Submission No 41

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Subject:

Summary

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INQUIRY SUBMISSION

LEGISLATIVE COUNCIL

GENERAL PURPOSE STANDING COMMITTEE No. 1

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

SUBMISSION BY THE LAW SOCIETY OF NEW SOUTH WALES

March 2005

Law Society Submission to the Legislative Council General Purpose Standing Committee No. 1, in response to the Committee's Inquiry into Injury Compensation Legislation

This submission is made in response to the Inquiry by the General Purpose Standing Committee No. 1 (the *"GPSC No.1"*) into personal injury legislation (the *"Inquiry"*). The Inquiry's terms of reference are:

> That the General Purpose Standing Committee No. 1 inquire into, and report on the operations and outcomes of all personal injury compensation legislation (including but not limited to: claims by persons injured in motor accidents, transport accidents, accidents in the workplace, at public events, in public places and in commercial premises but not including claims by victims injured as a result of criminal acts) approved by the Parliament of New South Wales from 1999, 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 cost 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.

The Law Society submission is comprehensive. However the Society has limited information with regard to Item 1 above and reserves its position on those elements of the Terms of Reference not covered in this submission should further information become available during the course of the inquiry.

John McIntyre
President

17 March 2005

TABLE OF CONTENTS

SECTION TWO

ANNEXURES

OVERVIEW

A timely review

This inquiry by the Legislative Council General Purpose Standing Committee No. 1 is timely and entirely warranted given the impact on the lives of thousands of New South Wales residents of the changes to personal injury compensation laws over the past six years. Enough data is now available to begin an objective assessment of both the rationale that underpinned the changes to personal injury laws, and the real impact of those changes.

In addition, the experience of seeing these laws in operation has brought to light clear inequalities and inconsistencies that must be addressed to restore any sense of fairness to the system. In particular, many people seriously injured through the carelessness of others have been left with little or no right to compensation. The Chief Justice of the Supreme Court the Hon JJ Spigelman AC has pinpointed this inequity, stating:

> …some people who are quite seriously injured are not able to sue at all. More than any other factor I envisage this restriction will be seen as much too restrictive.[1]

This submission

The Law Society of New South Wales is the professional association of solicitors in NSW, with a membership of more than 18,300 practising solicitors, or 92.5% of practising solicitors in the state. This submission draws on the practical legal knowledge of lawyers working in the personal injury field along with expert actuarial advice, academic analysis and close observation of political and community opinion.

The submission addresses the Inquiry's Terms of Reference by analysing the rationale for the changes to personal injury laws in light of data now available; assessing the impact of the changes on the community; evaluating the benefits that have flowed to insurance companies; and suggesting a range of measures to address clear inequalities and inconsistencies in the system. The Law Society reserves its position on elements of the Terms of Reference not covered in this submission should further information become available during the course of the Inquiry.

Does the record match the rhetoric?

For all the inflamed rhetoric about an insurance "crisis" and "litigation explosion", it is now clear from the subsequent data that the perceived crisis in availability and price of insurance in the 1999 – 2002 period was largely due to cyclical factors affecting the insurance market exacerbated by one-off events, and not due to excessive litigation or compensation payouts. The data demonstrates that:

- Court judgements were already swinging in favour of defendants before the changes to personal injury law;
- The only significant upsurge in litigation was in *response* to clear indications of impending changes to personal injury law, not *vice versa*;
- The injury compensation schemes and systems were not in permanent decline at the time of the changes to the law; and
- The community has yet to see the significant reductions in premiums or improved availability of insurance that were promised.

Parallels in this regard can be drawn with the UK experience, where the Government's Better Regulation Task Force recently stated that:

> It is a commonly held perception that the United Kingdom is in the grip of a "compensation culture". Newspapers complain that the UK is becoming like the United States with stories of people apparently suing others for large sums of money, and often for what appear to be trivial reasons. Media reports and claims management companies encourage people to "have a go" by creating a perception, quite inaccurately, that large sums of money are easily accessible. It is this perception that causes the real problem: the fear of litigation impacts on behaviour and imposes burdens on organisations trying to handle claims..
>
> ...The compensation culture is a myth; but the cost of this belief is very real. It has got to be right that people who have suffered an injustice through someone else's negligence should be able to claim redress.[2]

Identifying the flaws in the rationale behind the changes to personal injury compensation laws is important in order to assess policy options for the future.

Winners and Losers

Broadly, the changes to personal injury compensation legislation were designed to restrict the circumstances in which damages could be claimed, by imposing thresholds, and restricting the amount of damages that could be achieved by imposing caps. In other words, someone injured as a result of the carelessness of another person first has to demonstrate a severe injury in order to get over the threshold, but even then finds the amount of compensation subject to a cap.

Insurers have been the biggest winners from the personal injury compensation changes. Claim numbers have dropped dramatically and profitability is again high.

In the longer term the restriction or removal of fault-based compensation for negligence undermines both personal responsibility and corporate responsibility by removing or reducing the legal duty of care. In effect it shifts the balance of incentives by sending a message that careless behaviour by an individual or corporation resulting in injury to another person will not attract as great a penalty. These social consequences may be unintended but are no less real.

Correcting the imbalance

It is clear that the changes to personal injury law have gone too far, that the pendulum has swung too far in favour of defendants. The community has suffered in three ways. Individuals have lost rights to fair compensation when they are injured as a result of the carelessness of another person; they are not receiving the significant reductions in premiums that were promised; and community organisations continue to report problems with the availability of insurance.

The personal injury compensation systems and schemes in NSW can be made fairer and more equitable through the adoption of the following changes:

The provisions relating to common law claims in all three statutes, the *Workers Compensation Act* 1987, the *Motor Accidents Compensation Act* 1999, and the *Civil Liability Act* 2002 should, as far as possible, be unified in the interests of fairness and clarity. In that regard, the first stage of the *Civil Liability Act* 2002 changes should be the basis of the unified model.

The *Workers Compensation Act* 1987 should be amended

- to remove the existing threshold for common law claims of 15% of permanent impairment so as to bring victims of work accidents under the same rules as other tort victims;
- to restore the common law rights of seriously injured workers to recover damages for non-economic loss subject to the same threshold as is used for claims subject to the *Civil Liability Act* 2002, the maximum amount recoverable being $350,000 (indexed);
- to restore all other heads of damage which were removed by the *Workers Compensation Legislation Further Amendment Act* 2001 but with such heads of damage to be quantified as provided in the *Civil Liability Act* 2002;
- to abolish the arbitrary retiring age of 65 to allow workers' common law claims for economic loss to be assessed in the same way as other common law claims; and
- to restore the workers' right to common law damages for gratuitous attendant care services subject to the limits imposed on the recovery of such damages by other tort victims.

The *Motor Accidents Compensation Act* 1999 should be amended

- to replace the existing unfair and arbitrary permanent impairment threshold for the recovery of damages for non-economic loss with the threshold for non-economic loss prescribed by the *Civil Liability Act* 2002; and
- to increase the maximum amount of damages recoverable for noneconomic loss to $350,000 (indexed) as provided in the *Civil Liability Act* 2002.

SECTION ONE

Post-1998 changes to NSW personal injury legislation: does the data match the rhetoric?

The Society maintained strongly at the time of the introduction of the *Motor Accidents Compensation Act* 1999, the *Civil Liability Act* 2002 and associated legislation, and the various changes to the *Workers Compensation Act* 1987, that the basis of the legislative changes being introduced was flawed. While the content and circumstances of each piece of amending legislation differed, the Society consistently stated throughout that benefit reduction should not be the first and only approach taken by the NSW Government to perceived injury compensation premium pressure. As the intervening years since the enactment of the Post-1998 Tort Law Amendments has shown, premium pressure is due to a large number of complex factors of which benefit levels may be just one. It is submitted that each of these factors needs to be carefully taken into account and addressed by the Parliament in the tort law amendment process.

An evaluation of the impact of the Post-1998 Tort Law Amendments on the community and on insurance levels, and a subsequent determination of the success of these amendments, must of necessity include an evaluation of the validity of the assumptions upon which the amendments were based. It must also include an assessment of the pattern of legislative change that has been based on these assumptions. By using financial and other information from the period subsequent to the introduction of the Post-1998 Tort Law Amendments, the following section will build an accurate picture of the financial position of each area of tort law at the time that the Government introduced its respective legislative changes. In the light of this information, the submission will then undertake a hindsight assessment of the appropriateness of the assumptions upon which the legislative changes were introduced. The three interconnected assumptions that will be examined are:

> Assumption 1: Before the NSW Government's legislative changes, each respective injury compensation scheme/system was permanently deteriorating.
>
> Assumption 2: The financial pressure causing the apparent deterioration was internal and litigation based, rather than external and structural.
>
> Assumption 3: The most effective solution to the perceived problems affecting each injury compensation area was to reduce injury compensation payouts.

Furthermore, the appropriateness of the pattern of legislative change that the Government consistently adopted based on these assumptions in carrying out its amendments to the tort law area will also be examined. The general pattern that has been historically adopted since 1999 in amending tort law has included the following features:

- Changing tort systems area by area, rather than on a holistic "principled" basis

- Viewing Injury compensation premium levels as being more important than the adequacy of injury compensation payouts

- Enacting State legislation unilaterally in response to perceived financial pressure on tort systems, in preference to adopting a national approach

- Legislatively focussing on reducing injury compensation payments by introducing caps and thresholds, and by reducing legal costs

The analysis of the validity of these assumptions, and the pattern of legislative amendment subsequently adopted, will in turn be used as the basis for determining and evaluating, in Section 2 of this submission, the impact of the Post-1998 Tort Law Amendments, and the options for further legislative changes in this field.

The validity of each of the above assumptions will now be examined in turn.

1.1 Assumptions underlying legislative changes to tort law

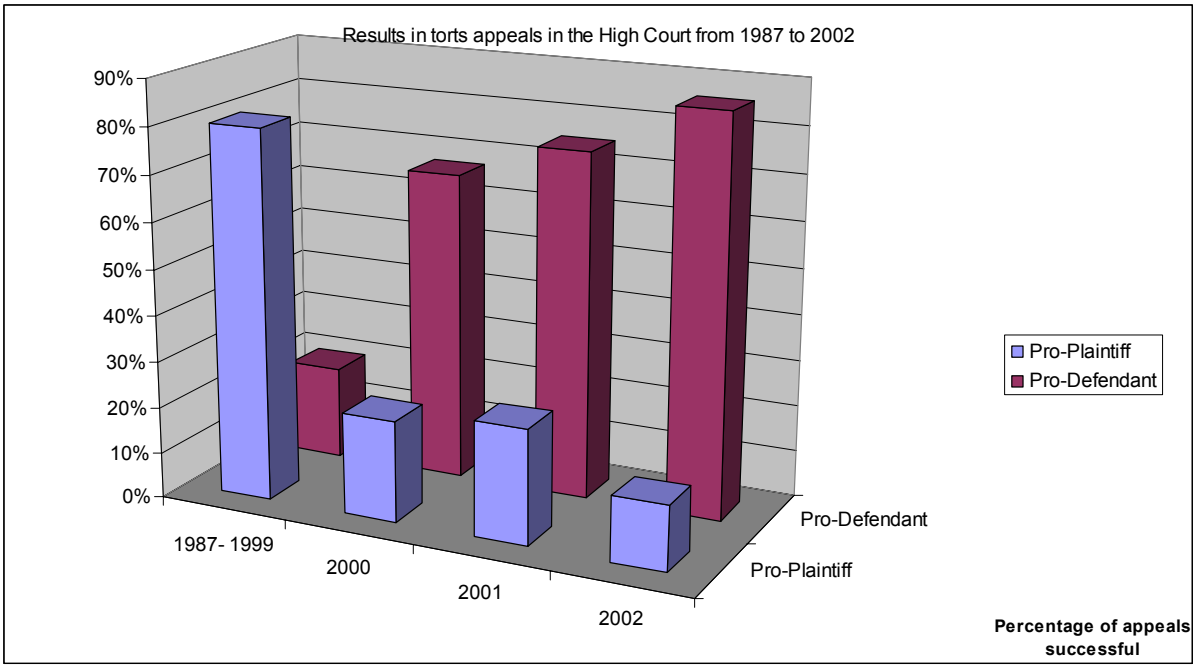
Assumption 1: Before the NSW Government's legislative changes, each respective injury compensation scheme/system was permanently deteriorating

As several years have now passed since the introduction of the Post-1998 Tort Law Amendments, sufficient data is now available to begin an analysis of the true financial position of the Motor Accidents Scheme,[3] the Workers Compensation Scheme,[4] and the public liability area[5] at the time that each was affected by the Government's amending legislation. The data now available clearly demonstrates that:

- The financial position of the major stakeholders in each injury compensation area at the time of the interventions was more robust than previously thought; and
- The premium pressures being experienced within each area at the time the Government legislatively intervened were not as substantially driven by payments to injury victims as had been stated at the time.

