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**The Future of the
New South Wales
Workers' Compensation
Scheme**

by

Rachel Callinan

Briefing Paper No 8/2001

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EXECUTIVE SUMMARY

On 23 March 2001, the Government introduced reforms to the New South Wales workers' compensation scheme, through the Workers Compensation Legislation Amendment Bill 2001. The Bill was designed to amend the *Workers Compensation Act 1987* (the *1987 Act*) and its companion Act, the *Workplace Injury Management and Workers Compensation Act 1998* (the *1998 Act*), to make extensive reforms to claims procedures, dispute resolution, commutation, lump sum compensation, common law damages and other matters.

The Bill was strongly attacked by the union movement, the legal profession and other stakeholders. The main concerns were: the proposed changes to the dispute resolution procedures (particularly changes to the role of the Compensation Court of New South Wales and the use of binding medical assessments); and amendments to common law damages and statutory lump sum compensation.

After negotiations with stakeholders, the Government agreed, on the 21st of May, to make alterations to the package of amendments and to refer the common law issues to a judicial inquiry, to be undertaken by Justice Terry Sheahan. After a breakdown in negotiations, the Government introduced a new amendment act - the Workers Compensation Legislation Amendment Bill (No 2) - into the Legislative Assembly on 19 June 2001. This paper examines the Government's 2001 workers' compensation reforms, particularly the contentious reforms.

PART A examines the common law and the statutory workers' compensation scheme in New South Wales. In Section One, the development of the common law remedy for workplace injuries caused by negligence is traced and the current common law, as altered by statute, is set out. In Section Two, the development of the statutory scheme is examined, followed by a review of the scheme as it operates currently.

PART B examines the Government's 2001 reforms. Section One looks briefly at the perceived need for the reforms – WorkCover's \$2.18 billion deficit. Section Two provides an overview of the main aspects of Bill No 2. In Section Three, an examination of the contentious reforms, including a comparison between the original Bill and Bill No 2 is undertaken.

BACKGROUND

Over the years, New South Wales workers' compensation legislation has been amended on many occasions, in various attempts to fine-tune the workers' compensation scheme. It is currently facing a deficit of \$2.8 billion. This year the Government intends to implement further reforms, some of which have proved to be extremely controversial. The Workers Compensation Legislation Amendment Bill 2001 was introduced into the Legislative Council on 23 March 2001. This Bill was designed to amend the *Workers Compensation Act 1987* and its companion act, the *Workplace Injury Management and Workers Compensation Act 1998*, to make extensive reforms to claims procedures, dispute resolution, commutation, lump sum compensation, common law damages and other matters.

The Bill met with intensive lobbying from trade unions, the legal profession and other stakeholders. The main concerns were: proposed changes to the dispute resolution procedures, particularly changes to the role of the Compensation Court of New South Wales and the use of binding medical assessments; access to common law; and the proposal to use American Medical Association guidelines to assess permanent impairment of injured workers. Conversely, and not surprisingly, most aspects of the original Bill were supported by employer groups.¹

After negotiations with stakeholders, the Government agreed, on the 21st of May, to make alterations to the package of amendments and to refer the common law issues to a judicial inquiry, to be undertaken by Justice Terry Sheahan.² The negotiations broke down and it became apparent that the Government was intending to introduce a revised Bill into parliament that the unions claimed did not reflect the agreement they had with the Government. 19 June saw unprecedented union protests at the New South Wales Parliament that were intended to prevent the legislation from being introduced into Parliament. While the Legislative Assembly sat at the scheduled time of 2.15 pm the Speaker left the chair. When the Assembly resumed three hours later, the Workers Compensation Legislation Amendment Bill No. 2 (Bill No. 2) was introduced and read the first and second time. It was passed the following day.³

This paper examines the Governments' 2001 workers' compensation reforms, particularly the contentious reforms. By way of background material, Part A of the paper examines the common law and the statutory workers' compensation scheme in New South Wales. In Section One, the development of the common law remedy for workplace injuries caused by negligence is traced and the current common law, as altered by statute, is set out. In Section Two, the development of the statutory scheme is examined followed by a review of the scheme as it operates currently.

Part B of the paper examines the Governments' 2001 reforms. Section One looks at the perceived

¹ 'Unions sign WorkCover 'talks' deal', *The Daily Telegraph*, 20/4/01, p 9.

² J Della Bosca MLC, Minister for Industrial Relations, 'Agreement on Workers' Compensation', *Media Release*, 21/05/01.

³ At the time of writing, Bill No 2 had not been introduced into the Legislative Council.

need for the reforms – WorkCover’s \$2.8 billion deficit. Section Two provides an overview of the main aspects of Bill No 2. In Section Three, an examination of the contentious reforms, including a comparison between the original Bill and Bill No 2 is undertaken.

A. WORKERS' COMPENSATION IN NEW SOUTH WALES

The New South Wales Parliamentary Library Research Service has published two papers concerning workers' compensation in New South Wales.⁴ These papers trace the development of the statutory scheme, from the introduction of the first scheme in 1926, to legislative amendments to the scheme in 1999. The papers also follow the development of the common law remedies for workplace injury caused by negligence, and the statutory modification of the common law in this area. The information contained in those papers is summarised and updated in this Part.

1. COMMON LAW

1.1 A brief history

Employers have a legal duty to take reasonable care for the safety of their workers. If this duty is breached and a worker suffers injury, the worker is entitled to sue the employer for compensation for the damage suffered.⁵ In all Australian jurisdictions, the liability of employers to pay damages at common law, for injuries caused by a breach of this duty, that are also compensable under workers' compensation legislation, has been either modified (to varying degrees) or abolished by statute. For example, the right to seek common law damages for workplace injuries caused by negligence has been abolished in the Northern Territory⁶ and South Australia.⁷ In New South Wales, Queensland,⁸ Victoria,⁹ and under Commonwealth legislation,¹⁰ an employer's liability at common law has been substantially modified, and by and large, restricted. However, in Western Australia,¹¹ Tasmania¹² and the Australian Capital Territory¹³ an employer's liability at common law has only been modified in a minimal way by statute.

In New South Wales, a workers' entitlement to claim damages against an employer (and the

⁴ *Workers Compensation and Motor Accidents Compensation in New South Wales*, by Marie Swain, NSW Parliamentary Library Research Service, Briefing Paper No 039/95 (hereafter referred to as Briefing Paper No 039/95) and *The New South Wales Worker's Compensation System: Problems and Proposed Reforms*, Roza Lozusic, NSW Parliamentary Library Research Service, Briefing Paper No 24/99 (hereafter referred to as Briefing Paper No 24/99).

⁵ The early history of the common law remedy for injuries caused by an employer's negligence in Australia, and the elements of a common law action, are set out in Briefing Paper No 039/95, op cit n 4, p 3–6.

⁶ *Work Health Act 1986* (NT), section 52(1) & 189(3).

⁷ *Workers Rehabilitation and Compensation Act 1986* (SA), section 54.

⁸ *WorkCover Queensland Act 1996* (Qld), section 253(2) & (3).

⁹ *Accident Compensation Act 1985* (Vic), section 134AB.

¹⁰ *Safety, Rehabilitation and Compensation Act 1988* (Cth), section 44 & 45(1); *Seafarers Rehabilitation and Compensation Act 1992* (Cth), section 53(d) & 54(1).

¹¹ *Workers Compensation Rehabilitation Act 1981* (WA), section 85, 86, 93A, 93B & 93C.

¹² *Workers Rehabilitation Compensation Act 1988* (Tas), section 132, 133, & 135.

¹³ *Workers' Compensation Act 1951* (ACT), section 21A, 22(1)(a) and 23(2).

concomitant liability of an employer to pay damages) for an injury caused by negligence at common law, is substantially modified by Part 5 of the *Workers Compensation 1987 Act (1987 Act)*. While the entitlement to claim damages arises independently of the *1987 Act*,¹⁴ the damages that may be recovered, and the procedures that must be followed in making such a claim, are governed by the *Act*.¹⁵

The relationship between statutory workers' compensation schemes and common law remedies for work place injuries caused by negligence in Australia has been particularly contentious in the past few decades. One of the main reasons for the introduction of the statutory schemes was that common law remedies were seen to provide relief only in limited circumstances. One of the most obvious concerns was that an injured worker who could not prove that the injury had been caused by an employers' negligence was not entitled to compensation. Since the introduction of statutory schemes, the efficacy of retaining common law damages has remained a contentious issue and one that fosters disparate views. The disparity of opinion is acutely illustrated by the abolition and then reinstatement of common law remedies in New South Wales, in 1987 and 1990, respectively. Other Australian jurisdictions have experienced similar tension between common law and statutory remedies. For example, in Victoria common law remedies were also recently abolished and reinstated by successive governments.

The major developments in the statutory modification of the common law are examined in this section, followed by an overview of the common law as it operates today. The statutory modifications of the common law in the past, and those contained in the original Workers Compensation Legislation Amendment Bill 2001, relate primarily to *access* to common law and the availability and quantum of damages once negligence has been established. Therefore, other aspects of the common law, such as the principles relating to establishing liability, are not explored in this paper.¹⁶

1987 – common law remedies abolished

In July 1987, the Unsworth Government enacted the *1987 Act*, introducing extensive reforms to the statutory worker's compensation system in NSW.¹⁷ The *1987 Act* also abolished common law remedies for workplace injuries or death caused by negligence.¹⁸ There was strong opposition this aspect of the legislation, particularly by the legal profession and unions. And, as part of its 1988 election platform, the Opposition promised that if the Coalition won government, common law rights would be restored.

The arguments for and against retaining common law remedies are set out below. At present there is no indication that the current Government is considering abolishing common law

¹⁴ *Grljak v Trivan Pty Ltd* (1994) 35 NSWLR 82.

¹⁵ LBC Information Services, *Personal Law Injury Manual*, Volume 2 at [3.550].

¹⁶ There is a wealth of case law establishing principles that must be satisfied in order for a plaintiff in a common law claim to be successful. Case law relates to matters such as the nature of an employer's duty of care, what constitutes a breach of the duty of care, contributory negligence and other matters. For a review of the relevant case law see, LBC Information Services, *op cit*, n 15 at [3.500] -[3.1500].

¹⁷ See section 2.1 for a discussion of these reforms.

¹⁸ *Workers Compensation Act 1987 Part 5*

remedies for workers' compensation entirely. It is argued, however, that the amendments in the original Bill which proposed to limit the availability of common law compensation to those who suffer a 25% permanent impairment (see Part B, section 3.1.1 for further detail) would effectively abolish common law remedies for the majority of injuries. The arguments for and against retaining common law remedies are therefore relevant to an understanding of the current debate.

Arguments for retaining common law remedies	Arguments against retaining common law remedies
<ul style="list-style-type: none"> • Only individual assessment of the kind applied at common law takes into account the special needs and circumstances of each plaintiff, to enable appropriate compensation to be awarded. • Under the statutory scheme, adequate compensation payments may not be made for serious injuries where a person requires extensive treatment and care for many years. • Lump sum awards promote rehabilitation and encourage independence on the part of the accident victim. • There are psychological benefits to a plaintiff being able to exercise the 'right' to take legal action against a negligent employer. • As negligence establishes fault, the responsible party is established and held liable. • Liability based on fault acts as a deterrent against conduct that is dangerous to others. • The courts are not vulnerable to political control. 	<ul style="list-style-type: none"> • The adversarial nature of litigation is difficult for both plaintiffs and defendants. • Obtaining common law damages can be a long, drawn out process thus delaying relief to a plaintiff. • Litigation is expensive for all parties (and this cost also flows on to insurers). • If a worker cannot establish fault, she or he will not succeed at common law. • Pressure to settle cases may mean that some plaintiffs are under-compensated. • There are deficiencies in assessing damages on a 'once and for all basis', especially in relation to a life-long disability. • Lump sum awards are allowed by the statutory scheme under the commutation provisions. • The adverse effects of the common law negligence action on the rehabilitation of many workplace accident victims. • Given that assessment of damages is made at the date of hearing, to ensure that a higher amount is obtained, a worker may be inclined to prolong his or her injuries.

1990 – common law remedies reinstated

Common law remedies were reinstated by the Greiner Coalition Government in February 1990, through the enactment of the *Workers Compensation (Benefits) Amendment Act 1989*.¹⁹ The whole of Part 5 of the *1987 Act* was repealed and a new Part 5 inserted. However, the reinstatement of common law rights represented a significant departure from the common law prior to 1987.²⁰ The new provisions contained significant restrictions on the right to seek common law damages. Generally, the effect of the restrictions was to shut

¹⁹ 1989 No 133.

²⁰ Injuries sustained after the abolition of common law damages on 30 June 1987 and before the restoration of common law remedies on 1 February 1990 are dealt with differently under the *Workers Compensation Act 1987* (NSW), see section 151V.

out smaller claims and to limit the amount of non-economic loss payable. A common law claim could be brought, but only where certain threshold requirements had been met, both in relation to economic loss and non-economic loss. Maximum amounts that could be awarded were also set, where previously there was no such limitation.

While there have been some subsequent amendments, the modified right to seek common law damages as reinstated in 1989 has remained essentially the same today. A review of the main features of the modified common law damages as they operate today is set out below. This is preceded by a brief look at the recommendations of the Grellman Inquiry that relate to the common law.

1997 - The Grellman Inquiry

In 1997, the Grellman Inquiry was commissioned to review the New South Wales workers' compensation scheme, including the common law remedies available to workers injured by an employer's negligence.²¹ The Inquiry considered the issue of the common law remedies in the context of the following propositions set out in its Issues Paper.²²

1. The provisions that allow an employee to seek damages at common law should be removed. A fault based common law regime is incompatible with a no-fault based statutory system. Access to common law sends the contradictory message that whilst the statutory scheme deems any workplace injury to have been the employer's fault, the common law will provide extra money to an employee who can prove that his/her injury was his/her employer's fault. It highlights that an employee who is injured at work through his own fault (which does occur, despite the employer being deemed to be in control of everything in the workplace) is nonetheless entitled to statutory benefits.
2. Abolish common law or raise the common law threshold.

The Final Report of the Inquiry recommended that access to common law should be retained, with some changes. The Report recommended the following approach:²³

- A 'whole of body' work related permanent impairment assessment made at the point of maximum medical impairment must exceed 25%.
- The worker must make an irrevocable election to pursue a common law action and therefore not be entitled to the Permanent impairment lump sum for permanent economic loss or long-term incapacity weekly benefits. (This is already a part of the common law remedies and was introduced when common law remedies were reinstated.)
- The worker is entitled to ongoing permanent impairment weekly benefits, based on the permanent impairment percentage until damages are recovered. These damages will then include a deduction for weekly temporary incapacity and permanent

²¹ The Grellman Inquiry is examined in the context of the statutory scheme in Part A, section 2.1.

²² *Inquiry into Workers' Compensation System in NSW – Issues Paper, 27/5/97* (Grellman Issues Paper), p 52.

²³ Grellman Issues Paper, op cit, n 22, p 82.

impairment benefits. Commutation of the weekly permanent impairment benefits is not permitted.

- The maximum amount payable for non-economic loss is \$220,000 and a threshold of 20% of the maximum applies (ie \$44,000). Amounts awarded between 20-25% of the maximum are scaled down by an appropriate factor.

1.2 The current scheme

Election: The *1987 Act* provides that an injured worker is not entitled to make a claim for common law damages from an employer liable to pay that compensation *and* a claim for permanent loss compensation. Permanent loss compensation means compensation under Division 4 Part 3 of the *1987 Act* for non-economic loss (see Part B, section 3.1.2). A worker is required to *elect* whether to claim common law damages or make a claim for permanent loss compensation under the *1987 Act*.²⁴ An election is made (or is taken to have been made) in the following circumstances:

- An election in favour of the common law is made by commencing proceedings in a court to recover damages, or by accepting payment of those damages (in which case the person ceases to be entitled to permanent loss compensation in respect of the injury).²⁵
- An election in favour of permanent loss compensation is made by commencing proceedings in the Compensation Court to recover permanent loss compensation, or by accepting payment of permanent loss compensation (in which case the person ceases to be entitled to recover damages in respect of that injury).²⁶

An election is essentially irrevocable. However, an election to claim permanent loss compensation may be revoked with the leave of the Court in certain circumstances concerning the deterioration of a workers' condition.²⁷

Statutory limitations: There is a statutory limitation on when common law actions can be brought. A common law action cannot be commenced within six months of giving notice of the injury (unless an employer admits liability).²⁸ An action cannot be commenced after three years from the date of the injury, except with the leave of the court.²⁹ Previously, the

²⁴ *Workers Compensation Act 1987* (NSW), section 151A.

²⁵ *Workers Compensation Act 1987* (NSW), section 151A(3)(a).

²⁶ *Workers Compensation Act 1987* (NSW), section 151A(3)(b).

²⁷ *Workers Compensation Act 1987* (NSW), section 151A(4)&(5). Following the recent High Court decision in *State of NSW v Taylor* [2001] HCA 15 (15 March 2001), it will be difficult to obtain leave of the Court to withdraw an election to receive lump sum compensation, even in circumstances where it is acknowledged that the worker's condition has deteriorated following the election: Panagoda K and Smith J, 'Revocation of election by an injured worker is not so easy' *Law Society Journal*, June 2001, p 68.

²⁸ *Workers Compensation Act 1987* (NSW), section 151C.

²⁹ *Workers Compensation Act 1987* (NSW), section 151D & 151W. When the common law was reinstated in 1989, section 151D also contained a requirement that a person who commences or who has commenced court proceedings for common law damages more than 18 months after the date

general rule at common law was that actions must be commenced within six years of the accrual of the cause of action.

Damages: At common law there are two main types of damages available; damages for economic loss and non-economic loss. Other damages that can be awarded in certain circumstances include, damages for domestic and nursing services, interest on damages, damages for psychological or psychiatric injuries and aggravated damages. Exemplary or punitive damages, which are designed to punish defendants in specific circumstances, have been abolished in relation to workplace injuries compensable under workers' compensation legislation.³⁰

Damages for non-economic loss: Non-economic loss is defined in the *1987 Act* to include pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement.³¹ There is a threshold that determines eligibility for non-economic loss. To be eligible the amount of non-economic loss suffered by the injured worker must be greater than \$36,000 (the lower limit).³² If an injured worker meets the threshold, the amount of damages to be awarded is a proportion of the maximum amount payable and the proportion is determined by the severity of the injury. The *1987 Act* also contains a formula to reduce the amount of damages if the amount of non-economic loss falls between the lower limit and \$48,000 (the upper limit).³³ The legislation also stipulates a maximum amount of \$204,000, which may only be awarded in the most extreme cases.³⁴ The amounts set in the *1987 Act* are indexed and are currently set at \$44,600 (lower limit), \$59,700 (upper limit) and \$252,550 (maximum).³⁵ Common law damages for non-economic loss are examined in further detail in Part B, section 3.1.1.

Damages for economic loss: Damages for economic loss can only be awarded if the worker received a 'serious injury', or died as a result of the injury. A 'serious injury' can be one of two things. First, an injury for which compensation payable under section 66 of the *1987 Act* for permanent loss is, in the opinion of the court, not less than 25%³⁶ of the maximum

of the injury must give the court a full and satisfactory explanation for the delay. This requirement was removed by the *Workers Compensation Legislation (Amendment) Act 1994* No 10, in recognition of the fact that many work-related injuries took some time to stabilise (Schedule 5(7) Explanatory Note).

³⁰ *Workers Compensation Act 1987* (NSW), section 151R.

³¹ *Workers Compensation Act 1987* (NSW), section 149.

³² *Workers Compensation Act 1987* (NSW), section 151G.

³³ *Workers Compensation Act 1987* (NSW), section 151G. When the *1987 Act* was introduced these thresholds were higher - the lower limit was \$45,000 and the upper limit was \$60,000. The current figures were introduced by the *Workers Compensation (Benefits) Amendment Act 1991* No 99, in response to the financial success of the scheme: NSWPD, 14/11/91 p 4587.

³⁴ *Workers Compensation Act 1987* (NSW), section 151G. When the *1987 Act* was introduced the maximum amount was lower - \$180,000. The current figure were introduced by the *Workers Compensation (Benefits) Amendment Act 1991* No 99.

³⁵ *Workers Compensation Act 1987* (NSW), section 151G(7), 80 & 81(1). The set amounts are adjusted on 1 April and 1 October each year in accordance with the Consumer Price Index.

³⁶ When the *1987 Act* was introduced this threshold was set at 33%. It was reduced to 25% by the *Workers Compensation (Benefits) Amendment Act 1991* in response to the financial success of the scheme) see footnote 33.

amount payable under the Table of Disabilities (see Appendix I). Second, an injury for which damages for non-economic loss are not less than \$48,000³⁷ (this amount is indexed and currently is set at \$59,450).³⁸ Note that the formula used to calculate lost earning capacity does not reflect the actual amount earned, as it disregards overtime, penalty rates etc and has a statutory limit. Common law damages for non-economic loss are examined in further detail in Part B, section 3.1.1.

Other restrictions: There are other statutory restrictions of the common law remedies that were not a part of the common law prior to 1987. For example, the discount rate by which damages are reduced, to take into account the benefit of receiving a lump sum, was increased from 3% to 5%, and the onus of proof in relation to mitigation of loss was reversed and placed on the worker. The employer's defences of contributory negligence and *volenti* were also re-instated in 1990. 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.

Dust Diseases Tribunal: A specific tribunal was set up in 1989 to deal with common law action for injuries caused by dust.³⁹ The Dust Diseases Tribunal resolves disputes relating to death or personal injury occurring as a result of exposure to asbestos and other dusts resulting in dust diseases and other dust-related conditions. Common law actions in which it is alleged that a person suffered or died as a result of a dust related condition attributable to another person's breach of duty can only be litigated in the Tribunal.⁴⁰ The Tribunal is established to operate as a fast-track mechanism to hear these cases.⁴¹ The statutory restrictions on common law damages in New South Wales do not apply to injury or death resulting from a dust disease, because the workers' compensation legislation excludes dust diseases from the statutory definition of injury.⁴²

2. THE STATUTORY SCHEME

Each State and Territory in Australia has a statutory no-fault workers' compensation scheme. There are also two federal schemes: the Comcare scheme covering Commonwealth employees; and the Seacare scheme covering certain workers engaged on national and international ships.⁴³ In this section, an outline of the history of the New South Wales

³⁷ *Workers Compensation Act 1987* (NSW), section 151H(2A). Note that this applies to injuries received on or after the commencement of Schedule 2(2) to the *Worker's Compensation (Benefits) Amendment Act 1991*. A different threshold applies to injuries received before the commencement of that Act: section 151H(2). When the *1987 Act* was introduced this threshold was set at \$60,000. It was reduced by the *Workers Compensation (Benefits) Amendment Act 1991*.

