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Common Law Matters: The  
Sheahan Inquiry**

by

**Rachel Callinan**

**Briefing Paper No 14/2001**

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## **EXECUTIVE SUMMARY**

This paper examines the recommendations of the Commission of Inquiry Into Workers' Compensation Common Law Matters, conducted by Justice Terry Sheahan. Justice Sheahan was asked to consider several matters in relation to common law claims for personal injury arising in the employment context. First, the appropriate threshold for 'serious and permanent injury' necessary to recover damages at common law. Second, more efficient ways to process common law claims. Third, ways to reduce unnecessary costs and inefficiencies in the processing of common law claims and fourth, ways to reduce the incentive for pursuing common law claims. The report of the Inquiry was presented to the Governor on 31 August 2001.

The report contains several recommendations addressing the Terms of Reference. The Inquiry grouped its recommendations into two main categories: those made in relation to Terms of Reference One and Four; and those made in relation to Terms of Reference Two and Three. The recommendations are summarised in Section Two of this paper. Section Three examines the recommendations in relation to Terms One and Four and Section Four examines the recommendations in relation to Terms Two and Three. Some submissions to the Inquiry addressing matters relevant to the recommendations are noted. Section Five examines the response to the Sheahan Inquiry recommendations. However, at the time of writing only a few responses have been made publicly available.

By way of background material, the relevant common law and the amendments proposed in the Workers' Compensation Legislation Amendment Bill 2001 will be briefly examined in Section One. This information is a précis of relevant parts of an earlier briefing paper by the author: *The Future of the New South Wales Workers Compensation Scheme*, Parliamentary Library Research Service, Briefing Paper No 8/01.

## INTRODUCTION

On 29 March 2001, the NSW Government introduced reforms to the 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 met with intensive lobbying from trade unions, the legal profession and others. One of the main areas of concern was the proposed change to access to common law for workers whose injuries were caused by negligence (examined in Section One of this paper). After negotiations, the Government agreed, on 21 May 2001, to refer the common law issues to a judicial inquiry, to be undertaken by Justice Terry Sheahan of the Land and Environment Court.<sup>1</sup> The Terms of Reference for the Inquiry are set out below. The remaining aspects of the Government's reforms were incorporated into a new amendment bill - the Workers Compensation Legislation Amendment Bill (No 2) - introduced into the Legislative Assembly on 19 June 2001 and assented to on 17 July 2001.<sup>2</sup>

### Terms of Reference<sup>3</sup>

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*.

<sup>1</sup> The Hon J Della Bosca MLC, Special Minister of State and Minister for Industrial Relations, 'Agreement on Workers' Compensation', *Media Release*, 21/05/01.

<sup>2</sup> This bill and the contentious aspects of the Government's reform package (including the common law issues) were examined in an earlier briefing paper by the author: *The Future of the New South Wales Workers' Compensation Scheme*, Parliamentary Library Research Service, Briefing Paper No 8/01.

<sup>3</sup> The Letters Patent is contained in Appendix A to the *Commission of Inquiry Into Workers Compensation Common Law Matters -Report*, 31 August 2001. See also NSWPD 20/6/01, p 25 (Proof LC).

Certain procedural aspects of the Inquiry were also specified.<sup>4</sup> The Inquiry was to be an informal process, not bound by the rules of evidence. The Inquiry could inform itself in any way it saw fit and could take submissions from stakeholders, including trade unions, employer associations and Government and other interested parties. The Inquiry was to have access to any relevant reports or research held by WorkCover on common law or related issues and was to be assisted by an Expert Reference Group, made up of employer, employee and Government representatives.

The Inquiry commenced on 18 June 2001. An Issues Paper was produced for the purpose of inviting public submissions and 51 written submissions were received and a further 12 oral submissions were heard.<sup>5</sup> The Inquiry, assisted by the Expert Reference Group and an Advisory Group appointed by the Inquiry, was completed on 31 August 2001.

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<sup>4</sup> NSWPD, 20/6/01, p 25 (Proof, LC).

<sup>5</sup> Sheahan Report, n 3, Appendix G and H.

## 1. THE 2001 WORKERS' COMPENSATION REFORMS AND THE COMMON LAW

### 1.1 The current law

When common law remedies for workplace injuries were reinstated in NSW in 1990, they were significantly modified by statute. For the purposes of this paper, the most important modification was that thresholds were put in place to limit access to the two main types of damages: for economic loss and non-economic loss. Due to the financial success of the scheme, these thresholds were lowered in 1991, to the current level.

