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**Workers Compensation and
Motor Accidents Compensation
in NSW**

by

Marie Swain

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EXECUTIVE SUMMARY

- Prior to the establishment of statutory compensation schemes, a person who was injured through the fault of another, could only be compensated for that injury through a successful common law action for negligence (pp3-5).
- Given that success at common law was not guaranteed, statutory compensation schemes were introduced. These schemes were based on the common law principle of restitution, that is, to award a sum of money which would put a person in the position he or she would have been in but for the injury (pp6-7).
- Such a scheme was put in place for workers in New South Wales in the early 1900s and remained in the same form virtually until the early 1980s, when the scheme underwent severe problems, including a blow-out in costs. A number of reforms were put in place to ameliorate the position but by 1986, with no improvement in sight, proposals for radical departures from the way in which the scheme had operated hitherto, were called for (pp7-12).
- As a result the workers compensation legislation was radically overhauled in 1987, with common law rights being abolished as a means of limiting costs to the scheme. This was a very unpopular move with many sections of the community and in the 1988 election campaign, the Opposition of the day promised, if they won government to re-instate common law rights, albeit in modified form (pp12-13).
- On being elected to Government the Coalition undertook a review of the system and brought into being legislative amendments to the *Workers Compensation Act 1987* in 1989, which gave access to common law damages in certain circumstances. The only major changes to this legislation since this time have been beneficial from an injured worker's point of view (pp13-18).
- In recent times however this scheme has, in its turn, been faced with problems and cost blow-outs. To put an end to this situation a number of proposals have been made. Whether they are assessed as being appropriate would appear to depend on the particular interest group's point of view (pp27-34 and pp40-45).
- The motor accidents compensation scheme has a slightly different historical background. Just as with other personal injury cases, those injured in motor vehicle accidents, could seek redress through the courts by instituting a common law negligence action. However, in many cases even where the necessary elements could be made out, the negligent driver was uninsured, which meant the injured person usually would not recover any compensation. To overcome this situation the *Motor Vehicles (Third Party Insurance) Act* was introduced in 1942 to make third party insurance compulsory (p18).
- As with the workers compensation legislation, few amendments of any significance were made until the early 1980s, when steps to limit the spiralling costs of premiums became necessary. After a number of studies into the motor accidents scheme had been undertaken and proposals for possible reform made, the Government of the day introduced TransCover, which abolished common law rights. The reception to these changes was the same as that evidenced in relation to the workers compensation legislative amendments. Restoring common law

rights to the motors accident scheme was also a feature of the Coalition election platform in 1988 (pp19-22).

- Having won government, the Coalition introduced the changes they had foreshadowed. In 1988 the *Motor Accidents Act*, which restored modified common law rights, was introduced (pp22-27).
- Up until recent times, this scheme was also seen to be meeting its objectives and to be operating successfully. However, as in the past, problems have again emerged, particularly in the area of cost blow-outs (pp34-38).
- As a result, proposals to restrict access to the scheme have been mooted and as with the reforms of earlier days, reception has been mixed. What is seen as appropriate and acceptable varies depending on the constituency represented by the parties involved in the compensation system (pp38-46).

1 INTRODUCTION

The first section of this *Briefing Paper* examines how compensation for personal injury damages is awarded for workplace or motor accidents under the common law and the statutory schemes in New South Wales and outlines the historical development of both these schemes, including the major legislative reforms. In the second section the current position of the workers compensation and motor accident schemes, and proposals for reform are described. The views of the various stakeholders on these proposals are given in section three.

2 PERSONAL INJURY COMPENSATION

The principle behind compensation for negligently inflicted injuries is that the injured person (the Plaintiff) should receive an amount of compensation, which so far as money can do, will put that person in the same position as he or she would have been in if the tort had not been committed. This compensation takes into account actual loss suffered (both financial and non-financial) and loss which the injured person will probably suffer (both financial and non-financial) resulting from the fault or negligence of another person (the Defendant).

(i) Common Law

Historical background ¹

At common law if the Plaintiff can establish that his or her injury arose through the fault or negligence of the Defendant, then the Plaintiff is entitled to bring an action to recover damages for any loss suffered. Before the action for negligence developed, once the connection between the Plaintiff's injury and the Defendant's act could be shown, then liability attached to the individual responsible for causing the harm regardless of whether the act was intentional or unintentional. While this requirement of merely establishing causation was appropriate in the context of a predominantly agricultural community, the weaknesses of the common law were evident when applied to an emerging industrial society, which gave rise to an increase in the incidence of accidental death and injury, especially in workplace and transport accidents. It was inevitable in this situation that there would be instances where although an accident could be attributed to a particular person's action, he or she was not to blame. To meet these changing economic and social times, the modern negligence action, which limited liability to those at fault, was developed. As was pointed out in the NSW Law Reform Commission (LRC) *Report on a Transports Accident Scheme for NSW*:

The principle of 'no liability without fault' was a product of the laissez-faire philosophy of the time, since it provided for the loss to be shifted from the

1 Much of the information in this section is taken from Final Report of the New South Wales Law Reform Commission on a *Transports Accident Scheme for New South Wales*, 1984, Chapter 2.

victim only in cases where the person causing it was deemed culpable.²

Further justification on social grounds was given for limiting liability to a person who failed to exercise reasonable care over a matter within his or her control: it was not only a means of exacting retribution from a negligent Defendant (at this time liability insurance was not widely available and an individual wrongdoer was normally obliged to pay compensation from his or her own pocket) but also a device for deterring careless behaviour. Over time however the emphasis on moral culpability has diminished.

Apart from the need to prove negligence on the part of the Defendant for an injured person's claim to be successful and an award of compensation to be made, the availability of the tort of negligence was restricted by a number of other factors. These were: one spouse could not sue another; damages could not be recovered for the death of a human being; highway authorities were immune from liability for failure to keep highways safe and in good repair; and the courts would not award damages in respect of nervous shock. There were also three specific restrictions which applied to injuries sustained at work, which limited the liability of employers. These restrictions, referred to as 'the unholy trinity' were: the defence of contributory negligence, which resulted in a worker's claim being totally defeated even if the injury was only partly the result of the worker's own carelessness; the defence of voluntary assumption of risk (*volenti fit non inuria*), which applied if the injury was the result of risks inherent in the work even if the worker effectively had no choice about the work to be performed; and the doctrine of common employment, which prevented compensation being payable where the injury was caused by the negligence of a fellow worker for whom the employer would otherwise have been liable.

While accident compensation under the common law remains fault based, modifications have occurred and a number of restrictions have been removed, either through judicial interpretation or by legislative amendment. This freeing up of the system has been explained in part by the increased availability of insurance which allows the cost of compensation to be spread to the community at large.³ Some of the legislative changes which have occurred are:

- the introduction of Lord Campbell's Act (*Fatal Accidents Act* 1846 UK) which permitted close relatives of a deceased person to claim damages for loss of material support, where the person's death was caused by the negligence of the Defendant. This was followed in New South Wales in 1847⁴ and eventually adopted throughout Australia;
- the modification, and subsequent abolition of, the doctrine of common

2 *ibid*, p19.

3 *ibid*, p20.

4 *Fatal Accidents Compensation Act* 1847 later replaced by the *Compensation to Relatives Act* 1897.

employment⁵;

- the abolition of the contributory negligence defence and its replacement with a statutory rule under which damages were reduced in proportion to the Plaintiff's share of responsibility for the accident causing his or her injury⁶;
- the abolition of the rule preventing one spouse from suing the other, initially in cases of motor vehicle accidents⁷ but more recently for all purposes.⁸

Modifications which occurred in the courts were: the reformulation of the doctrine of *volenti* so that it could not be applied to a worker merely because he or she undertook work knowing that there was a risk of injury; the acceptance of nervous shock as a head of damage; and the scope of the duty to take reasonable care for the safety of another person was expanded.

Elements of the common law negligence action

In summary the main features of the common law negligence action today are:⁹

- the injured person is entitled to damages only if he or she can establish that the injury was caused by the Defendant's fault, that is, by a failure to take reasonable care for the safety of the injured person;
- damages are reduced to the extent that the Plaintiff through his or her contributory negligence was to blame for the accident;
- damages are assessed in the form of a lump sum and are awarded on a once and for all basis;
- damages are designed, in theory, to provide 'full' compensation for both the economic loss and non-economic loss sustained by the injured person;
- claims may be made by dependent relatives of a person killed as the result of another person's negligence.

5 In New South Wales this was achieved by section 65 of the *Workers' Compensation Act 1926*.

6 *NSW Law Reform (Miscellaneous Provisions) Act 1965*.

7 Amendments to the *Married Persons (Property and Torts) Act 1901* in 1964 and the *Law Reform (Married Persons) Act 1964*.

8 *Family Law Act 1975 (Cth)*.

9 This summary is taken from the Report by the NSW Attorney-General's Department, *Motor Accidents: The Act and Background Papers, 1989, p5*.

Although the changes outlined above meant that the negligence action was more widely available and the requirements to be met in order to establish liability had become less restrictive, statutory schemes to compensate accident victims were introduced as it was thought that the usefulness of common law remedies were still too limited. Some schemes are 'no-fault', (for example, workers compensation and those set up to compensate victims of sporting or criminal injuries), others (such as that established to compensate victims of motor accidents) still require fault on the part of the Defendant to be established before compensation will flow. In New South Wales, in spite of previous attempts to eliminate common law actions for workplace or motor vehicle accidents, it is currently possible for a person who has suffered an accident at work or in a motor vehicle to seek compensation either under a statutory scheme or through a modified common law action. The issues involved in both these processes are discussed below at pages 14-17 and 24-25.

Arguments for and against the action for negligence at common law

The arguments typically given for retaining the common law system as well as those put forward in support of its abolition are listed in summary below.¹⁰

Arguments for

- only individual assessment of the kind applied at common law takes into account the special needs and circumstances of the Plaintiff, which enables full compensation to be awarded.

This is the most often cited reason for favouring a determination at common law. It is argued that applying a statutory defined amount can lead to inequitable results, for instance, the same fixed lump sum for the loss of a body part or function, is available whether the person is a working adult or a child. While other factors may help arrive at an appropriate assessment of the particular individual's loss, critics of the statutory scheme say that there should be more of a sliding scale which takes these differences into account.

- lump sum awards promote rehabilitation and encourage independence on the part of the accident victim.
- the fault principle is in accordance with community expectations. This reflects to a certain extent the earlier sentiment of retribution in that a specific person is identified as being blameworthy of a particular incident.
- liability based on fault acts as a deterrent against conduct which is dangerous to others; and

10 These for and against summaries are based largely on those contained in the Attorney-General's Department Report, *ibid*, pp 6-7. While they are given specifically in relation to motor accident actions in that Report, the underlying reasoning applies equally to workplace accidents.

- victims' rights are protected by the courts which are best able to determine the appropriate level of compensation, are responsive to community needs and are not vulnerable to political control.

Arguments against

- the deficiencies of assessing damages on a once and for all basis;
- the difficulties and inconsistencies which arise in assessing damages for non-economic loss;
- the delays and consequent hardship experienced by many accident victims in obtaining common law damages;
- the burden on the court system and the drain on judicial resources, caused by deciding claims arising out of transport and workplace accidents;
- the substantial legal and administrative costs associated with common law negligence actions;
- the increasing cost to the community of a compensation system relying heavily on the common law negligence action;
- the adverse effects of the common law negligence action on the rehabilitation of many transport and workplace accident victims. Given that assessment of damages is made at the date of hearing, to ensure that a higher amount is obtained, workers may be inclined to prolong their injuries;
- the failure of the common law negligence action to provide compensation for a substantial proportion of accident victims. In many accidents proving fault is often artificial, time consuming and difficult and where this cannot be established no compensation will be awarded;
- the failure of the fault principle to fulfil its stated aims and the practical difficulties in its application.