³⁹ *Dust Diseases Tribunal Act 1989* (NSW), section 4.

⁴⁰ *Dust Diseases Tribunal Act 1989* (NSW), section 11.

⁴¹ This information is taken from the web site of the Dust Diseases Tribunal. See the web site: www.agd.nsw.gov.au/cc.nsf/pages/ddtindex for further information.

⁴² *Workers Compensation Act 1987* (NSW), section 4(c) & 151, *Workers Compensation (Dust Diseases) Act 1942* (NSW), section 3(1), *Workplace Injury Management and Workers Compensation Act 1998* (NSW), section 4(1): *The Laws of Australia*, 26 Labour Law, 26.5, [214].

⁴³ The Heads of Workers Compensation Authorities (HWCA) produced a biannual update of a document titled: *Comparison of Workers' Compensation Arrangements in Australian Jurisdictions*. The document was compiled from information supplied by the HWCA jurisdictions and contains a useful comparison of many aspects of the various statutory schemes in Australia. The HWCA

statutory scheme is undertaken. This is followed by an examination of the scheme as it operates today. This examination provides an update to the earlier Briefing Papers and establishes the background to the analysis to the current reforms.

2.1 A brief history

1910 – early 1980's

In New South Wales, the first workers' compensation legislation was the *Workmen's Compensation Act 1910* (the *1910 Act*). This Act applied to personal injury by accident arising out of, and in the course of, employment and was limited to certain occupations that were deemed to be 'dangerous'. The *1910 Act* was replaced by the *Workers Compensation Act 1926* (the *1926 Act*) which introduced compulsory insurance for employers and the licensing and regulation of insurers. It also established the first specialised workers' compensation tribunal in Australia: the Workers' Compensation Commission. The function of the Commission was to assist in the conciliation of disputes and where this could not be achieved, to adjudicate. The Commission also had the power to license and supervise the operations of insurers, and appoint medical practitioners as medical referees.⁴⁴

This scheme continued essentially unchanged until the mid 80s, although there were some legislative amendments before then. For example, the *Workers' Compensation Act and Workmen's Compensation (Broken Hill) Act (Amendment) Act 1942* introduced an Uninsured Liability Scheme to be administered by the Commission. If the employer against whom a worker had made a claim was uninsured, the worker could make his or her workers' compensation claim on the Scheme. This solved the problems that often arose when a worker sought compensation from an uninsured and impecunious employer.⁴⁵ Also, in the 1940's, legislation was introduced to ensure that all those who suffered from silicosis and other dust diseases were eligible for compensation.⁴⁶ This legislation filled the gaps in compensation laws that meant that workers with silicosis were inadequately compensated for their injuries.

The Mid 1980's

In 1984, the Workers Compensation Commission was disbanded and replaced with the State Compensation Board and the Compensation Court.⁴⁷ The Board took over administrative and licensing functions and the Court continued to exercise judicial functions. Commissioners were appointed to the Court and given the power to hear cases that did not involve more than \$40,000.⁴⁸

recently amalgamated with the Occupational Health and Safety Admin Group to form the Heads of Workplace Safety and Compensation Authorities (HWSCA). The new HWSCA will continue to publish this document, to be revised annually on 1 October each year.

⁴⁴ *The Compensation Court of New South Wales Annual Review 1999*, March 2000, The Compensation Court of New South Wales, p. 3.

⁴⁵ *ibid.*

⁴⁶ *Workers' Compensation (Dust Diseases) Act 1942* (NSW). NSWPD 17/12/42, p 1501–1509.

⁴⁷ *Compensation Court Act 1984* (NSW).

⁴⁸ Compensation Court of New South Wales, *op cit*, n 44, p 4.

In 1985, problems with the workers' compensation scheme were becoming evident. For example, premiums had risen from 2.65% of payroll in 1976/77 to an estimated 4.3% in 1985.⁴⁹ Reform of the system was commenced, and amendments to the *Occupational Health and Safety Act 1983* (NSW), the *Compensation Court Act 1984* (NSW) and the *Workers Compensation Act 1926* (NSW) introduced. 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 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.⁵⁰

Several measures were put in place to achieve these goals. For example, the role and jurisdiction of the Commissioners was reformed and proceedings before Commissioner's were made less formal. All existing insurance licences were cancelled, the pool of participating insurers was decreased and new licensing criteria were established. In place of the former recommended premium rate scheme, premiums as determined by the Insurance Premiums Committee were to be mandatory. An Insurers Guarantee Fund, to be administered by the GIO, was also set up to meet claims under policies issued by 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.

However, despite these changes problems with the scheme continued and by 1986 it was clear that a major overhaul of the workers' compensation scheme was needed. However the best means of achieving a more effective scheme was far from clear. To this end, the State Compensation Board was asked by the Government to prepare a discussion paper, canvassing various options.⁵¹ The Government conducted extensive consultations based on that paper. The final outcome was the *Workers Compensation Act 1987*.

1987 – Workers Compensation Act 1987

The *Workers Compensation Act 1987* (the *1987 Act*) repealed the *1926 Act* and put in place a radically different workers' compensation scheme. The *1987 Act* (as amended) now forms the basis of the statutory scheme in New South Wales. The most notable feature of the *1987 Act* was that it removed the right of a worker to make common law damages claims against his or her employer. The common law issues are examined in Part A, section 1.1. Other notable features included:

- Severe restriction of the role of the Workers' Compensation Court, confining its jurisdiction to hearing appeals from Commissioners and certain other matters. The introduction of 'review officers' in lieu of judges to conciliate matters. The Commissioners were given a status separate from the Court and jurisdiction to hear cases at first instance;
- A new method of calculating a worker's wage entitlements, particularly the

⁴⁹ NSWPD, 23/4/85, p 6775.

⁵⁰ State Compensation Board, *New South Wales Compensation Scheme: Options for Reform*, Discussion Paper, September 1986, p 70.

⁵¹ *ibid.*

introduction of a ceiling of \$500 per week on claims in the first 26 weeks;

- Expansion of the nature of permanent injuries compensable under the Act (ie the injuries included in the Table of Disabilities) in comparison to the *1926 Act*;
- Provision was made for the indexation of a number of entitlements;
- Introduction of a rehabilitation scheme with the recognition of 'rehabilitation providers' and linking rehabilitation to a worker's continuing entitlement to weekly payments;
- Introduction of a pain and suffering allowance in lieu of common law damages for a person suffering losses which attracted in excess of 10% of the maximum amount allowable under the Table of Disabilities;
- Removal of the use of redemption payments (commutations), except for persons over 55 years; and
- A 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.

After the commencement of the *1987 Act* the target premium rate for insurers was set at 3.2%, based on costings of the benefits under the new system.⁵² There were early signs that a surplus would emerge following the commencement of the new scheme. This became evident with the actuaries' report in May 1989 that claims were extraordinarily low, coupled with the maintenance of the target premium rate at 3.2% for the 1988/89 policy year. The primary reason for the improvement of the scheme was a low level of weekly benefits paid to injured workers. In subsequent years, the target premium rate continued to drop which contributed to the financial success of the scheme for several years.⁵³

1989

Following the election of the Coalition, a Committee (including representatives of unions, insurers, and the legal and medical professions) was set up to review the system in 1989. Several months after the Committee had completed and presented its report, the Greiner government introduced a raft of legislation⁵⁴ which made a number of changes to the workers' compensation system. The two most notable changes were the re-establishment of the role played by the Compensation Court and the restoration of common law rights (the latter is discussed in Part A, section 1.1).

The object of the *Workers Compensation (Compensation Court Amendment) Act 1989* was to return the workers' compensation system in NSW to a judicial structure rather than a bureaucratic or administrative model that had been introduced by the *1987 Act*. To this end,

⁵² *Inquiry into Workers Compensation System in NSW*, Final Report, 15/9/97 (the Grellman Report), p 17.

⁵³ Grellman Report, op cit, n 52, p 17-18.

⁵⁴ The *Workers Compensation (Benefits) Amendment Act 1989 No 133*; the *WorkCover Administration Act 1989 No 120*; the *Workers Compensation (Amendment) Act 1989 No 214*, and the *Workers Compensation (Compensation Court) Amendment Act 1989 No 119*.

primary jurisdiction in workers' compensation matters was transferred from the Commissioners back to the Compensation Court. The Commissioners were re-incorporated into the Court structure and they now form a second adjudicative tier. Under the 1989 reforms, the State Compensation Board, which had changed its name to the Workers Compensation and Rehabilitation Authority, became the WorkCover Authority of NSW. The Authority continues to pay claims under the Uninsured Liability and Indemnity Scheme. It also meets the costs of the operation of the Court.

Early 1990's

In the early 90's, there were a number of legislative amendments to the *1987 Act* that were largely beneficial in nature from an injured worker's point of view. That these improvements were possible was attributed to the sound performance of the re-vamped scheme. In May 1990, a \$1.1 billion surplus was announced. The surplus had grown significantly due to much stronger return to work rates than anticipated. The target premium rate was lowered from 3.2% to 2.6%.⁵⁵

Examples of the amendments include, an expansion of the range and level of benefits,⁵⁶ access to the common law was freed up,⁵⁷ and the use of rehabilitation services was further encouraged. Other changes fall into two main categories. First, 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. Second, 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.

For a number of years following the various legislative changes outlined above, the workers' compensation scheme appeared to be 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,⁵⁸ the accumulated funds were in a healthy position, and there was a continuing downward trend in the incidence of major claims. In the WorkCover Authority 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%. The rate of 1.8% was confirmed for 1994/95.

Mid 1990's

By the mid 1990's however, it became apparent that the health of the scheme was not as robust as thought. The surplus eroded by almost \$1 billion to \$454 million deficit at 30 June 1996. Target premium rate was set at 2.5%; an increase of 39%. A number of reasons for this change in fortunes were given, such as an increase in claims due in part to higher employment and greater awareness of the scheme, over generous benefits, low premiums,

⁵⁵ Grellman Report, op cit, n 52, p 19.

⁵⁶ *Workers Compensation (Benefits) Amendment Act 1991* No 99, Schedule 1.

⁵⁷ *Workers Compensation (Benefits) Amendment Act 1991* No 99, Schedule 2.

⁵⁸ In 1991/92 the target premium level of 1.8% was reached. The true cost of claims was estimated to be higher but the difference was being offset by investment income on the surplus. The 1.8% premium rate was maintained for the next 3 years: Grellman Report, op cit, n 52, p 19.

and high legal costs.⁵⁹

Further amendments in 1995 and 1996 were designed to improve the financial state of the scheme.⁶⁰ However, as noted by the Grellman Report only moderate cost savings were achieved due to these measures.⁶¹ The key objective of the *WorkCover Legislation Amendment Bill 1995*⁶² was said to be to reduce the amount of expensive court action and involvement of lawyers with workers' compensation. Subsequently, a strong backlash from the legal profession and trade unions forced the Government to drop its proposal to reduce lawyers' involvement by increased use of conciliation conferences before allowing injured workers to pursue compensation claims through the court.

The resulting bill was also heavily amended in the Legislative Council where the Government lacked a majority. Consequently, '...only moderate cost savings were achieved and there was little impact upon adverse trends, which again exceed expectation. The deficit at 30 June 1996 was \$454 million.'⁶³ At the time there was speculation that the Government would make a further attempt to achieve its original reforms in the future, particularly as WorkCover's cost blow out continued. The main aspects of the *WorkCover Legislation Amendment Act 1995*⁶⁴ are summarised as follows:

- Restrictions on claims for stress;
- A 6% threshold on hearing loss claims;
- Suspension of indexation of lump sum benefits and partial abolition of interest on lump sum benefits and damages;
- Deduction for pre-existing back, neck and pelvis impairments from lump sum entitlement;
- 3 year limit for making claims with later claims allowed if 'in the interests of justice';
- Insurers required to give written reasons whenever claims are disputed;
- Cost penalties for unreasonable refusal of settlement offer;
- Various changes to conciliation and dispute resolution;
- Provision for return-to-work plans;
- Stronger measures against failure to obtain worker's compensation insurance;
- Introduction of provisions allowing regulations to prescribe maximum worker's compensation legal fees (subsequent regulations reduced fees by 10%);
- New lump sum benefits for HIV/AIDS and serious bowel injuries; and
- Increased penalties for workplace safety breaches.

Further amendments were introduced by the *WorkCover Legislation Amendment Act 1996*.⁶⁵ The main changes included:

⁵⁹ Grellman Report, op cit, n 52, p 21.

⁶⁰ In November 1995, the Government released a Discussion Paper outlining changes to the scheme designed to improve the scheme's financial situation. A summary of the proposals is contained in Briefing Paper No 039/95, op cit, n 4, p 33–34.

⁶¹ Grellman Report, op cit, n 52, p 22.

⁶² 1995 No 89.

⁶³ Grellman Report, op cit, n 52, p 22.

⁶⁴ 1995 No 89.

⁶⁵ 1996 No 120

- Requirement for employment to be 'a substantial contributing factor' to compensable injuries;
- 25% reduction in maximum lump sum benefits for permanent impairment and pain and suffering;
- Provision for possible discontinuation of weekly compensation after 104 weeks by reference to worker's return-to-work efforts;
- Extension of provision for deduction of pre-existing impairment to all lump sum disability claims (previously limited to back, neck and pelvis claims);
- New conciliation arrangements, including compulsory conciliation before commencement of litigation;
- Changes concerning status of medical panel certificates;
- Introduction of provisions allowing regulations to restrict worker's compensation advertising by lawyers and agents; and
- Restoration of no-fault workers' compensation cover on journeys between home and work.

1997 - The Grellman Inquiry

In spite of these changes, the worker's compensation scheme was the subject of continuing criticisms, particularly with respect to its deficit. This led to the instigation of the Grellman Inquiry in April 1997, as stated by the then New South Wales Attorney General, the Hon. Jeff Shaw QC MLC:

..the Government brought forward significant legislative packages in 1995 and 1996 to deal with the WorkCover scheme cost problem...While those earlier measures, which included reductions in benefits, have allowed considerable savings, I subsequently instigated the Grellman Inquiry in April 1997 in view of the continuing deterioration in the scheme's overall financial position.⁶⁶

The final report of the inquiry, (the Grellman Report), was handed down on 15 September 1997.⁶⁷ The Grellman Report outlined the financial progress of the WorkCover scheme, stating that at 30 June 1996 the scheme's deficit was \$454 million and worsening.⁶⁸ The Grellman Report identified the weaknesses within the New South Wales system and made several key recommendations to address the weaknesses.

The central weakness in the NSW system, according to the Report, was the marginalisation of the stakeholders, in particular the employers and insurers. Grellman also found several other structural weaknesses including: a lack of legal and financial accountability and control of statutory funds; lack of incentives for licensed insurers to research and implement best practice injury management processes; heavy regulation of licensed insurers leading to less than optimal injury management; deficiencies in the premium system which create inequities for small employers and which do not provide sufficient recognition for prevention and injury management programs; a flawed benefit structure where a litigious lump sum approach to the delivery of benefits has developed; an expensive infrastructure for the

⁶⁶ *NSWPD*, 26/6/98, p 6707.

⁶⁷ Grellman Report, op cit, n 52, p 3.

⁶⁸ Grellman Report op cit, n 52, p 15.

hearing of litigated matters; and complex and disjointed legislation.⁶⁹

In order to increase the participation of stakeholders, the Report recommended the establishment of a NSW Workers' Compensation Advisory Council with representatives of stakeholder groups. It also recommended the establishment of Industry Reference Groups to focus on issues effecting particular industries. In regard to insurance and premiums, the Report made several recommendations including: the transfer of the underwriting function to a limited number of licensed insurers; the introduction of more detailed industry classifications; the formation of a New South Wales Compensation Rating Bureau responsible for developing the industry classification premium rates; and alteration of self-insurance licence requirements.

The Report also recommended changes to the statutory benefits structure to provide greater incentives for injury management, including: weekly benefits, lump sum non-economic loss compensation assessed in relation to the worker's whole body impairment according to the American Medical Association's Guides to the Evaluation of Permanent Impairment; and access to modified common law provisions for seriously injured workers, with a whole of body work-related permanent impairment in excess of 25%. The Report also recommended changes to dispute resolution procedures; integrating the Compensation Court with the District Court and implementation of a three tiered dispute resolution process involving screening of disputes by WorkCover, compulsory conciliation and court proceedings. The Report also recommended the implementation injury management processes to effect a timely return to work and the drafting of new, plain English, legislation and regulations to incorporate the proposed model.⁷⁰

1998 - *Workplace Injury Management and Workers Compensation Act 1998*

In 1998, the workers' compensation system was again subject to significant change, pursuant to the *Workers Compensation Legislation Amendment Act 1998*⁷¹ and the *Workplace Injury Management and Workers Compensation Act 1998* (the *1998 Act*).⁷² The *1998 Act* is to be read in conjunction with the *1987 Act*, as a 'companion act'. This legislation introduced a system of compensation that was intended to emphasise the rehabilitation and timely return to work of injured workers. It was also intended to speed up the resolution of disputed claims. The changes were largely a response to the recommendations of the Grellman Report, particularly those relating to concerning the increased participation of stakeholders. They introduced:

...a new era and a new dimension of responsibility which had not been incorporated in the Workers Compensation Act 1926 nor the Workers Compensation Act 1987. The key stakeholders, namely the Employers, Unions and Insurers, negotiated intensely and the Bills ultimately reflect the structure which

⁶⁹ The weaknesses identified by the Grellman Report are explained in more detail in Briefing Paper No 24/99, n 5, p 16–17. See also Grellman Report, op cit, n 52, p 35–46.

⁷⁰ The recommendations of the Grellman Report are explained in more detail in Briefing Paper No 24/00, op cit, n 5, p 17–19. See also Grellman Report, op cit, n 52, p 5 & 55–88.

⁷¹ 1998 No 85. For a review of the provisions of these two Acts, see NSW Young Lawyers, 'The New Workplace Injury Management and Workers Compensation Legislation', *The Law Society of NSW*, 1998.

⁷² 1998 No 86. The *1998 Act* applies to all injuries occurring on or after 1 August 1998. Certain aspects of the *1987 Act* apply to injuries before that date.

was advanced in the Grellman report and subsequently refined. Responsibility vests not only in the major stakeholders but also in the minor and peripheral stakeholders.⁷³

The changes included the establishment of an Advisory Council, Industry Reference Groups, the Workers Compensation Premiums Rating Bureau and changes to the role of the WorkCover Authority of New South Wales. These new bodies are examined in section Part A, section 2.2. Other aspects of the legislation included:

- Notification requirements for employers and workers designed to speed the process of claims, injury management and return to work;
- Measures to facilitate the pro-active management of injures and injury prevention;
- Greater availability of commutations of weekly payments by the removal of the requirement that commutation applications be approved by WorkCover;
- Increased conciliation opportunities, legal representation for parties at all levels of dispute resolution;
- The reduction and restriction of weekly benefits for partially incapacitated workers; and
- The private underwriting of the licensed insurance scheme (the latter provision was not implemented at the time, see section 2.2).

2000

In June 2000, the Carr Government announced a comprehensive plan for the future direction for workers' compensation reform in New South Wales.⁷⁴ That plan is to be implemented in three stages. Stage One concentrated on renewing the focus of the WorkCover scheme on injury management and improving compliance, and was commenced through *Workers Compensation Legislation Amendment Act 2000*,⁷⁵ outlined in the following paragraph. Stage Two is being implemented by the current reforms (see Part B, section 2). The Government has stated its intention to bring about the third stage, focusing on the simplification of the legislative framework, in the spring session.⁷⁶

The *Workers Compensation Legislation Amendment Act 2000* combined the Advisory Council and the Occupational Health and Safety Council into a new Workers Compensation and Workplace Occupational Health and Safety Council. The new Council has the function of providing advice to the Minister on occupational health and safety, workers compensation and injury management. The 2000 amendments also included:

- The establishment of injury management pilot schemes and the introduction of market incentives for employers to improve OH&S and injury management performance;
- That the *commencement of proceedings* in the Compensation Court to recover permanent loss compensation constitutes an election to claim that compensation and prevents a claim for common law damages against the employer in respect of the injury concerned;

⁷³ NSW Young Lawyers, op cit, n 71, p i.

⁷⁴ NSWPD, 8/6/00, p 6879.

⁷⁵ 2000 No 87.

⁷⁶ NSWPD, 29/3/01, p 12879.

- The regulations to make it an offence for an insurer to fail to give the required notice of a dispute as to liability and to require additional matters to be included in the notice;
- The regulations or the rules of the Compensation Court to limit the number of medical reports that are obtained for the purposes of disputed claims;
- A requirement that parties to a dispute about liability for compensation exchange information about, and provide copies of, the documentary evidence on which they propose to rely for the purposes of conciliation;
- A new offence of fraud against the workers' compensation scheme and to modify existing fraud offences;
- Increased penalties for a breach by an insurer of a provision of the *1987 Act* or *1998 Act*, the regulations, its licence or an insurer agreement; and
- Removal the Crown's exemption from prosecution for a breach of workers' compensation legislation.

2.2 The current scheme

An outline of the current New South Wales statutory workers' compensation scheme will be undertaken in this section. This outline provides a basis for an understanding of the Governments' 2001 reforms examined in Part B. It also draws together the material in the proceeding section to show the result of the developments in workers' compensation. The basic legislative framework rests on the *Workers Compensation Act 1987* (the *1987 Act*) and the *Workplace Injury Management & Workers Compensation Act 1998* (the *1998 Act*). The Acts cover different parts of the workers' compensation system and therefore need to be read together.