In any event, the judicial trend was already moving against payments to injury recipients, and towards defendants. As the Chief Justice JJ Spigelman stated in his 2004 speech, *"The New Liability Structure in Australia"*, there is now a significant body of recent High Court decisions, and an even larger body of intermediate court of appeal decisions, which find in favour of defendants, when the opposite decision would have been made if the previous long-term trend had continued. Over the years there have been a large number of comments by judges criticising the previous trend and advocating its reversal.

This evaluation appears to be backed up by the following statistics from the High Court:



Year	PI Cases	Pro-Plaintiff		Pro-Defendant	
1987-1999	40	32	80%	8	20%
2000	9	2	22%	6	67%
2001	8	2	25%	6	75%
2002	7	1	14%	6	86%

Source: Paper entitled: *"Negligence: Where Lies the Future"* delivered by the Hon Justice GL Davies at the Supreme and Federal Court Judges' Conference, Adelaide, 23 January 2003.

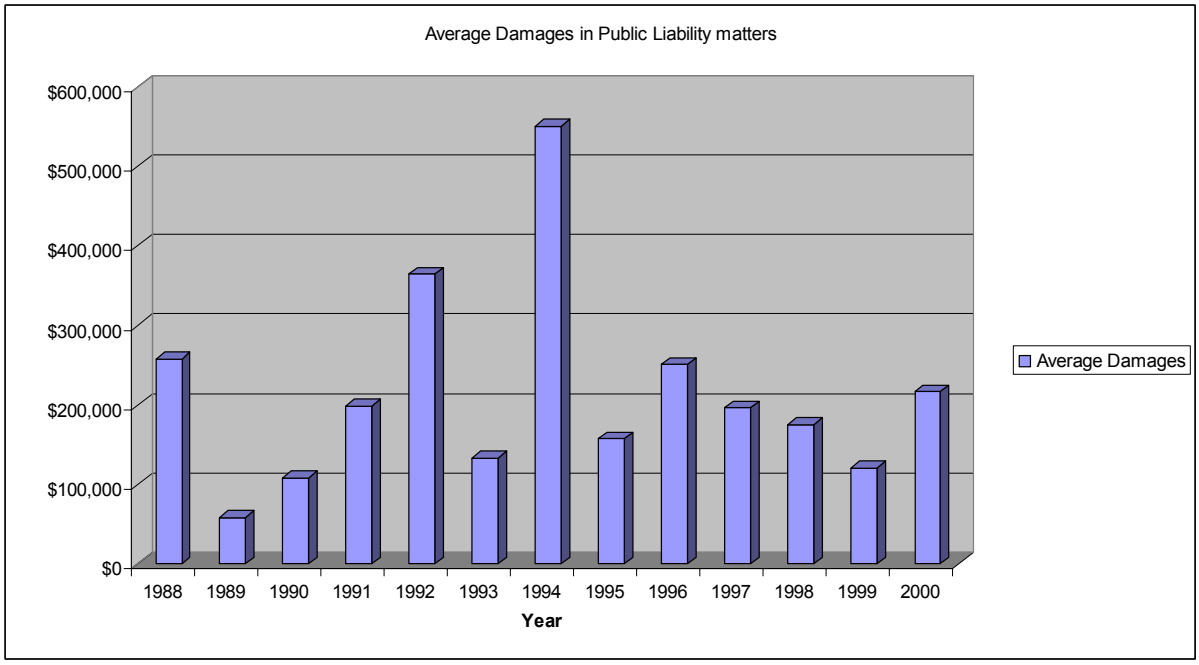
- Motor Accidents Scheme

Turning firstly to the Motor Accidents Scheme, considerable evidence now exists to show that the Scheme insurers were in a solid financial position at the time that the Government introduced the *Motor Accidents Compensation Act* 1999 in response to apparent premium pressure. As the actuarial analysis carried out for the Society by Cumpston Sarjeant and contained in Part 3 of Annexure *"A"* demonstrates, significant profit levels, above the level needed to ensure continued private underwriting of the Scheme, existed in the Motor Accidents Scheme established under the prior *Motor Accidents Act* 1988. As that analysis states, *"insurers made profits in each year from 95-96 to 98-99, averaging 17% of premiums"*. This trend is further borne out by the statistics contained in the table entitled *"3.1 CTP premiums and estimated profits"* set out in Part 3 of Annexure *"A"*.

As such, there seems evidence that the capacity existed to lower premiums and still maintain sufficient profitability to retain private underwriting for the Motor Accidents Scheme. In addition, the benefits of improved profitability flowing from the reduction in compensation payments have not been fully passed on to the states and Territories.

- Public Liability

The Government's claim that premiums were rising unsustainably, and that such rises were due to unsustainable increases in claims expenses, which was its prime justification for its legislative changes to the Motor Accidents Scheme, was also used to justify its changes to public liability laws. Prior to the introduction of these laws, it had been claimed in the media that *"thousands"* of small businesses had gone, or were on the verge of going, out of operation on the basis of the claimed public liability premium rises.[6] However, as the following graph demonstrates, claims expense had remained relatively stable throughout the period leading up to the legislative reforms.



Year	Average Damages
1988	$258,016
1989	$58,174
1990	$108,029
1991	$198,522
1992	$364,379
1993	$133,139
1994	$550,877
1995	$157,284
1996	$250,987
1997	$196,376
1998	$175,271
1999	$120,471
2000	$216,201

Source: Paper entitled: *"Negligence: Where Lies the Future"* delivered by the Hon Justice GL Davies at the Supreme and Federal Court Judges' Conference, Adelaide, 23 January 2003.

In regards to this table, which was apparently produced by the insurance industry to the Review of the Law of Negligence chaired by the Honourable David Ipp, the by the Hon Justice GL Davies stated:

> It is unclear why this was produced but you may recall that public liability was one of the major areas in which insurers claimed that payouts were increasing. To the contrary, this table shows that there has been no significant increase in damages payouts in public liability claims over the last 12 years.
>
> From this albeit sketchy evidence I would be inclined to conclude:
> (a) that for at least the last three or four years the trend has been against plaintiffs in personal injury case and, indeed, in torts cases generally; and
> (b) that the indications are that damages payouts have not increased over a substantial period.

While premiums were indeed rising in 2002, there is now substantial evidence to suggest that the insurers' financial position was much better than was thought at the time. As the by the Hon Justice GL Davies again stated in the same paper:

> It is debatable whether the insurance industry in general is in difficulty. On the contrary there is evidence that general insurance profitability for the year ended 2001 was the highest since 1997 and there is also evidence that, because there are fewer competitors in the market, insurers can be more selective about what insurance they take and at what price.

In this regard, the Queensland Insurance Liability Taskforce paper also indicated that the public liability insurers' profit performance was actually improving prior to the introduction of the 2002 tort law amendments,,[7] with gross losses estimated to have fallen from 378.0M in 1999 to 228.5M in 2000. Furthermore, it has been stated that the general insurers made $1.5 Billion profits in 2001. [8]

While this information suggests that the financial position of the insurers prior to the introduction of the civil liability reforms was not as difficult as previously claimed, an accurate assessment of this situation is still impeded by lack of appropriate data. In addition, as noted in Part 5 of Annexure *"A"* by Cumpston Sarjeant, general insurance statistics are not available from APRA for the quarters ending September 2002 to June 2003. It would be of great assistance to the GPSC No. 1 in consideration of the current terms of reference were such statistics to be made available.

Assumption 2: The financial pressure causing the apparent deterioration was internal and litigation based, rather than external and structural

- Internal v. External Influence

Having supposedly identified serious financial pressures necessitating urgent action in the Motor Accidents and Workers Compensation Schemes, the Government's approach to changes in tort law further assumed that such pressures were internally generated. This

belief was crucial, as it led the Government to focus on instituting changes that reduced injury payments as a means of reducing this supposed financial pressure.

But to what extent were the supposed price pressures affecting the insurance industry and the injury compensation schemes internally, rather than externally, generated? For instance, how do these pressures relate to the understanding that most types of insurance operate according to a business cycle, which is reflective of the balance between profitability and competition in the relevant market. According to this principle:

- As competition increases, generally profitability decreases as new entrants and existing players in the insurance market lower prices in order to compete for market share.
- Conversely, during periods of low competition, such as when the number of players in a relevant insurance market has been rationalised and stabilised, profitability tends to increase.
- In an open market, increased profitability inevitably attracts new entrants, which leads to greater competition and price reduction, thus continuing the cycle.

In addition, insurance levels may also be affected by other factors, such as changes to the international reinsurance market, the collapse of one or more market players, and legislative interventions.

It is now clear that the supposed financial pressures that drove the Government's Post-1998 Tort Law Amendments were due more to such cyclical trends and other non-cyclical factors than they were to internal systemic changes within each of the compensation systems themselves.

- - Public Liability Premiums

The trends in public liability premiums prior to the introduction of the amending legislation in 2002 showed evidence of being affected by cyclical and non-cyclical external factors.

In cyclical terms, while public liability trends declined in the second half of the 1990s, towards the end of 1999, premiums started to increase and by the end of 2000 they had gone up about 20 per cent.[9] This rise coincided with significant market consolidation in the public liability market, with the mergers of AMP/GIO, QBE/Mercantile Mutual, NRMA/GIO and others. [10] At the end of 2002 there were generally considered to be only six major players (Allianz, CGU, IMA, QBE, RSA & Suncorp Metway) competing to underwrite insurance in Australia. [11]

In non-cyclical terms, public liability insurance levels in 2002 had also been affected by several factors unrelated to litigation.[12] As the by the Hon Justice GL Davies again stated:

> To the extent that there have been problems for the insurance industry in the last year or so they seem to have been caused, not by increasing payouts in torts cases, but rather because of four global causes. One is a collapse in global stock markets. Insurers and reinsurers are

major investors in world stock markets and one estimate is that the nett worth of insurers world wide has been reduced by $US175 billion in the last two years because of the downturn in the stock market.

A second recent cause of problems in the insurance industry has been a run of major company collapses, the most substantial being Enron and WorldCom. HIH by comparison was a mere minnow. A third has been a number of major disasters in the last year. The destruction of the World Trade Centre is estimated to have cost the insurance industry $80 billion.

As the Report prepared by the Queensland Insurance Liability Taskforce states,[13] it has been suggested that some of these apparent causes were:

- Poor federal Government policy and regulatory control (general insurers were not subject to intense APRA reviews until 2001),[14] which allowed insurers such as HIH to have poor management controls[15] and to offer very low premiums in the 1990s[16] (especially in the public liability sector[17]) backed up by generally inadequate reserves[18] and imprudent risk management systems.[19] It has been suggested that this price cutting strategy was often adopted to protect market share,[20] in response to the entrance of new competitors to the insurance market between 1992 and 1998[21]. It has also been suggested that, especially between 1997 and 1999,[22] this forced other insurers to lower their premiums to unsustainable levels[23] (considering the long tail nature of public liability claims[24]) led to market expansion[25] and declining profits in this sector of the insurance market,[26] and contributed to the monumental HIH collapse. (HIH held 40% of the public liability insurance market, 50% of the capacity of the local market for small and intermediate risks,[27] and was the second largest insurer[28].) This collapse provoked a *"shake out"*[29] in the industry.[30] This *"major precipitating factor"*[31] also led to a hardening of the insurance market, [32] and a rise in premiums due to lack of market competition.[33]

- New Australian Prudential Regulation Authority (APRA) solvency requirements for long tail classes such as public liability;[34] The financial restrictions imposed by APRA in its new prudential standards, particularly the issue of minimum capital requirements, increased pressures on insurance companies to obtain higher premiums.