#### Damages for economic loss

*Definition:* Damages for 'economic loss' include: compensation for past economic loss due to loss of earnings; for future economic loss due to the deprivation or impairment of earning capacity; and for the loss of expectation of financial support.<sup>6</sup> Economic loss damages are also available in relation to the provision of gratuitous home care services.<sup>7</sup>

*Threshold:* 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.<sup>8</sup> A 'serious injury' is defined as either an injury:

- (a) For which compensation payable under s 66 of the *1987 Act* is, in the opinion of the court, not less than 25% of the maximum amount payable in s 66(1) (ie under the Table of Disabilities); or
- (b) For which common law damages for *non-economic loss* are not less than \$60,450.<sup>9</sup>

#### Damages for non-economic loss

*Definition:* Damages for 'non-economic loss' means that a person can be compensation for pain and suffering, loss of amenities of life, loss of expectation of life, and disfigurement.<sup>10</sup>

*Threshold:* To be eligible to claim damages for non-economic loss, the amount of the loss suffered by the injured worker must be greater than \$45,350<sup>11</sup> (the lower limit). The amount awarded is to be a proportion of the maximum amount payable, which is currently set at

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<sup>6</sup> 1987 Act, s 151I.

<sup>7</sup> 1987 Act, s 151K.

<sup>8</sup> 1987 Act, s 151H(2A).

<sup>9</sup> The prescribed amount is \$48,000. This amount is indexed and as of 1 October 2001 is set at \$60,450. Note that this applies to injuries received on or after the commencement of Schedule 2(2) to the *Workers' Compensation (Benefits) Amendment Act 1991*. A different threshold applies to injuries received before the commencement of that Act: s 151H(2).

<sup>10</sup> 1987 Act, s 149.

<sup>11</sup> The prescribed amount is \$36,000: s 151G(4). This amount is indexed and as of 1 October 2001 is set at \$45,350.



\$256,900.<sup>12</sup> The proportion is determined by the severity of the injury. The legislation states that the maximum amount may only be awarded in the most extreme cases. There is also a formula to reduce the damages awarded if the amount of non-economic loss falls between the lower limit and an upper limit of \$60,450.<sup>13</sup>

## 1.2 Proposed amendments to common law in the Workers Compensation Legislation Amendment Bill 2001

The bill contained amendments to alter the nature of the threshold requirements for access to common law damages. Rather than linking the threshold to the Table of Disabilities (for economic loss) and prescribed limits (for non-economic loss), the bill proposed linking the thresholds for both types of damages to the *degree of permanent impairment* suffered by the worker. The bill proposed that damages could only be awarded if the degree of permanent impairment suffered by the worker is greater than 25%.<sup>14</sup>

Therefore, in relation to *economic loss*, the current requirement that damages can only be awarded if the worker suffered a ‘serious injury’, or died as a result of the injury, would be removed and replaced by the 25% permanent impairment threshold. In relation to *non-economic loss*, the bill proposed the removal of the prescribed lower threshold to be replaced by the threshold of 25% permanent impairment. The current reduction that applies to non-economic loss assessed between the lower and upper limits would also be removed. The maximum damages payable would still be prescribed at \$256,900. Under the bill, the amount of damages to be awarded for non-economic loss was to be calculated in the same way as under the present provisions, ie as a proportion, determined according to the severity of the non-economic loss, of the maximum amount that can be awarded.

The bill proposed 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’ (AMA Guides).<sup>15</sup> After the bill was introduced into Parliament it was commonly believed that, until WorkCover developed its own guidelines, it would adopt the AMA Guides.<sup>16</sup> It was also thought that, in any case, guidelines developed by WorkCover would be heavily based on the AMA Guides, as has occurred in the NSW motor accident’s scheme.

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<sup>12</sup> The prescribed amount is \$204,000: s 151G(3). This amount is indexed and as of 1 October 2001 is set at \$256,990.

<sup>13</sup> The prescribed amount is \$48,000: s 151G(5). This amount is indexed and as of 1 October 2001 is set at \$60,450.

<sup>14</sup> Workers Compensation Legislation Amendment Bill 2001, Schedule 4, items [1] – [4].