Structure

The WorkCover Authority of New South Wales (WorkCover): WorkCover is a statutory corporation constituted by the *1989 Act*.⁷⁷ It is responsible for managing the state's workplace safety, injury management and workers' compensation systems and administering relevant legislation. WorkCover is responsible for ensuring compliance with workers' compensation and occupational health and safety legislation.⁷⁸ It is governed by a Board of Directors consisting of a General Manager and six part-time Directors. The Workers Compensation and Workplace Occupational Health and Safety Council and several Industry Reference Groups are located within WorkCover.

Workers Compensation and Workplace Occupational Health and Safety Council: As noted in previously in section 2.1, the Grellman Report recommended the establishment of an Advisory Council to facilitate the participation of stakeholders in the workers' compensation scheme. The Workers Compensation Advisory Council was established in 1998 in response to the recommendation. The Advisory Council was disbanded in 2000 and

⁷⁷ *1989 Act*, Chapter 2, Part 2. For further information about the role and objectives of WorkCover see the WorkCover Authority of New South Wales, Annual Report 1999/2000, p 3. The WorkCover web site at: www.workcover.nsw.gov.au also contains useful information.

⁷⁸ WorkCover's main statutory functions are to administer the *1998 Act*, the *Occupational Health and Safety Act 1983*, the *Construction Safety Act 1912*, the *Factories, Shops and Industries Act 1962*, the *Dangerous Goods Act 1975*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services Act 1987* and the Regulations and Codes of Practice under those Acts.

combined with the Occupational Health and Safety Council to form the Workers Compensation and Workplace Occupational Health and Safety Council (the Council).⁷⁹ The Council comprises worker and employer representatives, medical and legal practitioners, and insurance, injury management, and occupational health and safety experts. The Council's key function is to give advice to the Minister on occupational health and safety, workers' compensation and injury management. The Council is to 'provide for a greater emphasis on a systemic approach to the prevention of workplace injury, injury management/return to work and compensation issues with a broader range of representatives with an interest in these matters'.⁸⁰

Industry Reference Groups: Industry Reference Groups (IRGs) were established following the passage of the *1998 Act*, as recommended by the Grellman Inquiry (see Part A, section 2.1).⁸¹ The purpose of the IRGs is 'to develop industry specific solutions for significant workplace occupational health and safety problems, so as to reduce the frequency and severity of workplace accidents and reduce the cost of workers compensation'.⁸² The overall aim of the strategies developed is to reduce the costs of claims. The terms of reference of the IRGs are determined by the Council. The 13 groups are:

- Rural
- Retail
- Mining
- Utilities
- Wholesale
- Construction
- Business Services
- Transport & Storage
- Consumer Services
- Industrial Manufacturing
- Consumer Manufacturing
- Health and Community Services
- Government Administration and Education

Workers' Compensation Premiums Rating Bureau: The Premiums Rating Bureau is subject to the control of the Minister. Its functions are to determine and submit to WorkCover a proposed methodology to be used for the calculating of risk premiums, to provide advice, statistical and actuarial information on scheme performance and costings, and provide costing estimates in relation to any proposals for change. The Bureau is also to provide advice in the development of workers' compensation insurance industry standards.⁸³

Workers Compensation Resolution Service: The Workers Compensation Resolution Service was established in 1997 to provide a fast and inexpensive method of resolving disputes arising under workers' compensation legislation. It provides workers, employers and insurers with a service that facilitates the resolution of disputes by involving all parties in an informal process to achieve a fair agreement. The Service is a part of the New South Wales Department of Industrial Relations. In the second half of 1998, it was expanded and most disputes are now referred for conciliation.

To ensure that disputes are dealt with economically and quickly, the WCRS operates within strict timeframes. Conciliation conferences are informal and confidential and parties are

⁷⁹ The Council is established and governed by Chapter 2, Part 4 of the *1989 Act*.

⁸⁰ See the WorkCover web site: www.workcover.nsw.gov.au.

⁸¹ The Industry Reference Groups have been established by WorkCover pursuant to Chapter 2, Part 5 of the *1989 Act*.

⁸² This information is taken from the WorkCover web site: www.workcover.nsw.gov.au.

⁸³ The Premiums Rating Bureau was established and is governed by Part 3 of the *1989 Act*.

entitled to legal or agent representation. Agents include employees of unions, employer organisations and licensed insurers. Conciliators may assist the parties to identify the issues and provide solutions to the dispute, or may, at times, play a more interventionist role. For example, a conciliator may wish to talk to the parties separately, in private confidential sessions. Where conciliation does not resolve the issues, or the dispute is 'fast tracked' without conciliation, the parties may proceed to file an application for determination in the Court.⁸⁴

Compensation Court of New South Wales: The Compensation Court of New South Wales was established as a Court of Record under the *Compensation Court Act 1984*. The Court has jurisdiction under the *1987 Act* to resolve workers' compensation disputes arising out of work related injury or disease suffered by a worker in New South Wales or in some circumstances outside that State. The Court administers the medical panels provided for by the *1987 Act* and also has a review or appellate jurisdiction under a range of statutes.⁸⁵ The Court deals with an average of 20,000 matters each year. Proceedings for compensation are commenced in the court by way of an Application for Determination.⁸⁶

Eligibility for benefits

To be eligible for workers' compensation benefits, a person must be a 'worker' as defined in the legislation and must have suffered an 'injury' as defined in the legislation. These criteria are explained briefly in the following paragraphs.⁸⁷

The person must be a 'worker': A person who is a 'worker' or 'deemed worker' under the *1998 Act*, is eligible to claim workers' compensation.⁸⁸ A worker means any person who enters into or works under a contract of service or apprenticeship with an employer, or a deemed worker as described by the Act. A worker is '[g]enerally...someone who receives wages or commission regardless of the number of hours worked each week and includes workers who work away from the employer's premises.'⁸⁹ Some examples of deemed workers are outworkers, contractors, taxi drivers, sales representatives and casual or part time workers.

The worker must have suffered an 'injury': Under the *1989 Act* 'injury' means: 'a personal injury arising out of or in the course of employment and includes a disease contracted by a worker where the employment was a contribution factor to the disease or

⁸⁴ See the Workers Compensation Resolution Service web site: www.dir.nsw.gov.au/wcrs/ for further information.

⁸⁵ Including the *Police Regulation (Superannuation) Act 1906*, *Workers' Compensation (Dust Diseases) Act 1942* and *Sporting Injuries Insurance Act 1978*. The Compensation Court also has jurisdiction in relation to the *Workers' Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*.

⁸⁶ New South Wales Compensation Court web site: www.lawlink.nsw.gov.au/cc.nsf/pages/ccfirst

⁸⁷ This is a very general overview and there are many other matters than must be taken into consideration when determining whether a person is entitled to workers' compensation benefits. See McManamey, Goldberg & Monaghan, *Workers Compensation Law Manual NSW*, LBC Information Services, 1997, Volume 1, Chapter 2 for a thorough analysis.

⁸⁸ *1998 Act*, section 4 & Schedule 1.

⁸⁹ WorkCover website: www.workcover.nsw.com.au .

the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contribution factor to the aggravation, acceleration or deterioration.⁹⁰ The concept of injury under the *1989 Act* is complex as there is an extremely broad range of injuries that go beyond obvious injuries such as broken bones.

The worker must establish that the injury arose *out of* the employment or *in the course of* employment. For an injury arising *out of* employment there must be 'an unbroken chain of events between the employment and the injury'.⁹¹ For an injury arising *in the course of* employment a 'temporal relationship' must exist between the injury and the employment so that in general, all injuries suffered during working hours will be covered.⁹² Some injuries caused by activities taken for mixed purposes (employment and another purpose) and some injuries sustained outside normal working hours may also be covered, in certain circumstances.⁹³ Benefits are also payable for injuries received on a normal journey to or from work (without significant interruption or diversion) or during an authorised recess, providing the worker did not expose him or herself to any abnormal risk of injury.⁹⁴

Benefits

Weekly payments: The primary form of benefit payable under the *1987 Act* is a weekly payment during the period that an injured worker is incapacitated for work.⁹⁵ For the first 26 weeks a worker is entitled to his or her basic Award rate. This does not include overtime, shift work, or penalty rates. If a workers' salary is not based on an Award rate or Enterprise Agreement the worker will be paid 80% of his or her average weekly earnings subject to a maximum amount adjusted twice yearly (April and October).⁹⁶ After 26 weeks this amount is the statutory amount per week. If the worker has dependants she or he is entitled to additional weekly amounts in respect of those dependants. The total weekly payment is not to exceed the workers' current weekly wage rate (ie rate paid during first 26 weeks). The statutory rate is set out in the Benefits Guide and is updated twice yearly (April and October).

Commutations: A worker and an employer may agree to settle a compensation claim for weekly payments on a once and for all basis, by the payment of a lump sum. This lump sum payment terminates the employer's liability to the injured worker. This process is known as a 'commutation'. The Compensation Court must approve or determine the commutation.⁹⁷ Commutation enables the insurer to remove a potential long term liability and allows the worker to obtain a tax free lump sum, secure in the knowledge that he or she could later

⁹⁰ *1998 Act*, section 4.

⁹¹ McManamey, Goldberg & Monaghan, op cit, n 78, at [2.380].

⁹² McManamey, Goldberg & Monaghan, op cit, n 78, at [2.400].

⁹³ *Workers Compensation Law Manual*, LBC [2.420-2.440].

⁹⁴ *Workers Compensation Act 1987* (NSW), section 10.

⁹⁵ *Workers Compensation Act 1987* (NSW), section 33, see also Chapter 3 of the *1998 Act*.

⁹⁶ *Workers Compensation Act 1987* (NSW), section 42(1)(d) & 43.

⁹⁷ *Workers Compensation Act 1987* (NSW), section 51. See Part B, section 2.1 for the proposed reforms to commutations.

either resume paid employment without incurring a financial penalty or transfer to the social security system for income maintenance.⁹⁸

Medical, hospital and rehabilitation expenses: If, as a result of an injury received by a worker, it is reasonably necessary that medical or related treatment be given, or any hospital treatment, ambulance service or occupational rehabilitation be provided, the worker's employer is liable to pay the cost of that treatment or service and the related travel expenses.⁹⁹

Permanent losses: A worker who has suffered permanent incapacity of part of the body or faculties as a result of a work related injury, is entitled to receive compensation for the loss, in addition to any other compensation under the *1987 Act*. In the case of partial loss of a part of the body (such as the loss of a finger at the first joint, rather than the whole finger), the lump sum entitlement will depend on the assessed percentage of loss. The benefit payable is determined by reference to the Table of Disabilities (extracted in Appendix I).

The Table lists certain permanent impairments such as, loss of an arm, fingers, leg, foot, sight, hearing, sexual organs, severe facial disfigurement, or HIV infection/AIDS. The Table specifies the amount recoverable for each loss, by according each loss a percentage of the maximum amount that can be received.¹⁰⁰ For example, for the loss of a foot a worker is entitled to 65% of the maximum. For all claims made after 12 January 1997, the maximum benefit for a single loss is \$100,000 and for multiple losses is \$121,000.¹⁰¹

Pain and suffering: A worker who has suffered a loss mentioned in the Table of Disabilities is also entitled to additional lump sum compensation for pain and suffering resulting from the loss, not exceeding \$50,000.¹⁰² The maximum amount is only payable in the most extreme cases. However, compensation for pain and suffering is only payable if the amount payable for the permanent loss or impairment of a body part (as described in the preceding paragraph) is at least 10% of the maximum amount payable for permanent loss. In other words, the injury must be one that attracts 10% or greater on the Table of Disabilities. Unless the parties reach agreement, the amount of compensation payable is determined by the Compensation Court.¹⁰³

'Pain and suffering' is defined as 'actual pain or distress or anxiety suffered or likely to be suffered by the injured worker, whether resulting from the loss concerned or from any necessary treatment'. Note that the Act makes a distinction between an 'injury' and a 'loss resulting from an injury'. Compensation may only be paid for pain and suffering resulting from a loss, and not pain and suffering resulting from the injury but not the loss.¹⁰⁴

⁹⁸ Sackville R, 'Workers Compensation: Costs and Options', *Australian Quarterly*, Winter 1984, p 131-141 at 138.

⁹⁹ *Workers Compensation Act 1987* (NSW), section 60.

¹⁰⁰ *Workers Compensation Act 1987* (NSW), section 65, 66.

¹⁰¹ These amounts are indexed on 1 April and 1 October each year.

¹⁰² *ibid.*

¹⁰³ *Workers Compensation Act 1987* (NSW), section 67.

¹⁰⁴ *Workers Compensation Act 1987* (NSW), section 67.

Other benefits: Other benefits include, death claims,¹⁰⁵ specific benefits for industrial deafness,¹⁰⁶ and compensation for personal items damaged in a work related accident eg eyeglasses. A worker may also be entitled to common law damages if the injury was caused by negligence. While the damages that may be recovered, and the procedure that must be followed in making such a claim, are governed by the *1987 Act*, the entitlement to claim damages arises independently of the *Act* (see Part A, section 1, for further information about the common law).¹⁰⁷

Claims procedure

- After reporting an injury or work related illness to his or her employer, a worker must obtain a WorkCover Medical Certificate from the worker's treating doctor.
- A claim form obtained from the employer's workers' compensation insurer with the medical certificate must be submitted to the employer.
- The employer must send the form and certificate and other relevant documents and receipts to the insurance company, with the employer's completed Report of Injury form, within seven days of receiving them from the employee.
- The insurer has 21 days from the day the claim and medical certificate were given to the employer, to either commence payments or dispute the claim. The insurer either accepts or denies liability (not the employer). In cases where the insurer is awaiting a further doctor's report or the insurer has another reasonable excuse, a further 21 day extension is offered before the insurer has to make a decision.
- If the insurance company agrees to pay the claim, the worker will receive weekly payment, medical and other expenses, usually through the employer if the worker is still employed and from the insurer if the workers' employment has ceased.

Permanent impairment lump sum compensation: In relation to compensation for permanent impairment, a worker must write to the insurance company handling the claim and enclose a medical report which gives an assessment of permanent loss or loss of use, expressed as a percentage, eg, 1% of the left little finger. The insurance company may accept the worker's doctor's assessment, and pay the appropriate benefit or it may refer the worker to a doctor of their choice for an opinion, or a medical panel or mutually agreed independent medical practitioner for an independent assessment of the worker's percentage disability.¹⁰⁸

Denial, or dispute of aspects, of a claim: If a claim is denied or aspects of the claim are disputed, there are certain dispute resolution procedures established which are designed to encourage a timely and inexpensive resolution of the disputed claim (see below).

¹⁰⁵ *Workers Compensation Act 1987* (NSW), section 25 & 26.

¹⁰⁶ *Workers Compensation Act 1987* (NSW), section 66 & 67.

¹⁰⁷ *Grljak v Trivan Pty Ltd* (1994) 35 NSWLR 82.

¹⁰⁸ WorkCover web site: www.workcover.nsw.gov.au .

Dispute Resolution

If an insurer denies liability or further liability, the parties must attend conciliation. Conciliation of all claims is handled by Workers Compensation Resolution Service (WCRS) that is described above. Where there is agreement a certificate setting out the agreement is issued. Where there is no agreement the conciliator may issue: a certificate allowing the matter to proceed to the Compensation Court; a recommendation; or a direction for weekly payments of compensation. If a satisfactory outcome cannot be arrived at conciliation, the Compensation Court has primary jurisdiction to hear and determine the dispute.

Insurance and Premiums¹⁰⁹

Insurance: All employers have a legal liability to pay compensation to workers who are injured in the course of their work. Anybody who operates a trade or business and employs workers and/or engages contractors who are or may be deemed workers, is obliged to hold a current workers' compensation policy from a licensed workers' compensation insurer. There are 10 licensed insurers in New South Wales.¹¹⁰ The penalty for non-insurance is a fine of up to \$55,000 and/or six months imprisonment. There is also the possibility of additional penalty of double premiums as well as the cost of any claims paid on the employer's behalf. If an employer is not insured, an injured worker can make a claim under the Uninsured Liability and Indemnity Scheme. Under that scheme, WorkCover pays out claims and recovers money from the employer.

Premiums: The basic premium is a percentage of an employers' payroll. Insurers assign all employers with an industry classification based on the description of their trade or business. The insurer uses the official classification listing published by WorkCover. At the beginning of each insurance period, an employer must provide its insurer with an estimate of the wages that the employer will pay in the next 12 months. The insurer will calculate the premium on the basis of that estimate. At the end of the insurance period, the employer must provide its insurer with a declaration of the actual wages the employer paid during the year. The insurer will calculate a 'final' or 'actual' premium based on the actual wages paid. If this is different to the estimated premium already paid, there will be an adjustment payment or refund.

Private Underwriting: Private underwriting of the NSW workers' compensation scheme was due to commence on 1 October 1999. However it was delayed, on the recommendation of the (former) Advisory Council, through the passage of the *Workers Compensation Legislation Amendment Act 1999*.¹¹¹ This Act amended the *1998 Act* and the *1987 Act* to defer the start date for private insurance from 1 October 1999, to 1 October 2000. At the time of deferment questions were raised about alleged plans to abandon private underwriting of the workers' compensation scheme altogether. The Attorney General's response was that

¹⁰⁹ This information in this section is based on material on the WorkCover website at: www.workcover.nsw.gov.au.

¹¹⁰ The 10 licensed insurers are: Allianz Australia Workers' Compensation (NSW) Ltd; CGU Workers Compensation (NSW) Ltd; Employers' Mutual Indemnity (Workers Compensation) Ltd; GIO Workers Compensation (NSW) Ltd; NRMA Workers Compensation (NSW) Pty Ltd; NRMA Workers Compensation (NSW) (No 2) Pty Limited; NRMA Workers Compensation (NSW) (No 3) Limited; QBE Workers Compensation (NSW) Ltd; Royal & Sun Alliance Workers Compensation (NSW) Ltd; Zurich Australian Workers Compensation Ltd.

¹¹¹ 1999 No 24.

private underwriting would take place on or before 1 October 2000 as per the current legislative framework.¹¹²

However, private underwriting was again deferred in 2000.¹¹³ The *Workplace Injury Management and Workers Compensation Amendment (Private Insurance) Act 2000*¹¹⁴ deferred, to a date to be appointed by the Governor by order published in the Gazette, the coming into operation of arrangements for the private underwriting of workers compensation insurance. If and when a date is proclaimed, it means that the risk will be transferred from the current managed fund to private sector insurers. Insurers handling workers' compensation will no longer be 'fund managers' for WorkCover and they will be responsible for the financial underwriting of the scheme (ie, they will keep any profits and suffer any losses). WorkCover will continue to license insurers, self-insurers and specialised insurers and WorkCover will still be funded by contributions from the insurers.

¹¹² Briefing Paper No. 24/99, op cit, n 4, p 29.

¹¹³ The *Workplace Injury Management and Workers Compensation Amendment (Private Insurance) Act 2000* (2000 No 46) was assented to on 27/06/00. It deferred, to a date to be appointed by the Governor by order published in the Gazette, the coming into operation of arrangements for the private underwriting of workers compensation insurance. A date has not yet been appointed.

¹¹⁴ 2000 No 46

PART B. WORKERS COMPENSATION LEGISLATION AMENDMENT BILL 2001 (No 2)

1. THE NEED FOR REFORM

On 27 April 2001, the New South Wales Minister for Industrial Relations, the Hon John Della Bosca MLC, announced that, as at 31 December 2000, the WorkCover had a deficit of \$2.18 billion.¹¹⁵ The total assets of the scheme were stated to be \$6.88 billion and the total estimated future liabilities \$9.06 billion. This is an increase of \$1.12 billion on the deficit at June 2000 of \$1.6 billion. The original Workers Compensation Legislation Amendment Bill 2001 was introduced into the Legislative Council two days after the deficit was announced. The measures contained in the Bill were designed to save the WorkCover scheme up to \$300 million a year.¹¹⁶ The Minister cited three main reasons for the increased deficit:¹¹⁷

1. A greater than expected increase in claims costs in the last six months of last year, which has added approximately \$200 million to the deficit. In particular, there was an increase of almost 30% in the number of common law claims lodged in the six months to 31 December 2000, compared with the number reported over the six months prior to 30 June 2000. The estimate of total future common law liabilities has accordingly increased by around \$360 million, or by 23% on the June 2000 valuation.
2. The current state of the national economy has also contributed to the deficit. There has been an increase of \$120 million in estimated liabilities due to a revision of assumptions about future inflation and investment returns.
3. The under-collection of premiums is another significant factor. While the average premium cost of the scheme is 2.89 % net of the GST, the Government has set a rate for employers at 2.8% of wages, net of GST. This has been done to keep premiums affordable for employers, pending implementation of cost-saving reforms.

WorkCover has produced a chart depicting the break up of the costs of the scheme. The chart is reproduced in Appendix III. The chart shows that legal costs are a significant contributor. In the second reading speech of the original Bill, the Hon John Della Bosca, MLC noted that, as of 31 December 2000 legal costs accounted for \$422 million of the scheme's liabilities. This was compared to the \$438 million paid as weekly benefits to injured workers.¹¹⁸ The legal costs have two parts. First, legal costs for statutory 'no fault' benefits that are projected to be \$344 million for 2001/02 claims. Second, legal costs for common law cases. Because common law settlements are made as one lump sum, inclusive of legal costs, WorkCover has provided an estimate of this component for legal costs – about \$78 million out of \$488 million projected to be paid to injured workers at common law. Added together, it is approximately \$422 million and, at 17%, represents the largest third party cost in the scheme.

¹¹⁵ The Hon J Della Bosca MLC, Special Minister of State and Minister for Industrial Relations, 'Streamlining Workers Compensation - Simpler, Fairer, Faster', Media Release, 27/3/01.

¹¹⁶ *ibid.*

¹¹⁷ NSWPD, 27/3/01, p 12560.

¹¹⁸ NSWPD, 29/3/01, p 12879.