- Poor claims experience in the public liability sector from at least 1994 onwards;[35]

- Poor risk management practices;[36]

- A fall in expectations of investment returns during 2002 (upon which the insurers rely for their profits), reflecting declining interest rates (the lowest in decades[37]) and the slowing growth of the US economy. The US economy's decline commenced with the significant stockmarket correction of 1997, and later the US economy went into recession[38] This followed the *"bull run"* in investment markets between 1982 and 2000.[39]

- Higher reinsurance rates, reflecting the global decline in investor income to reinsurers;[40]

- A massive change to the risk profile of the global reinsurance market,[41] resulting in a hardening of that market, following the September 11 2001 terrorist attacks (which cost an estimated A$120 Bn);[42]

- The new need for insurers to cover damages caused by terrorist acts;[43]

- The occurrence of natural disasters;[44]

- The Ansett collapse;[45]

- The Enron collapse;[46]

- The possibility that insurers may be using high premiums as a signal that *"they are reluctant to continue providing cover especially for groups such as adventure tourism operators"*[47] (in some cases tourism operators have been unable to obtain cover);[48] and

- A growth in the size of the adult Australian population;[49]

- - Health Care Liability

As stated by the Law Council of Australia in its *"Law Reform Resource Kit"*[50]

> Historically, medical indemnity providers inadequately reserved for their liabilities. Premiums remained low throughout the 1970s and 1980s, even as claim rates began to rise. Another issue of concern was the shift from mutuality (a common premium rate for doctors) to risk-rated premiums (certain specialists were required to pay considerably higher premiums).
>
> Particular problems were caused in 2002 when UMP the largest medical indemnity insurer in Australia went into provisional liquidation as a result of a number of pressures, including poor management in the 1990s, underprovisioning for long-tail claims, a sharp increase in premiums and the failure of its re-insurer, HIH. Additional problems were caused by the withdrawal of insurer St Paul from the primary medical indemnity insurance market and the implementation of financial restrictions imposed by the Australian Prudential Regulation Authority (APRA) and its new prudential standards, including those relating to minimum capital requirements.

- - Motor Accidents Scheme

As with public liability premiums, premiums in the NSW Motor Accidents Scheme appeared to follow a cyclical pattern prior to the introduction of the *Motor Accidents Compensation Act* 1999, but one which was also affected by legislative intervention. As stated in Part 3 of Annexure *"A":*

> Reductions to non-economic loss damages were made for accidents from 26/9/95. Earned premiums increased by 35% in 95-96, and by 27% in 96-97. As a result of the benefit reductions and the premium increases, insurers made profits in each year from 95-95 to 98-99, averaging 17% of premiums.

- *Litigation based*

The second part of the Government's assumption that the financial pressures causing the apparent deterioration of each of the areas of injury compensation were internal and litigation based, rather than external and structural, was the belief that the premium rises experienced within each area of tort were directly related to proportionate rises in litigation levels. The corollary of this belief was the view that reducing premiums must involve restricting litigation. The basic argument that has been used by the NSW Government in this regard in support of each of the elements of the Post-1998 Tort Law Amendments is as follows:

1. That a litigation explosion is occurring, with society becoming increasingly litigious,[51] with more frivolous claims being litigated, and with larger awards and settlements being granted.[52]
2. That the litigation explosion has been caused by the advertising and pro-litigation attitude of the legal profession,[53] which is fostering greed and a litigation *"jackpot"* mentality.
3. That the litigation explosion has driven up the costs of personal injury compensation and caused a crisis, making the business of insurance/running an injury compensation Scheme financially unsustainable.
4. That the crisis has harmed the community, resulting in higher premiums.
5. That Government intervention must be directed towards strictly curbing the ability of injured people to litigate their personal injury claims.

The pivotal point in this argument is Point 3 (i.e. *"That the litigation explosion has caused an insurance crisis"*).Each time this view has been presented, it has been seemingly against a backdrop of a large amount of contrary evidence and a failure to consider alternatives. For example, in the case of the introduction of the *Health Care Liability Act 2001*, the Government failed to clearly and independently demonstrate to Parliament:

- The financial and structural need for reform of the health care liability field;
- Why such reform should focus on reducing compensation;

- How such reforms would address the field's long term difficulties; and
- Why it had chosen to reform the field by directing its energies against the *"soft targets"*, namely the injured, and shied away from dealing effectively with the field's underlying problem, the health care indemnity providers' structural difficulties.

The difficulty with the presentation of this argument can be seen most clearly in regards to the debate on public liability laws, which occurred in 2002. Little evidence was produced by the Government at the time, nor has it been since, to demonstrate that premium rises were directly linked to public liability litigation rates. Indeed, given the apparent rapidity of the premium increases, their precise coincidence with a number of very significant external events that have significantly affected the insurance industry (as above), and the slow moving nature of litigation trends, it seems highly unlikely that public liability litigation caused the 2002 premium price *"spike"*; As the Queensland Insurance Liability Taskforce stated in its February 2002 report:

> lawyer advertising and our current judicial process.. ..are not the only contributing factor and certainly do not solely explain the very large increases in premiums which have recently been experienced. [54]
>
> ….The key finding of the study is that *"the data do not support any conclusion that enactment of tort law limits since the liability insurance crisis of the mid-1980s has succeeded in reducing insurance costs to insurance consumers."* The study concluded:
>
> > Just as the liability insurance crisis was ultimately found to be driven by the insurance underwriting cycle and not a tort law cost explosion as many insurance companies had claimed, the remedy (tort law reform) pushed by the insurance companies failed. Laws that restrict the rights of injured consumers to go to court do not produce lower insurance costs or rates, and insurance companies that claim they do are severely misleading this country's lawmakers (Hunter&Doroshow, 1999:19).
>
> The history of law reform in the United States that precipitated the study, as explained therein, bears a remarkable similarity to what is presently occurring in Australia and internationally.[55]

As already noted, the pendulum was already swinging in favour of defendants in court judgements, a point noted by the Hon. J J Spigelman. Furthermore, statistics from the District Court show a sharp upsurge in claims filed during 2001-02, in anticipation of changes to the law. In other words, rather than a so-called litigation "explosion" being a valid rationale for changes to the law, it was the impending legislative changes that seem to have sparked the temporary spike in litigation.

Australia is not alone in experiencing exaggerated claims of an outbreak of excessive litigation. As noted at the outset of this submission, the United Kingdom's Better Regulation Task Force recently examined the "commonly held perception that the UK is in the grip of a 'compensation culture'" and concluded that it was a myth.

Assumption 3: The most effective solution to the perceived problems affecting each injury compensation area was to reduce injury compensation payouts

As outlined above, it now seems clear that the various personal injury compensation schemes and systems were not in permanent decline at the time of the amendments to personal injury law. It logically follows then that the chosen solution – to permanently reduce injury compensation entitlements – was not the most effective or appropriate solution to the problem. This is borne out by the subsequent events. Court filings have plummeted, insurance company profits are skyrocketing but premiums remain high and complaints about the unavailability of insurance continue. These issues will be examined further in Section Two below.

In the longer term the restriction or removal of fault-based compensation for negligence undermines both personal responsibility and corporate responsibility by removing or reducing the legal duty of care. In effect it shifts the balance of incentives by sending a message that careless behaviour by an individual or corporation resulting in injury to another person will not attract as great a penalty.

An example of the unintended consequences this type of change can have occurred in New Zealand following the introduction of the no-fault Accident Compensation Scheme in the mid-1970s. Workplace safety appears to have deteriorated under the Scheme's no-fault structure, as the system has lifted the compensation onus off the party responsible and placed it on the taxpayer. Analysing the outcomes, Chief Judge Thomas G Goddard noted:

> The abolition of the right of action for breach of the duty of care in practice also abolished that duty, except where it was independently supported by criminal sanctions. Those sanctions, however, had no teeth, and a resurgence of workplace injuries soon assumed epidemic proportions.[56]
>
> In half a decade, the number of serious accidents had doubled…..It is still clear that the work environment is many times more dangerous a place to be in today than it was in 1974.[57]
>
> …it is necessary also to take great care to guard against unwanted social consequences of the displacement of a legal duty of care and its replacement with a responsibility vacuum.[58]

1.2 Patterns and characteristics of the tort law amendments

Changes to tort systems made area by area, rather than on a holistic "principled" basis

The manner in which tort law has been amended in NSW since 1999 has been largely ad hoc and in response to specific perceived crises in specific areas. In contrast to this approach, the Society has argued, in the paper by Dr John Ball entitled *"Uniform Tort Law: A Fairer System for a Fairer Result: Recommendations for a balanced system that treats*

everyone equally" (the *"Ball Report"*), that a more *"principled"* tort law reform basis is appropriate:

> **Statutory reform must be 'principle driven reform'**
>
> Critics of some aspects of the statutory intervention in tort law have been concerned that they are based on *ad hoc* decisions rather than on universally defensible principles. Examples of such decisions include the 1999 reform of the motor accident compensation system to meet the electoral promises of the recently re-elected government of 'a $100 reduction in the average price of greenslips' and the 2001 reform of work-related accident compensation law which effectively removed the worker's right to sue the employer for common law damages and was directed expressly at reducing premiums to 2.8% of the payroll from an estimated 3% of payroll.13
>
> The only truly defensible model of legislative intervention is that which has been identified by the Chief Justice of NSW, the Hon JJ Spigelman AC as 'principle driven reform'. He has argued that restricting liability and damages in accordance 'with the application of universally applicable principles' is equally capable of restraining the escalation in insurance premiums as is *ad hoc* decision making.14 It is implicit in such an approach that there should be compelling reasons shown if victims of negligence in the workplace, in motor accidents, in the health care area, or in the broader area of public liability are not provided with the same access to the common law system and with the same basis for assessment of their damages for their injuries.

Injury compensation premium levels seen as more important than the adequacy of injury compensation payouts

The central consideration that has driven the Government's changes to injury compensation law NSW since at least 1999, and perhaps the cause of its *ad hoc* reform approach, has been its focus on cost reduction and the reduction of premium levels. This focus has been to the apparent exclusion of the adequacy of the payments made to injury victims. Moreover, the Government has repeatedly used premium levels as the main measuring stick for determining the success of each element of the Post-1998 Tort Law Amendments. For example, while the *Motor Accidents Compensation Act* 1999, retains, in name at least, an emphasis on the Scheme's central *"compensation"* function, the Scheme's primary design and operating focus has been, and remains, fixated on reducing premium levels. This pattern has been repeated in the design and operation of the other elements of the Post-1998 Tort Law Amendments.

The Government's tendency to present the compensation needs of the injured as a discretionary financial interest, and one which is in competition with premiums, rather than as a social right (the right of restitution), has allowed it to create systems in which fair compensation has given way to financial and political concerns. The fact that the injured's need for compensation is no longer viewed as being on the same level as these larger

interests has allowed the Government's post 1998 tort law legislative change agenda to be implemented almost entirely at the expense of the injured. As such, the Government focused heavily on the merits of benefit reduction when introducing each element of the Post-1998 Tort Law Amendments. Yet, within this process, the Government seemingly directed little attention to the *"bigger picture"* concerns of insurer profitability and the appropriateness of using benefit cuts as a cost saving measure.

When the Government did address such issues, it did so in passing, or in terms that have subsequently been shown to be ineffectual. For example, during the Parliamentary debate of the *Motor Accidents Compensation Bill* 1999, the Hon John Della Bosca MLC stated in Parliament on 3 June 1999 that:

> At present, the profit component of the green slip premium is between 8 per cent and 10 per cent per premium....the appropriate level of profit for insurers will be far less or significantly less than it is currently....a significant proportion of the savings in green slip premiums will be achieved through changes to the system of claims handling and a reduction in legal expenses and **insurers' profits** (emphasis added).

Further, on 22 June 1999, during the second reading debate, he stated that:

> profits will be reduced as the *[Motor Accidents Compensation] Bill* comes into operation.

During the same debate, the Hon Ian McDonald MLC mentioned that:

> The (expected) substantial reduction in green slip prices comes from savings in legal costs and **insurers' costs and profits** (emphasis added).

Yet, despite the Parliamentary promises of lower insurer profits, as will be shown later in this submission, benefits have dropped but insurer profits have remained high.

State legislation enacted by Government unilaterally in response to perceived financial pressure on tort systems, in preference to a national approach

Another trend that has characterised the State Government's reform of various tort laws since 1999 has been its consistent adoption of unilateral legislation in place of legislation developed with its state and Territorial counterparts in the context of a national framework.