(ii) Statutory Schemes

(a) Workers Compensation

Workers compensation legislation based on that in force in the United Kingdom was first introduced in 1910 and then replaced with new legislation, the *Workers Compensation Act*, in 1926. This Act introduced the concept of compulsory insurance, licensing and regulation of insurers and it established a Commission which was to assist in the conciliation of disputes and where this could not be achieved, to adjudicate. The Commission also was charged with examining ways workplace injury could be reduced. Despite a proposal in 1972 to replace all existing workers compensation schemes with a

national compensation scheme, which would cover all injuries and diseases whether occupational or not,¹¹ and amendments in 1984 which disbanded the former Workers Compensation Commission, and replaced it with the State Compensation Board and the Compensation Court, the scheme continued essentially unchanged until the mid 80s.¹²

As far back as 1985, problems with the workers compensation scheme were becoming evident, (premiums had risen from 2.65% of payroll in 1976/77 to an estimated 4.3% in 1985)¹³ and an overhaul of the system was commenced. To this end, amendments to the *Occupational Health and Safety Act 1983*, the *Compensation Court Act 1984* and the *Workers Compensation Act 1926*, were introduced as part of the reform process. The primary objective of these Bills was said by the then Minister for Industrial Relations to be:

... first, to provide an incentive for employers to create safe work environments, thereby minimizing risks of injury; second, to promote the efficient rehabilitation of injured workers so as to ensure their early return to the work force and society; third, to guarantee the prompt delivery of benefits to injured workers at an adequate level and ensure that most of the premium dollar is directed towards the accident victim; and, fourth to make workers compensation arrangements more consistent with occupational health and safety strategies.¹⁴

This legislative package was designed to rectify problems in four main areas by: introducing a system of maximum insurance premiums on a prospective basis; linking those premiums to the occupational health and safety performance of employers as

11 A committee of inquiry was appointed under Mr Justice Woodhouse of the New Zealand Court of Appeal, who had headed a similar inquiry a few years earlier in his own country. A Bill based on the Committee's Report was presented to the Federal Parliament and referred by the Opposition-controlled Senate to its Standing Committee on Constitutional and Legal Affairs. The Report from this Committee in July 1975 made it virtually impossible for the Government to proceed with its original Bill. While the Committee did not reject outright the idea of national compensation scheme, it raised objection to nearly every essential element in the Government's Bill. After the defeat of the Labor Government later that year, the new administration announced that it would re-examine the proposals for a national compensation scheme but such a venture did not have much support as it would have been expensive and would have intruded on an area which has traditionally been left to the States. CP Mills, *Workers Compensation (New South Wales)*, 2nd Edition, 1979, pxxix. The notion of a national workers compensation scheme has been raised again in more recent times but it would appear that this approach is no longer favoured.

12 Although the NSW LRC was given a reference in November 1981 by the then Attorney-General, the Hon FJ Walker, QC MP, to examine, and make recommendations on, accident compensation generally, including workers compensation, the Final Report concentrated on compensation for victims of transport accidents and their families. It was envisaged that the other matters within the terms of reference would be dealt with in later reports. NSW LRC Report, *ibid*, p1.

13 NSWPD, Hon PD Hills MP, Minister for Industrial Relations, 23 April 1985, p6775.

14 *ibid*, p6774.

reflected in the cost of claims; eliminating the hidden cost of brokerage from insurance premium costs as well as excessive administrative charges and reducing court delays and legal costs.¹⁵ The measures put in place to achieve these goals were:¹⁶

- in relation to Commissioners, provisions for their appointment under the *Compensation Court Act 1984* were repealed and corresponding but not identical provisions inserted as Part IVA of the *Workers Compensation Act*; the Commissioners became the responsibility of the Minister for Industrial Relations and were no longer subject to the control and direction of the court; non-lawyers were eligible for appointment; the jurisdiction of a Commissioner was increased to include the hearing of any application for compensation where the amount to which the application related, excluding medical and hospital expenses, was not likely to exceed \$40,000; in general the jurisdiction of a Commissioner was made exclusive of the jurisdiction of a judge of the Compensation Court; proceedings before a Commissioner were to be conducted with as little formality and technicality as possible and the rules of evidence were not to apply; a right of appeal was to lie from a decision of a Commissioner to the Compensation Court on a point of law, or on the misuse of statutory discretion and a new scale of fees and costs applicable to proceedings before a Commissioner was introduced with the express intent of limiting legal costs.
- all existing insurance licences were cancelled, the pool of participating insurers was decreased and new licensing criteria established.
- in place of the former recommended premium rate scheme, premiums as determined by the Insurance Premiums Committee were to be mandatory.
- payment of commission to a broker or agent was prohibited.
- an Insurers Guarantee Fund to be administered by the GIO was to be set up to meet claims under policies issued by an insurer declared by the Minister to be an insolvent insurer.
- as an incentive to workplace safety, employers (other than those with premium bills less than \$2000) would have to meet the first \$500 of each claim.
- age limits bringing an end to weekly payments for incapacity were to apply.

15 State Compensation Board, *NSW Workers Compensation Scheme: Options for Reform*, Discussion Paper, September 1986, p70.

16 M Poberezny, 'Workers compensation - Recent changes in New South Wales', *Legal Service Bulletin*, August 1985, pp 194-195.

While it was recognized that the cost to the scheme could not be curbed simply by reducing the number of claims through the minimization of workplace injuries,¹⁷ sufficient attention does not seem to have been paid to how the increasing cost of individual claims could be contained. This fundamental problem appears still to be contributing to the cost blow-out of the scheme today. This issue is examined in further detail below (pages 28-30 and 34-36).

Despite these changes problems with the scheme continued. According to Marks and McLean:

... the cost of the system had imposed an undue financial burden on the community, the Government perceived that the dispute resolution procedure had broken down, ... there was widespread discontent from employers as to the increasing cost of workers compensation premiums, concern by insurers that the premiums had not increased sufficiently to enable workers compensation business to be underwritten without incurring a loss, and the time taken for the resolution of disputed claims before the Compensation Court exceeded twelve months after the initiation of proceedings.¹⁸

While it was recognized that an overhaul of the scheme was needed, the best means of achieving this was far from clear. To this end, the State Compensation Board was asked by the Government to prepare a Discussion Paper, canvassing various options. This Discussion Paper was published in September 1986.¹⁹ Problems identified by the State Compensation system were:

- (i) workers compensation payments had risen 140% to \$838 million over the preceding five years despite a fall in the number of workplace accidents and the costs of the scheme were increasing faster than the capacity of New South Wales industry to pay;
- (ii) the higher costs incurred by the scheme were due to several factors:
 - court awards and out of court settlements had increased at a rate higher than inflation (particularly for minor and temporary ailments);
 - there was a trend towards more expensive claims - from cuts and breaks to occupational diseases such as RSI and soft tissue injuries such as whiplash;

17 The Minister for Industrial Relations pointed to the claims experience for the period 82/83 and 83/84 and said that "while new compensation claims fell by 12%, compensation payouts increased by 25.4%. There are several reasons for this, including the increasing cost of individual injuries and the escalation of the cost of injuries caused by accidents in previous years", *NSWPD*, *ibid*, p6775.

18 F Marks and B McLean, *Workers Compensation: Law and Practice in New South Wales*, (3rd edition), 1992, pp5-6.

19 State Compensation Board, *ibid*.

- legal and medical costs had grown with both a volume effect (increased servicing) and a price effect (higher rates);
- (iii) excessive lump sum payments created an added inducement to make claims and overstate the severity of injury especially in the case of minor injuries;
- (iv) there was clear evidence that lump sum payments were often inappropriate for seriously injured and disabled people;
- (v) delays caused by an adversary or court based system;
- (vi) the uncertainty in assessing compensation for seriously injured people;
- (vii) difficulty in managing large lump sums awarded; and
- (viii) the lack of any real commitment to, and inducement for, rehabilitation.²⁰

A number of options were presented to reform the workers compensation scheme and common to all options was the need to:

- reduce reliance on 'once and for all' assessment and the lump sum form of payment and increase reliance on the weekly benefit;
- ensure payment of all medical, hospital and other 'out of pocket' expenses when needed, direct to the provider of the service;
- provide more comprehensive guides for assessment of non-pecuniary loss;
- increase the emphasis on administrative rather than advocacy processes; and
- encourage a greater commitment to rehabilitation services.²¹

Submissions from interested parties were received following the release of this Discussion Paper and a process of consultation with employers, the insurance industry, the legal profession, and the trade union movement, ensued. The final outcome of the Government's deliberations was the *Workers Compensation Act*, which was introduced on 14 May 1987. This Act repealed the earlier 1926 legislation and put in place a radically different workers compensation scheme, based on the principles outlined above, which aimed to address the problems associated with the former scheme. As was stated by the Minister for Industrial Relations, in the Second Reading speech to the Bill:

... represents the most important and comprehensive reforms affecting workers compensation since the scheme was introduced more than sixty

20 *Ibid*, pp1-2.

21 *Ibid*, p4.

years ago. Major reform of the present system was made imperative because of its failure to provide fair and equitable benefits to injured workers at a cost the community could sustain. In brief the system as we know it now is virtually out of control.²²

Workers Compensation Act 1987

The most notable feature of this legislation was that it removed the right of a worker to make common law damages claims against his or her employer, in respect of an injury sustained at, or after, 4pm on 30 June 1987. Other notable features were:²³

- Introduction of new methods of calculating a worker's wage entitlements, particularly the introduction of a ceiling of \$500 per week on claims in the first 26 weeks.
- Provision was made in the legislation for the indexation of a number of entitlements - benefits payable on the death of a worker; the maximum weekly payment; the amounts payable after the first 26 weeks; the amounts payable for specified injuries listed in the Table of Disabilities and for pain and suffering. These would be adjusted every April and October according to a formula based on movements in the weekly award rates of pay for adult males in the State.
- Introduction of a rehabilitation scheme with the recognition of 'rehabilitation providers' and linking rehabilitation to a worker's continuing entitlement to weekly payments for partial deemed total incapacity.
- Extension of the Table of Disabilities and increased allowances under that Table.
- Introduction of a pain and suffering allowance in lieu of common law damages for a person suffering losses in excess of 10% of the Table of Disabilities entitlement.
- Removal of the use of redemption payments, except for persons over the age of 55 years.
- Restrictions upon journey claims.
- Severe restriction of the role of the Workers Compensation Court and the introduction of 'review officers' in lieu of judges.
- Requirement that the employer commence payments to the worker within 21 days and for disputed claims to be notified to the workers compensation authority by the employer; and

22 NSWPD, Hon PD Hills MP, 14 May 1987, p12205.

23 B Williamson, 'Amendments to the NSW Workers Compensation Legislation', *Australian Journal of Labour Law*, 4(1) March 1991, pp62-72.

- Increased death benefits.

This legislation was strongly opposed by sections of the community especially the trade union movement and the legal profession. As part of the 1988 election platform, the then Opposition leader, promised that if the Coalition won government, the Act would be repealed and common law rights restored.

The Labor government in 1987 legislated to take away from traffic and workplace accident victims their common law rights to compensation ... It is the Coalition's intention to abolish WorkCover and reinstate workers' lump sum compensation in a way which avoids the uncompetitive premiums which prevailed in New South Wales prior to the introduction of WorkCover. In order to achieve the necessary real cost reductions, the areas which will be focussed on will be journey and fraudulent claims.²⁴

Following the election of the Coalition, a Committee (including representatives of the major parties involved in the workers compensation scheme: employers, the union movement, insurers, the legal and medical professions) was set up to review the system. Several months after the Committee had completed and presented its Report, the Greiner government introduced a raft of legislation²⁵ which made a number of changes to the workers compensation system. This legislative package was described by the Minister for Industrial Relations and Employment, the Hon JJ Fahey, in the Second Reading speech as:

... a responsible one which has been formulated with the benefit of extensive actuarial advice. It demonstrates the Government's commitment to render the scheme more equitable, balanced and efficient.²⁶

The two most notable changes were: the re-establishment of the role played by the Compensation Court and the restoration of common law rights albeit in modified form.

*Workers Compensation (Compensation Court Amendment) Act 1989*²⁷

The object of this Act was to return the workers compensation system in NSW to a judicial structure rather than a bureaucratic or administrative model which had been introduced by the 1987 Act. To this end primary jurisdiction in workers compensation matters was transferred from the Commissioners back to the Compensation Court. This intention was reflected in the Second Reading Speech to the Bill:

24 Hon N Greiner MP, then Leader of the Opposition, in the Coalition Election Policy Document *The First Four Years of Government*, 1988, p51.

25 The *Workers Compensation (Benefits) Amendment Act*; the *WorkCover Administration Act*; the *Workers Compensation (Legislation) Amendment Act* and the *Workers Compensation (Compensation Court) Amendment Act*.

26 NSWPD, 1 August 1989, p8823.

27 NSWPD, *ibid*, p8818.

... Commissioners were separated from the court from 1 July 1987 and given exclusive jurisdiction to determine disputes under the Act. Since that date the jurisdiction of the Court has consisted of disposing of the accumulated arrears and dealing with matters transferred by, and appeals from, the Commissioner's jurisdiction. It is considered necessary to rationalize the current system by returning jurisdiction for all disputes to the Compensation Court ... disputes of this nature need to be determined by a judicial tribunal. However, the court will be restructured into two tiers with judges on the upper level and Commissioners at the secondary level.²⁸

Under the new structure, Commissioners would hear and determine matters referred to them by the Court. Other amendments were made by this Act to:

... encourage finalization of appropriate matters before a Commissioner, promote the use of conciliation and avoid any unnecessary legal expenses. An important part of the present dispute resolution process, currently performed by review officers is to be retained. This is the conciliation function in respect of disputed claims. The review officers will become conciliation officers employed by WorkCover Authority ... they will act independently and will not be subject to the control or direction of the authority ... it was recognized during the WorkCover review that the conciliation function has proved highly successful at reducing the number of matters proceeding to hearing.²⁹

*Workers Compensation (Benefits) Amendment Act 1989*³⁰

As for the right to claim common law damages, the whole of Part V of the 1987 Act was repealed and a new Part V substituted by the *Workers Compensation (Benefits) Amendment Act*. This Part provided for a limited common law claim to be brought but only where certain threshold requirements had been met, both in relation to economic loss and non-economic loss. **Non-economic loss** damages were not available unless the worker's normal life was 'significantly impaired' by the injury (no definition of 'significantly impaired' was given in the Act). If this could be established, the Act provided for up to a maximum of \$180,000 to be recovered. If, however, the court's assessment did not exceed \$45,000, no damages were payable. Damages for **economic loss** could only be recovered where the worker died or the injury was 'serious', which for the purposes of the Act means either an injury of not less than 33% of the maximum under the Table of Disabilities or where the worker has an entitlement to damages of not less than \$60,000 for non-economic loss.