The Government's deficit figure, particularly the legal cost component, has been disputed by a number of stakeholders. For example, the New South Wales Law Society, Injuries Australia and the Australian Association of Surgeons have expressed doubt about the veracity of the actuarial calculations that concluded that the scheme has a \$2.18 billion deficit:

The actual size of the workers' compensation scheme's deficit is necessarily based on an actuarial projection. The Government's seemingly daunting figure of \$2.18 billion is thus just an estimate. It is notoriously difficult to accurately calculate the workers' compensation deficit. This is partly because the deficit includes common law liabilities, and no one really knows the total of those liabilities.¹¹⁹

These organisations argue that other issues such as delays by insurers, medical over-servicing, return to work disputes, and delays in reporting injuries are the real problems with the scheme.¹²⁰ They also argue that recent rises in legal costs may be attributable to a rise in the number of commutations due to the removal, in 1998, of the need for the prior approval of WorkCover before taking a commutation agreement to court.¹²¹ Similar objections to the Government's statement of legal costs have been made by the New South Wales Bar Association.¹²²

2. AN OVERVIEW OF THE BILL

The Workers Compensation Legislation Amendment Bill 2001 (No 2) ('the Bill') was introduced into the Legislative Assembly on 19 June 2001. It replaced the original Workers Compensation Legislation Amendment Bill 2001 ('the original Bill') to amend the *Workers Compensation Act 1987* (the *1987 Act*) and the *Workplace Injury Management and Workers Compensation Act 1998* (the *1998 Act*). Any reference to 'the Bill' in this section is a reference to the Workers Compensation Legislation Amendment Bill 2001 (No 2), unless otherwise stated.

The Bill makes extensive reforms to claims procedures, dispute resolution, commutation procedures, lump sum compensation, and other matters. An overview of the main aspects of the Bill is undertaken in this section. These are as follows:

- i. Amendments relating to commutation procedures;
- ii. Amendments relating to assistance for injured workers;
- iii. Amendments relating to lump sum compensation;
- iv. Amendments relating to new claims procedures - new dispute resolution mechanisms, minimising insurer delays; and legal costs and representation.

2.1 Amendments relating to commutation procedures

At present, the workers' compensation scheme makes provision for a worker and an employer to agree to settle a compensation claim for weekly payments, on a once and for

¹¹⁹ Law Society web site: www.lawsociety.com.au/practice/compo/1141142.html

¹²⁰ Law Society web site: www.lawsociety.com.au/practice/compo/problems_with_existing.html

¹²¹ For further information about commutations see Part A, section 2.2 and Part B, section 2.1.

¹²² New South Wales Bar Association, 'The Carr Government's workers compensation changes: more haste, less justice', *Media Release*, 5/01.

all basis, by the payment of a lump sum.¹²³ The lump sum payment terminates the employer's liability to the injured worker. This process is known as a 'commutation'. Currently, the commutation of weekly benefits to a lump sum must be determined by the Compensation Court. While the overwhelming majority of commutations are approved, the perceived problem with the commutation process rests with the cost of legal fees associated with seeking court approval.¹²⁴ In this respect, the Hon John Della Bosca, MLC, has cited the following statistics:

Approximately 11,000 commutation agreements are heard by the court each year. Generally the court will reject fewer than 2 per cent, or approximately 150, of the 11,000 agreed commutations. However, each commutation agreement considered by the court accounts for a cost of between \$2,000 and \$15,000 in legal fees to the WorkCover Scheme.¹²⁵

Schedule 1 of the Bill makes changes to the way in which agreements for commutations are made and finalised, with the aim of simplifying and reducing the costs of commutations.¹²⁶ The amendments will remove the requirement for the Compensation Court to determine lump sum commutation of workers' compensation benefits, and allow the parties to a claim to settle commutations by agreement. This will be subject to additional requirements for independent advice and scrutiny and registration of commutation agreements by the new Workers' Compensation Commission. The amendments also allow compensation under Division 3 of the *1987 Act* for medical, hospital and rehabilitation expenses etc to be commuted as well as weekly benefits.

To safeguard the interests of the injured workers, a worker's solicitor will be required to certify that the effect of the commutation process has been explained to the worker, and the worker will be required to confirm the provision of this advice in writing. In addition, a 14-day cooling off period will exist in which the worker may reconsider his or her decision. Before a commutation agreement will be binding on the parties, it must be registered by the new Workers' Compensation Commission. The Director will have the broad power to refer matters to a Commissioner for review.¹²⁷

2.2 Amendments relating to assistance for injured workers

The Bill makes provision for enhanced assistance and information to be provided to injured workers and employers in connection with their rights and obligations under the legislation. Schedule 2 provides for the establishment of a Claims Advisory Service.¹²⁸ The Claims Advisory Service is to be a free service providing workers and employers with information and the necessary assistance to enable them to comply with their respective obligations under the legislation. The Claims Advisory Service is designed to 'assist parties through the claim process, and if necessary mobilise the parties and non-government agencies such as rehabilitation providers and injury management consultants to broker solutions to workplace

¹²³ *Workers Compensation Act 1987* (NSW), section 51.

¹²⁴ NSWPD, 29/3/01, p 12883.

¹²⁵ *ibid.* These statistics were cited in the second reading speech of the original Bill.

¹²⁶ *Workers Compensation Legislation Amendment Bill 2001* (No 2), Schedule 1. The amendments to commutations are essentially the same as initially proposed in the original Bill.

¹²⁷ NSWPD, 29/3/01, p 12883.

¹²⁸ These amendments are essentially the same as initially proposed in the original Bill.

problems before they become disputes.¹²⁹ Schedule 2 also provides for the accreditation of injury management consultants by WorkCover and for WorkCover Guidelines to provide for their functions. Accredited injury management consultants will be competent but not compellable to give evidence.

When the original Bill was introduced, the Government stated that it would also provide funds to unions, and trade and employer organisations to allow them to assist workers through the claims process. In this respect, the Hon John Della Bosca MLC, stated that ‘..funding to these bodies will also be provided for a period of three years to equip them with the resources to provide consistent and accurate information and assistance’.¹³⁰ There has been little further comment on this issue.

2.3 Amendments relating to lump sum compensation

Lump sum compensation for permanent impairment: Schedule 3 of the Bill makes several changes to lump sum compensation for non-economic loss in relation to permanent impairment. The most significant amendments relate to the way in which permanent impairment is assessed for the purpose of determining lump sum compensation. Currently, lump sum compensation for non-economic loss is assessed pursuant to the Table of Disabilities in Part 3 Division 4 of the *1987 Act*. The Table of Disabilities lists a number of injuries and each is allocated a proportion of the maximum amount of compensation payable.¹³¹

Schedule 3 of the Bill provides that the amount of compensation for permanent impairment that a worker is entitled to is to be calculated as prescribed by the regulations, on the basis of the *degree* of permanent impairment that results from the injury. Rather than prescribing how the amount should be calculated in the regulations, the original Bill set out formulas for calculating the amount of compensation in which the degree of permanent impairment suffered by the worker was to be multiplied by certain monetary amounts, depending on the degree of impairment. At the time of writing this paper there was no indication as to how the regulations will calculate the amount. Permanent impairment is to be assessed in accordance with WorkCover guidelines issued for that purpose. The second reading speech of the original Bill indicates that Government’s rationale for this change:

The overwhelming majority of claims for compensation for permanent impairment under the workers’ compensation legislation enter the dispute resolution system. Litigation of such claims generates a substantial number of medical reports for each side and there is often great disparity between medical assessments of the worker’s impairment. Many people who suffer permanent impairment as a result of an injury recover no compensation for the disability that arises because their condition is not listed in the table of disabilities. Schedule 3 to the bill proposes the adoption of a consistent objective method of assessing permanent impairment. The assessment of permanent impairment using an objective guideline is undertaken by all other mainland Australian States. Assessment guides are also used under the Commonwealth Comcare and Seacare schemes and in the New South Wales motor accident compensation scheme. The use of a prescribed guideline for the New South Wales workers’ compensation scheme will not only provide a more certain system so as to reduce the number of disputes that will arise in relation to permanent impairment compensation, but will also ensure that workers with comparable disabilities will receive comparable amounts of compensation. The proposed

¹²⁹ NSWPD, 29/3/01, p 12880.

¹³⁰ NSWPD, 29/3/01, p 12880. This statement was made in the second reading speech of the original Bill.

¹³¹ The Table of Disabilities is set out in Appendix I.

amendments will also mean that, for the first time, those workers with impairments not listed in the current table will be able to receive permanent impairment compensation.¹³²

The use of guidelines for the assessment of permanent impairment for the purposes of determining lump sum compensation (and eligibility to make a common law claim) has been one of the most controversial aspects of the Governments' reforms. This will be discussed in further detail in Part B, section 3.1.¹³³

Pain and suffering: The Bill changes the entitlement criteria for compensation for pain and suffering. Under the amendments, a worker who receives an injury that results in a *degree* of permanent impairment *that is greater than that prescribed by the regulations* is entitled to pain and suffering compensation not exceeding \$50,000. The degree of permanent impairment is to be assessed in accordance with the WorkCover guidelines issued for that purpose. The use of guidelines to determine the degree of permanent impairment is discussed in further detail in Part B, section 3.1. At the time of writing there was no indication as to what the degree to be prescribed will be. However, the original Bill stated a worker must have a degree of permanent impairment greater than 10% to be eligible for compensation for pain and suffering.

Psychological and psychiatric injury: Currently, the Table of Disabilities does not include psychological injuries, therefore lump sum compensation is not available for permanent impairments caused by psychological injuries (although the worker can receive weekly benefits and medical expenses). The original Bill basically maintained the status quo providing that no permanent impairment compensation was payable for any psychiatric or psychological impairment.

Under the amendments in Schedule 3 of the Bill, no lump sum compensation will be payable for permanent impairment that results from a 'secondary psychological injury', but will be available for 'primary psychological injuries,' in certain circumstances.¹³⁴ A 'secondary psychological injury' means a psychological injury to the extent that it arises as a consequence of, or secondary to, a physical injury. A 'primary psychological injury' means a psychological injury that is not a secondary psychological injury. In other words, psychological injuries that arise directly from the workplace, such as an armed hold up or violent assault.

Compensation in for permanent impairment that results from a primary psychological injury will only be available in certain circumstances. The degree of permanent impairment resulting from the primary psychological injury must be *greater than the degree of permanent impairment prescribed by the regulations*. At the time of writing there was no indication as to what that degree is likely to be. In the second reading speech of the Bill the rationale for this threshold was stated as follows;

The Government considers this to be necessary because of the difficulties associated with diagnosing and distinguishing work-related impairments and based on advice from experts in the field that minor

¹³² NSWPD, 29/3/01, p 12883.

¹³³ Workers Compensation Legislation Amendment Bill 2001 (No 2), Schedule 3. The degree of permanent impairment is to be assessed in accordance with the provisions of the new Part 7 of Chapter 7 of the 1998 Act, which is also created by the Bill.

¹³⁴ The original Bill basically maintained the status quo, providing that no permanent impairment compensation was payable for any psychiatric or psychological impairment.

psychological impairments are common and need not impact on a worker's capacity to continue in their employment.¹³⁵

Also, if a worker receives a primary psychological injury and a physical injury, arising from the same incident the worker is only entitled to receive compensation in respect of impairment resulting from one of those injures.

Dispute resolution: Schedule 3 also provides for certain dispute resolution mechanisms for resolving disputes about the degree of permanent impairment. The reforms relating to dispute resolution are another contentious aspect of the amendments and will be discussed in further detail in Part B, section 3.2.

2.4 Amendments relating to new claims procedures

Schedule 4.2 of the Bill inserts a new Chapter 7 and Schedule 5 into the *1998 Act* to provide for new procedures for the making and determination of claims for statutory compensation and common law damages and disputes involving those claims. The significant features of the new Chapter 7 are described in the following paragraphs.

Preventing insurer delays

The Government views insurer delays in assessing and processing claims as a significant contributing factor to the current scheme deficit. The problem of insurer delays has also been recognised by WorkCover.¹³⁶ Several reforms are included in the Bill that are designed to reduce insurer delays. Schedule 4.2 of the Bill amends the *1998 Act* to provide for the provisional acceptance of liability by insurers, to require insurers to commence weekly payments in 7 days, to set time frames for determining claims and impose penalties on insurers who delay.¹³⁷ The rationale for these reforms was stated as follows:

Approximately 15 per cent of all disputes in the New South Wales workers' compensation system arise as a consequence of an insurer's failure to make a timely decision with respect to the payment of weekly benefits. This has the effect of compromising the existing early notification and prompt treatment initiatives in the legislation. In the majority of matters where an injured worker pursues his or her claims, the insurer is ultimately found to be liable to pay compensation. However, by the time this decision is made or the court orders payment to commence, the worker is often struggling financially and the opportunity for rehabilitation is irretrievably lost.¹³⁸

Under the new provisions, an insurer will be required to commence weekly payments within 7 days after initial notification to the insurer of an injury, without a claimant's entitlements to compensation being determined. An insurer must also determine a claim for weekly payments within 21 days by either accepting liability or disputing liability. Liability can be accepted on a provisional basis for a period of up to 12 weeks, determined by the insurer

¹³⁵ NSWPD 19/6/01, p 13 (Proof LA).

¹³⁶ WorkCover, op cit, n 136, p 1.

¹³⁷ Workers Compensation Legislation Amendment Act 2001 (No 2), Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 3, Division 2.

¹³⁸ NSWPD, 29/3/01, p 12881. This statement was made by the Hon John Della Bosca, in the second reading speech of the original Bill. This aspect of the original Bill has remained essentially the same in Bill No 2.

having regard to the nature of the injury and the period of incapacity.¹³⁹

The acceptance of liability on a provisional basis will not constitute an admission of liability by the employer or insurer. If an insurer disputes liability to make compensation payments to a worker, the obligation to make weekly payments pursuant to the provisional acceptance of liability will cease. If the worker is found not to be entitled, the insurer can stop payments. Provision is also made for the recovery of over payments. If fraud is suspected, the matter would be referred for investigation and prosecution.¹⁴⁰

The Bill also contains similar provisions in relation to claims for medical expenses and lump sum compensation.¹⁴¹ A claim for medical expenses must be determined within 21 days and a claim for lump sum compensation within 8 weeks. A claim for medical expenses can also be accepted on a provisional basis in certain circumstances.¹⁴²

Penalties will be introduced for insurers who delay the assessment of claims and response to claimants. For example, an insurer who fails to commence weekly payments of compensation pursuant to the provisions acceptance of liability is guilty of an offence and is liable to pay a maximum penalty of \$5,500. An insurer who fails to determine a claim for lump sum compensation within the specified time frame will be subject to a maximum penalty of \$5,500.¹⁴³

New dispute resolution procedures

The proposal to change the dispute resolution mechanisms is one of the most contentious aspects of the Government's reforms. The main provisions of the Bill relating to dispute resolution will be outlined in the following paragraphs. A full discussion of the issues will be undertaken in Part B, section 3.2.

New Workers' Compensation Commission: Schedule 4.2 of the Bill provides for the establishment of a new Workers Compensation Commission (the Commission).¹⁴⁴ The Commission will be independent of WorkCover and will comprise a President, who must be an appointed judge, 2 Deputy Presidents with legal qualifications with at least 5 years experience, and a Registrar and Arbitrators who must generally be legally qualified. The members of the Commission other than the Arbitrators are to be appointed by the Minister.

¹³⁹ Workers Compensation Legislation Amendment Bill 2001 (No 2), Schedule 4.2 item [16] - new Chapter 7, of the *1998 Act*, see Part 3, Division 2.

¹⁴⁰ *ibid.*

¹⁴¹ Workers Compensation Legislation Amendment Bill 2001 (No 2), Schedule 4.2 item [16] - new Chapter 7, of the *1998 Act*, see Part 3, Division 3 and Division 4.

¹⁴² Workers Compensation Legislation Amendment Bill 2001 (No 2), Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 3, Division 2. If provisional liability has been accepted the period within which liability must be determined is extended to the end of the period for which liability has been accepted on a provisional basis.

¹⁴³ Workers Compensation Legislation Amendment Bill 2001 (No 2), Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 3, Division 2.

¹⁴⁴ Workers Compensation Legislation Amendment Bill 2001 (No 2), Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 10.

Generally, any party to a dispute about a claim may refer the dispute to the Registrar for determination by the Commission (unless the dispute is about lump sum compensation in which cases only the claimant can refer the dispute).¹⁴⁵ The Commission will have three distinct areas in which it will exercise its functions.

1. **Expedited assessments:** The Bill will establish an expedited assessment jurisdiction of the new Commission. When a dispute relating to weekly benefits or small medical expenses compensation (for less than \$1,000), is referred to the Commission for determination, the Registrar will have the option of making an order that the employer/insurer pay the compensation in question.¹⁴⁶ The primary purpose of the expedited assessment is to get payments to injured workers started, to facilitate injury management, while waiting for the full dispute to be determined.¹⁴⁷ The expedited assessment jurisdiction will also deal with disputes relating to suitable duties and obligations under injury management plans.

2. **Medical Assessment:** The Bill will establish a system of medical assessment, through which arbitrators will be able to obtain advice on medical questions arising in the course of proceedings. The Bill modifies the existing system of approved medical specialists provided for under the *1989 Act*.¹⁴⁸ The medical assessment provisions are similar in many ways the system proposed under the original amendment Bill. The medical assessment system has been described by the Government in the following terms:

The registrar or an arbitrator in proceedings will be able to refer medical questions to approved medical specialists for consideration and advice. For most medical questions, that advice will be prima facie evidence in any proceedings before the arbitrator. The arbitrator would be free to depart from the advice where they have a clear and cogent reason for doing so. Given the eminent medical specialists that will be appointed as approved medical specialists, it is expected that in most cases the arbitrator will give substantial weight to the advice of the approved medical specialist.¹⁴⁹

The Bill states that a medical dispute means a dispute as to 'the worker's condition (including the worker's prognosis, the aetiology of the condition and treatment proposed or provided) or the worker's fitness for employment'.¹⁵⁰ The President of the Commission is to appoint the specialists in accordance with 'criteria developed by the Minister in consultation with the Advisory Council'.¹⁵¹ A medical dispute maybe referred for assessment by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute. Parties to a dispute may agree on the approved medical specialist who is to assess the dispute. If, however, the parties cannot agree within 7 days after the dispute

¹⁴⁵ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 4.

¹⁴⁶ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 5, Division 2.

¹⁴⁷ NSWPD 19/6/01, p 14 (Proof LA).

¹⁴⁸ *ibid.* Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 7.

¹⁴⁹ NSWPD, 19/6/01, p 14-15 (Proof, LA).

¹⁵⁰ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1989 Act*, see Part 7, section 319.

¹⁵¹ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 7, section 320.

is referred the Registrar will choose a specialist.¹⁵²

An assessment of the degree of permanent impairment is to be made 'in accordance with WorkCover Guidelines issued for that purpose'.¹⁵³ See Part B, section 3.1 for further discussion of the use of guidelines to make assessments about permanent impairment. A deduction must be made for any proportion of the impairment that is due to any previous injury or that is due to any pre-existing condition or abnormality. If the extent of a deduction is difficult or costly to determine it is to be assumed for the purpose of avoiding dispute that the deduction is 10% unless this assumption is at odds with available evidence.¹⁵⁴

An opinion certified in a medical assessment certificate is conclusively presumed to be correct as to the matters which the certificate is concerned.¹⁵⁵ A party to medical dispute may appeal against a medical assessment on one of the following grounds:

- (a) Deterioration of the workers' condition that results in an increase in the degree of permanent impairment;
- (b) Availability of additional relevant information that was not previously available;
- (c) The assessment was made on the basis of incorrect criteria
- (d) The medical assessment certificate contains a demonstrable error.¹⁵⁶

The appeal is heard by an Appeal Panel consisting of two approved medical specialists, and an arbitrator.¹⁵⁷ The Panel will take submissions from the original parties and review the original decision, with the possibility of conducting further medical examinations. The role of the arbitrator will be limited to ensuring procedural fairness given that most issues arising in appeals will call for the exercise of medical judgement and expertise.¹⁵⁸

3. Arbitration: The Government foresees that this area of the Commission will deal with and determine the overwhelming majority of disputes presenting to the Commission.¹⁵⁹ The Bill provides for the appointment of arbitrators who will be responsible for conciliating and arbitrating disputes. They will have a broad range of powers that can be exercised in seeking to resolve matters. Arbitrators will be required to issue a certificate setting out their reasons for decision. Parties will then have 28 days in which to lodge an appeal to a presidential member of the Commission. The presidential member will have a broad discretion to decide

¹⁵² Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 7, section 322.

¹⁵³ *ibid.*

¹⁵⁴ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 7, section 323.

¹⁵⁵ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 7, section 326.

¹⁵⁶ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 7, section 327.

¹⁵⁷ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 7, section 328.

¹⁵⁸ NSWPD, 19/6/01, p 15 (Proof, LA).

¹⁵⁹ *ibid.*

whether to grant leave to appeal. Appeals will proceed by way of a review of the original decision.¹⁶⁰

Legal costs and representation

The Government has cited legal fees as one of the major factors in the increase of the WorkCover schemes deficit.¹⁶¹ Accordingly, the Bill introduces mechanisms designed to contain the level of fees.¹⁶² The Bill provides that claimants, employers and insurers will be entitled to legal representation before the new Commission, but that the Commission may refuse to allow an insurer to be represented if the claimant is unrepresented. This decision is subject to review by the Principal Commissioner. Existing costs sanctions will also be expanded to apply to legal representatives who contribute to delay.

The WorkCover scheme will still meet the costs of legal representation. The level of fees able to be recovered from the scheme will continue to be regulated by a cost scale fixed by regulation, as they are at present, but a maximum amount will be set for each type of resolution reached. The Bill also provides that regulations may be made with respect to fixing maximum costs for legal services.¹⁶³ The fee schedule is to be set in consultation with the legal profession and agents, such as union representatives, who are entitled to represent injured workers. As to objective of these changes, the Hon John Della Bosca MLC stated: '[t]he objective of the fee structure will be to encourage the settlement of disputes in an efficient and timely manner at the earliest possible stage in a dispute.'¹⁶⁴ The amendments to commutation procedures (outlined above) are also designed to reduce legal costs.

¹⁶⁰ *ibid.*

¹⁶¹ NSWPD, 29/3/01, p 12880. See Part B, section 1 for further detail.