For example, during the public liability debate, it became clear that, due to the nationally determined nature of public liability premiums, a nationally consistent approach to the problem (which would presumably generate economies of scale) was to be preferred. As the Queensland Insurance Liability Taskforce stated:

> It is certainly true that changes to common law can be achieved through mechanisms available at the State level. However, the Taskforce believes that the issue is best dealt with through a consistent national approach. This can include sharing of information and learnings

> as well as the possibility of developing consistent legislative changes. Any changes in this area will take considerable time and in particular, there needs to be sufficient time allowed for informed community debate about what directions we should be taking in this area.
>
> …The Taskforce believes that calls for reform of the common law system in respect of personal injuries need to be more closely examined and are best addressed at the national level. Any tort reform emerging from discussions at the national level will be a long and involved process and it is crucial that a coordinated approach is put in place so there are not several different systems developed across the country.[59]

On this basis, Recommendation 14 of the Queensland Liability Insurance Task Force stated that:

> The Taskforce recommends that the issue of law reform be referred to the Council of Australian Governments (COAG) to explore the development of a national approach to reviewing common law damages for personal injury.

Nevertheless, the NSW Government's legislative approach to the problem was very much state-based.

Legislative focus on reducing injury compensation payments by introducing caps and thresholds, and by reducing legal costs

A further trend, which has underpinned all of the elements of the Post-1998 Tort Law Amendments, is the Government's use of thresholds, compensation caps and legal costs caps as a means of reducing compensation payments. The difficulties with this approach, which are common to all elements of tort law to which it has been applied, are twofold. First, the thresholds imposed are not clearly linked to the financial pressures affecting such compensation systems. Second, such measures are ideologically problematic in that they arbitrarily discriminate against the injured. Some of the difficulties associated with the imposition of thresholds, as identified in the Ball Report, are attached in Annexure *"B"*.

(The difficulties of this approach in practice will be considered in more detail in Section 3 of this submission.) As the Tasmanian Department of Treasury and Finance has stated:

> - the purpose of an award of damages is to put a claimant in the same position he/she would have been in, but for his/her accident. Capping awards assumes that the claimant is obtaining a *"windfall"* as a result of his/her accident. In addition, there may be an unintended redistribution of responsibility for payment of future costs – eg instead of meeting medical expenses from an award, a claimant may turn to the public health system for subsidised medical treatment;
> - a cap would need to be set at the top end of the scale of possible awards. Although the cost of large claims contributes significantly to the overall cost of claims, the saving resulting from a cap would be relatively small; [60]

Furthermore, even if a cap is to be introduced, in the absence of detailed financial information regarding the area of tort in which it is to be imposed, legislators are forced to

effectively guess at what level it should be set. To set it too high would not adequately achieve the desired reductions in compensation payments; to set it too low would unnecessarily deprive stakeholders of their compensation.

Similar arguments apply with regards to the imposition of compensation thresholds.

SECTION TWO

Winners and losers: Assessment of the operations and outcomes of all personal injury compensation legislation enacted since 1999

The current relevance of the assumptions that have underpinned the Post 1998 Tort Law Amendments is the impact that they have had on the operation and outcomes of the State's injury compensation laws. As will be shown below, deficient assumptions have often translated into deficient compensation performance, and have created tort systems requiring further amendment. Some of the aspects of that performance will now be considered.

2.1 What's the financial state of the compensation schemes/systems? Has it improved?

- Profits and premiums.

- - Insurer profits in general

The Australian Prudential Regulatory Authority's (APRA) Quarterly General Insurance Performance publication, released on 6 January 2005, showed that the insurance industry had "recovered strongly from its lows of several years ago" with strong growth in insurer profitability and asset bases.

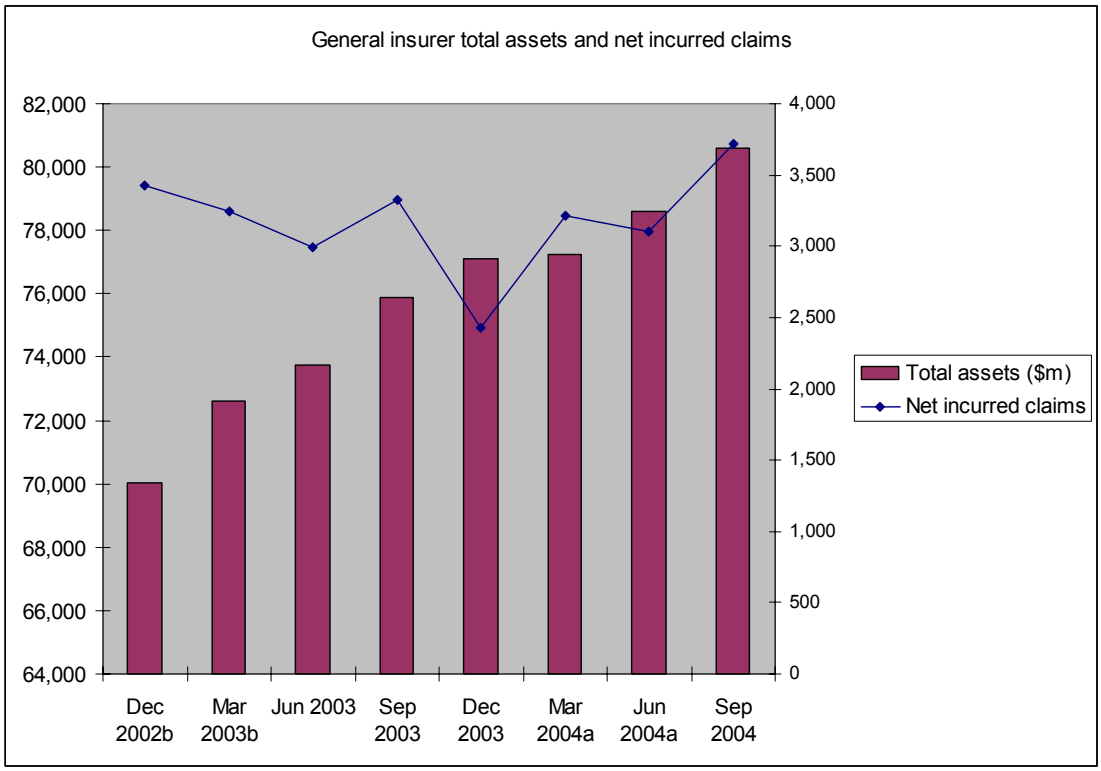
These results were also reflected in the KPMG General Insurance Industry Survey 2004, which stated that:

> The 2003/2004 reporting season was characterised by the most favourable industry results in decades. All insurers surveyed showed increases in gross written premiums which, in total, increased by 12 percent from last year. Underwriting profitability before tax improved y 428 percent to circa $1.6bn, whilst investment returns added a 73 percent improvement (year on year) with a contribution of over $2bn. Profit after tax improved from last year's figure of $916m to $2.5bn.

This profitability appears to be being fuelled by two factors:

- **Consistently strong underwriting results**[61] (insurance premiums which, while stable, appear to be systematically higher than net incurred claims values); and
- **High investment volumes and returns** (resulting increasing insurer assets combined with high returns on investments (due to the current economic climate))

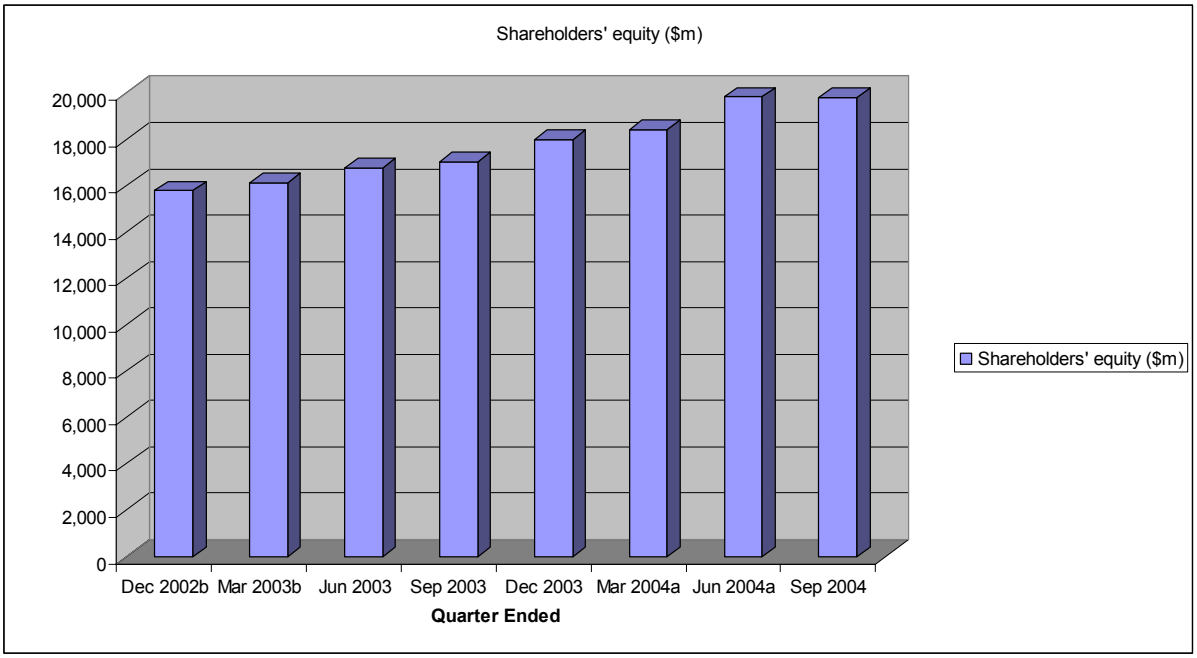
Turning firstly to the underwriting result: In the year ended Sept 2004, the insurers made a $3.3Bn underwriting profit, up from $2.3Bn from the year ended Sept 2003.



Source: Australian Prudential Regulatory Authority's (APRA) Quarterly General Insurance Performance publication, released on 6 January 2005

However, as the above graph shows, while premium and incurred claims levels have remained relatively static over the last two years, the assets of the insurers steadily increased (indicating premiums are higher than they need to be). General insurer assets rose by $3.1 billion to $23.3 billion, up 15.3 per cent from the previous year, and increased by 37.2% over the two years from September 2002 to September 2004. (Total assets for the industry were at $80.6Bn, up by $4.7Bn.)

The increase of this asset base, under conditions where liabilities have remained basically static, is most clearly seen in the increase in shareholder equity:



As such, it appears that the systematic profiteering of the insurers is occurring at the expense of the general economy, the community and, perhaps, of insurance availability. It is unclear the extent to which this profitability represents the peak of the insurance cycle, and the extent to which it represents part of a continuing trend (which may prompt legislative intervention). The APRA report makes no comment on this point, while the KPMG report views the insurance recovery from previous losses as not yet being complete.

In its analysis of future developments, the KPMG report states that:

- The chances of the current hard insurance market collapsing into a soft market are distant;
- Insurers have a commercial incentive to keep premium levels within reasonable limits; and
- Australian insurers are moving more towards “sustainable underwriting”, which should reduce market fluctuations and improve investor confidence.

All of which seems to suggest that the current situation is likely to continue future.

In addition, information recently released showed that the net profits for Suncorp, IAG and QBE had all risen by over 40%.[62] The insurers’ recent profit figures arrive on the back of strong profit growth in 2004, as set out in the APRA’s *Quarterly General Insurance Performance* publication for September 2004. The APRA’s study revealed that total insurance industry net profit after tax for the year ended 30 September 2004 was at $5.0 billion, an increase of over 50 per cent on the previous year. Despite such strong growth in profits, the insurance industry has indicated that it is unlikely to reduce its premiums.

- - Motor Accidents Scheme

The operation and outcomes of the Motor Accidents Scheme can be measured against its two main objectives. The Scheme's apparent primary objective has always been to enable licensed insurers to reduce their average Greenslip prices by $100, through reducing Scheme costs (including insurer profits). The Scheme's secondary objective, which stands independently alongside the first and cannot readily be harmonized with it, is to maintain reasonable levels of compensation for the road injured.

The statistical information available after the Motor Accident's Scheme's first three years of operation has indicated it to be an unbalanced system. It has revealed that the drive to reduce premium costs has kept compensation out of the hands of road accident victims, but allowed insurers to generate high gross annual profits on motorists' premiums.

An example of this imbalance can be seen in the analysis, prepared by Cumpston Sarjeant and contained in Part 3 of Annexure *"A"* to this submission. The table entitled *"3.1 CTP premiums and estimated profits"* and the graph entitled *"CTP profits as a % of premiums"* within this analysis clearly demonstrate that insurer profits have risen and remained high under the Scheme, despite the Scheme's substantial benefit reductions. Indeed, as the analysis states,

> In the four years before the 1999 changes, CTP insurers made profits averaging about 17% of premiums.

and further, that

> estimated profits varying between 11% and 31% of premiums from 95-96 to 02-03, averaging 24%. The profits are far above those considered reasonable by Taylor Fry, and well above those considered reasonable by the insurers or MAA.