<sup>15</sup> Workers Compensation Legislation Amendment Bill 2001, Schedule 5, item [14], new Part 7 of Chapter 7 of the 1989 Act, s 318, American Medical Association, *Guides to the Evaluation of Permanent Impairment* (Fourth Edition), Chicago, 1993.

<sup>16</sup> 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)’:  
[www.lawsociety.com.au/practice/compo/1142257.html](http://www.lawsociety.com.au/practice/compo/1142257.html) (accessed 10/6/01).

The decision to align access to common law with the degree of permanent impairment and the likely reliance on the AMA Guides model was a major concern to unions. Under the AMA Guides the degree of permanent impairment (expressed as a percentage) relates to the 'whole person'. It was argued that it would be more difficult for an injury to satisfy the proposed threshold (of 25% whole person impairment) for eligibility for common law damages than the thresholds under the present law.

As noted in the introduction to this paper, the common law aspects of the Workers Compensation Legislation Amendment Bill 2001 were removed and referred to the Sheahan Inquiry. However, the Workers Compensation Legislation Amendment Bill No 2, which was assented to on 17 July 2001, still included reference to guidelines for assessing permanent impairment in relation to statutory compensation for permanent impairment. In the second reading speech of Bill No 2, the Government made some comments about the nature of the guidelines that were to be developed:

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 also pointed out that a broader range of injuries will be compensable using the guidelines rather than the Table of Disabilities.<sup>17</sup> WorkCover is now in the process of developing the guidelines. The process was described to the Inquiry by WorkCover in the following way:<sup>18</sup>

- Expert medical specialists, including general surgeons, orthopaedic surgeons, occupational physicians, rehabilitation specialists, psychiatrists, physicians and others with specialised expertise such as pain management, are participating in working parties to review the guidelines for specific conditions and body parts.
- Five initial working groups have been established to cover the most common conditions in workers' compensation – the lower extremities, upper extremities, nervous system, psychological injury and spine. The other conditions will be addressed when this initial work is completed.
- A consistency group comprising of doctors nominated by their representative speciality colleges, a representative from the Australian Medical Association and representatives from Labor Council will review the work of the working parties to ensure that the assessment of each of the body parts is consistent with the others.
- The guides will be kept under review and feedback from users, and the medical assessors will ensure that the guides remain relevant and provide consistent methods of assessing impairment. A formal process of reviewing consistency in application will be established utilising an independent evaluator for the first 12 months of their use. The first full review will occur 12 months after commencement.

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<sup>17</sup> NSWPD, 19/6/01, p 12 & 13 (Proof, LA).

<sup>18</sup> WorkCover submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 32, p 8.

## 2. SUMMARY OF THE SHEAHAN INQUIRY RECOMMENDATIONS

### Recommendations addressing Terms of Reference One and Four

- (a) **Common law actions limited to damages for economic loss:** The Inquiry recommended that common law actions only be available in relation to recovering economic loss damages, relevantly defined in s 151I of the *1987 Act* as: past economic loss due to loss of earnings; and future economic loss due to deprivation or impairment of earning capacity. It therefore recommended that common law damages for non-economic loss be abolished. These recommendations are examined in Section 3.1.
- (b) **The nature of economic loss damages to be available:** The Inquiry recommended that economic damages remain capped, that they be calculated only to age 65 and that they may be taken as a structured settlement. This recommendation is examined in Section 3.2.
- (c) **20% threshold for access to common law damages for economic loss:** The inquiry recommended that only workers assessed to have a whole person impairment of 20% or more should be entitled to make a claim for economic loss damages. This recommendation is examined in Section 3.3.
- (d) **Abolishing the ‘election’ requirement:** The Inquiry recommended that the requirement of ‘election’ be repealed, but that recovery of economic loss damages preclude the receipt of any further statutory benefits. This recommendation is examined in Section 3.4.
- (e) **Indexation and maximum amount recoverable under the statutory scheme:** The Inquiry recommended that as soon as the scheme’s financial position permits, the indexation of s 66 benefits should be reinstated and the maximum amount recoverable under the combined operation of ss 66 and 67 should be increased gradually to \$250,000 and indexed thereafter. This recommendation is examined in Section 3.5.
- (f) **Claims for non-economic loss to be dealt with under the statutory scheme:** The Inquiry recommended that all claims in respect of non-economic loss be dealt with under the statutory scheme pursuant to ss 66 and 67 of the *1987 Act*. This recommendation is examined in Section 3.6.
- (g) **Griffith v Kerkemeyer damages:** The Inquiry recommended that the common law head of damages known as *Griffiths v Kerkemeyer* be abolished in relation to claims against employers. It also recommended that a limited right to claim benefits in respect of the cost of ‘gratuitous domestic care’ be provided for in the statutory scheme. These recommendations are examined in Section 3.7.
- (h) **Structured settlements:** The Inquiry recommended that common law damages for economic loss should be able to be taken as a structured settlement and that structured settlements should also be available for statutory lump sums and possibly for commutations. The Inquiry recommended that consideration should be given to expanding the Court’s discretion to order structured settlements. The Inquiry also recommended that the NSW Government should maintain pressure on the Commonwealth Government to reform tax laws to facilitate structured settlements and that some mechanism be devised to protect structured settlements in the event of insurer collapse post-settlement. These recommendations are examined in Section 3.8.