¹⁶² Workers Compensation Legislation Amendment Bill 2001 (No 2), Schedule 2.2 [16], new Chapter 7, of the *1989 Act*, see Part 9, section 356. Note that the provisions relating to legal fees and costs remain largely the same as in the original Bill.

¹⁶³ Workers Compensation Legislation Amendment Bill 2001 (No 2), Schedule 5.2 [16], new Chapter 7, of the *1989 Act*, see Part 8, Division 2.

¹⁶⁴ NSWPD, 27/3/01, p 12562.

3. THE CONTENTIOUS REFORMS

Several aspects of the Government's original workers' compensation amendment Bill were objected to by stakeholders. There are two main areas of contention. First, the proposed changes to dispute resolution processes. Of particular concern to unions and other stakeholders was the proposal to introduce a new 'medical assessment service' and to change the role of the Commissioners and the Compensation Court of New South Wales. Also contentious was the proposal to alter the threshold requirements for access to the common law, and the assessment of lump sum compensation for permanent impairment through the introduction of guidelines for the assessment of permanent impairment. Reforms designed to reduce legal costs also met with strong criticism, particularly from the legal sector. These contentious reforms will be examined in this section.

By way of background, the current law in relation to each of the issues will be set out, as well as the amendments contained in the original Bill. The reforms as they are currently constituted in Bill No 2 will be examined and the views of various stakeholders that have been made publicly available will also be set out.

3.1 AMENDMENTS TO COMMON LAW DAMAGES AND STATUTORY LUMP SUM COMPENSATION

The original Bill contained amendments to the way in which eligibility for common law damages for permanent impairment and statutory pain and suffering compensation is determined, and the way in which statutory compensation for permanent impairment is assessed.¹⁶⁵ The amendments proposed the introduction of a new regime for assessing an injured worker's *degree of permanent impairment* in relation to these types of compensation. The Bill provided that assessments of permanent impairment are to be made 'in accordance with WorkCover guidelines issued for that purpose or, if there are no such guidelines in force - the American Medical Association Guides to the Evaluation of Permanent Impairment'.¹⁶⁶

It is the reference to the American Medical Association Guides (the AMA Guides) that was the major concern to stakeholders. It was commonly believed that, until WorkCover developed its own guidelines, it would have adopted the AMA Guides in the interim.¹⁶⁷ It was also thought that, in any case, the guidelines subsequently developed by WorkCover would be heavily based on the AMA Guides, as has occurred in the New South Wales motor accidents scheme.¹⁶⁸

¹⁶⁵ If a worker suffers a permanent impairment she or he is entitled to claim either statutory compensation for permanent impairment *or* common law damages for permanent impairment. An election must be made between the two and both types of compensation cannot be claimed. The process of election is explained in further detail in Part A, section 2.2.

¹⁶⁶ Workers Compensation Legislation Amendment Bill 2001, Schedule 5, item [14], new Part 7 of Chapter 7 of the *1989 Act*, section 318.

¹⁶⁷ For example, the Law Society of New South Wales has stated its assumption that 'due to WorkCover's time constraints, and the complexity of the AMA Guides, the new scheme will almost certainly adopt the AMA Guides (as did the MAA)'. Law Society web site: www.lawsociety.com.au/practice/compo/1142257.html.

¹⁶⁸ The reliance on the AMA Guides by the Motor Accidents Authority is discussed in further detail below, in Part B, section 3.1.3.

The crux of the objection is that under the AMA Guides, the degree of permanent impairment (expressed as a percentage) relates to the 'whole person', rather than the degree of impairment of the injured body part. This, it has been argued, means that it will be more difficult for an injury to satisfy the threshold for eligibility for common law damages and statutory pain and suffering compensation, than under the Table of Disabilities method that is currently used. There is a great deal of speculation about the actual effect these changes will have and it is difficult to estimate the extent of the impact on injured workers and the costs of the scheme.

After intensive lobbying by stakeholders, and negotiations with the Government, reference to the AMA Guides has been removed in Bill No 2. The amendments as they relate to the common law created the fiercest reaction, and the Government has agreed to refer the matter of common law to a judicial inquiry. The provisions of the original Bill that concerned the threshold for eligibility to claim common law damages were therefore not retained in Bill No 2. The new Bill provides simply that WorkCover is to formulate guidelines for the assessment of permanent impairment. As it is possible that the guidelines developed by WorkCover will still use the 'whole person' method of the AMA Guides, the assessment of permanent impairment is still a contentious issue.

The common law issues are discussed in subsection 3.1.1 where the terms of reference for the judicial inquiry into common law aspects of the workers compensation scheme are also set out. The amendments as they relate to lump sum compensation for permanent impairment and pain and suffering are examined in subsection 3.1.2. The table in Appendix II contains a summary of the current provisions and the amendment proposals in relation to common law and statutory lump sum compensation. The criticisms of the AMA Guides and the views of stakeholders will be addressed in subsection 3.1.3.

3.1.1 Common law

As outlined in section 1.1, when common law remedies were reinstated in New South Wales in 1990, thresholds were put in place to limit access to common law damages for economic and non-economic loss. Due to the financial success of the scheme, these thresholds were lowered in 1991 to the current level. The original Bill contained amendments to alter the nature of the threshold requirement for access to common law damages. Instead of linking the threshold to the Table of Disabilities (for economic loss) and prescribed limits (for non-economic loss), the original Bill linked the thresholds to the degree of permanent impairment as assessed by guidelines. There has been speculation about moves to change the thresholds to entitlement to common law damages for permanent impairment in this way for many years. For example, as outlined in Part A, section 1.1, the Grellman Report recommended that to access common law an injured worker should have a 25% 'whole of body' impairment.

The current law¹⁶⁹

Damages for economic loss: An injured worker can only make a claim for damages for economic loss if the worker has suffered a 'serious injury', or died as a result of the injury.¹⁷⁰

¹⁶⁹ The table in Appendix II contains a summary of the current provisions and the amendments in the original Bill.

¹⁷⁰ *Workers Compensation Act 1987* (NSW), section 151H(2A).

A 'serious injury' is defined as:

- (a) An injury for which compensation payable under section 66 of the *1987 Act*, for the loss or losses resulting from the injury is, in the opinion of the court, not less than 25% of the maximum amount payable (under the Table of Disabilities) referred to in section 66(1); or
- (b) An injury for which common law damages for non-economic loss are not less than \$48,000 (currently indexed at \$59,450).¹⁷¹

Note that there are 24 out of the 44 injuries listed in the Table of Disabilities for which compensation payable is not less than 25%.¹⁷² For the purposes of determining whether an injury is a 'serious injury', a court has the same power of the Compensation Court to refer a matter to a medical referee or medical panel for a report. As to the usage of this power, it has been stated that: '[I]n practice this power has not been used. The common law courts have been content to assess whether or not a worker has suffered a serious injury by reference to entitlement to damages to non-economic loss.'¹⁷³

Once it has been determined that a worker is entitled to damages for economic loss, there are a number of restrictions on the amount that may be awarded. For example, if the worker was earning a weekly amount greater than the weekly amount prescribed in the Act for weekly benefits, the court must treat the worker's earnings as being the same as this amount.¹⁷⁴ Also, when making assessments for future loss of earning capacity, a discount rate of five percent is applied.¹⁷⁵

¹⁷¹ *ibid.* Note that this applies to injuries received on or after the commencement of Schedule 2(2) to the Worker's Compensation (Benefits) Amendment Act 1991. A different threshold applies to injuries received before the commencement of that Act: section 151H(2).

¹⁷² Note that there are 6 other injuries in the Table of disabilities for which a range of percentages is stated eg. 0 - 60% of the maximum amount payable, to take into account the extent of certain permanent injuries, such as brain damage. These have not been included in the total of 44.

¹⁷³ LBC Information Services 1995, *op cit*, n 15, p 3449.

¹⁷⁴ *Workers Compensation Act 1987* (NSW), section 151I.

¹⁷⁵ *Workers Compensation Act 1987* (NSW), section 151J.

Damages for non-economic loss: To be eligible to claim common law damages for non-economic loss, the amount of non-economic loss suffered by the injured worker must be greater than \$36,000 (the lower limit). There is also a formula to reduce the amount of damages if the amount of non-economic loss falls between the lower limit and \$48,000 (the upper limit).¹⁷⁶ If an injured worker meets the threshold, and negligence is established, the amount of damages to be awarded is to be a proportion of the maximum amount payable and the proportion is determined by the severity of the injury. The amount of damages is determined by the court hearing the claim. The maximum amount payable is set in the legislation at \$204,000.¹⁷⁷ The maximum amount may only be awarded in the most extreme cases.

The lower, upper and maximum amounts prescribed by legislation and set out above, are adjusted on 1 April and 1 October each year, in accordance with the Consumer Price Index.¹⁷⁸ At 1 April 2001, the lower limit was indexed at \$44,600, the upper limit at \$59,700 and the maximum at \$252,550. The amounts which apply in an individual case are the applicable amounts at the date of the injury.¹⁷⁹

Amendments in the original Bill

Under the original Bill, common law damages for both economic and non-economic loss can only be awarded if the *degree of permanent impairment suffered by the worker is greater than 25%*.¹⁸⁰ The degree of permanent impairment is to be assessed in accordance with WorkCover guidelines/AMA Guides.¹⁸¹

In relation to *economic loss*, the current requirement that damages for economic loss can only be awarded if the worker suffered a 'serious injury', or died as a result of the injury was removed and replaced by the 25% permanent impairment threshold.¹⁸²

In relation to *non-economic loss*, the Bill removed the lower limit threshold of \$36,000. Therefore it replaced the prescribed monetary threshold with a threshold of 25% permanent impairment.¹⁸³ The current reduction that applies to non-economic loss assessed between \$36,000 and \$48,000 was also removed.¹⁸⁴ The maximum damages payable was still prescribed at \$204,000.¹⁸⁵ Under the original Bill, once the 25% permanent impairment

¹⁷⁶ *Workers Compensation Act 1987* (NSW), section 151G.

¹⁷⁷ *Workers Compensation Act 1987* (NSW), section 151G.

¹⁷⁸ *Workers Compensation Act 1987* (NSW), section 151G(7), 80 and 81(1).

¹⁷⁹ *Workers Compensation Act 1987* (NSW), section 151G(8).

¹⁸⁰ Workers Compensation Legislation Amendment Bill 2001, Schedule 4, items [1] – [4].

¹⁸¹ *ibid*, and Schedule 5.2, item [14], Chapter 7, Part 7, section 318.

¹⁸² Workers Compensation Legislation Amendment Bill 2001, Schedule 4, item [4].

¹⁸³ Workers Compensation Legislation Amendment Bill 2001, Schedule 4, item [2].

¹⁸⁴ Workers Compensation Legislation Amendment Bill 2001, Schedule 4, item [2].

¹⁸⁵ Workers Compensation Legislation Amendment Bill 2001, Schedule 4, item [3].

threshold and negligence is established, the amount of damages to be awarded for non-economic loss was to be calculated in the same way as under the present provisions. In other words, as a proportion, determined according to the severity of the non-economic loss, of the maximum amount that can be awarded.

The common law inquiry

The Judicial Inquiry into the common law commenced on the 18th of June and is being conducted by Justice Terry Sheahan of the Land and Environment Court. The Inquiry is due to report in August. The Terms of Reference for the Inquiry are set out below.¹⁸⁶

TERMS OF REFERENCE

1. To recommend the appropriate threshold for 'serious and permanent injury' necessary to recover damages at Common Law in the WorkCover Scheme, consistent with the available measures of impairment in the statutory workers compensation scheme, and with maintaining access to Common Law claims under the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* for seriously injured workers.
2. To examine more efficient ways to process Common Law claims under the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*.
3. To identify ways to reduce unnecessary costs and inefficiencies in the processing of Common Law claims under the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*.
4. To identify ways to reduce the incentive for pursuing Common Law claims under the under the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*.

The Inquiry is to be an informal process, not bound by the rules of evidence. The Inquiry is to inform itself in any way it sees fit and can take submissions from stakeholders, including trade unions, employer associations and Government and other interested parties. It is to be assisted by an expert reference group made up of employer, employee and Government representatives.¹⁸⁷

3.1.2 Statutory lump sum compensation¹⁸⁸

The current law

Division 4 of Part 3 of the *1987 Act* deals with compensation for non-economic loss.

¹⁸⁶ NSWPD 20/6/01, p 25 (Proof LC).

¹⁸⁷ NSWPD, 20/6/01, p 25 (Proof, LC).

¹⁸⁸ The table in Appendix II contains a summary of the current provisions and the amendment proposals in the original Bill and Bill No 2.

Division 4 deals primarily with compensation for permanent injuries, but also with compensation for pain and suffering and other related matters. In this Division, a 'loss' in relation to a thing, means the loss of that thing, or the permanent loss of the use, or the efficient use, of that thing.¹⁸⁹

Permanent impairment: Section 66 deals with compensation for permanent injuries. It provides that a worker who has suffered a loss of a thing mentioned in the prescribed table is entitled to receive from the worker's employer, a lump sum by way of compensation.¹⁹⁰ The prescribed table is referred to commonly as the Table of Disabilities (the table is set out in Appendix I).

The Table of Disabilities lists a number of injuries and each injury is allocated a percentage of the maximum amount of compensation payable. Not all injuries are included on the table and therefore compensation for permanent impairment is not available for all injuries. For a single injury the maximum amount payable is \$100,000 and for multiple injuries the maximum amount payable is \$121,000.¹⁹¹ These amounts are indexed.

Example	
For the loss of a right hand:	70% of the maximum amount is payable
For the loss of a foot:	65% of the maximum amount is payable

Pain and suffering: Under the *1987 Act*, an injured worker is also entitled to make a claim for lump sum compensation in respect of pain and suffering, in addition to any claim for permanent impairment compensation.¹⁹² Entitlement to pain and suffering compensation only accrues in circumstances where the compensation payable for permanent injuries under section 66, is equal to, or greater than, 10% of the maximum amount payable ie, an injury that is accorded 10% or higher on the Table of Disabilities. Note that there are 6 out of 44 injuries listed in the Table of Disabilities for which compensation payable is less than 10%.¹⁹³

Once the injured worker meets the threshold for pain and suffering compensation, and negligence is established, the assessment of pain and suffering is purely subjective and discretionary and independent of assessments made under section 66. The legislation stipulates however, that a maximum amount of \$50,000 is payable for pain and suffering, but only in the most extreme of cases.¹⁹⁴

¹⁸⁹ *Workers Compensation Act 1987* (NSW), section 65.

¹⁹⁰ *Workers Compensation Act 1987* (NSW), section 66. The Table of Disabilities applies to all injuries occurring from 4pm on 30 June 1987.

¹⁹¹ *Workers Compensation Act 1987* (NSW), section 66(1) and (2).

¹⁹² *Workers Compensation Act 1987* (NSW), section 67.

¹⁹³ Note that there are 6 other injuries in the Table of Disabilities for which a *range* of percentages is stated (eg. 0 - 60% of the maximum amount payable), to take into account the extent of certain permanent injuries, such as brain damage. These have not been included in the total of 44.

¹⁹⁴ McManamey B, Goldberg T, Monaghan A, op cit, n 87 at [3.1050]. This amount is also indexed.

Amendments in the original Bill

Permanent impairment: Schedule 3 of the original Bill substituted a new section 66, providing that compensation for permanent impairment was to be based on the degree of permanent impairment suffered by the worker, multiplied by certain monetary amounts, depending on the degree.¹⁹⁵

Example

If the degree (D) of permanent impairment is more than 20%, but not more than 30%, the amount of permanent impairment compensation is to be calculated as follows:

$$\$22,500 + [(D-20) \times \$2,500]$$

If degree of permanent impairment was 66% or more, the maximum amount of permanent impairment compensation available was \$173,500. The degree of permanent impairment was to be assessed 'in accordance with WorkCover guidelines issued for that purpose or, if there are no such guidelines in force - the AMA Guides.'¹⁹⁶

Pain and suffering: The Bill changed the threshold criteria for pain and suffering compensation. Under the amendments, a worker who receives an injury that results in a degree of permanent impairment that is greater than 10%, was entitled to pain and suffering compensation not exceeding \$50,000. The degree of permanent impairment was to be assessed in accordance with the WorkCover guidelines/AMA Guides.

The Bill also provided that a Commissioner may, at any stage of the proceedings on a claim for permanent impairment compensation or pain and suffering compensation, refer the matter for assessment of the degree of permanent impairment by a medical assessor.¹⁹⁷ The resolution for disputes by medical assessors is another of the controversial aspects of the Bill and is discussed in Part B, section 3.2.

The amendments in Bill No 2

Permanent impairment: Schedule 3 of the Bill provides that the amount of compensation for permanent impairment that a worker is entitled to, is to be calculated *as prescribed by the regulations*, on the basis of the *degree* of permanent impairment that results from the injury.¹⁹⁸ At the time of writing there was no indication as to how the regulations will calculate the amount. In the second reading speech of Bill No 2 it was stated 'the amount will be determined through formulas which will be prescribed by regulation. Until the

¹⁹⁵ Workers Compensation Legislation Amendment Bill 2001, Schedule 3, item [1].

¹⁹⁶ Workers Compensation Legislation Amendment Bill 2001, Schedule 3, item [1]. The degree of permanent impairment is to be assessed in accordance with the provisions of the new Part 7 of Chapter 7 of the *1998 Act*, which is also created by the Bill.

¹⁹⁷ Workers Compensation Legislation Amendment Bill 2001, Schedule 3, item [1].

¹⁹⁸ Note that rather than prescribing how the amount should be calculated in the regulations, the original Bill set out formulas for calculating the amount of compensation in which the degree of permanent impairment suffered by the worker was to be multiplied by certain monetary amounts, depending on the degree.

guidelines are developed, a proper assessment cannot be made as to what compensation formulas are adequate. It is for this reason that Government has decided to prescribe these formulas through delegated legislation'.¹⁹⁹

Pain and suffering: Under the amendments, a worker who receives an injury that results in a *degree* of permanent impairment that is *greater than that prescribed by the regulations* is entitled to pain and suffering compensation not exceeding \$50,000. At the time of writing there was no indication as to what the degree to be prescribed will be. It may be indicative, however, that the original Bill stated a worker must have a degree of permanent impairment greater than 10% to be eligible for compensation for pain and suffering.

Bill No 2 provides that the degree of permanent impairment for the purpose of both forms of lump sum compensation is to be assessed 'in accordance with the WorkCover guidelines issued for that purpose'. The reference to the AMA Guides that was contained in the original Bill has been removed. The reforms in Bill No 2 are therefore essentially the same as in the original Bill, although the issue of the nature of the permanent impairment assessment guidelines has been removed from the immediate context of the Bill.²⁰⁰ Despite this, concern about the AMA Guides and the use of the whole person assessment remain, as it appears that the AMA Guides will be used as a basis for the development of guidelines by WorkCover. In respect of the AMA Guides it was stated in the second reading speech of Bill No 2 that:

The Government recognised that there is a need for locally developed guidelines to be used rather than the guidelines issued by the American Medical Association (AMA). During the consultation process a number of specific concerns were raised with the existing content of the AMA Guides. There is a need for a comprehensive review of those Guidelines before they are implemented, so that they can be adapted for Australian conditions. Accordingly, the bill now requires WorkCover to issue locally developed guidelines instead of relying on the AMA guides. Further, the bill provides that WorkCover must issue guidelines relating to the assessment of permanent impairment before the legislation can be commenced.

The second reading speech of Bill No 2 emphasised that the guidelines for the assessment of permanent impairment would provide for assessment of injuries in accordance with objective scientific evidence. It was also pointed out that a broader range of injuries will be compensable using the guidelines rather than the Table of Disabilities, including psychological injuries in certain circumstances (see below).²⁰¹

The Bill expands the functions of the Workers Compensation and Workplace Occupations Health and Safety Council to include consultation on the terms of the guides.²⁰² The guides will be disallowable by Parliament. Work on the development of the guides has commenced through five working groups established to cover the most common workers' compensation injuries (lower extremities, upper extremities, nervous system, psychological injury and spine). A consistency group has also been established to ensure continuity. Consultation with stakeholders, including the Labor Council, in the development of the Guidelines was

¹⁹⁹ NSWPD, 19/6/01, p 13 (Proof, LA).

²⁰⁰ NSWPD, 29/3/01, p 12883. Note that a rationale similar to that extracted above in relation to the original Bill was referred to in the second reading speech of Bill No 2.

²⁰¹ NSWPD, 19/6/01, p 12 & 13 (Proof, LA).

²⁰² NSWPD, 19/6/01, p 12 (Proof, LA). The Workers Compensation and Workplace Occupations Health and Safety Council is outlined in Part A, section 2.2.

emphasised in the second reading speech.²⁰³

Psychological and psychiatric injury: Currently, the table of disabilities does not include psychological injuries, therefore lump sum compensation is not available for permanent impairments caused by psychological injuries (although the worker can receive weekly benefits and medical expenses). Under the amendments in Schedule 3 of the Bill, no lump sum compensation will be payable for permanent impairment that results from a 'secondary psychological injury', but will be available for 'primary psychological injuries,' in certain circumstances.²⁰⁴ A 'secondary psychological injury' means a psychological injury to the extent that it arises as a consequence of, or secondary to, a physical injury.²⁰⁵ A 'primary psychological injury' means a psychological injury that is not a secondary psychological injury. In other words, psychological injuries that arise directly from the workplace, such as an armed hold up or violent assault.

Compensation for a permanent impairment that results from a primary psychological injury will not be available unless the degree of permanent impairment is *greater than the degree prescribed by the regulations*. At the time of writing there was no indication as to what that degree is likely to be. In the second reading speech of the Bill the rationale for this threshold was stated as follows;

The Government considers this to be necessary because of the difficulties associated with diagnosing and distinguishing work-related impairments and based on advice from experts in the field that minor psychological impairment are common and need not impact on a workers capacity to continue in their employment.²⁰⁶

Also, if a worker receives a primary psychological injury and a physical injury arising from the same incident the worker is only entitled to receive compensation in respect of impairment resulting from one of those injures.