The analysis goes on to point out that the levels of profit indicated by that graph appear to be far in excess of the 6.5% to 10% benchmark figure referred to on page 101 of the MAA's annual report. Clearly there was a capacity to reduce premiums without the severe reductions in benefits to the injured.

As the report further states:

> The large profits apparently made by insurers in the 8 years to 30/9/03 reflect actuarial estimates in insurer premium filings that have subsequently proved to be pessimistic. This sustained pessimism has had two serious consequences
>
> - benefits to the injured have been needlessly reduced
> - premiums paid by motorists have been needlessly high.

Furthermore, the relationship between insurer profits and premiums is further demonstrated in Annexure *"C"*, also prepared by Cumpston Sarjeant.

As noted in that analysis, it would be of assistance in the evaluation of the Scheme's operation and outcomes if the Motor Accidents Authority were to make more detailed information available to the GPSC No. 1.

- - Public Liability

Similarly, and perhaps for the same reasons, the information now available on the operation and outcomes of the public liability laws established under the *Civil Liability Act* 2002 indicate that the only thing the Act has succeeded in reducing is injury compensation. As the attached analysis from Cumpston Sarjeant in Part 5 of Annexure *"A"* demonstrates, public liability insurers apparently made a profit of about 19% of premiums in the year ending June 2004. Moreover, as the graphs entitled *"Premiums in year ($m)"* contained in Annexure *"A"* (at paragraph 5.1), and "*Profits in year, as a % of premiums"* (at paragraph 5.4) demonstrate, public liability insurer premiums have continued to climb during this period. Furthermore Annexure *"C"*, also prepared by Cumpston Sarjeant, demonstrates that even as a proportion of premiums, insurer profits are rising.

A number of claims were made at the time of the introduction of the *Civil Liability Act* 2002. The Government predicted that the changes would result in public liability insurance premiums falling by 12%[63]. Instead premiums rose 44% in 2002 and a further 17% in 2003. Even with the fall in public liability premiums recorded in the latest ACCC monitoring report premiums remain close to double the 1999 levels (see page 29).

The failure of the *Civil Liability Act* 2002 to achieve its primary purpose of reducing public liability premiums may well relate to the deficiencies of the assumptions underlying it.

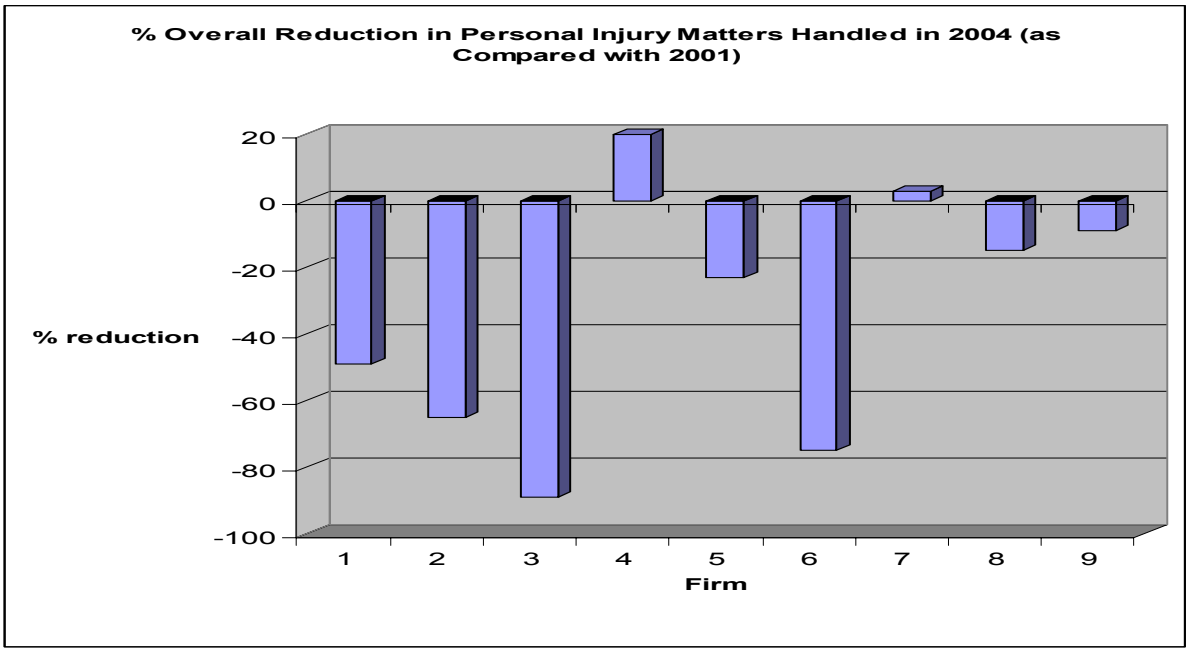
- - Workers Compensation Scheme

Furthermore, as will be described in more detail below, while the legislative changes to the Workers Compensation Scheme have reduced injured workers' access to compensation, the changes do not seem to have had a commensurate effect in improving the Scheme's premium levels or financial position. As the information provided by Cumpston Sarjeant and contained in Part 4 of Annexure *"A"* states (at paragraph 4.6), data setting out the analysis of payment type for the Workers Compensation Scheme is not available after 2003. However, it is noted from that Annexure that while major workplace injuries per 1000 employees fell by about 26% from 97-98 to 02-03, *"the average premium rate was unchanged."* Notwithstanding what should be an improvement in Scheme conditions, the graph entitled *"4.5 Assets as a % of liabilities"* demonstrates that the Workers Compensation Scheme's net assets as a % of liabilities actually *decreased* over this period, from 78% in 1998 to 73% in 2004.

2.2 Claims numbers

- Claims numbers overall

In an overall sense, it is clear that a key outcome of the post 1998 amendments to tort law has been to reduce the community's access to the tort law system by reducing the number of personal injury claims made, especially since 2001. The following graph, obtained from survey data supplied by some of the state's top personal injury firms, demonstrates this phenomena from the perspective of the number of injured persons engaging solicitors in personal injury matters.



While the short to medium term trend has been for premiums and claims numbers to remain static, over the longer term ACCC monitoring has shown claims numbers falling and premiums rising, perhaps indicating movement to the top of the insurance business cycle:

Chart 4.1 Total number of claims reported within the same year as incident and frequency of claims reported within the same year as incident (compared to total policies)—public liability—1998 to 2003

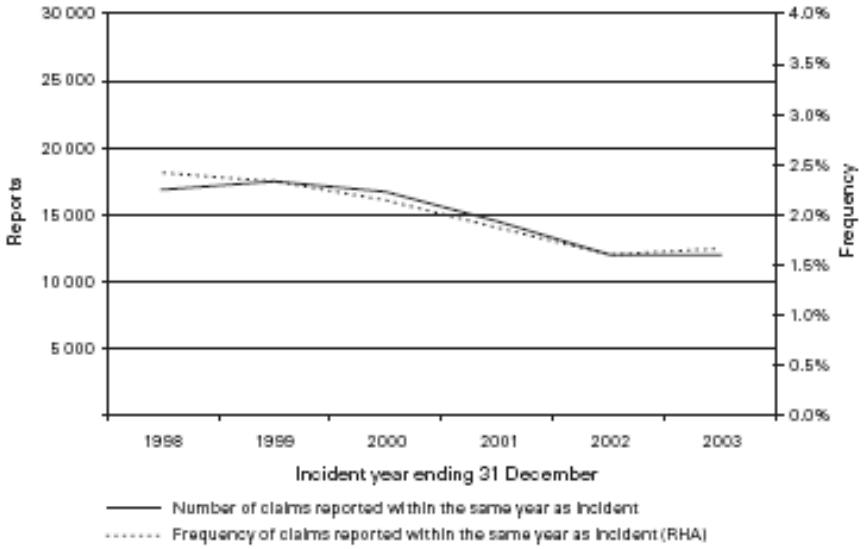
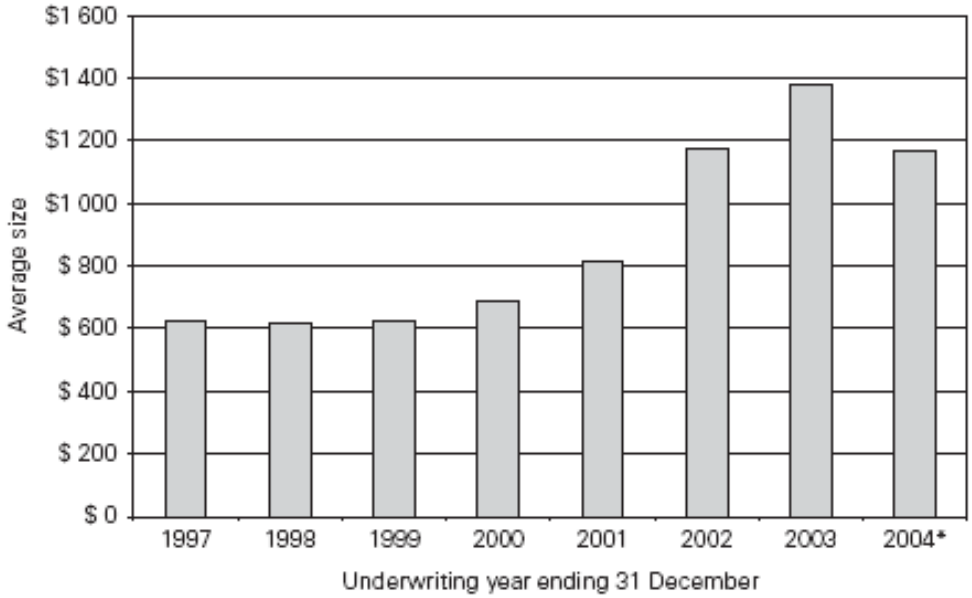


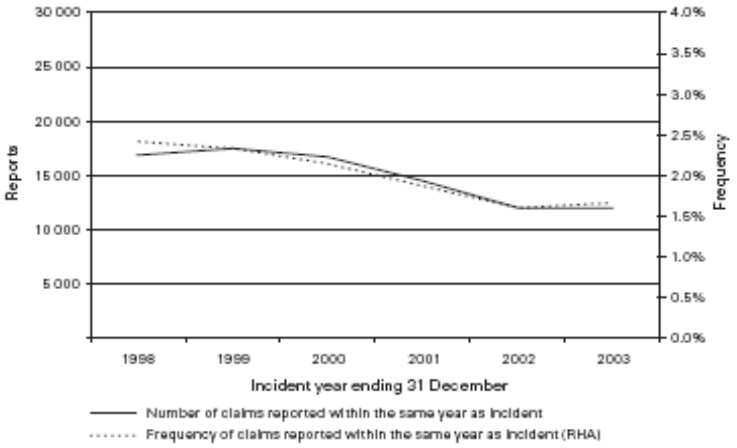
Chart 3.4 Average premium—real terms—public liability—1997 to 2004*



Notes: * 1 January to 30 June 2004.
Data is shown in real terms adjusted to 30 June 2004 values using AWE index.
Derived by ACCC from responses provided by seven insurers.

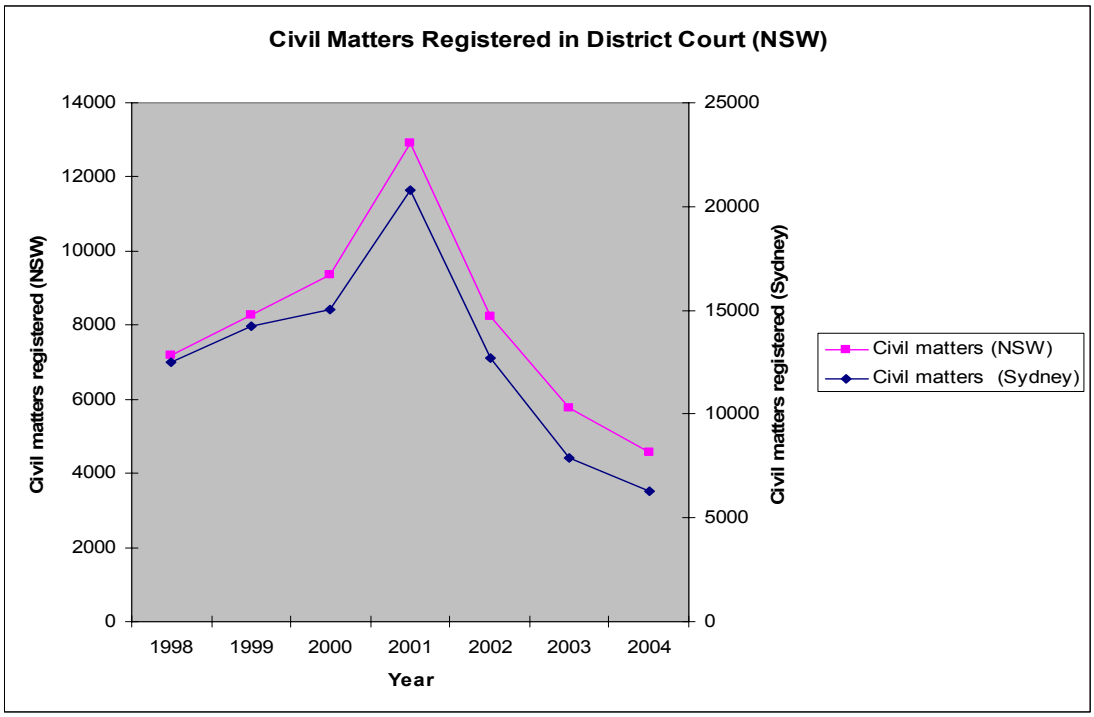
Chart 4.1 examines the number of claims reported to insurers within the same year as the incident occurred (reported within the same year as incident), and the frequency of claims reported within the same year as incident when compared to total policies over the incident year period 1998 to 2003.