28 NSWPD, *ibid*, p8819.

29 *ibid*.

30 *ibid*, p8820.

There were a number of factors, however, which arguably restricted workers from instituting common law actions:

- provision was made for an election between the recovery of common law damages or the acceptance of a lump sum entitlement under the Table of Disabilities. The election was made either by commencing common law proceedings or by accepting the lump sum payment, and once the decision was made, it was for the most part, irrevocable.
- the amount of damages which could be awarded by a court in relation to any particular head of damage was governed by the parameters set in the Act.
- minimum and maximum limits of compensation were stipulated, and in the case of the maximum amounts, these also were only to apply to the 'most extreme cases'.
- the formula used to calculate lost earning capacity does not reflect the actual amount earned, as it disregards overtime, penalty rates etc and is subject to a statutory limit.
- the discount rate, which is set to deal with the present receipt of benefits which would have been received in the future, and is usually set at 3%, was set at 5% under the *Workers Compensation Act*.
- Damages for home care services provided by family members, which have arisen as a result of the workplace accident or injury, were not awarded until they have been provided for six months and for more than six hours a week during this time.
- Onus of proof in relation to mitigation of loss was reversed and placed on the injured worker
- Employers' defences of contributory negligence and *volenti* were re-instated. Contributory negligence was introduced as a proportionate defence in actions for breach of statutory duty or those brought by dependants of deceased persons for lost financial support. Prior to these amendments, contributory negligence was not a defence in these actions.
- A statutory limitation was also placed on when actions could be brought. They could not be commenced for six months (where an employer admitted liability) and had to be lodged within 18 months, and were not to be brought after three years, except with the leave of the court. At the time this Act was introduced the general rule was that actions must be commenced within six years of the accrual of the cause of action (for personal injury this is either from the date the injury was inflicted or from when the disease was contracted).

Other features of the 1989 amendments were:³¹

- Variations to benefits were introduced. Certain benefits, such as the death benefit, maximum weekly payments for totally incapacitated workers, permanent loss and pain and suffering payments were increased. However the weekly payment for partial incapacity was substantially reduced. This was in keeping with the philosophy of the Act, which aimed to get people back to work earlier. A new system for compensating partially incapacitated workers, where the employer failed to provide suitable employment, was also introduced. Previously where this occurred, workers were deemed to be totally incapacitated for the purposes of receiving a benefit - former section 11(2). This section was repealed and partially incapacitated workers in this situation were now required to actively seek employment and undertake rehabilitation to be entitled to receive payment as if they were totally incapacitated.
- The Table of Disabilities was expanded with provision being made for new categories of loss.
- Restrictions were placed on redemptions (lump sum payouts for serious injuries). Redemptions appealed to both insurers and workers. They enabled the insurer to remove a potential long term liability from the books and allowed the worker to obtain a tax free lump sum, secure in the knowledge that he or she could later either resume paid employment without incurring a financial penalty or transfer to the social security system for income maintenance.³² These payments were one of the main factors in the increased costs incurred by the earlier schemes.
- Insurers/employers were required to commence the payment of compensation within a short period. If there was a dispute the matter would be referred initially to a conciliation officer, who would attempt to conciliate the dispute. These officers would have the power to direct that compensation payment be made. If a satisfactory outcome can not be arrived at, the Compensation Court has primary jurisdiction to hear and determine the dispute.
- The importance of observing occupational health and safety measures in the workplace was stressed as a means of preventing or reducing workplace injury, which in turn would help limit claims and cost to the scheme.

31 The 1989 amending legislation consisted of: *Workers Compensation (Benefits) Amendment Act*; the *WorkCover Administration Act*; the *Workers Compensation (Legislation) Amendment Act* and the *Workers Compensation (Compensation Court) Amendment Act*. Reference to the 1989 amendments refers to the changes brought about by this legislative package. Some of the information in this section is taken from Marks and McLean, *ibid*, pp6-8.

32 R Sackville, 'Workers compensation: costs and options', *Australian Quarterly*, Winter 1984, pp131-141 at p138.

- Emphasis on the rehabilitation process was increased, with a new provision being added which required an employer to contribute to a worker's rehabilitation program.
- Insurers were relicensed and a system of managed funds was introduced. The role played by the insurers was now one of 'fund manager' rather than that of 'underwriter', and they were confined to the administration of premiums collection, payment of claims and the investment of funds.
- Premiums were to be assessed on the basis of cross-subsidisation, which meant that the less injury prone industries would to a certain extent be subsidising those industries where the risk of injury is higher.
- New journey claim provisions were introduced which would have made compensation for an injury occurring on a daily or periodic journey, to or from work, unavailable in the majority of cases. These amendments were met with strong opposition by the union movement and a modified version was introduced later in 1989 in the *Workers Compensation (Amendment) Bill 1989*. A concept of fault was introduced which means that any journey claim will be disallowed if the injury was caused partly or wholly by the fault of the worker.

Further amendments

While there have been a number of legislative amendments to the *Workers Compensation Act 1987* since these changes were introduced in 1989, they have been largely beneficial in nature from an injured worker's point of view: the range and level of benefits have been expanded, access to the common law has been freed up (the thresholds which may have barred some workers from lodging common law claims have been lowered, the requirement to bring an action within 18 months has been removed, as has the requirement that an injury 'significantly impair' the life of the worker before non-economic loss damages can be awarded, the cost of respite or relief care can now be recovered, the time period specified in relation to the provision of home care services by family members has been removed) and the use of rehabilitation services has been further encouraged.

That these improvements were possible has been attributed to the sound performance of the re-vamped scheme. This point was made in the Second Reading speech to the *Workers Compensation Benefits Amendment Act 1991*:

As a result of the excellent performance of the workers compensation scheme, this bill provides major improvements to workers compensation benefits .. in addition to reducing workers compensation insurance premiums for employers ... when the workers compensation scheme was introduced in 1987, the targeted premium rate was 3.2% of wages. In 1989 this was reduced to 2.6% of wages and last year was further reduced to 2%. From 91/92 the rate has been set at 1.8%. This rate compares favourably with average rates of 3% in Victoria and 3.8% in South Australia. This Government is committed to ensuring that the New South Wales

WorkCover scheme will continue to operate on a fully funded basis and for workers' compensation benefits to be monitored to provide an equitable and affordable workers compensation system.³³

Other recent changes fall into two main categories: those of an administrative or procedural nature such as removing the need for multiple insurance policies for an employee who works in one or more States and those made as a direct response to decisions handed down by the courts, which were seen not to be in keeping with the spirit and intention of the legislation.

(b) Motor Accidents

As was the case with workplace injuries, those injured in a motor vehicle accident (or their surviving dependants) could seek redress through the courts if the injury resulted from the negligence of another. The problem was, however, that many people were not insured and therefore could not pay any damages which may have been awarded. Similarly many of those who had a legitimate claim were loathe to spend money bringing futile claims where they suspected the driver would not be insured. In 1942 the *Motor Vehicles (Third Party Insurance) Act* was introduced in New South Wales and for the first time third party insurance was made compulsory. Under this legislation it was still necessary for the injured person to prove negligence on the part of another person to succeed in the action, but:

once the injured party has proved negligence, the Bill will ensure that he shall receive payment of any damages awarded.³⁴

This legislation continued in force for several decades with no major changes. However, as with the workers compensation scheme problems developed with the cost of claims continuing to increase over the years. In an attempt to streamline both schemes, the NSW LRC was given a reference in 1981 from the then Attorney-General, the Hon FJ Walker QC MP to inquire into, report on and make recommendations concerning the extent to which compensation should be payable in respect of death or personal injury. The terms of reference were very broad and covered:

- whether 'no fault compensation' should be payable in respect of death or personal injury suffered by any person through the use of a motor vehicle or other means of transport;
- whether 'no fault compensation' should be payable in respect of death or injury suffered by any person in circumstances other than the use of a motor vehicle or other means of transport;

33 NSWPD, Hon JJ Fahey MP, 14 November 1991, p4590.

34 NSWPD, Hon M O'Sullivan MLA, Minister for Transport, 29 April 1942, p3085.

- whether a 'no fault compensation' scheme or schemes should be introduced in New South Wales, and if so, to consider further the nature and scope of any such scheme including: the benefits to be provided; the basis on which claims should be determined; the means of financing the scheme; the manner in which the scheme is to be administered; the relationship between the benefits under the scheme and other forms of assistance or entitlements, whether provided under legislation or otherwise;
- whether any 'no fault compensation' scheme should be in substitution for all, or any rights, to compensation under existing law;
- whether the principles and practices relating to compensation for death or personal injury under: workers compensation legislation; other legislation; the tort or common law system; should be modified and, if so, in what way;
- any matter incidental to the above, including transitional arrangements for the implementation of recommendations.³⁵

Prior to the finalization of the study being undertaken by the NSW LRC, amendments were made to the principal Act by the *Motor Vehicles (Third Party Insurance) Amendment Act* in 1984, which introduced a number of provisions to limit the amount of damages recoverable in successful motor accident cases. This legislation was necessary "for the implementation of the Government's undertaking to reduce compulsory motor vehicle third party premiums by 6% from 1 April 1984".³⁶

The main changes brought about by this legislation were:

- the method of calculating the third party premiums was changed from a fully funded system to a modified 'pay as you go' system.

A funded insurance scheme, is one where the premiums collected in any given year are sufficient to meet all claims arising from accidents in that year, whether or not payments are actually made in that year. Under this scheme, the insurer should set aside reserves sufficient with investment income, to meet the estimated cost of outstanding claims. By contrast a 'pay as you go' scheme operates on a cash flow basis, with premium income in each year being the source of pay-outs for that year. No substantial reserves are maintained to take account of outstanding claims, the cost of which must be met in future years.³⁷ Maintaining the scheme as a fully funded one was no longer seen as appropriate as it involved increasing premiums every year to ensure that sufficient reserves were built up

35 NSW LRC Report, *ibid*, pv.

36 NSWPD, Hon T Sheahan MP, 10 May 1984, p 586.

37 These definitions were given in the NSW LRC Report, *ibid*, pxxxv.

to meet the increasing liabilities incurred during that year.

- all claims and proceedings were to be taken directly against the GIO. Making the GIO the sole insurer was seen as a way of simplifying the process associated with the commencement of proceedings for personal damages in the courts.
- courts could not award interest on general damages from the date of death or injury to the date the award was actually made. If interest was calculated in this way, it represented a 'windfall' to the Plaintiff, and was not in keeping with the principle of restitution which aims to put a Plaintiff in the position he or she would have been in but for the accident.
- amount for home care services provided by the injured person's family members was limited to a maximum of the current level of average weekly earnings.
- the discount rate was increased from the 3% rate set by the High Court to 5%

After much research and consultation the NSW LRC Final Report issued in 1984. In it a number of recommendations were made, the most significant being that an action for negligence at common law should be abolished in New South Wales for transport accidents. In its place a statutory 'no fault' scheme should be established, ('no fault schemes' already were in place in Victoria, Tasmania and the Northern Territory) which would provide people injured in motor vehicle accidents with a range of benefits.

No immediate action was taken on the NSW LRC Report. By 1986, faced with the continually increasing cost of compulsory third party insurance and the developing unfunded liability resulting from the failure of premiums to cover cost increases, the Government requested the GIO to present further options for reform. This was done and a Discussion Paper released.³⁸ Some of the more notable findings were:

- the cost of third party claims had risen by an average of 28% each year over the preceding five years. Annual premium increases in excess of 20% would be required to cover the escalating cost of claims and to avoid depleting the fund. If nothing was done the fund which was then over \$1 billion would be exhausted within two years.
- many in the community shared the view that the scheme was unfair as it awarded excessive sums for minor injuries and insufficient compensation for serious or long term impairment.

The general problems associated with the scheme and the factors which had led to higher costs were in essence the same as those underlying the malaise in the workers compensation scheme. They are detailed, along with the central reform issues which needed to be addressed, earlier on pages 10-11.