3.1.3 Guidelines for the assessment of permanent impairment

As outlined above, the amendments in relation to both common law damages and lump sum compensation for permanent impairment centre on the assessment of permanent impairment. The reliance in the original Bill on the AMA Guides was a major concern to stakeholders. The government explained its rationale for implementing permanent impairment Guidelines in the second reading speech of the original Bill:

Many people who suffer permanent impairment as a result of an injury recover no compensation for the disability that arises because their condition is not listed in the table of disabilities. Schedule 3 to the bill proposes the adoption of a consistent objective method of assessing permanent impairment. The assessment of permanent impairment using an objective guideline is undertaken by all other mainland Australian States. Assessment guides are also used under the Commonwealth Comcare and Seacare schemes and in the New South Wales motor accident compensation scheme. The use of a prescribed

²⁰³ NSWPD, 19/6/01, p 13 (Proof, LA).

²⁰⁴ The original Bill basically maintained the status quo providing that no permanent impairment compensation was payable for any psychiatric or psychological impairment.

²⁰⁵ Note that workers who develop a secondary psychological injury after a workplace accident (such as depression following an inability to work due to a back impairment), may be entitled to an award for pain and suffering subject to threshold requirements: NSWPD, 19/6/01, p 13 (Proof LA).

²⁰⁶ NSWPD 19/6/01, p 13 (Proof LA).

guideline for the New South Wales workers' compensation scheme will not only provide a more certain system so as to reduce the number of disputes that will arise in relation to permanent impairment compensation, but will also ensure that workers with comparable disabilities will receive comparable amounts of compensation. The proposed amendments will also mean that, for the first time, those workers with impairments not listed in the current table will be able to receive permanent impairment compensation.²⁰⁷

While reference to the AMA Guides is removed in Bill No 2, and replaced with provisions for guidelines to be developed by WorkCover, it may be that the AMA Guides will be used as the basis for development of guidelines by WorkCover. The AMA Guides will be examined in this section.

The American Medical Association Guides to the Evaluation of Permanent Impairment

The AMA Guides were developed by the American Medical Association, with the first edition published in 1970 and the fifth edition published this year. They are the most commonly used guide to assessing permanent impairment in the United States. The nature of the Guides has been explained in the following terms:

The Guides is a tool to convert medical information about permanent impairments into numerical values. Each chapter focuses on a single organ system and provides a description of the diagnostic and evaluative methods for assessing specified impairments. Each impairment is assigned a rating, expressed as a percentage of loss of function for that system. Organ-based ratings are then translated into impairment ratings for the whole person, termed *whole person impairment* (WPI). For example, amputation of the index finger of either hand is considered a 20% impairment of the upper extremity, and an 11% WPI. Finally, the Guides combine multiple WPIs into a single rating by using the formula $[A+B(1-A)]$, where A is the rating for the first impairment and B is the rating for the subsequent impairment, thus creating an asymptotic curve toward 100%.²⁰⁸

Use of the AMA Guides in New South Wales

The possibility of using guidelines for assessing permanent impairment in the context of compensation for permanent impairment has been on the agenda in New South Wales for many years. As mentioned on Part B, section 2.1, in 1986, the State Compensation Board was asked by the Government to prepare a discussion paper, canvassing various options for reform of the New South Wales workers' compensation system.²⁰⁹ At that stage, the *1926 Act* provided for lump sum compensation for loss of function and/or loss of part of the body, with the amount of compensation determined by reference to the Table of Disabilities, or the 'Table of Maims' as it was called then.²¹⁰ The Table of Maims set out 25 losses and attributed to each a specific monetary amount. The discussion paper canvassed the option of substituting this form of compensation with 'lump sums for permanent impairment using the Commonwealth adaptation of the American Medical Association Guides to the

²⁰⁷ NSWPD, 29/3/01, p 12883.

²⁰⁸ Speiler E, Barth P, Burton J, Himmelstein J and Rudolph L, 'Recommendations to Guide Revision of the Guides to the Evaluation of Permanent Impairment,' *JAMA*, January 26, 2000 – Vol 283, No 4, p 519

²⁰⁹ State Compensation Board, op cit, n 50, p 70.

²¹⁰ For a discussion of the history of the Table of maims, see Blackmore, Kate 'Law, Medicine and the Compensation Debate', *Journal of Occupational Health and Safety – Australia and New Zealand*, 99(1): 59-63.

Evaluation of Permanent Impairment',²¹¹ ie, the 'whole person approach.'

The *1987 Act* did not take up this option and instead contained a similar table to the original Table of Maims, renamed the Table of Disabilities. The Table of Disabilities contained many more losses than the earlier table and each loss was allocated a certain percentage of the maximum compensation available. The percentages were not based on an approximation of whole person impairment,²¹² and do not represent a degree of impairment, but rather the percentage of compensation that a worker is entitled to for each injury.

The Grellman Report: The whole person approach, and the use of the AMA Guides for the assessment of permanent impairment was again examined in 1997 by the Grellman Inquiry. The Inquiry report identified compensation for permanent impairment and pain and suffering as one of the key cost drivers of the NSW scheme. It recommended that 'lump sum payments in recognition of non-economic loss be assessed as the worker's whole of body work related permanent impairment percentage applied to a maximum amount'.²¹³ The Report also recommended that 'the whole of body work-related permanent impairment percentage will be assessed using the latest edition of the American Medical Association's Guides to Evaluation of Permanent Impairment'.²¹⁴

²¹¹ State Compensation Board, op cit, n 50, p 36.

²¹² Personal communication with WorkCover, 8/6/01. The rationale for including percentages was to accommodate for the indexation of prescribe statutory amounts of compensation that were also introduced by the *1987 Act*. While the percentages must relate in some way to the severity of the injury, they are not based on any notion of 'whole person'. They are not however intended to reflect an assessment of a 'degree' of injury or impairment, rather a percentage entitlement to compensation.

²¹³ The Grellman Report, op cit, n 52, p 5 & 22. The Grellman Report is discussed further in Part A, section 1.1 and 2.1.

²¹⁴ The Grellman Report, op cit, n 52, p 5, 22, 80.

The NSW Motor Accidents Scheme: The *Motor Accidents Compensation Act 1999* requires that common law damages for non-economic loss can only be awarded where the permanent impairment of the injured person is greater than 10%.²¹⁵ If there is a dispute about the degree of permanent impairment, the dispute will be decided by a single medical assessor with a limited right of review. Where the degree of permanent impairment is greater than 10%, the common law principles in relation to the assessment of general damages apply, subject to a maximum of \$260,000 (indexed).²¹⁶ The Act stipulates that the 'assessment of the degree of permanent impairment is to be made in accordance with the Motor Accidents Authority Medical Guidelines (the MAA Guides) issued for that purpose, or, if there are no such guidelines in force – the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition'.²¹⁷ At the time the Act was introduced objection to the use of the AMA Guides was made by the Opposition and various stakeholders.²¹⁸

Accordingly, the MAA Guides were issued in March 2000.²¹⁹ They were developed by a number of reference groups of 'senior New South Wales clinicians for each of the major body systems'.²²⁰ The Guidelines state that they use the AMA Guides as their basis, with qualifications:²²¹

The AMA 4 Guides are widely used as an authoritative source for the assessment of permanent impairment. However, these MAA Guidelines make significant changes to the AMA Guides to align them with the Australian clinical practice and to better suit them to the purposes of the Act.²²² [I]n these guidelines there are some very significant departures from [the AMA Guides]. Persons undertaking impairment assessments for the purposes of the *NSW Motor Accidents Compensation Act 1999* must read the MAA Guidelines in conjunction with the AMA 4 Guides. These MAA Guidelines are definitive with regard to the matter they address. Where they are silent on an issue, the AMA 4 Guides should be followed.²²³

The MAA offers training courses to doctors designed to 'equip medical practitioners with the skills to assess permanent impairment, reduce variability in medical assessments; and assist with understanding the *Motor Accidents Compensation Act 1999*'.²²⁴ The MAA has also published impairment case studies which provide 110 practical examples of how cases

²¹⁵ *Motor Accidents Compensation Act 1999* (NSW), section 131.

²¹⁶ *Motor Accidents Compensation Act 1999* (NSW), section 134.

²¹⁷ *Motor Accidents Compensation Act 1999* (NSW), section 133(2).

²¹⁸ See for example, NSWPD, 22/06/99 p 967 and 29/06/99, p 1673. See also 'NSW – Lawyers Attack New Laws for Car Injury', *AAP*, 6/6/99.

²¹⁹ The Guidelines were issued pursuant to section 44 of the *Motor Accidents Compensation Act 1999* (NSW). To view the Guidelines, see the MAA web site: www.maa.nsw.gov.au/professionals/assess_guide/impairment/.

²²⁰ *MAA Medical Guidelines – Guidelines on the Assessment of the Degree of Permanent Impairment of an Injured Person*, Motor Accidents Authority, March 2000, para 1.3.

²²¹ *MAA Medical Guidelines*, op cit, n 220.

²²² *MAA Medical Guidelines*, op cit, n 220, Explanatory Note.

²²³ *MAA Medical Guidelines*, op cit, n 220, para 1.2.

²²⁴ See the MAA web site at: www.maa.nsw.gov.au/professionals/ for further detail.

will be assessed under the new scheme. Each case study contains an outline of the accident, injuries, treatment and summaries of medical reports, then details how whole person permanent impairment would be assessed in accordance with the new Act.²²⁵

The use of the AMA Guides in other Australian jurisdictions

The AMA Guides are currently used in some way in most Australian workers' compensations schemes.²²⁶ Workers' compensation legislation in Queensland, Victoria, South Australia, and the Northern Territory specify that the AMA Guides are to be used to make assessments about permanent impairment. The two Commonwealth schemes, Comcare and Seacare, and the Western Australian scheme, have developed their own guidelines to assess permanent impairment. The AMA Guides were used as a reference source in the development of those guides. Only Tasmania and the ACT have no assessment methodology prescribed. A brief outline of these jurisdictions is undertaken below.

Queensland: In Queensland, a worker who is assessed as having a degree of permanent impairment is entitled to lump sum compensation.²²⁷ The amount of the lump sum compensation must be calculated with regard to the degree of permanent impairment and the table of injuries.²²⁸ Permanent impairment is to be assessed according to the regulations. The regulations state that they must be read in conjunction with the relevant provisions of the AMA Guides, and that the methods of assessing the degree of permanent impairment are the methods stated in the AMA Guides (unspecified edition).²²⁹

South Australia: Lump sum compensation for non-economic loss is calculated as a percentage of the prescribed sum determined by reference to a Table of Maims.²³⁰ The percentage loss of total bodily function represented by a particular impairment of a physical or sensory faculty is to be determined in accordance with 'professionally accepted principles approved by regulation'.²³¹ The regulations have approved the AMA Guides (3rd edition)

²²⁵ 'Motor Accidents Compensation Act, Impairment Case Studies', October 2000, Motor Accidents Authority. See the MAA web site at: www.maa.nsw.gov.au/professionals/ for further detail. The cases studies were provided by insurers who were asked to provide 50-70 cases they thought were borderline, that is between 9 - 11%, and 20-30 cases that were clearly in excess of 10%: Personal communication with Belinda Cassidy, Division Manager Claims Assessment Resolution Service, Motor Accidents Authority, 20/6/01.

²²⁶ It is also used in some motor accidents schemes, although only the NSW scheme is examined in this paper. For an analysis of the use of the AMA Guides in Australia, with particular reference to Victoria, see O'Loughlen M, 'The American Medical Associations' "Guides to the Evaluation of Permanent Impairment" in Australia: the Standards, and departures from the Standard, 8 (1997) *Insurance law Journal* p 194-209 and Mulvany P and Horner N, 'The Use and Abuse of the American Medical Association Guides in Accident Compensation Schemes', *Journal of Law and medicine*, Vol 6 November 1998, p 136 -146.

²²⁷ *Workcover Queensland Act 1996* (Qld), section 196, 197.

²²⁸ *Workcover Queensland Act 1996* (Qld), section 198.

²²⁹ *Workcover Queensland Act 1996* (Qld), section 197 and *Workcover Queensland Regulation 1997*(Qld), regulation 55, except for psychiatric and psychological and industrial deafness which is assessed differently.

²³⁰ *Workers Rehabilitation and Compensation Act 1986* (SA), section 43.

²³¹ *Workers Rehabilitation and Compensation Act 1986* (SA) Schedule 3 subsection (4)

for this purpose.²³²

Victoria: Assessment of impairment for the purposes of determining compensation is to be made in accordance with the AMA Guides (4th edition) or methods prescribed in regulations.²³³

Northern Territory: Permanent impairment must be assessed in relation to prescribed guides (in the first instance by a medical practitioner with a right to apply for an appeal to the Authority to be reassessed by a panel of 3 medical practitioners).²³⁴ The guides prescribed for this purpose are the AMA Guides (4th edition).²³⁵

Commonwealth: Under the Comcare scheme, the degree of permanent impairment is assessed in accordance with the 'Guide to the Assessment of the Degree of Permanent Impairment' published by Comcare.²³⁶ The guide states that the main sources of reference in its development were, The AMA Guide (3rd edition) and Guide to the Assessment of Rates of Veteran's Pensions, Department of Veterans' Affairs.²³⁷ In reference to the Comcare guide:

Although these documents have been used as source material, values contained in them for specific conditions are not necessarily the same as those in this Guide. Comcare is indebted to the American Medical Association's Guides for the concept of 'whole man impairment', referred to in this guide as 'whole person impairment'. In preparing this guide concepts used in the American Medical Association's Guides have been adopted. However, as these concepts have been developed to suit the specific needs of the Commonwealth Employees' Rehabilitation and Compensation Act, the American Medical Association cannot be responsible for matters printed herein.

Seacare has also published a guide which has been adapted from the Comcare guide. Under the seafarers legislation, all injuries that result in a permanent impairment must be assessed according to this guide.²³⁸

Western Australia: Workers' compensation legislation specifies that the amount of lump sum compensation is to be determined in relation to the Table of Disabilities. There is no specified method of assessment.²³⁹ However, in relation to common law claims, damages

²³² *Workers Rehabilitation and Compensation (General) Regulations 1987* (SA), regulation 16.

²³³ *Accident Compensation Act 1985* (Vic), section 91. This applies for injuries arising after 12/11/97. For injuries prior to that date, a table of maims is used without specific assessment methodology. The AMA Guides are modified to take into account Australian best practice in evaluation of psychiatric and hearing impairments.

²³⁴ *Work Health Act* (NT), section 70 - 72.

²³⁵ *Work Health Regulations* (NT), regulation 9.

²³⁶ *Safety, Rehabilitation and Compensation Act 1988* (Cth), section 28.

²³⁷ *Guide to the Assessment of the degree of Permanent Impairment*, Comcare, December 1988. See the Comcare website at: www.comcare.gov.au/publications/pig/fs-cover.htm to view the guide.

²³⁸ *The Guide to the Assessment of the Degree of permanent Impairment* issued pursuant to *Seafarers Rehabilitation and Compensation Act* (Cth), section 42. See the Seacare web site: www.seacare.gov.au/Publications/PublicationsInformation.htm to view the guide.

²³⁹ *Workers' Compensation and Rehabilitation Act 1981* (WA), section 24.

can only be awarded if the disability results in the death of the worker or it is a 'serious disability'. Serious injury is determined by reference to the table of disabilities, or if the table does not provide for such a disability, in accordance with the 'Assessment of Disability Guide' (WA Guide) published by the WA Branch of the Australian Medical Association.²⁴⁰ The WA Guide states that the AMA Guides (4th edition) was one of several reference sources used in its development. However the WA Guide is careful to point out that:

[it] is concerned with disability as defined by the [Workers' Compensation and Rehabilitation Act] and not impairment as defined in the US Guides. Thus whilst the US Guide is, in a number of areas, extremely useful as an impairment based guide its limitations in terms of direct application to a disability based system need to be recognised.²⁴¹

Tasmania: Under Tasmanian legislation the amount of compensation payable for specific injuries is determined with reference to a Table of Maims.²⁴² There is no medical assessment methodology prescribed. Similarly, in the ACT there is no specified assessment methodology.²⁴³

Criticisms of the AMA Guides

The use of the AMA Guides for determining the degree of permanent impairment has been strongly criticised by stakeholders. As outlined above, various stakeholders have argued that it will be more difficult to reach the thresholds when permanent impairment is assessed in accordance with guidelines rather than with reference to the Table of Disabilities. The AMA Guides have been described as a 'harsher scale of impairment'.²⁴⁴ The crux of the criticism is based on the fact that the AMA Guides use a 'whole person' approach when measuring the degree of permanent impairment. A simple example illustrates how a particular injury may attract a different percentage rating under the AMA Guides rather than on the Table of Disabilities.

Example - Loss of an index finger on the right hand

Table of Disabilities: Under the Table of Disabilities, such a loss entitles a worker to **21%** of the maximum compensation payable.

AMA Guides: Such a loss is accorded **11%** whole person impairment in accordance with the AMA Guides.²⁴⁵

The AMA Guides have not only been criticised for their use in relation to thresholds, and as a method of assessing permanent impairment in general, but have also been criticised in a number of other ways. While an extensive analysis of these criticisms is beyond the scope of this paper, some will be set out briefly below.

²⁴⁰ *Workers' Compensation and Rehabilitation Act 1981* (WA), section 95.

²⁴¹ 'Assessment of Disability Guide', AMA (WA), January 1994.

²⁴² *Workers Rehabilitation and Compensation Act 1988* (Tas), section 71.

²⁴³ *Workers Compensation Act 1951* (ACT).

²⁴⁴ 'A system that is anything but fair', *Daily Telegraph*, 3/4/01, p 19.

²⁴⁵ Speiler E, op cit, n 209, p 519.

Many stakeholders have pointed out that the AMA Guides themselves state that they shouldn't be used in the context of determining compensation. In this respect, the AMA Guides state that 'impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of disabilities'.²⁴⁶ Despite this warning the AMA Guides are used for evaluation and adjudication of disability benefits in more than 40 state workers' compensation schemes in the US²⁴⁷ and, as outlined above, are already used to a greater or lesser degree in many Australian jurisdictions.

The Guides have also been criticised for not taking into account the effect of the *disability* caused by an injury, as well as the permanent impairment caused by the injury. Under the Guides 'impairment' is defined as a deviation from normal in a body part or organ system and its functioning. The assessment of impairment is based solely on objective medical findings.²⁴⁸ 'Disability' is defined as an alteration to a person's capacity to meet personal, social or statutory or regulatory requirements. The example of a labourer and a concert pianist is often used to illustrate the difference between the two. While both will suffer the same impairment if a finger is severed in a workplace accident, the concert pianist will arguably suffer a greater disability. While the labourer may be able to return to work, the concert pianist cannot.²⁴⁹

Australian legal commentators Paul Mulvany and Nick Horner have three main criticisms of the AMA Guides. First, that they are 'inherently flawed because they are arbitrary and internally inconsistent'. Second, that 'although they represent a useful tool for assessment (more useful in some body systems than others such as vision and hearing) serious anomalies result when use of the Guides is mandated'. Third, that worse than merely mandating the use of the Guides, is the situation (as in Victoria), where the Guides are not only mandated but either adopted in a piecemeal fashion or legislatively disrupted.²⁵⁰ They also note that some of the most trenchant criticism of the Guides comes from within the medical profession.

In the US, a fifth edition of the Guides has recently been published. In the process of the development of that edition many criticisms of the fourth edition were aired. For example, in a 2000 edition of the *Journal of the American Medical Association*, the Guides were criticised for '...internal deficiencies, including the lack of a comprehensive, valid, reliable, unbiased and evidence based system for rating impairment'.²⁵¹ The authors also criticised the way in which workers' compensation systems used the ratings, resulting in inappropriate compensation.²⁵²

²⁴⁶ AMA Guides (4th edition) 1993, p 5.

²⁴⁷ Speiler E, op cit, n 209, p 519.

²⁴⁸ O'Donovan, Dr JE, 'Impairment and Disability—a Medical Perspective', *Plaintiff*, June 2000, p 17.

²⁴⁹ For further information about this criticism see: O'Donovan, op cit 248, p 17-20 and Moore, D 'The Great Debate: Impairment v Disability', *Plaintiff*, October 1999.

²⁵⁰ Mulvany P and Horner N, 'The Use and Abuse of the American Medical Association Guides in Accident Compensation Schemes', *Journal of Law and medicine*, Vol 6 November 1998, p 137.

²⁵¹ Speiler E, op cit, n 209, p 519.

²⁵² *ibid.*

3.1.4 Stakeholder views

Labor Council of New South Wales: The Council has strongly rejected the changes to the common law. The Council is concerned that the changes will take away the right to sue negligent employers for all but the most seriously injured workers. The Council argues that the 25% impairment requirement assessed under guidelines modelled on the AMA Guides will prohibit all but the most severely injured workers from accessing common law.²⁵³

This methodology is based on the whole of body and will significantly reduce the current dollar amount workers receive. Under the current Workers Compensation Scheme the threshold to access Common Law is 25%. While the threshold remains the same, the assessment will be based on whole body rather than individual parts of the body. It will knock-out hundreds of Common Law claims as workers will not reach the 25% threshold, unless they are basically a quadriplegic or have severe brain injury.²⁵⁴

Australian Plaintiff Lawyers Association: APLA rejects the proposed reforms based on the assessment of permanent impairment, and the imposition of a whole person approach as the gateway to common law damages in particular. Like, the Labor Council, APLA contends that the whole person impairment approach taken by the AMA Guides will prevent all but the most seriously injured of workers from accessing common law damages. It also criticised the original amendments because they did not allow compensation for psychological injuries:

The proposed system imposes the requirement of demonstrating a [Whole Person Impairment] of greater than 25%. That assessment is to be made solely by reference to physical injuries despite the fact that there may be a combination of physical and psychological injury. The inevitable effect of this change to the common law threshold will be to exclude all but the most seriously injured (probably only those left quadriplegic, paraplegic or severely brain damaged) from damages for their employers' negligence.²⁵⁵

APLA also points out that the AMA Guides carry a specific disclaimer against their use for the direct calculation of compensation entitlements and the Bill proposes that it be used for just this purpose.²⁵⁶ APLA also argues that the AMA Guides are 'complex, complicated, rigid, fail to take into account significant factors such as adverse changes to lifestyle, pain, and psychological/psychiatric injury, disregard the individual and under-estimate certain well known consequences of physical injury'. APLA makes reference to a study of a large number of injured workers in the USA that showed that the AMA Guides routinely underestimate the severity of injuries and particularly the effects of an injury on a worker's quality of life. For example, back injuries do not receive the attention they deserve, considering the magnitude of such injuries in the workplace.²⁵⁷

Law Society of New South Wales/Injuries Australia/Australian Association of Surgeons: These organisations similarly reject the changes as the relate to access to common law:

²⁵³ Labour Council of NSW web site: www.labor.net.au/compo .