Chart 4.1 Total number of claims reported within the same year as incident and frequency of claims reported within the same year as incident (compared to total policies)—public liability—1998 to 2003



Source: Derived by ACCC from responses provided by seven insurers.

This trend is repeated in the next graph and statistics, which show a similar decline in the number of tort matters lodged with the District Court over the last few years.



Year	Civil matters registered (NSW)	% change	Civil matters registered (Sydney)	% change
1998	12500	+15%	7182	-27%
1999	14261	+14%	8272	+15%

2000	15070	+6%	9348	+13%
2001	20784	+38%	12916	+38%
2002	12686	-39%	8220	-36%
2003	7912	-38%	5755	-30%
2004	6275	-26%	4570	-21%

Source: District Court (letter from His Honour R.O. Blanch, Chief Judge, District Court, 7 March 2005)

This trend is set out in more detail in Annexure *"D"*, which contains extracts from the NSW District Court 2003 Annual Review. Unfortunately at this stage the Court does not publish differentiated data to show the individual trends for public liability or medical indemnity claims. In addition, the District Court Registry has informed the Society that the 2004 Annual Review (which covers court statistics for the 2004 calendar year) is not likely to be publicly available until March 2005 at the earliest. However, it may be of assistance to the GPSC No.1 in addressing the Inquiry's terms of reference to request that such data be provided.

The District Court figures show a distinct "spike" in claim numbers in 2001-02. This is of interest in that it reflects a rush of claims *in anticipation* of changes to personal injury law including those brought about by the Civil Liability Act 2002. In hindsight it is now clear that far from there being an actual litigation explosion requiring a legislative response, the only sudden upsurge in litigation was in fact prompted by the legislative change itself.

- Effect of various thresholds

Another aspect of the tort law legislative amendments instituted since 1998 that impacts upon the community's access to injury compensation legislation, and which is perhaps reflective of the *ad hoc* manner in which these changes have been instituted, is the inconsistency that has arisen between tort law systems. The following table sets out the different thresholds and monetary caps for non-economic loss damages that currently apply for workers compensation, motor accidents and public liability matters.

As the Hon JJ Spigelman AC stated:

> In particular, the introduction of caps on recovery and thresholds before recovery - an underwriter driven, not a principled change - has led to considerable controversy. The introduction of a requirement that a person be subject to fifteen percent of whole of body impairment - that percentage is lower in some States - before being able to recover general damages has been the subject of controversy. It does mean that some people who are quite seriously injured are not able to sue at all. More than any other factor I envisage this restriction will be seen as much too restrictive. [64]

	Motor Accidents Matters	Workers Compensation Matters	Medical Negligence Matters & Civil Liability Matters
What's the threshold for recovering damages for pain and suffering?	**> 10% permanent impairment.** (No damages may be awarded for pain and suffering unless the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10%)	*Common law:* "permanent impairment of the injured worker… …[must be] at least 15%" as a result of the accident[2] *Statutory scheme:* Injury must cause at least 10 % permanent impairment.	The injuries must constitute at least 15% of a most extreme case, with assessments between 15% and 32% being subject to a sliding scale .
How is the threshold measured?	American Medical Association's Guides to the Evaluation of Permanent Impairment 4th edition (modified).	*Common law and statutory scheme* American Medical Association Guidelines, 4th and **5th Editions**[6] (modified) and the WorkCover Authority Guidelines	Common law principles.
Who does the assessment?	Medical assessors within the Medical Assessment Service (a department of the Motor Accidents Authority).[8]	*Statutory scheme:* "Approved medical specialists" appointed by President, Workers Compensation Commission for both common law[9] and statutory schemes.	It is a judicial assessment. That is, the judge hearing the case makes the assessment.
What is the cap?	The maximum amount that a court may award for non-economic loss is $284,000 (indexed)	*Common law* No cap. *Statutory scheme* Pain and suffering can not exceed $50,000	The maximum amount of damages that may be awarded for non-economic loss is $350,000, but the maximum amount is to be awarded only in a most extreme case.

Furthermore, due to the unilateral tort law amendment approach taken by the State Government, such inconsistency now extends to the thresholds applied in NSW and the other Australian states and territories. The following extract from pages 189-190 of the Commonwealth Treasury Department's *"Review of the Law of Negligence Report"*, dated 2 September 2002 demonstrates the extent of this inconsistency:

Table 1: State and Territory civil liability schemes — general damages

Jurisdiction	Cap	Threshold
New South Wales *Civil Liability Act 2002* (NSW)	$350,000*: s 16(2)	15% of a most extreme case: s 16(1)
Victoria Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002 (Vic)	$371,380*: s 28G	No threshold
Queensland *Personal Injuries Proceedings Act 2002* (Qld)	No cap	No threshold
Western Australia Civil Liability Bill 2002 (WA)	No cap	General damages at least $12,000*: ss 9(1) and 10(1)
South Australia *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA)	$240,000* (weighted scale, 0—60 x $1,710*: ss 24B(2)(a), (b)	7 day impairment: s 24B(1)(a); or $2,750* in medical costs: ss 24, 24B(1)(b)
Australian Capital Territory Civil Law (Wrongs) Bill 2002 (ACT)	No cap	No threshold
Northern Territory Personal Injuries (Liabilities and Damages) Bill 2002 (NT)	$250,000*: s 24(a)	$15,000*: s 25(a)

*Indexed

Table 2: State and Territory motor accident schemes — general damages

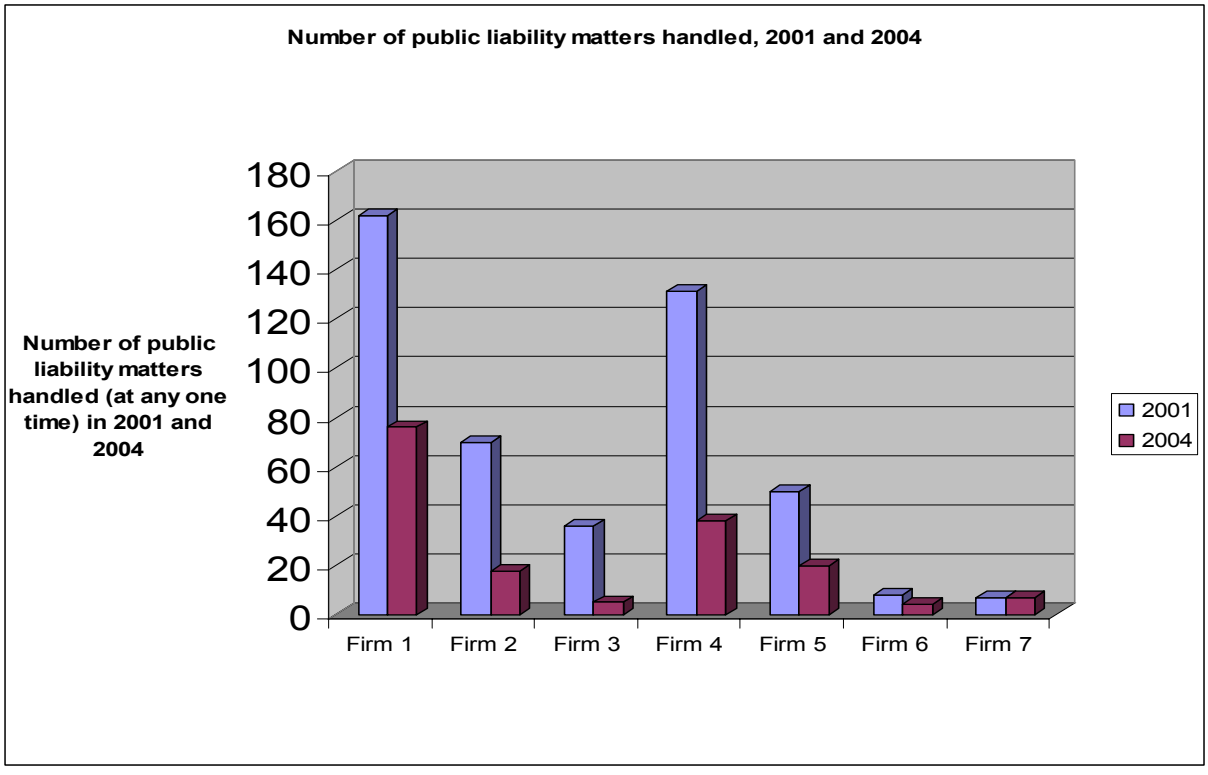
Jurisdiction	Cap	Threshold
New South Wales *Motor Accidents (Compensation) Act 1999* (NSW)	$296,000*: s 134	> 10% permanent impairment: s 131
Victoria ** *Transport Accident Act 1986* (Vic)	$360,000*: s 93(7)(b)	> 30% permanent impairment: s 93(3)
Queensland *Motor Accident Insurance Act 1994* (Qld)	No cap	No threshold
Western Australia *Motor Vehicle (Third Party Insurance) Act 1943* (WA)	$232,000*: s 3C	$11,500* (5% of maximum amount), deductible phases to nil to $46,500* (20% of maximum amount): s 3C
South Australia *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA)	$240,000* (weighted scale, 0—60 x $1,710*): s 24B(2)(a)	7 day impairment: s 24B(1)(a); or $2,750* in medical costs: ss 24, 24B(1)(b)
Tasmania ** *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas)	No cap	No threshold
Australian Capital Territory *Road Transport (General) Act 1999* (ACT)	No cap	No threshold
Northern Territory *** *Motor Accident (Compensation) Act 1979* (NT)	208 x AWE*: s 17(3) [AWE = full-time adult persons, weekly ordinary time earnings for NT]	5% permanent impairment: s 17(1)(c); reduced awards apply if the degree of impairment is < 15%: s 17(2)

* Indexed ** No-fault scheme
*** No-fault for residents of the Northern Territory only

The Society has previously argued in favour of uniformity in thresholds, and a summary of this position is contained in an excerpt from the Ball Report, in Annexure *"E"*.