Four main options for reform of the third party scheme were presented:

- Option 1, which was based on the recommendations of the NSW LRC Report, abolished common law negligence actions and made benefits available on a 'no fault' basis. It also restructured benefits in favour of those seriously injured. Implementation of this proposal would reduce the cost per car by 11%.
- Option 2, which was based on the Victorian Government proposal, also restructured benefits in favour of the seriously injured and abolished common law rights. It differed from Option 1 in the amounts it provided and the thresholds which needed to be met. Implementation of this proposal would reduce the cost per car by 21%.
- Option 3, which was based on submissions by the Law Society of New South Wales, introduced a number of 'no fault' benefits into the existing common law system. This option was not independently costed but it appeared to involve increased cost per car.
- Option 4, used the NSW LRC's recommendations for restructuring benefits in favour of the seriously injured, but retained the fault principle and gave limited access to the common law. The implementation of this option would reduce the cost per car by 30%.

After a considerable amount of public debate, the Government decided to implement Option 4 and the *Transport Accidents Compensation Act* was introduced.

Transport Accidents Compensation Act 1987

This legislation, which was introduced in May 1987, was said to be:

... without doubt the single most important reform to motor accidents compensation in the history of the State. The legislation has been developed to address the problems which are besetting the current scheme, namely: the alarming cost escalation in third party premiums; the inadequate compensation of the seriously injured; the lengthy delays in settlement of compensation; and the lack of effective rehabilitation of the injured.³⁹

Its main features were:

- it retained the fault principle but abolished the common law negligence action and in so doing it replaced the courts and legal advocacy process with a statutory administered scheme;
- it was administered by the GIO as agent for the Government;

39 NSWPD, Second Reading Speech, Hon KG Booth MP, 14 May 1987, p12227.

- it aimed to reduce delays by streamlining procedures for hearing disputes on claims for compensation.
- disputes on medical issues were to be heard by medical review panels and appeals on law, liability and the administrative discretion of the GIO were to be heard by the District Court, where a judge would be appointed solely to hear these appeals.
- benefits would be paid periodically;
- it retained lumps sum payments for permanent impairment resulting from a motor accident;
- it paid medical and hospital costs, as needed direct to the providers of the service;
- it aimed to discourage trivial claims by not paying compensation for the first week's lost income or the first \$100 of medical costs; and
- it placed a greater emphasis on rehabilitation than under the existing scheme.⁴⁰

As with the proposed changes to the workers compensation scheme, these changes were also met with a deal of unrest by sections of the community and reform to motor accident injuries compensation was another plank of the 1988 election Coalition platform. If the Coalition won government, Transcover would be abolished and common law rights restored:

The Labor government in 1987 legislated to take away from traffic and workplace accident victims their common law rights to compensation ... The Coalition will abolish TransCover and introduce legislation re-instating the right to bring common law actions as a result of a motor vehicle or transport accident. This will be limited by the extent to which the existing scheme has been implemented. There is clearly no way without massive increases in insurance premiums that the complete rights previously existing can be restored. A right of action, however, will be re-instated for substantial compensation.⁴¹

Following the election of the Coalition, a broad based committee (made up of representatives from the Attorney-General's Department, Treasury, the Ministry for Transport, the Insurance Council of Australia, the GIO, the NRMA, the Law Society and the Bar Association, the Medical Services Committee and the Australian Council for Rehabilitation of the Disabled) was established to review the TransCover scheme. Although it was not provided with specific terms of reference, it adopted the following as

40 *TransCover: The NSW Transport Accident Compensation Scheme*, Information booklet produced by the GIO, 1987, p8.

41 Hon N Greiner MP, then Leader of the Opposition, in the Coalition Election Policy Document, *The First Four Years of Government*, 1988, p51.

working terms of reference:⁴²

- (i) to determine the extent to which benefits available under the *Transport Accidents Compensation Act 1987* should be retained;
- (ii) to determine an appropriate and affordable level of common law benefits, the conditions applying to such benefits, and the means of administering claims for such benefits;
- (iii) to determine the means by which any changes encourage the early and effective rehabilitation of accident victims;
- (iv) to provide an effective and financially responsible means of resolving disputes as to liability or quantum through the court system;
- (v) to examine the feasibility of introducing commercial insurers into the compulsory third party insurance field; and
- (vi) to ensure appropriate arrangements exist for claims by persons resident in another State or Territory.

This Committee prepared five main options: (i) a modified version of the TransCover scheme; (ii) a modified common law scheme which retained a single fund administrator; (iii) a modified common law scheme which provided for multiple insurers by allowing private insurers back into the scheme; (iv) a combined common law/no fault scheme - this proposal was similar to one suggested by the Law Society of NSW to the previous Labor government and (v) a full no fault scheme as had been suggested by the NSW LRC in its 1984 Report. The last two options were not pursued as it was felt that the elements of no fault benefits went further than the Government's intention to restore common law damages. Accordingly actuarial costings were obtained for the first three options only.

A majority of the Committee recommended that the third option (a modified common law scheme with private insurers) should be implemented. The main arguments in support of this recommendation were:

- it provided a more equitable and appropriate range of benefits for accident victims;
- the cost of implementing it was affordable which meant it could be implemented successfully;
- the statutory criteria for determining benefits as provided for under TransCover did not sufficiently recognise the impact on the individual;

- access to the courts as the ultimate place for dispute resolution would be maintained; and
- it would enable rehabilitation initiatives commenced by the GIO and TransCover to be continued and expanded.⁴³

This recommendation was adopted by the Greiner Government and the *Motor Accidents Act 1988* was introduced. This scheme aimed to:

continue the desirable aspects of TransCover but to address the major defects of that scheme without reintroducing the major areas of concern of the former common law scheme. At the same time, regard has been had to the need to ensure the new scheme can be afforded by the community.⁴⁴

Motor Accidents Act 1988

While it was acknowledged that the main goals of the TransCover legislation to direct compensation to the seriously injured and to take all necessary steps to ensure the rehabilitation of injured accident victims, were entirely appropriate, the way in which these goals were to be achieved was not supported. One difficulty was that there was considered to be a conflict of interest in having officers of the GIO advising claimants in relation to benefits while at the same time being responsible for dispensing public funds⁴⁵. A greater problem however was the abolition of common law rights, which was seen as diminishing an individual's rights to just compensation. The statutory scheme did not take account of the individual circumstances of each accident victim; payment of weekly benefits rather than an award of a lump sum was thought to result in a 'pension mentality' among claimants; structuring benefits to encourage people back to work, while understandable on a theoretical level was seen as ignoring the practical situation in which employers were reluctant to provide work for people with an injury because of the fear that the injury would be aggravated and a claim for workers compensation would ensue; and the active discouragement of involvement of the legal profession was seen on the one hand as denying independent advice to the accident victim, and on the other as 'inhibiting the ability of the legal profession to speak on behalf of accident victims'.⁴⁶

The new scheme also had to be structured in such a way as to avoid what were described as major deficiencies in the scheme operating prior to the introduction of TransCover:⁴⁷

43 NSW Attorney-General's Department, *Motor Accidents: The Act and Background Papers*, *ibid*, p92.

44 NSWPD, Second Reading Speech, Hon J Dowd MP, 29 November 1988, p3829.

45 *ibid*, p3828.

46 *ibid*, p3829.

47 *ibid*, p3828.

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- the cost of the scheme was such that to remain viable it would have been necessary to increase premiums substantially to a level beyond the means of many motorists;
 - a lottery mentality had developed whereby people with very minor injuries were seeking damages to cover the cost of an overseas trip or a new car;
 - for the seriously injured there were difficulties in assessing future losses as predictions had to be made as to the future needs of the victim many years after the date of the assessment;
 - claimants were delaying effective rehabilitation until their matter had been determined or settled, often a number of years after the accident; and
 - the costs of administering claims was prohibitive since court proceedings were invariably commenced even though they were unlikely to proceed to a court hearing. This meant that substantial legal costs were incurred even if the injuries were minor.

The main features of this scheme were:⁴⁸

- it remained a fault based system, which restored modified common law damages along the lines of those under the workers compensation scheme. As with the workers compensation scheme threshold provisions to screen out minor injuries and statutory restrictions on maximum amounts for non-economic loss damages, were inserted. At the time the Act was introduced a 'deductible' of \$15,000 applied, which meant no damages would be awarded if the injury was assessed to be worth less than \$15,000. The 'deductible' is indexed and today stands at \$18,500.
- it imposed a number of obligations on claimants including the requirement generally for court proceedings to be commenced within 12 months of giving notice, or at the latest, within three and a half years after the accident;
- it imposed a number of obligations on insurers including the requirement to resolve claims expeditiously, by settlement or otherwise; and
- it promoted rehabilitation.

While the abolition of TransCover was seen as positive by many involved in the motor accidents compensation area, it did not take long for criticism to be levelled at the *Motor Accidents Act 1988*.⁴⁹

48 T Goudkamp and A Morrison, *Personal Injury Law Manual NSW*, LBC Information Services, 1995, pp2042-2045.

49 M Stack, 'Teething troubles', *Law Society Journal*, October 1990, pp37-39.

Further amendments

Apart from the *Motor Accidents (Amendment) Bill 1989*, which provided for the compulsory third party insurance industry to be deregulated, no major amendments departing from the thrust of the principal Act have been made. As for the 1989 amending legislation, according to the then Attorney-General:

this passage of this Bill will ... see the introduction of a bold new scheme for providing fair and equitable compensation to injured motor accident victims through the use of private insurance companies and the GIO acting in private competition.⁵⁰

Central to the amendments proposed by this Bill was the need for the cost of compulsory third party premiums to be set by the market. It was felt that the regulation of insurance premiums by the Government in the past had been kept artificially low for political reasons and that the introduction of a number of insurers from the private sector would ensure competitive prices would genuinely be available. It was recognised however that for premiums to be kept at an affordable level, it would be necessary to ensure that damages awards were also kept at a reasonable level. The difficulty in achieving this was acknowledged:

this balance between reasonable damages and affordable premiums is not easy to maintain; but I believe the insurers and the legal profession are aware that if this scheme does not work for the benefit of all road users, the only alternative will be a return to the minimum levels of compensation offered under TransCover. The onus is therefore on the players directly involved in the new scheme to achieve a different climate to that operating prior to TransCover by ensuring that only genuinely injured accident victims receive their just compensation.⁵¹

As part of this refinement to the scheme the Bill provided for an 'industry deed' to clearly define the respective rights and obligations of all parties.

Less than two years after the introduction of the new motor accidents compensation scheme, further minor amendments were made "to take account of experience and to clarify any provisions that are not being applied consistently".⁵² It was felt that overall the scheme had been successful in achieving its goals, especially in relation to limiting amounts paid to those with only minor injuries, and that as claims had decreased, there was cautious optimism that reductions in the premiums may be possible. In anticipation of the fully deregulated system to come into operation in July 1991, which would permit insurers to set their own premium rates independently of government, the Motor Accidents Authority was

50 NSWPD, Hon J Dowd MP, 9 May 1989, p7704.

51 Ibid, p7705.

52 NSWPD, Hon J Dowd MP, 14 November 1990, p9662.

given the power to issue guidelines to the participating insurers on the factors to be taken into consideration when setting premium rates. This measure was justified by the need to ensure that third party insurance, which all New South Wales motorists were required by law to have for vehicles used on public streets, remained available and affordable.

Four years after the introduction of the *Motor Accidents Act 1988* the scheme was assessed as successfully providing fair and effective compensation at an affordable price.⁵³ This was evidenced by the drop in the average compulsory third party premium from \$350 in 1989 to \$190 in 1993; by market research which indicated that the community perceived the scheme to be available and affordable; and the improved management of both new and old scheme claims, with the estimated unfunded liability of the old scheme claims dropping from \$5000 million as at June 1988 to \$1500 million at the end of 1992. The amendments made in 1993 were mainly in relation to those sustaining moderate to severe injuries and provided improvements in the availability of compensation for non-economic loss and home care services. The requirement to prove 'significant impairment to lead a normal life' was removed and replaced with a statutory formula. Other changes were related to streamlining administrative procedures to improve claims handling and the early payment of compensation.

In 1994 very specific amendments were made in response to a decision of the Court of Appeal, concerning the court's discretion to award interest on damages for personal injuries sustained in motor accidents.⁵⁴ The Bill was aimed at restoring the position which existed prior to the Court's decision.

