for injuries sustained and/or other non for profit organisations were extremely rare. Now it would seem that in respect of potential claims against sporting organisations for anyone participating in such an activity the rights have been all but removed. The Insurance industry has been ripping off non for profit and sporting organisations by continuing to aggressively sell public liability premiums in circumstances where it is all but impossible to bring a claim. In late 2002 the State Government passed the *Association Incorporation Amendment Public Liability Regulation* which removed clause 14 of the regulations and the need for those incorporated associations to hold public liability insurance in order to become or remain incorporated.

Sporting injury associations that are incorporated are being flogged public liability insurance by aggressive insurance companies when they no longer require the insurance, can't afford to have it, have no assets to protect, can't be attacked personally and against whom a successful claim cannot be brought.

Since the changes to the Regulation permitting an incorporated association not to have any public liability insurance and since the Tort Law Reform removing individuals rights to sue when participating in a recreational activity which involves substantial risk of injury, I have been asked to advise a number of non-profit organisations regarding whether or not they should pay expensive liability premiums. Those organisations include but are not limited to the following:

Council of Heritage Motor Clubs, New South Wales Inc., Batlow Tennis Club Inc., Morundah Recreation Ground Management Committee, Batlow Table Tennis Association Inc., Tumbarumba Pastoral, Agricultural and Horticultural Society Inc., Tumbarumba Rodeo Inc., Wagga Tigers Football Club Inc., Tumbarumba Fest. Inc., Australian Veterans Game Inc., Australian Veteran Games Wagga Wagga Inc., The Boree Creek Tennis Association Inc., The Lake Albert Soccer Sporting Club Inc., Wagga Wagga and District Amateur Soccer Association Inc., The Wagga Wagga & District Cricket Association Inc., the Go-Cart Racing Club (Wagga Wagga) Inc., The Rock Golf Club Inc., Australian Rules Football Clubs and many other organisations.

Various insurance brokers and insurers have criticised my advice which has been for those associations who are incorporated, have no assets, are not required to have an insurance premium and are sporting organisations that they should not waste their money and take out any public liability insurance. In fact I take the view that the selling by some insurance companies of insurance to such organisations is a rip off.

I **enclose** a copy of a story in the Daily Advertiser, Wagga's local newspaper dated 5 September 2003.

I also **enclose** for your information a copy of an insurance policy marketed by Jardine Lloyd Thompson to Country Cricket New South Wales.

When you read the document carefully you seriously wonder what it is that the local cricket associations are getting for their premium. Country Cricket like many of the National or State bodies have organised insurance for their affiliates throughout New South Wales and the country and in most instances impose the insurance on their affiliates on the basis that they have organised on a state or national basis a reduced premium.

Last year, Jardine Lloyd Thompson briefed a firm of solicitors namely Brown & Co. Solicitors, a copy of whose advice I **annex**. In short the insurers who work so hard to remove people's rights to sue for personal injury compensation are now intimidating organisations who should not be taking out insurance to take out cover.

We refer to the penultimate paragraph of the letter from Brown & Co. Solicitors dated 23 April 2004 and make the comment that the whole purpose of the legislation of the *Associaton Incorporation Act 1984* is to protect individuals who otherwise were on the committee for the time being of unincorporated associations being sued. The whole intention was to bring such an organisation within the protection of the corporate veil. No doubt the New South Wales government sensibly and quite deliberately removed the requirement for the unincorporated association to continue to maintain any public liability insurance. The government was encouraging those organisations not to have public liability insurance. To suggest that directors of those organisations who are of course non for profit, have no assets and have some sort of fiduciary duty to those that might otherwise be injured is factious, unreasonable and simply not legally correct. What is, I believe infuriating is that having removed people right's to sue for compensation, the insurers now greedily maintain a need for an organisation to take out public liability insurance. Is this not one of the greatest rip off's that the current community faces in this area?

Both the Brown & Co. Solicitor's letter and indeed the Jardine Insurance Policy enclosed dress up the premium by including elements for public and product liability, director's liability, medical expenses and the like. None of which really construes any particular benefit on any claimant. Why would for instance the Batlow Table Tennis Inc. or the Boree Tennis Club Inc. want to have products liability or director's professional indemnity? How ridiculous!

Finally, I **enclose** table of three (3) insurance companies' profits and estimated profits for the years 2003 through to 2007.

Timothy James Abbott (By his PARTNER : STEPHEN DWYER)

Partner

Walsh & Blair, Lawyers

Wagga Wagga