- - Civil Liability Thresholds

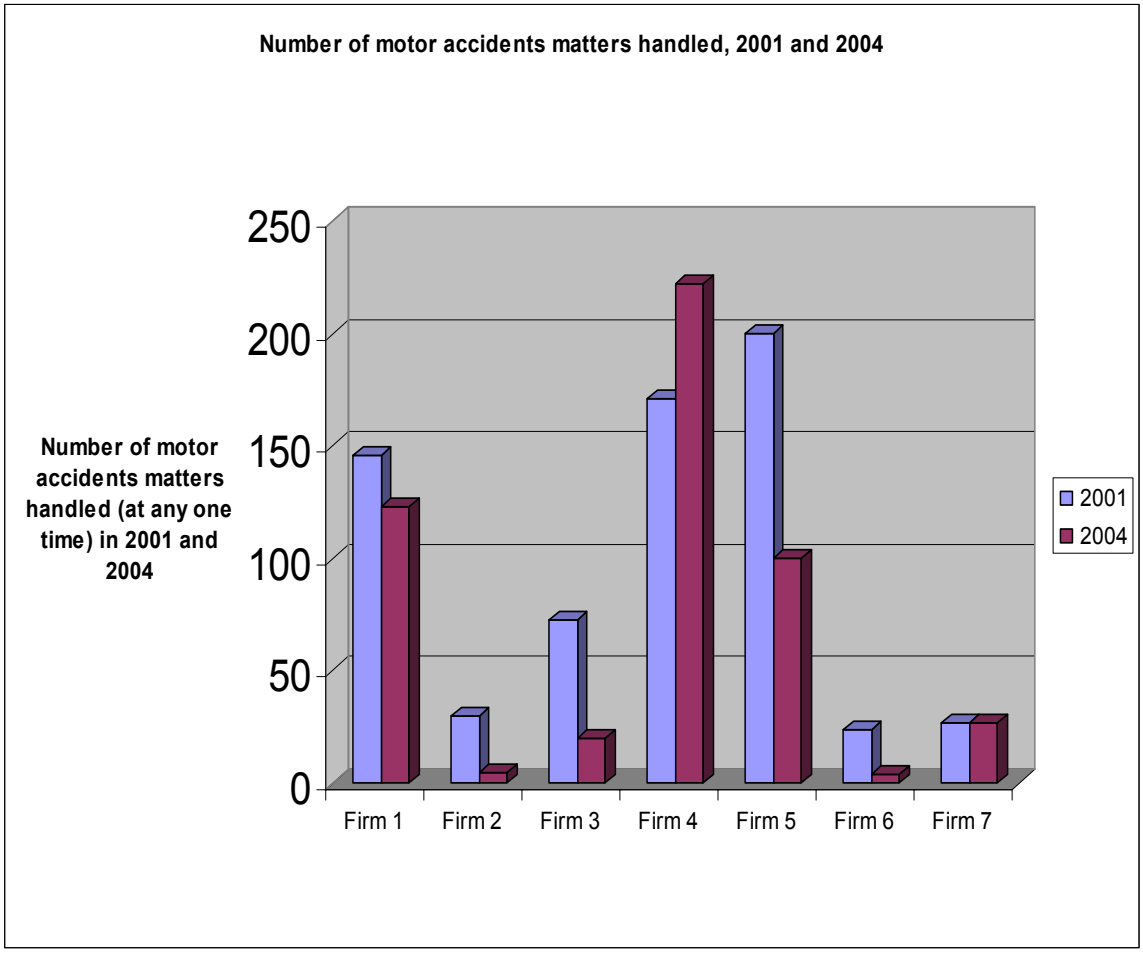
Some of the ideological difficulties associated with the imposition of 15% non-economic loss threshold contained in the *Civil Liability Act* 2002, and which the Society has previously raised, are set out in Annexure *"F"*. Current evidence available to the Society indicates that the threshold and the other benefit limitation provisions contained in the *Civil Liability Act* 2002 are seriously disadvantaging a large number of injured persons in the community, including victims of medical negligence, by either barring their access to compensation, or substantially reducing the amount of compensation that they can receive. Some examples of the circumstances of such injury victims are set out in Annexure *"G"*. Furthermore, while public liability premiums and insurer profits continue to rise (as above) the Society's survey data of personal injury firms, as set out below, confirms that the threshold has had a serious impact on claim numbers.



- - Motor Accidents Thresholds

The Society has also publicly highlighted the difficulties arising from the harshness and arbitrary nature of the permanent impairment threshold contained in Section 131 of the *Motor Accidents Act* 1999 on a number of occasions. The Society has argued at length against the current structure of the threshold in its submissions to the Legislative Council Standing Committee on Law & Justice, as part of the Society's participation in the Committee's annual Review and Monitoring of the Exercise of the Functions of the Motor Accidents Authority and the Motor Accidents Council. A summary of the Society's position in this regard is set out in Annexure *"H"*.

While insurer profit within the Motor Accident Scheme remains high, on the other side of the ledger, the imposition of the 10% and the other benefit restrictions contained in the *Motor Accidents Compensation Act* 1999 have served to substantially reduce claim numbers. The results from the Society's survey of a number of top personal injury firms revealed the following trend:



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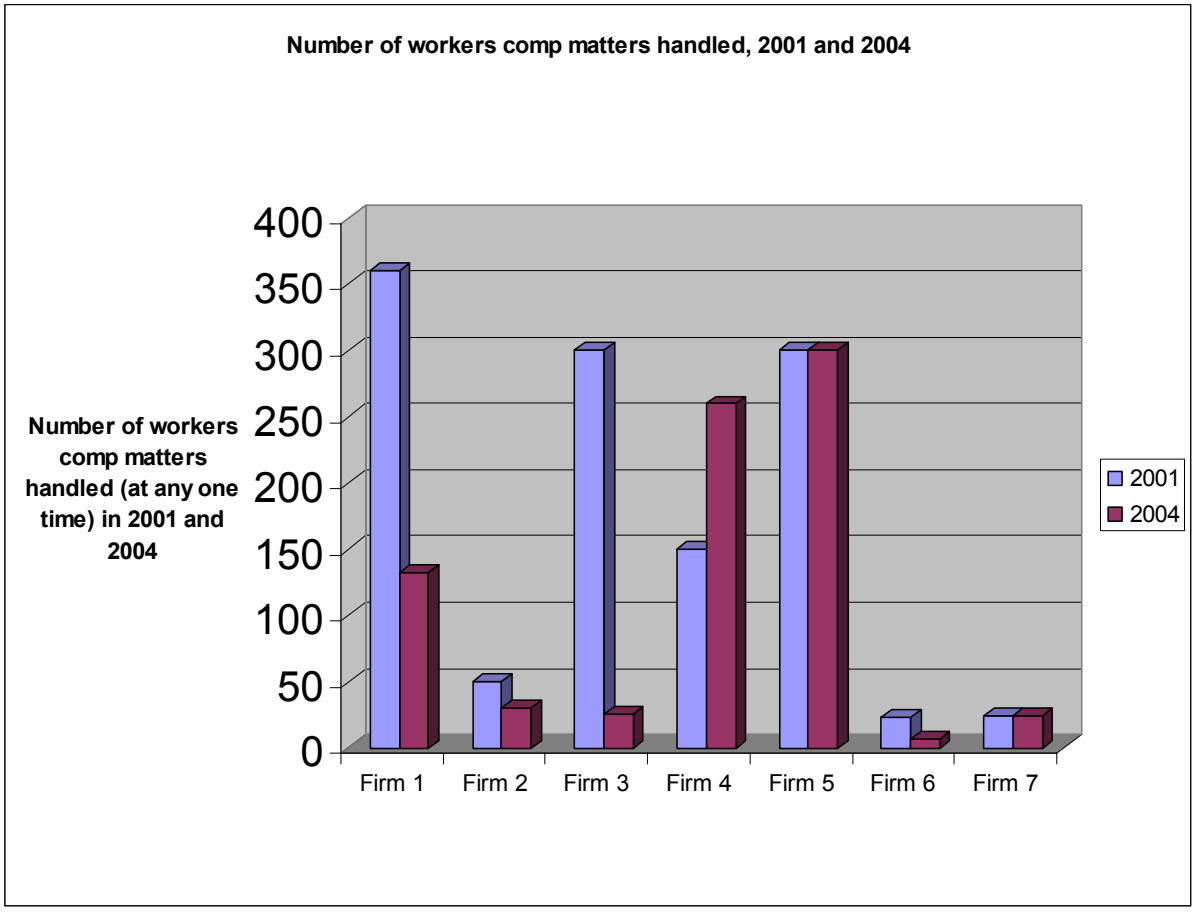
Workers Compensation Thresholds

As with the Motor Accidents Scheme threshold, the Society remains opposed to the effect of the 15% whole person impairment common law threshold incorporated into the *Workers Compensation Act* 1987 by the 2001 changes. A summary of the Society's position in this regard is set out in Annexure *"I"*.

As with motor accidents matters, the imposition of the non-economic loss threshold and the other benefit restrictions contained in the 2001 amendments have served to substantially reduce claim numbers by removing the rights of workers to damages. The results from the Society's survey of a number of top personal injury firms revealed this trend: However, these reforms have not been accompanied by any effective premium reduction (as above).



2.3 Insurance Availability

Despite one of the key aspects of the modifications of the tort law being to increase the availability of insurance to the community, there is still evidence, especially in the field of public liability, that significant deficits in the availability of insurance remain. For example, recent media reports stated that nearly 70 children's playgrounds have been *"ripped out across New South Wales by councils fearing public liability claims."*[65] As stated recently in the Daily Telegraph in an article entitled "Premiums unlikely to fall"[66]:

> Consumers are unlikely to receive reduced insurance premiums despite Australia's big insurers reporting another round of bumper profits.
>
> Insurers such as Promina, IAG and QBE Insurance say they are generally happy with their prices for categories such as motor and home and contents insurance.
>
> Their comments came as they each reported jumps in profit of more than 40 per cent …

Indeed, it has been suggested that gross premiums may rise in 2005 by 3 to 5 percent.[67]

This is despite the profits that the insurance industry is currently generating (as above), and despite indicators of the widening gap between premiums collected and moneys paid out. For example:

> [IAG's] insurance margin – the key indicator for what percentage of the money it receives from premiums drops fown to the bottom line – was at 16.7 per cent, up from 11.8 per cent in the previous corresponding period.[68]

As such, strong community concerns continue to be voiced about the availability of insurance for community groups and activities, especially in regional areas, such as community swimming lessons and surf lifesaving, as evidenced by the following articles and media releases:

- Lisa Foreman, "*Insurance Woes stun heart group",* The Irrigator, Leeton, 15 March 2005:

  > A lack of insurance has brought fundraising efforts of the Leeton Heart Support Group to a screaming halt…
  >
  > "We wouldn't be able to sell raffle tickets in public places without public liability, really we can't do anything, we can't hold any events." [Katrina Dufty, Support Group organizer]

- Joyce Jayet, *"Now it's swimming lessons being sunk by insurance. FREE LESSONS TO CEASE?"*, Champion Post, 6 December 2004:

  > "Dozens of children throughout the Parkes shire will no longer receive free swimming lessons because of public liability insurance."

> [Quoting Yvonne Hutton, coordinator, Parkes Learn to Swim]: "For the past two months the NSW Government has been advising parents to have their children taught swimming, yet we have NSW Swimming and their insurers preventing our children being taught."

- *"Insurance fees sink free learn to swim"*, Cowra Guardian, 3 December 2004:

  > "Cowra children will no longer receive free learn to swim lessons at the acquatic centre because of the high cost of public liability insurance."

- *"Govt asked to throw insurance lifeline to lifesavers"*, 20 October 2004, www.ABC.net.au:

  > "There have been calls for the NSW Government to cover the cost of public liability insurance for Illawara and NSW south coast life savers."

- *"We're asking the questions"*, Northern Argus, www.yourguide.com.au, 22 September 2004:

  > "Many tourism-based enterprises and sporting activities have been affected by the high cost of public liability insurance. What strategies could be put in place to control this trend?"

- *"Charities need fair insurance"*, Senator John Cherry, Democrats Leader for Queensland, 4 September 2004:

  > "Charities have been advised that their volunteers aged over 75 and in some cases 70 years will no longer be covered. This has meant that organizations have had to ask these volunteers to go home."
  >
  > "Important volunteer activities that are central to communities are increasingly under threat in the insurance crisis."

Based on anecdotal evidence from members of the Law Society around the state, many community organisations experienced significant increases in public liability insurance premiums in or around 2002, often by a factor in excess of 100%. To date premiums have remained at those high levels with no downward adjustment despite, in many cases, a claim free experience.

As a result the community loses out in three ways:

- persons injured as a result of the carelessness of others have lost access to fair compensation;
- individuals and groups taking out insurance continue to pay high premiums; and
- community organisations reduce their services to the public because of difficulties in obtaining adequate insurance.

2.4 Other Access to Justice Concerns

In addition to the injury compensation reductions resulting from thresholds, the imposition of practical barriers such as legal fee scales and scheme bureaucracies has substantially reduced injured persons' access to justice. As above, the adequacy of premium levels and

accessibility of insurance can not be evaluated without considering the adequacy and accessibility of the benefits that the insurance premiums fund.

- Legal costs provisions/access to justice.

The cost regulation and cost penalty provisions that have been imposed since 2002 in workers compensation matters are particularly onerous in this regard, as are the cost regulation and penalty provisions imposed under the *Civil Liability Act* 2002. (A summary of the Society's concerns regarding workers compensation costs, which are the subject of ongoing discussions with the WorkCover Authority, are set out in Annexure *"J"*.)