3 CURRENT POSITION

(i) Workers Compensation

For a number of years following the various legislative changes outlined above, the scheme appeared nothing short of a success. Cost blow-outs, a feature of earlier workers compensation schemes seemed finally to have been halted, the premium rate was maintained at a relatively low amount, the accumulated funds were in a healthy position,⁵⁵ enabling many positive changes to benefits provided under the Act, and there was a continuing downward trend in the incidence of major claims. In the WorkCover Authority

53 NSWPD, Hon C Hartcher MP, 19 May 1990, p2333.

54 NSWPD, Hon R Webster MLC, 4 May 1994, p1863.

55 WorkCover Authority, Annual Report 1993/94:

... WorkCover retains a prudential margin sufficient to provide for variations in the number and cost of claims that may occur in future years. WorkCover has a fully funded claims liability provision for the Statutory scheme of \$3.1 billion as at 30 June 1994 ... In addition WorkCover has a contingency reserve retained to accommodate asset fluctuations and to maintain premium stability, p39

Annual Report 1993/94 the performance of the scheme was still being assessed as strong and sound, particularly in regard to the appropriateness of a premium rate set at 1.8%⁵⁶ and when the 1.8% rate was confirmed for 1994/95, the former Minister for Industrial Relations said:

... the overall reduction in work-related deaths and injuries in New South Wales over the past three to four years has allowed the Liberal/National Government to keep down the cost of workers compensation.⁵⁷

In recent times it would appear however that the health of the WorkCover scheme is not as robust as imagined:

- there was an upward trend in the payment on new and existing claims,⁵⁸
- the scheme has sustained a \$982 million blow out which has already forced a .3% rise in average premiums to 2.5% and since June the reserve funds of the WorkCover Authority have fallen from \$65 m to \$53.5 million.⁵⁹
- part of the collapse in funds was due to a \$142 million shortfall in investment income from the previous income year mainly due to falls in the bond market and share market; there was a premium shortfall of \$130 million and excessive claims payments of \$61 million.⁶⁰
- of the \$982 million reversal, estimates of future court awards and legal costs accounted for \$613 million.⁶¹ WorkCover figures indicate the increase in legal

56 *ibid*, p6 and p41:

... the insurance arrangements under the WorkCover scheme continue to operate well with the average premium rate being held at 1.8% ... and the total reserves of the Scheme remain at a satisfactory level when compared to normal industry practice.

... this is the third year that the premium rate of 1.8% has been maintained and reflects the strong financial position of the Scheme. Target premium rates for 94/95 will also be at an average of 1.8% of wages.

57 Media Release, 'Workers Compensation Insurance Premium Freeze', 22 June 1994.

58 In 1992/93 payments were \$173 million more than in 1991/92 according to the WorkCover Annual Report, *ibid*, p30.

59 Media Release, Attorney-General, Hon J Shaw QC MLC, 'Workers Compensation Reform Proposals Announced', 9 November 1995.

60 I Verrender and B Norington, 'Hearing claims boost \$982 million WorkCover loss', *Sydney Morning Herald*, 8 June 1995.

61 I Verrender and B Norington, 'WorkCover the cash cow for the booming industry of compensation', *Sydney Morning Herald*, 14 June 1995.

fees: 1991/92 \$40.8 million; 1992/93 \$67.2 million; 1993/94 \$79.2 million and 1994/95 - \$104.4 million.⁶²

A number of reasons for this change in WorkCover's fortunes have been given:

- increased claims due to higher employment since the end of the recession;
- increased knowledge on the part of the community as to the availability of workers compensation;
- the benefits provided by the scheme have been too generous;
- the amount charged for the premiums has been inadequate (over the years the cost of workers compensation premiums has gone from 4.3% of wages in 1985; to 3.2% in 1987/88; 2.6% in 1988/89; 2.0% in 1990/91 to 1.8%, where it has remained since 1991/92). Whether this stemmed from the extent of potential claims being underestimated back when the scheme was being established and actuarial projections were being made or whether it was due to the limits being artificially maintained is not clear;
- the number of claims for industrial deafness, back injuries and stress have increased. (This issue was addressed somewhat by measures introduced in amending legislation in May 1995);
- increasing use of lump sum settlements;
- instances of claims which although not fraudulent, are exaggerated;
- the possibility of 'double dipping' in which an injured person (often police officers, prison officers, security guards and so on) claims compensation for the same injury under both the victim's compensation scheme and the workers compensation scheme;
- the legal profession has gained a greater understanding of, and familiarity with, the legislative scheme ;
- the costs associated with litigation particularly those related to payment of solicitors' and barristers' fees and the cost of medical reports ordered by both sides. Under the current system WorkCover meets the legal costs of both the victim and the employer's insurance company;
- the level of awards handed down by the courts, which in the opinion of the insurers has been in many cases overly generous;

- the recent changes to the *Legal Profession Reform Act* which allow lawyers to advertise that they will undertake work on a 'no win, no pay' basis;⁶³
- the level of litigation has increased particularly in regard to workplace accidents and injuries which occurred several years ago, and in some cases, in relation to accidents and injuries that were never reported;

Legal Costs

The issue of legal costs is an interesting one, another area where expenditure seemed to be increasing. Prior to the introduction of the WorkCover scheme, legal costs made up 10% of the costs incurred; in the 1993/1994 WorkCover Annual Report the figure was 11%⁶⁴. Given that one of the aims of the scheme was to keep litigation to a minimum, the fact that legal costs were about the same as, if not more than, under the old scheme caused the WorkCover Authority to commission an independent organization to conduct a study to show where litigation is occurring, how it is being conducted and what legal costs are being incurred.⁶⁵ The main findings of this study were:

- only a small proportion of workers compensation disputes are resolved without litigation (20%);
- although 45% of the unlitigated disputes were referred to and resolved by the WorkCover Authority conciliation service, the proportion of unlitigated disputes overall is small;
- it appeared that insurers do not often refer disputes to WorkCover Authority for conciliation unless they are required to do so by legislation and workers rarely referred matters unless they have received a notice from the insurer informing them that payments would be discontinued;
- a dispute where litigation was not involved took an average of 5 months to resolve; where the dispute arose out of permanent loss lump sums or pain and suffering claims and there was no litigation involved, it took 9 months to resolve.
- overall litigated disputes took an average of 12 months to resolve and where settlement occurred before the hearing, it took on average 10 months to resolve.

63 P Lewis, 'Deaf defiance', *Telegraph Mirror*, 14 June 1995.

64 WorkCover Authority, Annual Report, *ibid*, p30.

65 D Worthington, *Compensation in an atmosphere of reduced legalism*, Civil Justice Research Centre, published by the Law Foundation of NSW, December 1994. This study was based on a sample of 894 claims and only claims in which total incurred cost was greater than \$5000 were examined as most legal costs were found to arise from such claims.

- in certain cases (weekly benefits - only) litigation does not appear to follow a disagreement between the parties but is used as a means of making a claim for benefits;
- in 90% of litigated disputes, the insurer responded by instructing solicitors;
- despite the fact that at the time this study was conducted, there was 15 months' delay in the Compensation Court before matters were finalized, the proportion of matters settling 'at the door of the court' was particularly high (57%), compared with the Supreme Court, where only 27% settled 'at the court door' and 65% settled at an earlier stage.
- there was no attempt to negotiate settlement before the day of hearing in 64% of litigated disputes;
- where legal costs were incurred but no litigation was commenced, the average total cost was \$1,173. The average total legal cost for disputes which settled before the day of the hearing was \$4,882 and, where disputes settled on the day of or during the hearing, the average total legal cost was \$13,779, which was similar to those cases which were concluded by a verdict being handed down (where average total legal costs were \$12,732);
- litigation appeared not to be a cost effective mechanism for administering claims for permanent loss lumps sums or pain and suffering.

A cost/benefit analysis was done in relation to claims for permanent loss lump sums or pain and suffering to see what litigating the matter achieved. This was done by comparing the amount originally claimed with the amount finally received, with the difference being 'the benefit' achieved by the insurer. This amount was then compared with the amount spent on total legal costs.

- (i) Where the worker received less than the amount claimed, the median benefit achieved by the insurer in contesting the litigation was \$3,764, the median total legal cost incurred in achieving this benefit was \$5,395.
- (ii) Where the worker received the same amount as had been originally claimed, there was no benefit achieved by contesting the litigation, the median total legal cost incurred being \$4,015.
- (iii) Where the worker received more than the amount initially claimed, a cost was incurred by the insurer contesting the litigation, a median cost of \$2,889 was incurred in relation to the amount of benefit paid, and the median total legal cost was \$7,221.

- claims for sprain and strain injuries were more likely to be litigated than claims for

other injury categories.

- medical panels were used in 23% of the litigated disputes. In 75% of these, the medical panel's assessment was equivalent to that applied to the final assessment of the claim.

Proposals

Although amendments introduced by the *Workers Compensation Legislation Amendment Bill 1995*, are expected to result in savings of \$33.8 million with one off savings of \$96.8 million⁶⁶, the Attorney-General and Minister for Industrial Relations Hon JW Shaw QC MLC foreshadowed that:

the Government will be undertaking a wider review of WorkCover provisions, having regard to considerations of fairness and cost.⁶⁷

General proposals

A number of general suggestions have been made as to how the system could be reformed:

- greater use could be made of medical panels. Under the present system reports by doctors retained by each side are without exception favourable to whichever side is their client. However, criticism has been voiced against this system, which is being used extensively in Victoria as a means of cutting costs, as it is claimed insufficient time is given by the panel to hear the worker's account⁶⁸;
- benefits could be cut. Suggestions have been made such as the introduction of a statutory formula for assessing pain and suffering to replace subjective assessments made by judges and for a maximum limit to be stipulated. If this proposal is implemented it would be likely to be controversial as it would remove the powers of the court to exercise a broad discretion when setting amounts of compensation.⁶⁹ Other suggestions have been to freeze automatic CPI increases to maximum lump sum benefits and to freeze the maximum amount that could be claimed for medical treatment and hospital fees,⁷⁰ and
- the involvement of lawyers in the process could be reduced by increasing the use

66 M Russell, 'Employers face huge WorkCover rise', *Sydney Morning Herald*, 7 June 1995.

67 NSWPD, Attorney-General, Hon J Shaw MLC, 31 May 95, p416.

68 D Murphy, 'Unsworth claims his compo legacy', *The Bulletin*, 15 August 1995.

69 B Lagan, 'Radical plan to cut compensation cost', *Sydney Morning Herald*, 8 November 1995.

70 B Lagan, 'Legal fees may be cut in compensation cases', *Sydney Morning Herald*, 9 November 1995.

of a strengthened conciliation system.

Government proposals

Speculation as to what form the changes might take was ended with the release of a Discussion Paper by the Government on 9 November. In summary these are:

- to freeze indexation of maximum lump sums for permanent disability;
- to impose a 5% eligibility threshold for compensation claims for loss of hearing;
- to provide that any pre-existing impairment of the back, neck or pelvis is to be deducted from a worker's lump sum compensation entitlement for that impairment;
- to abolish interest on lump sums for permanent loss lump sums and pain and suffering claims, except interest for late payment of an award, a medical panel determination or an agreed settlement;
- to abolish interest on damages payable by the employer for non-economic loss and for domestic services, nursing and attendant or respite care, other than interest for late payment of a court order.
- to exclude workers compensation claims for stress where employment was not a substantial contributing factor or where the stress arises from reasonable action taken by the employer involving discipline, counselling, demotion, non-promotion, transfer, dismissal or retrenchment of the worker;
- to tighten the time limits for the making of workers compensation claims by requiring them to be lodged with the employer/insurer within three years after the worker's injury (or death) or after diagnosis of a gradual onset disease ;
- to require injured workers to lodge their compensation claim with the employer /insurer before dispute resolution procedures can be pursued;
- to introduce cost penalties applicable to either party for unreasonable refusal of lump sum settlement offers after conciliation, a medical panel determination or related negotiations;
- to establish a separate Dispute Resolution Service, comprising Commissioners and medical panels (from the Compensation Court) and conciliation officers (from the WorkCover Authority).
- to reduce by a uniform 10% legal practitioners' fees for workers compensation matters, with fees for practitioners appearing before Commissioners to be set at 80% of this reduced amount;
- to retain at current levels for two years maximum medical, hospital and other

treatment fees claimable under the *Workers Compensation Act* and provide that neither the worker nor the employer separately from its insurer is personally liable for any gap in fees that could emerge;

- to improve the effectiveness of employers' workplace rehabilitation programs by requiring preparation of a return to work plan for any injured worker who is totally incapacitated for at least 12 weeks;
- to strengthen penalties and other measures to ensure that employers obtain workers compensation insurance;
- to increase the maximum fines under the *Occupational Health and Safety Act* for workplace safety offences by employers from \$250,000 to \$500,000 for corporations and from \$25,000 to \$50,000 for individuals. Corresponding increases are also proposed to be made to penalty levels for other lesser offences under occupational health and safety legislation; and
- to introduce lump sum entitlements for workers who contract HIV/AIDS in the course of their employment or who suffer permanent severe bowel injuries.

(The full Discussion Paper is attached at **Appendix 1**).