²⁵⁴ LaborNet web site: www.labor.net.au/compo/4.html. LabourNet is a resource site provided by the Labor Council of NSW.

²⁵⁵ Australian Plaintiff Lawyers Association, *Submission on the Workers Compensation Legislation Amendment Bill 2001, 2000*, p 2.

²⁵⁶ Australian Plaintiff Lawyers Association, op cit, n 255.

²⁵⁷ *ibid.*

Under the current Workers Compensation Scheme the threshold to access Common Law is 25%. While the threshold remains the same, the assessment will be based on whole body rather than individual parts of the body. It will knock-out hundreds of Common Law claims as workers will not reach the 25% threshold, unless they are basically a quadriplegic or have severe brain injury. For example, a worker who has a severe back injury requiring surgery, i.e. a double level fusion who would now be assessed at 30% will be assessed at 18% and not qualify. This worker under the current system would receive somewhere between \$300,000 to \$350,000. Under the new assessment guidelines only 5% of workers will have access to Common Law, which is effectively, the abolition of Common Law.²⁵⁸

The Law Society argues that the AMA Guides should not be used as the basis for measuring impairment in any compensation scheme, describing the guides as harsh and unpredictable.²⁵⁹

AMA (NSW): the New South Wales Branch of the AMA has expressed concern that the clinical independence of treating and examining doctors may be compromised under the new scheme of assessing permanent impairment. It is concerned that the AMA Guides will be used as a strict protocol to the exclusion of the education, experience and intuitiveness that doctors utilise in assessing disability and impairment. The utility of the AMA Guides as a means of determining monetary compensation is also questioned, particularly as the Guides state that they should not be used for this purpose. The AMA (NSW) is also critical of the fact that the AMA Guides focus on impairment as opposed to disability and as such do not take into account the way that an impairment effects the ability of an individual to undertake various activities. It is argued that disability is a fairer means of compensating a worker for an injury than impairment.²⁶⁰

Individuals: Compensation Court of New South Wales Judge, and former Attorney-General, Frank Walker has argued that the reforms are a threat to judicial independence. In relation to common law claims he has stated:

In common law damages claims, Commissioners will be prohibited from awarding damages for either economic loss or non-economic loss unless the worker's impairment has reached 25 per cent of the whole body (after first reducing any whole of the body losses by pre-existing conditions or abnormalities). The Commissioner will be bound by the medical assessor's certificate on the issues. Again it is hard to imagine workers obtaining damages unless their injury was of the most serious kind. It is unlikely that there will be any litigated cases for common law damages if the Bill passes because, for the few who manage to attain the threshold, the costs penalties are likely to be too horrific to risk running the case. The thresholds, which are now to be based on whole of the body assessments, as opposed to the assessment of the particular parts of the body, have lifted the bar much higher.....The requirement that previous injuries and pre-existing conditions are also to be deducted may mean that some very serious injuries might not reach the threshold.²⁶¹

A Former Chief Judge of the Compensation Court, Mr Frank McGrath has also been reported as being critical of the AMA Guides, describing it as 'an arbitrary system that endeavours to equate everybody who has an injury to a certain type.'²⁶²

²⁵⁸ Law Society of New South Wales web site: www.lawsociety.com.au/practice/compo/ posted, 3 April 2001.

²⁵⁹ *ibid.*

²⁶⁰ Information supplied to the author by the Medico-Legal and Industrial Relations Division of the AMA (NSW).

²⁶¹ Walker F, 'View from the Bench', *Workers Online*, Issue No 95, 11/5/01. See the LabourNet web site to view this article: www.workers.labor.net.au/95/b_tradeunion_bench.html.

²⁶² 'Compo laws fob workers off: ex-judge', *Sydney Morning Herald*, 27/4/01, p 7.

Australian Industry Group: The AI Group believes that: 'the Government's proposals on common law don't go far enough and are very much a third rate solution. Common law should be abolished, as it has no place in a no-fault scheme. At the very least the threshold for access to common law should have been raised to 33%.'²⁶³ The AI Group also supports the changes to statutory lump sum compensation arguing that it will lead to a more objective system of impairment assessment.²⁶⁴

3.2 PROPOSED CHANGES TO DISPUTE RESOLUTION PROCEDURES

The original Bill contained major reforms to the dispute resolution processes of the workers' compensation scheme. The general nature of the reforms was to move toward a more bureaucratic dispute resolution process by restricting the role of the Compensation Court and establishing new dispute resolution mechanisms. The reforms were strongly criticised by unions and other stakeholders and were the subject of their negotiations with the Government. Bill No 2 contains different dispute resolution reforms than those originally proposed. This section will examine the initial reforms as contained in the original Bill and the scheme to be established by Bill No 2. The current dispute resolution processes were described briefly in section 2.2 of this paper.

3.2.1 Amendments in the original Bill

To address the deficiencies of dispute resolution within the current scheme, new dispute resolution procedures were contained in the original Bill. The proposal contained in the original Bill established a new procedure for resolving disputes that relied less on determinations by the Compensation Court and more on determinations by Commissioners and medical assessors. Under this initial proposal, most disputed claims were to be sent for resolution by administrative means, through the Claims Assessment Service, rather than by legal means.

Claims Assessment Service

The original Bill provided for the establishment of the Workers Compensation Claims Assessment Service.²⁶⁵ The Claims Assessment Service was to comprise a Director, Principal Commissioners, other Commissioners and medical assessors. It was to have exclusive jurisdiction to examine, hear and determine all matters arising under the workers' compensation legislation in respect of new claims. The Claims Assessment Service was designed to provide three types of services:

1. An *expedited assessment service* for urgent claims for statutory benefits, or medical treatment. The expedited assessment was described in the following terms in the second reading speech of the first draft of the Bill:

Parties to a dispute relating to the payment of weekly benefits and medical treatment may apply for an

²⁶³ Australian Industry Group, 'Workers Compensation - Government right to target legal cost blowout', Media Release, 30/3/01.

²⁶⁴ Australian Industry Group web site: www.aigroup.asn.au

²⁶⁵ Workers Compensation Legislation Amendment Bill 2001, Schedule 5.

expedited assessment. An application for an expedited assessment may be made where 21 days have elapsed since the claim was made and the insurer has not accepted liability and commenced payments or declined the claim. If on receiving the claim the director is satisfied that the claim has a reasonable prospect of success, the insurer can be directed to pay compensation on an interim basis for a period of up to 12 weeks. An insurer who fails to comply with an interim payment direction will be guilty of an offence and subject to a maximum penalty of \$5,500.²⁶⁶

2. Assessment of claims by Commissioners:²⁶⁷ Where parties were unable to resolve their own disputes, such disputes would be subject to assessment by a Commissioner. Commissioners were to assess lump sum claims, commutations, non-urgent claims for statutory benefits and other disputes about statutory compensation. The decisions of a Commissioner would be final and binding on parties (subject to a review by the Principal Commissioner and provision for the Director to refer a question of law to the Compensation Court). Under the proposal Commissioners would also assess common law disputes. However, decisions of Commissioners on liability in common law matters would not be binding, and parties would be able to seek a review in the relevant court. Complex common law matters were also to be exempt from the assessment service.²⁶⁸

Matters for determination before a Commissioner were to be conducted with as little formality and technicality as possible. Although Commissioners would not be bound by the rules of evidence, they were required to act within the bounds of procedural fairness and observe the principles of natural justice. The Commissioners were to have discretionary powers to deal with matters in a more formal manner should this be necessary.²⁶⁹

3. Medical Disputes: The Government has expressed the view that disputes about medical issues are a significant contributing factor to the scheme deficit. Deficiencies of the current system, and the reforms, were explained in the following terms by WorkCover:

Often a dispute over a worker's compensation claims is actually a difference of medical opinion. Many claims could easily be resolved by obtaining authoritative medical advice. However, while there are many capable experienced clinicians currently providing opinions, the volume of disputes is so high that they cannot meet all the demands made on them. Other experienced and able clinicians that could be of assistance are reluctant to risk legal involvement and prefer not to provide reports in the workers compensation system. It is proposed to solve this by giving medical practitioners back the role of providing authoritative advice on medical questions. Medical reports from an injured worker's doctor and the insurer's doctor are provided to an expert Medical Assessor. The Opinion of the Medical Assessor will be conclusive, and will be provided to both parties and the Claims Commissioner. This will enable the dispute to be resolved with full and authoritative medical assistance being provided.²⁷⁰

The original Bill provided for a new Chapter 7 to be inserted into the *1988 Act*. Part 7 of the new Chapter 7 provided for the establishment of the scheme for making assessments about medical disputes.²⁷¹ The Bill provided for binding determinations of disputed medical

²⁶⁶ NSWPD, 29/3/01, p 12882.

²⁶⁷ Workers Compensation Legislation Amendment Act 2001, Schedule 5.4 item [14] - new Chapter 7, Parts 4, 5 and 6, of the *1998 Act*.

²⁶⁸ NSWPD, 29/3/01, p 12882.

²⁶⁹ *ibid*.

²⁷⁰ WorkCover, *op cit*, n 136, p 9.

²⁷¹ Workers Compensation Legislation Amendment Bill 2001, Schedule 5, Part 7, items 314 – 325.

issues by a medical assessor in the Claims Assessment Service. Medical assessors would be appointed to make assessments about medical disputes referred to them by a Court, a Commissioner or by a party to a dispute. A medical assessor would issue a certificate as to the matters referred. The certificate could be used as conclusive evidence as to the matters certified. A right of review would exist as a party may apply to have a medical assessment reviewed by a panel of medical assessors on the grounds that the assessment was incorrect in a material aspect. There would be no right of review of the decision of the medical panel. A court could reject matters contained in a certificate and require that a further assessment be made. The reforms to medical dispute resolution were objected to strongly by stakeholders. The following paragraphs outline the main aspects of the proposal.

Definition of medical dispute: The definition of a medical dispute in the original Bill was broad. It meant a dispute between a claimant and the person on whom the claim was made, about any of the matters listed in the new section. The matters listed are non-exhaustive and include: whether the treatment provided to the worker was reasonable and necessary in the circumstances; whether an injury has stabilised; the degree of permanent impairment of the earning capacity of the worker; and the suitability of particular employment for a partially incapacitated worker. The definition also included an issue concerning any of the matters listed in the section arising in proceedings before a court or in connection with the assessment or determination of a dispute or claim by a Commissioner.²⁷²

Appointment of medical assessors: The Director of the Claims Assessment Service had the authority to appoint medical practitioners and *other suitably qualified persons* to be medical assessors. One of the persons appointed is to be the Principal Medical Assessor.²⁷³

Medical assessment procedures: A medical dispute may be referred for assessment by a court or a Commissioner, or by a party to the dispute. A request for a referral was to be made to the Director of the Claims Assessment Service. If a dispute was referred to a medical assessor, the assessor was to provide a certificate as to the matters referred. The certificate is to set out the reasons for any finding by the medical assessor as to any matter certified in the certificate.²⁷⁴ The costs of the medical assessment were met by the employer or insurer.²⁷⁵

Assessment of permanent impairment: Assessment of the degree of permanent impairment of a worker was to be made in accordance with WorkCover Guidelines issued for that purpose or, if there are no such Guidelines, the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition (the AMA Guides).²⁷⁶ The reference to the AMA Guides was one of the most controversial aspects of the original Bill. This issue is examined in further detail in Part B, section 3.1). Impairments that result from the same injury were to be assessed together to determine the degree of permanent impairment of the injured worker. Impairments that result from more than one injury arising out of the same incident were to be assessed together to determine the degree of permanent

²⁷² Workers Compensation Legislation Amendment Bill 2001, Schedule 5, Part 7, item 314.

²⁷³ Workers Compensation Legislation Amendment Bill 2001, Schedule 5, item 315-316.

²⁷⁴ Workers Compensation Legislation Amendment Bill 2001, Schedule 5, item 317.

²⁷⁵ Workers Compensation Legislation Amendment Bill 2001, Schedule 5, item 325.

²⁷⁶ Workers Compensation Legislation Amendment Bill 2001, Schedule 5, item 318.

impairment of the worker. A medical assessor may decline to make an assessment until satisfied that the injury has stabilised. Court proceedings or proceedings before a Commissioner may be adjourned until the assessment is made.²⁷⁷

Deduction for previous injury or pre-existing condition or abnormality: In assessing the degree of permanent impairment there was to be a deduction for any proportion of the impairment that was due to any pre-existing injury or any pre-existing condition or abnormality. If the extent of a deduction is difficult or costly to determine it was to be assumed for the purpose of avoiding dispute that the deduction is 5% unless this assumption is at odds with available evidence.²⁷⁸

Status of medical assessments – compensation claims: A medical assessment certificate is conclusive evidence as to the matter certified in any proceedings before a Commissioner. A Commissioner may object to any of the matters certified in the certificate on the grounds of denial of procedural fairness to a party in the proceedings in connection with the issue of the certificate if it would cause substantial injustice to a party.²⁷⁹

Status of medical assessments – work injury damages claims: A medical certificate is conclusive evidence of the following matters in any court proceeding, or in any assessment by a commissioner, in respect of a work related injury damages claim with which the certificate is concerned:

- (a) whether the degree of permanent impairment if the injured worker is greater than 25%;
- (b) whether any treatment already provided to the injured worker was reasonable and necessary in the circumstances;
- (c) whether an injury has stabilised; and
- (d) other matters.

A court may reject any matter certified in the certificate on the grounds of denial of procedural fairness, if admission of the matter would cause substantial injustice to the party. If a court rejects a matter in the certificate it must refer that matter again for assessment and adjourn proceedings until a further medical assessment is given and admitted in evidence in the proceedings. However, if a certificate as to whether or not the degree of permanent impairment of the injured worker is greater than 25% is rejected, the court may, if it considers it appropriate, substitute a determination of the court as to the degree of permanent impairment.²⁸⁰

Referral of matters for further medical assessment: If a matter has been assessed and there has been a deterioration of the injury or if there is additional relevant information about the injury a matter can be referred again. A further certificate may be issued which prevails over the original certificate.²⁸¹

²⁷⁷ *ibid.*

²⁷⁸ Workers Compensation Legislation Amendment Bill 2001, Schedule 5, item 319.

²⁷⁹ Workers Compensation Legislation Amendment Bill 2001, Schedule 5, item 320.

²⁸⁰ Workers Compensation Legislation Amendment Bill 2001, Schedule 5, item 321.

²⁸¹ Workers Compensation Legislation Amendment Bill 2001, Schedule 5, item 322.

Review of medical assessment by a review panel: A party to a medical dispute may apply to the Principal Medical Assessor to refer a medical assessment by a single assessor to a review panel of medical assessors for review on the grounds that the assessment was incorrect in a material respect. The assessment will only be reviewed by a review panel (of a minimum of 3 assessors) if there is reasonable cause to suspect that the medical assessment was incorrect in a material respect. The review panel can confirm the original certificate or revoke it and issue a new one. There is no right of review of the decision of the review panel.

Resolution of disputes about the level of permanent impairment: The original Bill also contains provisions for dealing with threshold disputes about the level of permanent impairment suffered by a worker. The Bill provided that if there was a dispute between the parties about whether the degree of permanent impairment is greater than 25%, the court could award damages unless the degree of permanent impairment had been assessed by a medical assessor, in accordance with the new medical assessment provisions described above.²⁸² The court could also refer the matter of the level of impairment to a medical assessor at an assessment at any stage of proceedings. A medical assessor may decline to make an assessment of the degree of permanent impairment if she or he is not satisfied that the injury has stabilised. If this occurs the court proceedings will be adjourned until the assessment is made. The degree of impairment can be re-assessed, or the claim can be settled at any time.²⁸³

Compensation Court of New South Wales: Under the original Bill, the Compensation Court would be retained, although its role changed to reflect the new dispute resolution arrangements outlined above.²⁸⁴ The Court could only have a limited review role. Disputes concerning novel or complex questions of law would be referred by the Director of the Claims Assessment Service to the Compensation Court for determination. The Director, a Commissioner, or a party to a dispute may request that a question of law be referred to the Compensation Court for determination. The Compensation Court may also be called on to determine questions of law during the review of a Commissioner's decision. A party to a dispute or assessment may request that a determination or assessment of a commissioner be reviewed. The Principal Commissioner may, in connection with any such review, state a case on a question of law for determination by the Compensation Court.²⁸⁵

3.2.2 Amendments in Bill No 2

Bill No 2 presents a different scheme for resolving disputes than that proposed by the original Bill. Principally, through the establishment of a new Compensation Commission.

A New Workers' Compensation Commission: Schedule 4.2 of the Bill provides for the establishment of a new Workers Compensation Commission (the Commission).²⁸⁶ The

²⁸² Workers Compensation Legislation Amendment Bill 2001, Schedule 4, item [4].

²⁸³ *ibid.*

²⁸⁴ Workers Compensation Legislation Amendment Act 2001, Schedule 5.4, item [14] – new Chapter 7 of the 1998 Act.

²⁸⁵ NSWPD, 29/3/01, p 12882-12883.

²⁸⁶ Workers Compensation Legislation Amendment Bill 2001 (No 2), Schedule 4.2 item [16] - new

Commission will be independent of WorkCover and will comprise a President, who must be an appointed judge, 2 Deputy Presidents with legal qualifications with at least 5 years experience, and a Registrar and Arbitrators who must generally be legally qualified. The members of the Commission other than the Arbitrators are to be appointed by the Minister. The Commission will have three distinct areas in which it will exercise its functions.

1. **Expedited assessments:** The Bill inserts a new Chapter 7 into the 1989 Act. Part 5 will establish the expedited assessment jurisdiction of the Commission. When a dispute relating to weekly benefits or small medical expenses compensation (for less than \$1,000), is referred to the Commission for determination, the Registrar will have the option of making an order that the employer/insurer pay the compensation in question.²⁸⁷ The primary purpose of the expedited assessment is to get payments to injured workers started, to facilitate injury management, while waiting for the full dispute to be determined.²⁸⁸ The making of such an order is 'an administrative function and will, in most cases, not require a conference with the parties subject to any procedural fairness requirements'.²⁸⁹

The expedited assessment jurisdiction will also deal with disputes relating to suitable duties and obligations under injury management plans. The Bill provides for the early conciliation of these disputes by the registrar and delegated staff of the Commission. If the matter cannot be resolved by conciliation, the registrar will be able to make recommendations to the parties to assist with meeting injury management obligations. The parties will then have 14 days to comply with the recommendation or to seek a review by an arbitrator. The arbitrator will have the power to vary or confirm the recommendations of the Registrar. The decision of the arbitrators will be binding, subject to a right of appeal.²⁹⁰

2. **Medical Assessment:** The Bill will establish a system of medical assessment, through which arbitrators will be able to obtain advice on medical questions arising in the course of proceedings. The Bill modifies the existing system of approved medical specialists provided for under the 1989 Act.²⁹¹ The medical assessment provisions are similar in many ways to the system proposed under the original amendment Bill. The main aspect of the medical assessment system are examined below.

Definition of medical dispute: The definition of medical dispute has been changed from the original Bill which contained a non-exhaustive list of matters which could constitute a medical dispute. Bill No 2 states simply that a medical dispute means a dispute as to 'the worker's condition (including the worker's prognosis, the aetiology of the condition and treatment proposed or provided) or the worker's fitness for employment'.²⁹²

Chapter 7 of the 1998 Act, see Part 10.

²⁸⁷ Workers Compensation Legislation Amendment Bill 2001 (No 2), Schedule 4.2 item [16] - new Chapter 7 of the 1998 Act, see Part 5, Division 2.

²⁸⁸ NSWPD, 19/6/01, p 14 (Proof LA).

²⁸⁹ *ibid.*

²⁹⁰ *ibid.*

²⁹¹ *ibid.* Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the 1998 Act, see Part 7.

²⁹² Workers Compensation Legislation Amendment Bill 2001, Schedule 5, Part 7, item 314.

Appointment of approved medical specialists: Under the present system, court appointed medical panels are used to make determinations about medical disputes. Bill No 2 provides that the President of the Commission is to appoint medical specialists in accordance with 'criteria developed by the Minister in consultation with the Advisory Council'.²⁹³ This differs from the original proposal under which the Director could appoint medical practitioners and other 'suitably qualified persons' to be medical assessors. This was one of the concerns raised by stakeholders as it was feared that inadequately qualified people could be appointed.

Medical assessment procedures: A medical dispute may be referred for assessment by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute. Parties to a dispute may agree on the approved medical specialist who is to assess the dispute. If, however, the parties cannot agree within 7 days after the dispute is referred the Registrar will choose a specialist.²⁹⁴

Assessment of permanent impairment: The assessment of permanent impairment provisions are essentially the same as in the original Bill, except that reference to the AMA Guides has been removed. Under the new provisions an assessment of the degree of permanent impairment is to be made 'in accordance with WorkCover Guidelines issued for that purpose'.²⁹⁵ See Part B, section 3.1 for further discussion.

Deduction for previous injury or pre-existing condition or abnormality: A deduction must be made for any proportion of the impairment that is due to any previous injury or that is due to any pre-existing condition or abnormality. If the extent of a deduction is difficult or costly to determine it is to be assumed for the purpose of avoiding dispute that the deduction is 10% unless this assumption is at odds with available evidence.²⁹⁶ As outlined above, the original Bill required only a 5% deduction.

Status of medical assessments: An opinion certified in a medical assessment certificate is conclusively presumed to be correct as to the following matters before the Commission with which the certificate is concerned:

- (a) The degree of permanent impairment of the worker as a result of an injury;
- (b) Whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality;
- (c) The nature and extent of loss of hearing suffered by a worker;
- (d) Whether impairment is permanent.²⁹⁷

²⁹³ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the 1998 Act, see Part 7, section 320.