The efficiency of the operation of the bureaucracies established to process claims in the Motor Accidents and Workers Compensation Schemes is also relevant. This is as it affects the injured's access to justice and compensation, and hence the allocation of Scheme resources.

In this regard, the Society has previously raised concerns about the operation and outcomes produced by the Workers Compensation Commission. The view presented by the Commission itself, as summarised in Part 4 of Annexure *"A"* (at paragraph 4.7), is that the disputes that it is handling are being resolved quickly and with high satisfaction levels amongst insurers, employers and especially self insurers. However, the comments that have been received from practitioners in response to a Law Society survey paint a different picture. The Society is currently involved in dialogue with the Commission aimed at establishing a Users Group, which it is hoped would serve as a means of resolving some of these difficulties.

SECTION THREE

Recommendations for Future Legislative Change

The above consideration of the operations and outcomes of the legislative changes to the motor accidents, workers compensation and civil liability areas have attempted to examine the issue of premium levels in the context of their relationship to injury compensation benefits. It has been argued that the adequacy of premium levels and insurance availability cannot be meaningfully considered in isolation to the adequacy and availability of the injury compensation provisions they fund.

In considering both aspects of each of the areas of tort law and the basis for future legislative amendment, the above analysis has firstly examined the validity of the assumptions that underpinned the legislative changes enacted since 1999. This examination has been conducted in the light of statistical evidence and actuarial analysis that has subsequently become available. This new information demonstrates that, on the basis of the evidence now available, much of the post 1998 legislative amendments to tort law proved ineffective in achieving their primary purpose of increasing insurance accessibility and reducing premiums. The ineffectiveness of this legislative change was the natural corollary of two factors:

1. The incorrect economic assumptions upon which the tort law amendments were based. (Legislative change in all three areas of tort focussed on compensation payments as the drivers of premium increases, without effectively focussing on imposing more direct and effective controls on premium levels and insurer profits); and
2. The ad hoc manner in which the legislative changes were implemented.

The data now available shows that the post-1998 tort law amendments have created two major negative outcomes that require correction:

1. An effective imbalance between premiums and profits. While injury compensation benefits have fallen across all three areas of tort as a result of the amendments, overall premiums have not reduced. Furthermore, within the privately underwritten systems, insurer profits have increased. It also demonstrates that, on the basis of the above information, it is arguable that the injury compensation benefits available could be raised without increasing existing premium levels.

2. Unfairness and inconsistency. In the three major areas of tort law, the Parliament has adopted a variety of different provisions as the basis upon which liability can be established and damages calculated. There is no discernible principle lying behind these differences. Persons who suffer injuries in the three different ways are subject

to quite different caps and thresholds and different heads of damages can be recovered in different ways. The inconsistencies between the different systems of personal injury damages in NSW are unfair and create numerous anomalies that are contrary to community expectations.

On the basis of the above, it is clearly evident that the next stage of legislative amendment to the operations and outcomes of each of the areas of tort law in NSW must be aimed at redressing the injury benefit-premium imbalance in a holistic and principled fashion. This could be achieved by adopting consistent principle-based reform that is focussed on achieving:

- More equitable outcomes for the injured; and
- A more equitable balance between the adequacy of premium levels and the availability of insurance, and the adequacy and availability of injury compensation.

The Society believes that the proposed changes to tort law as set out in the Ball Paper are an effective blueprint to how such reform could be enacted. In summary, the legislative changes envisaged are:

The *Workers Compensation Act* 1987 should be amended

- to remove the existing threshold for common law claims of 15% of permanent impairment so as to bring victims of work accidents under the same rules as other tort victims;
- to restore the common law rights of seriously injured workers to recover damages for non-economic loss subject to the same threshold as is used for claims subject to the *Civil Liability Act* 2002, the maximum amount recoverable being $350,000 (indexed);
- to restore all other heads of damage which were removed by the *Workers Compensation Legislation Further Amendment Act* 2001 but with such heads of damage to be quantified as provided in the *Civil Liability Act* 2002;
- to abolish the arbitrary retiring age of 65 to allow workers' common law claims for economic loss to be assessed in the same way as other common law claims; and
- to restore the workers' right to common law damages for gratuitous attendant care services subject to the limits imposed on the recovery of such damages by other tort victims.

The *Motor Accidents Compensation Act* 1999 should be amended

- to replace the existing unfair and arbitrary permanent impairment threshold for the recovery of damages for non-economic loss with the threshold for non-economic loss prescribed by the *Civil Liability Act* 2002; and
- to increase the maximum amount of damages recoverable for noneconomic loss to $350,000 (indexed) as provided in the *Civil Liability Act* 2002.

Finally, in the evaluation of the various areas of tort, it must always be remembered that personal injury schemes and systems are essentially paid for by interest groups (such as

employers, occupiers and car owners) who expect those injured through the carelessness of others to be properly and consistently compensated.

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[1] *"The New Liability Structure in Australia"*, address by the Honourable J J Spigelman AC, Chief Justice of New South Wales, Swiss Re Liability Conference, Sydney, 14 September 2004
[2] Better Regulation Taskforce, *"Better Routes to Redress",* May 2004. This report can be downloaded at http://www.brtf.gov.uk/reports/liticompensation.asp
[3] Established under the *Motor Accidents Compensation Act* 1999 (which commenced operation on 5 October 2000)
[4] Established primarily under the *Workers Compensation Act 1987*
[5] Now governed by the *Civil Liability Act 2002*
[6] *The Newcastle Morning Herald*, 26.01.02
[7] Queensland Government Liability Insurance Taskforce Report, February 2002, p. 6
[8] Peter McCarthy, *Industry Profitability*, op. cit , p.13
[9] David Burrows, Kells The Lawyers, *The Illawarra Mercury*, 28.01.02
[10] Rob Davis, National President, Australian Plaintiff Lawyers Association, *Increasing Insurance Premiums*, Position Paper, 07.0102, p.2
[11] Queensland Liability Insurance Taskforce, op. cit., p. 4
[12] Ibid.
[13] "*There are numerous and interrelated factors impacting on the costs of public liability insurance and there are no quick or easy solutions to the current problems being experienced".* Queensland Liability Insurance Taskforce, op. cit., p. 2.
[14] Rob Davis, *Increasing Insurance Premiums*, op. cit., p.2
[15] Peter McCarthy and Greg Trahair, *Lack of industry Profitability and Other Stories*, The Institute of Actuaries of Australia Twelfth General Insurance Seminar, Sanctuary Cove November 1999; Peter McCarthy, *Industry Profitability: A Brave New World*. The Institute of Actuaries of Australia, Thirteenth General Insurance Seminar, Sheraton Mirage, Monday 26 November 2001, p.5
[16] *The Age*, 24.01.02
[17] Rob Davis, National President, Australian Plaintiff Lawyers Association, *Hard Facts About Claims Costs &Premiums* Position Paper, January 2002, op. cit., p.2
[18] Peter McCarthy and Greg Trahair, op. cit; Peter McCarthy, *Industry Profitability: A Brave New World*. The Institute of Actuaries of Australia, Thirteenth General Insurance Seminar, Sheraton Mirage, Monday 26 November 2001, p.
[19] Rob Davis, *"Increasing Insurance Premiums"*, op. cit., p.2
[20] Ibid.
[21] Rob Davis, *"Hard Facts"*, op. cit., p.2
[22] Peter McCarthy and Greg Trahair, op. cit, p. 5
[23] Rob Davis, *"Increasing Insurance Premiums"*, op. cit., p.1
[24] Peter McCarthy and Greg Trahair, op. cit, p. 41
[25] Rob Davis, *"Hard Facts"*, op. cit., p. 2
[26] Peter McCarthy and Greg Trahair, op. cit, p. 28; Peter McCarthy, *Industry Profitability: A Brave New World*, op. cit., p.12.
[27] Queensland Liability Insurance Taskforce, op. cit., p. 4
[28] Rob Davis, National President, Australian Plaintiff Lawyers Association, *Increasing Insurance Premiums* Position Paper, 07.0102, p.2
[29] Rob Davis, *"Hard Facts"*, op. cit.,., p.3, 5
[30] David Burrows, op. cit., 28.01.02
[31] Queensland Liability Insurance Taskforce, op. cit., p. 3
[32] *The Australian*, 04.02.02
[33] Queensland Government Liability Insurance Taskforce Report, February 2002, p 4; Rob Davis, *"Increasing Insurance Premiums"*, op. cit., p.3
[34] Ibid., p. 3; Peter McCarthy, *Industry Profitability,* op. cit., p. 3
[35] Peter McCarthy and Greg Trahair, op. cit, p. 38
[36] Queensland Liability Insurance Taskforce, op. cit., p. 3
(especially in relation to sporting organisations)
[37] Rob Davis, *"Increasing Insurance Premiums"*, op. cit., p.4
[38] Rob Davis, *"Hard Facts"*, op. cit., p.2; Australian, 04.02.02; Queensland Liability Insurance Taskforce, op. cit., p. 2, 3
[39] Ibid., p.2, referring to APRA bulletin *Underwriting Patterns in General Insuranc*e, June Quarter, 1998, and the APRA bulletin *General Insurance Industry Update,* September Quarter, 1997, p. 4
[40] Ibid..., p. 4
[41] David Burrows, op. cit., 28.01.02

[42] Queensland Government Liability Insurance Taskforce Report, February 2002, p. 5; Rob Davis, *"Increasing Insurance Premiums"*, op. cit., p.1
[43] Rob Davis, *"Increasing Insurance Premiums"*, op. cit., p.4
[44] Tony Abbott, *The Sydney Morning Herald* Letter to the Editor 28.01.02
[45] Queensland Liability Insurance Taskforce, op. cit., p. 1
[46] *The Australian Financial Review* 04.02.02.
[47] Queensland Liability Insurance Taskforce, op. cit., p. 16
[48] Ibid.
[49] Rob Davis, *"Exploring the litigation explosion myth"*, op. cit.
[50] ***"Module A – Thresholds and Damages for Non-Economic Loss***
Examples of information you can use to help influence Australia's decision makers and opinion shapers on issues relating to tort law reform", **October 2004**
[51] Insurance Council of Australia discussion paper, *Liability Insurance*, p. 6
[52] Rob Davis, *"Exploring the litigation explosion myth*`, *Plaintiff*, Issue 49, February 2002, p. 5
[53] Insurance Council of Australia discussion paper, *Liability Insurance*, p. 7
[54] Queensland Liability Insurance Taskforce, op. cit., p. 7
[55] Ibid., p.32-33
[56] Chief Judge Thomas G Goddard, "*No Fault Accident Compensation and Workplace Safety in New Zealand",* p.1.
[57] Ibid., p.6
[58] Ibid., p.9
[59] Queensland Liability Insurance Taskforce, op. cit., p. 8
[60] Tasmanian Department of Treasury and Finance *"Discussion Paper on Public Liability Cover"*, p. 6
[61] Net premium revenue less net incurred claims and underwriting expenses. Net premium revenue is gross premium revenue net of outwards reinsurance expense
[62] QBE: 43% rise in full year net profit (Source: http://afr.com/articles/2005/02/24/1109180003932.html); Insurance Australia Group Limited (IAG): 41% increase in net profit for the six months ended 31 December 2004 (Source: http://www.egoli.com.au/egoli/egoliNewsViewsPage.asp?PageID=%7BB63367B7-DD09-4B24-821A-A0C1776D3F9B%7D); Suncorp: 47% increase in net profit to $413 million for the six months to December 2004 (Source: http://www.egoli.com.au/egoli/egoliNewsViewsPage.asp?PageID=%7BB6FB4269-D5AB-4B4D-9E87-F4621F982576%7D)
[63] *"A New Agenda for Government"*, address by the Hon Bob Carr, Premier, to the Sydney Institute, 9 July 2002.
[64] *"The New Liability Structure in Australia"*, address by the Honourable J J Spigelman AC, Chief Justice of New South Wales, Swiss Re Liability Conference, Sydney, 14 September 2004
[65] Skelsy, Mark, "*Swings, see-saws ripped out"*, news.com.au, 16 March 2005
[66] Alderton, Roz, *"Premiums unlikely to fall",* Daily Telegraph, 24 February 2005
[67] Brammel, Bruce *"Promina takes a hit"*, Finance.nsw.com.au
[68] *"IAG posts bumper profit"*, The Courier Mail, 24 February 2005. Bloomberg.com reported that QBE's underwriting margin also increased from 8.4% to 13% in the first half of the 2004-05 Financial Year: *"QBE Insurance Second-Half Earnings Rise 51% After Acquisitions"*, 24 February 2005.