(ii) Motor Accidents

As with the workers compensation scheme, the reforms to the motor accidents scheme implemented in the last few years seemed to have turned the situation around, with the number of claims diminishing and the cost of compulsory third party premiums decreasing. However, problems with the scheme have resurfaced and New South Wales now has the most expensive compulsory third party insurance in Australia and the cost of claims has been steadily rising since 1992.⁷¹ A recent report prepared for the Insurance Council of Australia estimated that the insurance industry has already lost about \$500 million on compulsory third party premiums.⁷²

One of the often most cited reasons for the scheme being in its current situation is the increasing incidence of claims for minor injuries. This was discussed in some detail by the Deputy General-Manager of the Motor Accidents Authority, in a recent article elaborating on some of the problems facing the scheme at present.⁷³ These are:

71 In 1992 the average cost of claims was \$25,130, in 1993 the figure was \$31,682 and in 1994 it had risen to \$35,348. V Palestrant, 'Third party break down', *Sydney Morning Herald*, 22 March 1995.

72 'New South Wales's green slip agony', *Financial Review*, 28 April 1995.

73 D Booth, Deputy General-Manager of the Motor Accidents Authority of New South Wales, 'NSW Motor Accidents Scheme Review: The Current Position', *Law Society Journal*, August 1995, pp46-47.

- the steadily increasing cost of greenslip premiums. In March 1995 premiums rose on average by about \$35 per vehicle, motorists renewing their registration after 1 July were faced with an increase of an extra \$70. This figure is nearly 50% more than that paid during 1994 and further increases are considered likely if changes to the system are not made.
- the downward trend in road accident casualties (there were approximately 35,000 in 1989/90 and 26,500 in 1992/93) has begun to increase (in 1993/94 there were approximately 28,000).
- the number of claims for compensation is also increasing. In the beginning of the scheme's operation there were about 14,000 claims for each 'accident year'.⁷⁴ Claims are still being made for the 1993/94 accident year but the total is expected to exceed 16,000. This figure is expected to rise to approximately 18,000 claims for the 1994/95 accident year and this trend is expected to continue into 1995/96.
- the claim frequency (which is based on the number of claims per 1000 vehicles) was 4.6 for the accident year 1989/90, decreased to 4.2 in 1990/91 and remained at that figure until 1993/1994 when the figure rose to 4.8%. In 1994/95 the figure was 5.2 and unless there is a major change in the scheme the claim frequency for 1995/96 is expected to be 5.8 claims per 1000 vehicles.
- a comparison of the number of claims with the number of reported injuries (taken from data collected over many years by the Roads and Traffic Authority) shows that there has also been an increase over time. Although the 1994/95 figure had risen from .42 in 1989/90 to .62, the situation is no where near as bad as that which prevailed in the mid 80s when there were as many claims as reported injuries. However, the upward trend apparently is continuing with the forecast for 1995/96 being .70 claims per reported injury.
- a recent report commissioned from a firm of consulting actuaries indicated that almost all the increased number of claims has been in relation to minor injuries only.⁷⁵ Claims relating to minor injuries have increased from around 6,500 per year to about 11,000 in 1994/95 and it is expected that this figure would increase further during 1995/96.
- the average compensation received for non-economic loss in the majority of finalized minor injuries claims for the 12 months to March 1995 was \$16,000.

74 The term relates to accidents (and hence injuries) which occurred during that year, regardless of when the claim is made, litigated or finalised. The first accident year was in 89/90.

75 Injuries falling within the minor category for the purposes of the actuarial review included whiplash (63% of minor severity claims); cuts, abrasions and bruises (12%); injuries to joints - lower extremities (5%), lumbar strain (4%); injuries to joints - upper extremities (4%); seat belt injuries (2%) and a range of other minor injuries (10%).

- the category of injuries which received the most compensation was that of minor injuries, where settlements accounted for about a third of total payments for the scheme.
- in the minor injury claims category, nearly half of the total payments related to non-economic loss damages.
- non-economic loss damages for minor injuries represented the largest single component of the awards and settlements.

The degree to which minor injuries claims figured was considered surprising given that one of the express intentions behind the scheme was to limit compensation for non-economic loss in cases of relatively minor injury. These figures seemed to indicate that despite section 79 of the *Motor Accidents Act*, substantial sums are flowing to substantial numbers of claims where the injuries sustained are minor.⁷⁶ Another surprising feature was that over 25% of claims relating to minor injuries received non-economic loss awards greater than 15% of a most extreme case.

The overwhelming conclusion drawn from the analysis by the actuaries was that a significant proportion of claims for relatively minor injuries are receiving relatively large awards for non-economic loss despite the impairment threshold in section 79 and the statutory deductible (which reduces the amount of non-economic loss compensation if the impairment is less than 30% of a most extreme case).

Other suggestions as to what has led to problems with the scheme are:

- the economic recovery has meant more vehicles on the road, which has led to an increase in deaths and injuries;
- increasing awareness by the community of the benefits available under the *Motor Accidents Act*,
- insurers not setting appropriate compulsory third party premium rates in their attempt to undercut the competition. (Premiums dropped from \$350 in 1989 to \$189 in 1992/93). It may also be the case that the original projections were inexact and estimates thought at the time to be sufficient, have proved with the benefit of claims experience to be inadequate. As was said when the Act was introduced in 1988:

The consulting actuaries have examined a number of compensation schemes in Australia and New Zealand, but in each case there is nothing directly comparable with either TransCover or the proposed modified common law scheme ... experience under TransCover has not been sufficient to

give a good indication of the likely long term cost of the scheme ... similarly the modified common law scheme is sufficiently different from the former scheme and known common law schemes operating in other States as to make comparisons difficult ... actuaries forced to make a number of assumptions when undertaking the costings. The accuracy of the costings will depend on the extent to which the assumptions are proved to be valid. Some of the assumptions related to the scheme itself, such as the likely number of claims, and some assumptions relate to the performance of the economy as a whole.⁷⁷

- inflexibility in the cost of premiums. Unlike the cost of comprehensive motor vehicle cover, which varies according to specified criteria such as the age of the driver, compulsory third party insurance is based on a community rating which permits only minor variations.⁷⁸
- the definition of 'motor accident' has been expanded in such a way that damages have been awarded in cases where the motor vehicle was incidental to the injury rather than the cause of it.⁷⁹
- amounts awarded by judges and arbitrators are more generous than insurers anticipate, particularly in relation to non-economic loss. The 'deductible' is said to have been eroded by judges making allowance for the fact that the first \$18,500 is not payable, and then assessing damages at a figure \$18,500 over what the judge thinks a person should get.

Awards under the Motor Accidents Act

To obtain more information on whether this was occurring, the Motor Accidents Authority commissioned an independent organization to conduct some research.⁸⁰ The resulting Report showed that:

... typically, amounts awarded by judges and arbitrators for non-economic loss were higher than assessments made by insurers. The findings suggest a number of factors which could account for these differences, but also indicate that there is much consistency in the way that judges, arbitrators

77 NSWPD, Hon J Dowd, 29 November 1988, p3829.

78 A Lampe, 'Drivers face \$70 rise in green slips', *Sydney Morning Herald*, 20 May 1995.

79 V Palestrant, '3rd party break down', *Sydney Morning Herald*, 22 March 1995.

80 D Worthington and M Delaney, *Awards made under the Motor Accidents Act 1988*, CJRC, published by the Law Foundation of NSW, June 1995. The study examined a sample of 342 claim files from all 14 licensed insurers.

and insurers are interpreting the Act.⁸¹

The main findings of the study were:

- The mean non-economic loss % awarded for the claims in the survey was 22%, which was equivalent to a net amount of \$30,340 and a gross amount of \$48,840. Most claims (78%) received awards that were between 10% and 29% of a most extreme case. (Awards for non-economic loss are described in terms of the percentage of the maximum amount which may be awarded).
- There was no statistically significant variation in the mean non-economic loss % awarded for hearing or arbitration, judge/arbitrator, court location or between the four years from 1991/92 to 1994/95. This seemed to indicate that the provisions of section 79 are being consistently interpreted by judges and arbitrators.
- The mean non-economic loss % assessed by insurers was 19%. This was lower than the mean non-economic loss % awarded which was 22%. This difference may indicate that judges and arbitrators are interpreting the provisions of section 79 differently from insurers. However it may also reflect a tendency on the part of insurers to under assess the non-economic loss %, either for actuarial purposes or otherwise.
- Overall the mean difference between the non-economic loss% awarded and the non-economic loss % assessed was 3.5%. That is, awards were typically \$7,700 higher than assessed by insurers.
- However, on examination there were many indications that the provisions of the Act in relation to section 79 are being interpreted consistently by both judges and arbitrators and insurers.

Proposals

Suggestions for change have been made from a number of quarters. Some of these include:

- reducing benefits;
- abolishing common law;
- introducing better driver education to reduce accidents;
- improving speed monitoring and red light camera surveillance;
- adopting a tougher attitude to settling injury claims;

-
- establishing more sophisticated fraud detection systems⁸²
 - raising the deductible;
 - toughening laws on late claims;
 - inserting “object clauses” into the Act to state the legislation’s main aims;
 - issuing comprehensive guidelines setting out the principles to be followed when assessing claims⁸³

Government proposals

The extent of current reforms has, however, been signalled by the Government in the *Motor Accidents (Amendment) Bill 1995*, which was introduced on 16 November. These are:

- inserting an ‘objects clause’ which requires the Act to be interpreted, and discretions conferred under the Act to be exercised, in a way that promotes its objects;
- amending section 79 to provide that: (i) no damages for non-economic loss shall be awarded unless the claimant’s ability to lead a normal life has been, or will be, significantly impaired for at least 12 months (currently 6 months) and (ii) no damages for non-economic loss shall be awarded unless the degree of impairment is at least 15% of the most extreme case (currently 8.2%);
- removing the concept of a deductible. Claims resulting from accidents occurring after 26 September 1995 will be assessed according to a Table setting out damages payable for non-economic loss. This amount is expressed as a proportion of the maximum amount prescribed for non-economic loss. In effect the threshold for pain and suffering claims will be \$32,900;
- preventing a court from awarding damages for future economic loss unless the court is satisfied that there is at least a 25% likelihood that the claimant will sustain the future loss claimed;
- amending the definitions of ‘injury’ and ‘motor vehicle’ to eliminate the overlap between motor accident and workers compensation claims and to limit the types of motor vehicles that can give rise to claims to only those which are required to be registered for use on a public road or are exempt from registration under the *Traffic*

82 The last four points were made in the article by A Lampe, *ibid*.

83 These last four points were recommendations made by the Motor Accidents Authority, the Insurance Council of Australia and the Law Society in a submission to the Attorney-General. M Sharp, ‘How the buck gets passed on green slip prices’, *Sydney Morning Herald*, 24 August 1995.

Act and regulations;

- stipulating that if claims are lodged late, a full and satisfactory explanation will need to be given and late claims will only be allowed if the total damages likely to be awarded are not less than 10% of the maximum amount prescribed under the *Act*;
- tightening the time frame before which court proceedings cannot be commenced, the period during which they may be commenced and the period after which they may only be commenced with the leave of the court;
- placing a requirement on insurers to resolve claims expeditiously and placing an obligation on claimants to respond expeditiously to offers of settlement;
- inserting a provision which will enable the Motor Accidents Authority to obtain police information concerning a motor accident and to pass that information on to the parties to the accident and to relevant insurers, in order to facilitate the early settlement of claims.
- requiring written notification of the accident to be given to the police;
- clarifying that a person injured in an accident is under a duty to mitigate his or her loss; and a number of other minor amendments were proposed.

This Bill, if passed, will apply retrospectively to accidents occurring after 26 September 1995.

The Government has foreshadowed that an extensive review of the *Motor Accidents Act* will be undertaken "in consultation with the Parliamentary Law and Justice Committee and that any amending legislation arising from the review will be introduced within eighteen months from the date on which Parliament approves this Bill".⁸⁴

4 VIEWS OF STAKEHOLDERS

Different views are held by the various parties involved in either the workers compensation or motor accidents compensation area for why the current situation has occurred, and what can be done to turn it around.

(i) Government

In relation to workers compensation, the low premiums of recent years have been seen as giving New South Wales an advantage in keeping businesses in the State and as an incentive for businesses in other States to set up here. The escalating costs of premiums put this investment at risk. There is also a concern that, faced with increasing costs of

workers compensation, employers may either take the risk of not being insured or of putting people off to make their premium more affordable. According to the Attorney-General, the package being put forward by the Government is “designed not only to halt abuses and save costs, but to result in workers receiving their compensation awards more quickly and easily”.