²⁹⁴ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the 1998 Act, see Part 7, section 322.

²⁹⁵ *ibid.*

²⁹⁶ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the 1998 Act, see Part 7, section 323.

²⁹⁷ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the 1998 Act, see Part 7, section 326.

As to any other matter, the opinion certified is evidence (but not conclusive evidence) in any proceedings.²⁹⁸

Appeal against medical assessment: Under the original Bill a party could only apply for a review of a medical assessment of a single assessor to a review panel of assessors, on the grounds that the assessment was incorrect in a material respect. This limited right of review was strongly rejected by the unions. There was no right of review from a panel. Under Bill No 2, a party to medical dispute may appeal against a medical assessment on expanded grounds. The grounds are:

- (e) Deterioration of the worker's condition which results in an increase in the degree of permanent impairment;
- (f) Availability of additional relevant information that was not previously available;
- (g) The assessment was made on the basis of incorrect criteria
- (h) The medical assessment certificate contains a demonstrable error.²⁹⁹

The appeal is heard by an Appeal Panel consisting of two approved medical specialists, and an arbitrator.³⁰⁰ The Panel will take submissions from the original parties and review the original decision, with the possibility of conducting further medical examinations. The role of the arbitrator will be limited to ensuring procedural fairness given that most issues arising in appeals will call for the exercise of medical judgement and expertise.³⁰¹

3. Arbitration: The Government foresees that this area of the Commission will deal with and determine the overwhelming majority of disputes presented to the Commission.³⁰² This aspect of the new Commission was described in the second reading speech as follows:

The third arm of the Commission will deal with, and determine, the overwhelming majority of disputes presenting to the commission. The bill provides for the appointment of arbitrators who will be responsible for conciliating and arbitrating disputes. Arbitrators will have a broad range of powers that can be exercised in seeking to resolve matters. This includes the power to order the production of documents, and to require the attendance of witnesses at hearings. Although many matters will be dealt with through a formal arbitration hearing, draft section 354 of the bill also provides that proceedings are to be conducted with as little formality and technicality as the proper consideration of the matter permits. It is also the intention that a less adversarial approach be used by arbitrators as reflected in section 354. The bill provides flexibility so that less structured, but more interventionist, processes can be used by arbitrators to resolve disputes.

Arbitrators will be required to issue a certificate setting out their reasons for decision. Parties will then have 28 days in which to lodge an appeal to a presidential member of the commission. The presidential member will have a broad discretion to decide whether to grant leave to appeal. In cases where less than \$5,000 is in dispute, or the amount in dispute is less than 20 per cent of the amount awarded, leave cannot be granted. This is aimed at ensuring that only significant disputes can be appealed and that

²⁹⁸ *ibid.*

²⁹⁹ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 7, section 327.

³⁰⁰ Workers Compensation Legislation Amendment Bill 2001 (No 2) Schedule 4.2 item [16] - new Chapter 7 of the *1998 Act*, see Part 7, section 328.

³⁰¹ NSWPD, 19/6/01, p 15 (Proof, LA).

³⁰² *ibid.*

appeals do not become routine. Appeals will proceed by way of a review of the original decision. The presidential member will be able to grant leave to have new evidence admitted, however, in general it is anticipated that the matter will be determined without the need for a full rehearing.³⁰³

3.2.3 Stakeholder views

Various stakeholders made a number of objections to the reforms contained in the original Bill. These are outlined below. At the time of writing there was little information available about the views of stakeholders on the new scheme proposed in Bill No 2.

Labor Council: The Labor Council strongly criticised the original proposal for a new Medical Assessment Service, particularly the power of the medical assessors under the scheme. One of the main concerns was that the decisions of the medical service were to be binding, with no right of appeal to the Compensation Court. The Council was also concerned that the opinion of the workers treating doctor would be of little consequence as medical evidence will not be scrutinised in an open court.³⁰⁴

The Labor Council also pointed out that the service is largely modelled on the current medical service used by the Motor Accidents Authority. The Council questions the efficacy of that scheme, claiming that the service under the motor accidents scheme has only assessed 19 matters from October 1999 to March 2001 and that in the previous 18 months (pre October 1999) there were 17, 000 matters.³⁰⁵

Law Society of New South Wales: The Law Society is critical of the original reforms to medical dispute resolution primarily because under the proposal a party cannot appeal from the decision of the panel of medical assessors and there is only a limited discretion conferred upon a court to reject a medical assessment:

An injured person may apply to the principal medical assessor, who, if satisfied may refer the decision to a review panel. None of these medical assessors need be medically qualified. To get a referral, the test is: that the assessment was incorrect in a 'material respect'. No definition of the phrase has been provided. The only grounds on which the Court will reject a medical assessment certificate in a damages claim is for a denial of procedural fairness where it has caused a substantial injustice to a party. But what constitutes 'procedural unfairness' and what constitutes 'substantial injustice' is unclear.³⁰⁶

The Law Society also argues that the original medical assessment scheme was deficient because the assessment of medical disputes '..depends upon a single Medical Assessor, who may well have no medical training, and who may be untrained in the use of the complex AMA Guides, to determine permanent impairment from multiple injuries of varying types. The examination may be quick and cursory, yet it will determine the injured worker's compensation for the rest of his/her life. It is not known what information is to be provided by the Assessor, by others or what weight is to be given to the information. The extent of the reasons that the Assessor is to set out for any finding is'.³⁰⁷

³⁰³ NSWPD, 19/6/01, p 15 (Proof, LA).

³⁰⁴ Labour Council web site: www.labor.net.au/compo/3.html .

³⁰⁵ *ibid.*

³⁰⁶ Law Society of New South Wales web site: www.lawsociety.com.au/practice/compo/, posted on 3 April 2001.

³⁰⁷ Law Society of New South Wales web site: www.lawsociety.com.au/practice/compo/, posted on 3 April 2001

Australian Plaintiff Lawyers Association: APLA rejected the original proposal to introduce binding medical assessments. APLA made the following objections to the new medical assessment proposal:³⁰⁸

- A number of the issues that are placed within the definition of 'medical dispute' are presently matters for determination by the trial judge, not by a doctor;
- The establishment of the service would require the application of a large amount of on-going funding which would only add to, rather than reduce, scheme costs. It could also contribute to significant delay in the resolution of disputes if the number of suitable medical assessors is not sufficient to be able to deal with the volume of medical disputes;
- The medical assessment is conclusive evidence of the matters certified in compensation claims, and also on questions of the level of permanent impairment in damages claims whether before a court or commissioner. Once again, this is objectionable in that the power of a court to make its own decisions based on evidence presented is fettered;
- There is no requirement for the decisions made by the doctors to be accompanied by any reasons, so it will be impossible to know what a doctor has or has not taken into account when making the binding medical determination. This creates the likelihood of substantial injustice;
- The proposed medical assessment arrangements make provision for the assessments to be subject to Workcover guidelines and training. This raises the distinct possibility of the Authority being able to exert its own influence and priorities on the scheme through the medical assessment process.

Employers First: The chief executive of Employers First has voiced concern about the use of medical assessors: '[I]f you end up with the wrong people as medical assessors, you go down the wrong drain. There's a clear role for objective medical opinion that people can believe'.³⁰⁹

Mr Frank McGrath: The Former Chief Judge of the Compensation Court was reported to have said that the Government's plan would 'deny workers their rights of appeal to a proper tribunal'.³¹⁰ In relation to the medical assessment provisions of the Bill, Mr McGrath is quoted as saying: 'If you try to determine things by medical panel assessment there's no way in which you can accommodate opposing medical views.'³¹¹

Australian Industry Group: The AI Group supports the changes to the dispute resolution procedures. The AI Group argues that the new claims assessment service promises to be a more efficient, fairer and consistent method of resolution of disputed claims. The Group also believes that the existing conciliation service should be abolished.³¹² In relation to the

³⁰⁸ Australian Plaintiff Lawyers Association, 2001, op cit, n 255, p 3.

³⁰⁹ 'WorkCover blows out again, but on lawyers', *Sydney Morning Herald*, 28/3/01.

³¹⁰ 'Compo laws fob workers off: ex-judge', *Sydney Morning Herald*, 27/4/01, p 7.

³¹¹ *ibid.*

³¹² AI Group web site: www.aigroup.asn.au .

medical assessment service the AI Group has stated that ‘the concept of binding medical panels is based on the commonsense notion that medical issues should be resolved by medical experts and not lawyers.’³¹³ The AI Group supports the idea that the new system will significantly limit the capacity for disputes over medical issues to become subject to legal proceedings, which will in term reduce costs.³¹⁴

4. CONCLUSION

The first part of this paper has examined the historical development of the New South Wales workers' compensation scheme. It is a history marked by numerous legislative amendments; both minor ‘tinkering’ reforms and major reforms. It also shows diverse policy differences between Governments, illustrated by the abolition and then reinstatement of common law rights in the late 1980’s and early 1990’s. The evolution of workers’ compensation in New South Wales is an ongoing process. The second part of this paper has examined the progress of the second stage in the current Government’s plan to reform the workers’ compensation scheme. Whether this latest round of changes solves the on-going difficulties of the New South Wales workers’ compensation scheme, and at what cost, remains to be seen.

³¹³ Australian Industry Group, ‘Workers Compensation - Government right to target legal cost blowout’, *Media Release*, 30/3/01.

³¹⁴ AI Group web site: www.aigroup.asn.au .

APPENDIX I

Table of Disabilities: *Workers Compensation Act 1987* (NSW), Part 3, Division 4

Workers Compensation 1987

Table

Compensation for permanent injuries

Nature of injury	Percentage of maximum amount payable
Speech loss:	
Loss of power of speech	60
Sensory loss:	
Loss of sense of taste or smell	17
Loss of senses of taste and smell	34
Hearing loss:	
Loss of hearing of both ears	65
Loss of hearing of one ear	20
Loss of vision:	
Loss of sight of both eyes	100
Loss of sight of an only eye	100
Loss of sight of one eye, together with serious diminution of the sight of the other eye	75
Loss of sight of one eye	40
Loss of binocular vision (where not otherwise compensable under this Table)	40
Loss of eyeball (in addition to compensation for loss of sight of the eye)	22
Arm injuries:	
Loss of right arm at or above elbow	80
Loss of right arm below elbow	75
Loss of left arm at or above elbow	75
Loss of left arm below elbow	70
Hand injuries:	
Loss of right hand	70
Loss of left hand	65
Loss of thumb of right hand	30
Loss of thumb of left hand	26
Loss of a joint of the thumb	16
Loss of forefinger of the right hand	21
Loss of forefinger of the left hand	18
Loss of 2 joints of forefinger of the right hand	16
Loss of 2 joints of forefinger of	12

the left hand	
Loss of the first joint of forefinger of right hand	10
Loss of the first joint of forefinger of left hand	9
Loss of middle finger of either hand	12
Loss of 2 joints of middle finger of either hand	10
Loss of the first joint of middle finger of either hand	6
Loss of little or ring finger of either hand	11
Loss of 2 joints of little or ring finger of either hand	9
Loss of the first joint of little or ring finger of either hand	6
Leg injuries:	
Loss of either leg at or above the knee	75
Loss of either leg below the knee	70
Foot injuries:	
Loss of a foot	65
Loss of great toe of either foot	22
Loss of a joint of the great toe of either foot	10
Loss of any other toe	6
Loss of any joint of any other toe	2
Bowel injury:	
Permanent loss of bowel function	0-65
Loss of sexual organs etc:	
Loss of sexual organs	47
Loss of both breasts	47
Loss of one breast	30
Brain damage:	
Permanent brain damage (being an injury which is not or is not wholly an injury otherwise compensable under this Table)	0-100
Permanent impairment of back, neck, pelvis:	
Permanent impairment of the back	0-60
Permanent impairment of the neck	0-40
Permanent impairment of the pelvis	0-15
Disfigurement:	

Severe facial disfigurement (being an injury which is not or is not wholly an injury otherwise compensable under this Table)	0-80
Severe bodily disfigurement (being an injury which is not or is not wholly an injury otherwise compensable under this Table)	0-50
Disease:	
HIV infection (Human Immunodeficiency Virus infection)	100
AIDS (Acquired Immune Deficiency Syndrome)	100

Interpretation:

(a) Where a range of percentages is provided by this Table, the maximum percentage is payable only in a most extreme case and the percentage payable in any other case shall be reasonably proportionate to that maximum percentage having regard to the severity of the matter. The amount payable in any particular case shall, in default of agreement, be determined in accordance with this Act by the Compensation Court.

(b) If a left arm or hand is the worker's dominant limb:

(i) loss of left arm, left hand or fingers of left hand shall be compensated as if loss of right arm, right hand or fingers of right hand,

(ii) loss of right arm, right hand or fingers of right hand shall be compensated as if loss of left arm, left hand or fingers of left hand.

(c) If a loss (not being the impairment of the back, neck or pelvis) may be compensated by a combination of items in this Table or by a proportionate loss of a single item, the loss shall be compensated by a proportionate loss of a single item (eg loss of 2 or more fingers to be compensated as a proportionate loss of the use of the hand).

(d) Loss of a hand includes the loss of the thumb and other fingers of the hand and is to be compensated as a loss, or a proportionate loss, of a single item only (namely, the loss of the hand).

(d1) Loss of an arm at or above the elbow includes the loss of the arm below the elbow and loss of the hand and is to be compensated as a loss, or a proportionate loss, of a single item only (namely, the loss of the arm at or above the elbow).

(d2) Loss of a leg at or above the knee includes the loss of the leg below the knee and loss of the foot and is to be compensated as a loss, or a proportionate loss, of a single item only (namely, the loss of the leg at or above the knee).

(d3) Loss of an arm below the elbow includes the loss of the hand and is to be compensated as a loss, or a proportionate loss, of a single item only (namely, the loss of the arm below the elbow).

(d4) Loss of a leg below the knee includes the loss of the foot and is to be compensated as a loss, or a proportionate loss, of a single item only (namely, the loss of the leg below the knee).

(e) Loss of an only arm, leg, foot or hand shall be treated as the loss of both arms, legs, feet or hands.

(f) In the case of loss of sexual organs (subject to the maximum percentage of 47 per cent and without limiting compensation for other losses of sexual organs):

(i) the percentage payable for loss of the penis is 47 per cent,

(ii) the percentage payable for loss of 1 testicle is 10 per cent, and

(iii) the percentage payable for loss of 2 testicles or an only testicle is 47 per cent.

(g) (Repealed)

(h) Compensation is payable in respect of severe bodily disfigurement even though the injury which caused the disfigurement was received after the commencement of this Division and before the inclusion of that item in this Table.

(i) In the case of disfigurement caused by an injury received before the commencement of Schedule 5 (5) to the *Workers Compensation Legislation (Amendment) Act 1994*, the relevant percentage is the range of 0-26% in respect of severe facial disfigurement and the range of 0-22% in respect of severe bodily disfigurement.

(j) For the purposes of determining whether and to what extent a worker has suffered permanent loss of bowel function:

(i) the bowel is taken to include the anal sphincter, and

(ii) permanent ileostomy and permanent colostomy are each taken to constitute permanent loss of bowel function for which the maximum percentage is payable.

APPENDIX II

Summary tables of the major amendments proposals in relation to statutory lump sum compensation for permanent impairment and common law damages

**SUMMARY OF THE MAJOR AMENDMENTS TO STATUTORY LUMP SUM COMPENSATION
AND COMMON LAW DAMAGES¹**

Statutory lump sum compensation

	Permanent Impairment - 1987 Act, s 66			Pain & Suffering - 1987 Act, s 67		
	Currently	Original Bill	Bill No 2	Currently	Original Bill	Bill No 2
Threshold	No	No	No (However, it would be possible to introduce a threshold into the regulations)	Must have an injury that attracts = or > 10% on the Table of Disabilities	Must have an injury that is assessed to be a greater than 10% permanent impairment according to the Guidelines	Must have an injury that results in a degree of permanent impairment greater than that prescribed by the regulations
Maximum amount available	Single injury - \$100,000 Multiple Injury - \$100,000	If the degree of permanent impairment is 66% or > the maximum is \$173,500	No (However, it would be possible to introduce a threshold into the regulations)	\$50,000	\$50,000	\$50,000
Calculation of Compensation	Each injury is accorded a % of the maximum amount available	Based on the degree of permanent impairment assessed according to Guidelines and then determined according to prescribed formula	Calculated as prescribed by regulations on the basis of the degree of permanent impairment	If threshold is met, and the parties can't agree, the amount is determined by the Compensation Court	If threshold is met, and the parties can't agree, the amount is determined by a Commissioner	If threshold is met, and the parties can't agree, the amount is determined by the Commission

¹ All figures in these tables are the figures prescribed by legislation. The indexed amounts have not been used. A reference to 'Guidelines' in these tables is a reference to the wording of the original Bill - 'WorkCover Guidelines issued for that purpose or, where there are no such guidelines, the AMA Guides'.

Common Law²

	Non-Economic Loss – 1987 Act, s 151G		Economic Loss – 1987 Act, s 151H	
	Currently	Original Bill	Currently	Original Bill
Threshold	The amount of non-economic loss must be > than \$36,000 ³	The degree of permanent impairment must be greater than 25%, according to Guidelines	Only ‘serious injuries’ will be compensated. ie. An injury for which 25% of maximum amount is payable under the Table of Disabilities OR, an injury for which non-economic loss damages is \$48,000 or >	The degree of permanent impairment must be greater than 25%, according to Guidelines
Maximum amount available	\$204,000	\$204,000	No (However, there are some restrictions on the calculation of economic loss)	No (However, there are some restrictions on the calculation of economic loss.)
Calculation of Damages	If threshold is met, damages are calculated as a proportion of the maximum amount available according to severity of the injury	If threshold is met, damages are calculated as a proportion of the maximum amount available according to severity of the injury	Damages determined according to the amount of economic loss suffered (Note that there are some restrictions on the calculation of economic loss)	Damages determined according to the amount of economic loss suffered (Note that there are some restrictions on the calculation of economic loss)

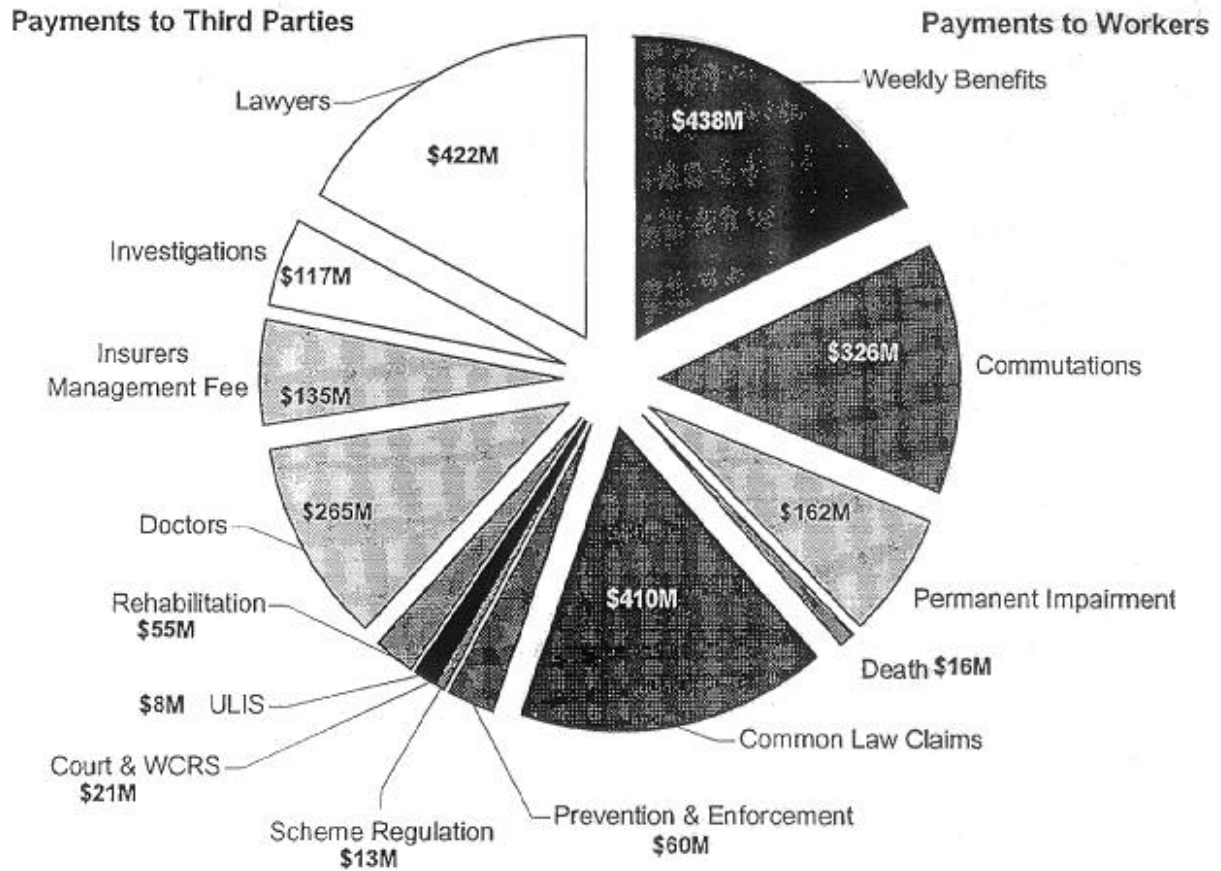
² The common law issues covered in this table have been referred to a judicial inquiry and subsequently no provision is made for them in Bill No 2.

³ There is also a formula to reduce the amount of damages if the non-economic loss falls between \$36,000 and \$48,000.

APPENDIX III

'Where do premiums go? 1999/2000', WorkCover 2001

Where do the premiums go? 1999/2000



Payments to Third Parties

Lawyers	17%
Investigations	5%
Insurers Management Fee	6%
Doctors	11%
Rehabilitation	2%

Payments to Workers

Weekly Benefits	18%
Commutations	13%
Permanent Impairment	7%
Death	1%
Common Law Claims	17%

Prevention & Enforcement	2%
Scheme Regulation	0.6%
Court & WCRS	1%
ULIS	0.3%