In relation to motor accidents compensation, the Government recognizes the need for a system to be in place which ensures the scheme is fully funded but is affordable for those purchasing greenslips. This underlying concern was alluded to by the Attorney-General:

ordinary people are entitled to afford to drive a car on New South Wales roads ... the task of government is to balance the need to compensate seriously injured people, who are injured on our roads, against the need for affordable third party insurance for drivers.⁸⁵

In a speech made at the Legal Convention in October,⁸⁶ the Deputy General-Manager of the Motor Accidents Authority, said

If the common law is to continue to provide the basis for compensating people injured in motor accidents, it must operate on a level which is:

- **consistent**, in terms of giving similar awards to people with similar injuries and needs;
- **equitable**, in terms of giving priority to those with most severe injuries;
- **predictable**, so that reasonably experienced solicitors and insurers can readily anticipate the likely award if a matter goes to court;
- **stable over time**, so that superimposed inflation is not a feature adding to cost pressures;
- **able to be costed**, so that insurers can determine a premium with a reasonable degree of confidence that they are not going to sustain losses; and most importantly
- **able to be funded by the community**, whether by insurance premiums in a privatised scheme, levies supporting government monopolies or mainstream taxation which supports social security and other programs. (emphasis added)

85 M Sharp, 'Shaw plans reforms to push down greenslip premiums', *Sydney Morning Herald*, 21 September 1995.

86 'The Common Law and Lawyers - Is there a Future for Them?', speech given by D Booth at the NSW Legal Convention held in Sydney on 31 October 1995.

For lawyers to continue to have a role in a scheme based on common law, they have to find a way of collectively ensuring that the legal system from suburban solicitor through to Court of Appeal judge, operates in a manner which produces the outcomes above.

He foreshadowed that if the current proposals announced by the Attorney-General are passed by the Parliament, the common law will be given one more chance. If they are not passed, or if, despite the amendments, the scheme deteriorates in a manner similar to the last two years, there was some doubt as to whether there would be a future for the common law or for lawyers in personal injury compensation.

(ii) Opposition

While the Opposition has indicated it recognises the need for, and is supportive of reform to these compensation schemes, it does not share the Government's view of how this best can be achieved. The Leader of the Opposition has indicated in a letter to the President of the Law Society that:

the Opposition parties view with grave concern the Government's proposals to make changes to the ... *Motor Accident Act*, and *Workers Compensation Act*. We are committed to protecting the rights of accident victims ...⁸⁷

In this letter the following commitments were given: in relation to the motor accidents scheme, the Coalition supports a deductible in respect of damages for non-economic loss but only in so far as it impacts on those with minor injury; it opposes the Government's proposal to introduce a deductible which increases in amount with the severity of injury; and it supports a deductible which maintains an appropriate balance between the rights of premium paying motorists and accident victims, one which will impact on those with minor injuries whilst preserving the entitlements of those with moderate and serious injury. As for the workers compensation scheme, the Coalition opposes compulsory mediation and the making of final decisions by a medical panel; it supports the right of workers to legal representation and the role of the courts in determining disputes between workers and employers.

In addition the Opposition's spokesman on Roads, Mr Souris, has called for a review of the *Motor Accidents Act* by the Parliamentary Public Accounts Committee or an independent panel of insurance industry and legal professionals, to 'review the causes of growth in the incidence of claims and the escalation of awards and whether any government policy or regulatory changes can be of an advantage'.⁸⁸

87 Letter to the President of the Law Society which was published in the Law Society Journal, November 1995, p32.

88 L. Morris, 'Rises prompt look at green slip scheme', *Sydney Morning Herald*, 1 May 1995.

(iii) Insurance industry

The insurance industry generally supports the Government's proposed changes to both the workers compensation scheme and the motor accidents compensation scheme.⁸⁹ From its point of view only legislative action by the Government can help stop the spiralling costs of both schemes. In relation to compulsory third party premiums many of the 14 licensed insurers have indicated that they want to phase out of the market to limit their losses.⁹⁰ Many have expressed a wish to become more selective in those they offer insurance to, for example, by reducing their exposure to drivers aged under 25 and in particular to male drivers under 35, as current industry experience is that all drivers under 25 account for a far higher incidence of accidents than all other age groups, but young women tend to have fewer serious injuries than their male counterparts. At present they are not permitted to discriminate in this fashion.⁹¹

(iv) Employers/Industry

Many peak bodies representing employers have stated that increases to workers compensation premiums put jobs at risk. This sentiment is the same as that expressed by the former Minister for Industrial Relations, the Hon P Hills MP, when the legislation was introduced in 1985:

The present level of workers compensation insurance premiums represents a considerable burden for many employers and is acting as a positive disincentive to the creation of new jobs, as well as the retention of existing levels of employment in this State.⁹²

An interesting point is made in relation to third party insurance and the rental car industry. Avis, the State's largest car rental company has warned it may have to increase its rental premiums unless the spiralling cost of CTP is contained. It is under pressure to increase rental premiums by an average 5% or about \$15 for a three day rental after absorbing three industry wide increases in the last 12 months.⁹³

89 However, not all insurers are enthusiastic about the compulsory third party scheme reforms. The Chief Executive Officer of the GIO believes compulsory insurance schemes are best administered by the State as 'private sector insurers cannot be trusted not to aggressively cut premiums again and cause a re-run of the compulsory third party scheme's costs blow out'. S Hoyle, 'Shaw 's a third party pooper, say lawyers', *Financial Review*, 22 September 1995.

90 'New South Wales' green slip agony' *Financial Review*, 28 April 1995.

91 A Lampe, *ibid*, 20 May 1995.

92 NSWPD, LA, Hon P Hills, 23 April 1985, p6773.

93 L Morris, *ibid*, 4 September 1995.

(v) Union movement

In relation to the workers compensation proposals, despite early fears that the Government's reforms would entail serious reductions in benefits, which the Labor Council signalled it would strongly oppose,⁹⁴ the Government is said to have received broad support from the union movement once its reform package was announced. Although concerns have been expressed about compulsory conciliation, the abolition of stress claims and freezes on benefits, unions seem generally to recognize the need for reform.⁹⁵

(vi) Lawyers

The strongest opposition to the proposed changes to both schemes has come from the legal profession. This has been on a number of grounds, not least of which is the reduction in work which would ensue for solicitors and barristers who practice in these areas, especially small suburban firms or those based in the country.

Other reasons of a more general nature which have been given by the legal profession for their dissatisfaction with the proposals are:

- the plans to limit lawyers' presence during compulsory conciliation and to give the WorkCover Authority the right to prohibit review of medical panel decisions are considered undemocratic;
- workers could be disadvantaged when faced with experienced industrial officers representing insurance companies during conciliation. There could be a risk under this system that workers would agree to settlements without understanding their rights;⁹⁶
- the legal profession also takes issue with the charge that it is responsible for cost blow outs stating that lawyers who advertise 'no win, no pay' services are just doing their job and that it is their responsibility to strenuously represent the interests of their client when conducting a matter;
- in relation to the motor accidents compensation proposals, the legal profession asserts that there is a difference in the amount estimated to be necessary to cover outstanding liability and the amount insurance companies have recommended be charged for premiums, which will end up being a 'windfall' for the insurance companies.
- concern has also been expressed that a number of injured people who would

94 P Lewis, 'Unions fight cuts to benefits', *Telegraph Mirror*, 23 September 1995 and M Sharp, 'Bid to block WorkCover cuts', *Sydney Morning Herald*, 29 September 1995.

95 P Lewis, 'Lawyers battle compo reforms', *Telegraph Mirror*, 10 November 1995.

96 *Ibid.*

previously have recovered damages for their injuries will miss out under the proposed arrangements.⁹⁷

A protest meeting, arranged by members of the legal profession, was held on 10 October 1995 to show the depth of feeling over these proposed changes.

5 CONCLUSION

It is obvious from the points made in this *Briefing Paper* that many factors have contributed to the current situation of both statutory compensation schemes. What is probably of most interest is that the pattern appears to be cyclical. A scheme is established, runs smoothly and according to expectations in the early stages, gradually starts to experience difficulties and costs begin to escalate, reform measures (some more drastic than others) are implemented and once again order is restored. Whether it is possible to eliminate this cyclical pattern remains to be seen.

It may also be that the success of a scheme is dependent on how it is defined. According to the Deputy General-Manager of the Motor Accidents Authority:

... the success of a compensation scheme is determined by the overall level of benefits it provides and the ability of the scheme to offer a reasonable level of benefits over time without incurring large amounts of superimposed inflation".⁹⁸

However, another commentator has said in relation to the workers compensation scheme that:

... whether the costs of the workers compensation system are too high is, in the end, a matter which depends on the perspective and values of the commentator ... and caution should be exercised before assuming that the costs of the system are so high that urgent remedial action should be taken on that ground alone. A strong case can be made out for the proposition that the costs borne by employers (and ultimately the community) are simply the price to be paid for a good system of compensation for work-related injury and disease.⁹⁹

It would appear that from a Government's perspective a mid-way point needs to be found. When the *Motor Vehicles (Third Party Insurance) Amendment Bill* was introduced in 1984, it was said that its aim was:

97 An insurance law specialist, Rick Burbridge QC, has estimated that 65% of accident victims who previously received awards of up to \$32,900 would now get nothing. B McDougall, '13,000 accident victims lose cash', *Telegraph Mirror*, 7 November 1995.

98 Speech by D Booth, *ibid*.

99 R Sackville, Chair of the NSW LRC, 'Workers compensation: costs and options', *Australian Quarterly*, 1984, pp131-141.

... to permit the most economical method of providing adequate compensation to the victims of motor vehicle accidents at a premium that will remain reasonable and affordable by all.¹⁰⁰

This sentiment would appear to have equal application for both statutory compensation schemes today.

APPENDIX 1



New South Wales

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9 November 1995

WORKERS COMPENSATION REFORM PROPOSALS ANNOUNCED

The Minister for Industrial Relations, Mr Jeff Shaw, QC, MLC, today announced the Government's workers compensation reform package.

The package was necessitated by a \$982 million blow out in workers compensation costs which drove reserve funds of the WorkCover Authority down to just \$65 million in one year and forced a 0.3 per cent rise in average workers compensation premiums to 2.5 per cent," Mr Shaw said.

"While the former Government knew costs were rising, they failed to increase premiums in 1994 or 1995 in an obvious pre-election ploy," Mr Shaw said.

"The Carr Government has come up with a package designed not only to halt abuses and save costs, but one which would also result in workers receiving their compensation awards more quickly and easily.

"I have considered a wide range of cost saving options, and rejected some of the more extreme options that would have impacted disproportionately on any one group in the community. The Government is now putting forward a moderate and balanced package for community consultation."

The Government proposals include:

- Giving people who acquire HIV/AIDS in the workplace access to benefits when they need it most, by being the first State in Australia to offer lump sum compensation in these cases. A person will receive approximately 50 per cent of the maximum lump sum payment (\$227,150) on being diagnosed as HIV positive. After the first payment of \$132,300, the worker will receive the balance of the maximum lump sum on developing AIDS syndrome;
- Attempting to eliminate unjustified stress claims by requiring that employment be a substantial contributing factor to the stress. Taxpayers were forced to pay out \$35.7 million in stress claims to public servants in 1994, the costs having skyrocketed from a mere \$5.6 million in 1990;

- Addressing the costly and counter productive "settling on the steps of the court syndrome" by disallowing legal fees where the Compensation Court determines there has been an unreasonable refusal of a settlement offer. WorkCover pays the legal costs of both parties in workers compensation claims, and legal costs have risen dramatically in the last five years - from \$40.8 million in 1991-2 to \$104.4 million in 1994-5;
- Lawyers fees will be reduced by 10 per cent;
- Injured workers will have to first lodge their compensation claim with the employer or insurer to prevent the common problem where court action is commenced immediately, wiping out the employer or insurers opportunity to reasonably assess the claim and perhaps resolve it;
- Conciliation will be made compulsory in all disputes to encourage speedier resolution of disputes and a new Dispute Resolution Service will be set up using existing staff to assist workers in this process. Contrary to the claims of some legal practitioners, lawyers will not be cut out of the system, and legal representation at conciliation conferences will be by leave of the conciliation officer. All workers with language or other special difficulties will be automatically entitled to legal representation. Workers will be entitled to legal representation in the Compensation Court as of right;
- Workplace rehabilitation will be improved with all employers being required to prepare return to work for injured workers incapacitated for 12 weeks or more;
- Employers who flagrantly disregard their worker's safety by breaching occupational health and safety provisions will face fines of up to \$500,000 for corporations and up to \$50,000 for individuals, twice the previous maximums;
- Attempting to prevent trivial hearing claims where compensation awarded was less than the costs involved by imposing a small - 5 % - threshold on hearing loss claims.

Mr Shaw said he hoped he would gain support for these urgent measures, as since June, the reserves of the self-funding WorkCover scheme had fallen even further, and now stood at a mere \$53.5 million.

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PROPOSALS FOR NSW WORKCOVER SCHEME

The NSW WorkCover Scheme presently faces a major cost problem owing to a sharp increase in the cost of claims and related legal and other expenses. In response, the Government has already increased the workers compensation insurance premium rates payable by employers for the 1995-96 financial year. Legislative changes are also required to adequately address the cost problem. Accordingly, comments on the following proposals, as well as any alternative or additional suggestions, are invited.

PROPOSED CHANGES TO WORKERS COMPENSATION ACT 1987 & RELATED LEGISLATION

1. LUMP SUM CLAIMS, STRESS CLAIMS, TIME LIMITS, ETC.

1.1 Indexation of lump sum benefits

Proposal - Freeze indexation of maximum lump sums for permanent disability (s.66) and pain and suffering (s.67).

Maximum lump sums under s.66 and s.67 are substantially higher than corresponding benefits under workers compensation schemes elsewhere in Australia. Under the proposal, further indexation increases of those maximum amounts, which presently occur each 1 April and 1 October, would be suspended.

1.2 Industrial deafness claims

Proposal - Impose a 5% eligibility threshold for compensation claims for loss of hearing. Lump sum compensation under s.66 of the Act would not be payable for the first 5% of hearing loss. Whether a worker has passed the 5% threshold would be determined using the standard binaural method of hearing loss assessment. It is envisaged that, if such a proposal is adopted, the threshold would be applied to claims lodged with employers on and from 10 November 1995.

Lump sum claims for loss of hearing have increased dramatically in recent years and claims for small amounts of hearing loss have disproportionately high legal, medical and administrative costs. Complementary with the proposed threshold, changes to be made to regulations under the Occupational Health & Safety Act would phase in National standards to lower permissible noise levels in NSW workplaces.

1.3 Impairment of the back, neck or pelvis

Proposal - Provide that any pre-existing impairment of a worker's back, neck or pelvis is to be deducted from his or her lump sum compensation entitlement for that impairment.

When lump sum benefits for impairment of the back, neck and pelvis were introduced in 1987, the intention of the legislation was that employers should not be liable for any pre-existing part of that impairment. That was mainly to avoid reluctance by employers to employ people with back problems caused by previous employment or by non-employment factors. However, following unexpected

interpretations adopted by the Court of Appeal, the legislation has not been applied in accordance with that original intention. Many cases occur where a major part of the lump sum compensation awarded to an injured worker relates to back etc impairment not caused by the work injury involved.

1.4 **Lump sum coverage for HIV/AIDS and severe bowel injuries**

Proposal - Introduce lump sum entitlements for workers who contract HIV/AIDS in the course of their employment or who suffer permanent severe bowel injuries.

While workers who contract HIV/AIDS proven to be due to their employment are entitled under the Workers Compensation Act to weekly incapacity benefits and payment of medical and other expenses, the s.66 Table of Disabilities does not currently provide a lump sum entitlement for those cases. Access to the lump sum for pain and suffering also depends on the worker having a loss covered by that Table. There is a similar gap in Table coverage for severe bowel injuries (such as those requiring a permanent colostomy or ileostomy).

1.5 **Interest on workers compensation**

Proposal - Abolish interest on lump sums for s.66 disability and s.67 pain and suffering, except interest for late payment of an award, a medical panel determination or an agreed settlement.

The Compensation Court presently has a wide discretion, not found in comparable workers compensation legislation of other states, to order the payment of interest on compensation entitlements as far back as the date of injury. The amount of interest ordered to be paid annually, particularly on lump sums, has become excessive. In relation to interest on weekly compensation entitlements, it is proposed to provide that interest will only apply, at the earliest, from the date the claim is lodged.

1.6 **Interest on damages for work injuries**

Proposal - Abolish interest on damages payable by the employer for non-economic loss and for domestic services, nursing and attendant or respite care, other than interest for late payment of a court order; also restrict interest on damages for economic loss to three quarters of the standard court rate.

These proposed changes are similar to changes made in 1994 to interest provisions of the Motor Accidents Act 1988.

1.7 **Claims for mental stress**

Proposal - Exclude workers compensation claims for stress where employment was not a substantial contributing factor or where the stress arises from reasonable action taken by the employer involving discipline, counselling, demotion, non-promotion, transfer, dismissal or retrenchment of the worker.

There has been a substantial increase in the number and size of workers compensation claims alleging work-related psychological stress. Several workers compensation schemes elsewhere in Australia have found it necessary to legislate along the lines proposed.

1.8 **Time limit for workers compensation claims**

Proposal - Tighten time limits for the making of workers compensation claims by requiring them to be lodged with the employer/insurer within 3 years after the worker's injury (or death) or after diagnosis of a gradual onset disease.

The current provisions of the Workers Compensation Act stating that claims must generally be made within 6 months after the worker's injury are interpreted as if there is, in effect, no time limit on the making of claims under the Act. Under the proposed stricter provisions, claims made later than 3 years after the injury, etc. would only be allowed in exceptional circumstances.

2. DISPUTE RESOLUTION

2.1 **Improved claim procedures**

Proposal - Require injured workers to lodge their compensation claim with the employer/insurer before dispute resolution procedures can be pursued.

This addresses the current problem of proceedings often being filed in the Compensation Court as a first step (without any claim having been lodged with the employer/insurer) or before the insurer has had a reasonable opportunity to assess and decide the claim.

2.2 **Unreasonable refusal of settlement offers**

Proposal - Introduce cost penalties applicable to either party for unreasonable refusal of lump sum settlement offers after conciliation, a medical panel determination or related negotiations.

Unnecessary litigation and costs often occur at present when a party has not given proper consideration to an early offer to settle a lump sum compensation claim. The proposal includes providing that, if a party refuses a settlement offer and the result of later litigation shows that the refusal was unreasonable, legal costs will not be recoverable or payable for that part of the proceedings. This will not result in individual claimants being liable for their legal costs.

2.3 **Dispute Resolution Service & Compensation Court**

Proposal - Establish a separate Dispute Resolution Service (DRS), comprising Commissioners and medical panels (from the Compensation Court) and conciliation officers (from the WorkCover Authority), with arrangements including -

- Compulsory conciliation of disputed workers compensation claims. Lodgement of Commissioner or Court proceedings only to be allowed after initial conciliation.
- Conciliation officers to retain their existing powers to issue directions for temporary weekly payments and to make recommendations to the parties to a dispute. New provisions for exchange of documents by the parties at the conciliation officer's discretion and compulsory attendance at necessary conciliation conferences.
- Legal representation of parties at conciliation conferences to be by leave of

the conciliation officer, with facility for representation where the worker has language or other special difficulties and for access to legal advice concerning any proposed settlement.

- Commencement of Commissioner or Court proceedings to determine lump sum disability claims only to be allowed 3 months after lodgement of the claim on the employer/insurer. This is to provide a proper opportunity for assessment of the claim and referral, on the application of either party, to a medical panel if appropriate. Where such referrals occur, the existing provisions of s.131 of the Act would apply regarding the questions on which medical panels' assessments are binding or not binding.
- Each medical panel to comprise suitably qualified specialists who have been nominated by employer organisations and employee organisations and appointed by the Minister to a medical referee list.
- Extension of current provisions enabling simple registration of settlements following conciliation or medical panel determination, as an alternative to entry of a formal award.
- A DRS delegate would be empowered to refer disputed lump sum disability claims for assessment by a medical panel, with new provisions in regulations specifying the questions on which the panel's opinion would be binding (additional to circumstances covered by existing s.131) or constitute prima facie evidence.
- Commissioners in the DRS to have full powers to determine disputed matters in proceedings before them (including any relevant s.67 pain and suffering entitlement, which they cannot presently determine). Legal representation in proceedings before a Commissioner to be subject to grant of leave by the Commissioner.
- Matters to be allocated for hearing before Commissioners (DRS) or Judges of the Compensation Court according to categories or criteria prescribed in regulations. The Court would also hear appeals against Commissioner decisions on questions of law.
- Appeals from the Compensation Court to the Court of Appeal also to be restricted to questions of law.

3. LIMITS ON LEGAL, MEDICAL & HOSPITAL FEES

3.1 Reduction of legal fees

Proposal - Reduce by a uniform 10% legal practitioners' fees for workers compensation matters, with fees for practitioners appearing before Commissioners to be set at 80% of this reduced amount.

In conjunction with this, it is proposed that costs of medico-legal reports on both sides would be limited to amounts applicable under current cost scales and that payment would only be made for reports used or submitted in relevant proceedings

or negotiations. An ancillary proposal would allow solicitors who appear as advocates in workers compensation proceedings to recover appearance fees similar to those payable to barristers.

3.2 **Retention of medical & hospital fees at current levels**

Proposal - Retain at current levels for 2 years maximum medical, hospital and other treatment fees claimable under the Workers Compensation Act and provide that neither the worker nor the employer separately from its insurer is personally liable for any gap in fees that could emerge.

The current levels of fees proposed to be retained include the amounts set by the Australian Medical Association and medical college guides, the maximum claimable hospital fees prescribed by regulations under the Workers Compensation Act and the levels of physiotherapists' and chiropractors' fees presently accepted by WorkCover.

4. REHABILITATION & NON-INSURANCE

4.1 **Return-to-work plans for injured workers**

Proposal - Improve the effectiveness of employers' workplace rehabilitation programs by requiring preparation of a return-to-work plan for any injured worker who is totally incapacitated for at least 12 weeks.

4.2 **Compliance with insurance obligations**

Proposal - Strengthen penalties and other measures to ensure that employers obtain workers compensation insurance, in particular -

- Provide for imprisonment for up to 6 months for uninsured employers, including directors of uninsured corporations, as an additional penalty option in appropriate cases (present maximum \$20,000 fine for non-insurance to be retained).
- Provide that injured working directors of uninsured corporations cannot claim compensation from the WorkCover Uninsured Fund (which is financed by insured and self-insured employers).
- Provide that a director who is responsible for a corporation's failure to insure can be personally proceeded against for any debt owing to the WorkCover Uninsured Fund for compensation paid to an injured worker of the corporation.
- Increase the effectiveness of the existing civil penalty for non-insurance (double the amount of avoided premium) by facilitating the determination of that avoided premium.
- Provide for an amnesty period during which defaulting employers may obtain workers compensation insurance.

**PROPOSED CHANGES TO OCCUPATIONAL HEALTH &
SAFETY ACT 1983 & RELATED LEGISLATION**

5. ACCIDENT PREVENTION

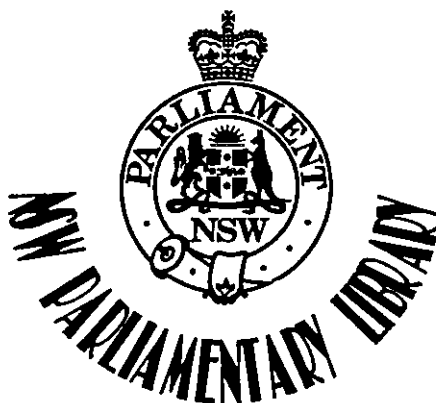
5.1 Increases in OHS penalties

Proposal - Increase the maximum fines under the Occupational Health & Safety Act for workplace safety offences by employers from \$250,000 to \$500,000 for corporations and from \$25,000 to \$50,000 for individuals. Corresponding increases are also proposed to be made in penalty levels for other lesser offences under OHS legislation.

These increases in penalty levels are considered appropriate to provide stronger deterrence to breaches of workplace safety obligations by employers. They are also in accordance with recommendations in the Federal Industry Commission's April 1995 Draft Report "An Inquiry into Occupational Health & Safety" and will bring OHS penalty levels in New South Wales into line with the highest in Australia (the Federal OHS (Maritime Industry) Act already contains maximum fines of \$500,000).

In addition, it is proposed to allow courts, as well as imposing fines, to order employers convicted of workplace safety offences to rectify unsafe working conditions. The Occupational Health & Safety Act will be further improved by a number of fine-tuning amendments.

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<i>Euthanasia</i> by Gareth Griffith and Marie Swain	1995/3
<i>NSW Elections 1995</i> by Antony Green	1995/4
<i>1995 NSW Legislative Assembly Election: Estimated Two-Candidate Preferred Results by Polling Place</i> by Antony Green	1995/5

(B) OCCASIONAL PAPER

	NUMBER
<i>The Legislative Assembly of New South Wales: 1941 to 1991</i> by David Clune	No 1 / February 1993
<i>Defamation of Public Officials and Public Figures: Special Rules and Free Speech in the United States and Australia</i> by Vicki Mullen	No 2 / August 1995

(C) BILLS DIGEST

TITLE	NUMBER
<i>National Environment Protection Council (New South Wales) Bill 1995</i> by Stewart Smith	001/95
<i>State Owned Corporations Amendment Bill 1995</i> by Vicki Mullen	002/95
<i>Crimes Amendment (Mandatory Life Sentences) Bill 1995</i> by Gareth Griffith	003/95
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<i>Waste Minimisation and Management Bill 1995</i> by Stewart Smith	005/95

(D) BRIEFING PAPER

TITLE	NUMBER
<i>Maritime Services in NSW: Issues for Reform</i> by Vicki Mullen	001/95
<i>Water Resources and Water Strategies</i> by John Wilkinson	002/95
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