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### **Recommendations addressing Terms of Reference Two and Three**

- (i) **Forum for dealing with common law claims:** The Inquiry recommended that common law actions for employment injuries be dealt with normally by the District Court, but without juries. This recommendation is examined in Section 4.1.
- (j) **Pre-litigation process:** The Inquiry recommended a pre-litigation process for common law claims. It also recommended that compliance with a pre-litigation process, to be managed by the proposed Workers' Compensation Commission, and aimed at early and cost-effective settlement of the claim, is to be a condition precedent to commencing proceedings for common law damages. This recommendation is examined in Section 4.2.
- (k) **Procedural reforms and reforms to legal costs:** The Inquiry recommended a range of procedural reforms and new rules regarding legal costs. These recommendations are examined in Section 4.3.

### 3. RECOMMENDATIONS ADDRESSING TERMS OF REFERENCE ONE AND FOUR

An overarching concern to improve the WorkCover scheme for the benefit of *all* injured workers appears to have guided the Inquiry in its recommendations.<sup>19</sup> In regard to Terms of Reference One and Four, the Inquiry aimed to find a balance between protecting and enhancing statutory benefits, and making special provision for access to common law for the most seriously injured workers who can prove fault.<sup>20</sup> It therefore focused on the differential between the benefits available at common law and the benefits available under the statutory scheme, for both economic and non-economic loss. The recommendations narrow the gap by limiting the benefits available under common law and improving the statutory benefits scheme.

In response to Term of Reference One the Inquiry recommended a 20% threshold for access to common law damages, as discussed in Subsection 3.2. The Inquiry made several recommendations in relation to Term of Reference Four. These are examined in the remaining Subsections.

#### 3.1 Common law actions limited to damages for economic loss

The Inquiry recommended that common law actions only be available in relation to recovering economic loss damages, relevantly defined in s 151I of the *1987 Act* as: past economic loss due to loss of earnings; and future economic loss due to deprivation or impairment of earning capacity. It therefore recommended that common law damages for non-economic loss be abolished.<sup>21</sup>

There are two main types of damages available at common law for an injury caused by the negligence of an employer: damages for economic loss and damages for non-economic loss. The current definitions and thresholds applicable for these heads of damages are explained in Section 1.1. While the Government proposed to change the thresholds for access to common law damages, through the Workers Compensation Legislation Amendment Bill 2001, (as described in Section 1.2), it did not propose to amend the heads of damages in any other way.

Pursuant to its task of recommending ways to reduce the incentive to take the common law route, the Sheahan Inquiry recommended abolishing damages for non-economic loss in common law claims brought by workers against employers. As the Report noted, this would mean that ‘...the only significant incentive for pursuit of a common law claim, where available, will be the only remaining head of damages, namely economic loss.’<sup>22</sup>

<sup>19</sup> See for example, Briefing Note – Commission of inquiry into Workers Compensation Common Law Matters, p 4.

<sup>20</sup> Sheahan Report, n 3, p 41.

<sup>21</sup> Sheahan Report, n 3, pp i and 34-36.

<sup>22</sup> Sheahan Report, n 3, p 35.

The Inquiry recommended that compensation for non-economic loss be instead dealt with under the statutory scheme and this recommendation is discussed in Section 3.6. The Inquiry also recommended changes to the nature of economic loss damages to be available at common law. These recommendations are examined in Section 3.2, 3.7 and 3.8.

## Submissions

The submissions did not raise the option of abolishing common law damages for non-economic loss. However, the *NSW Workers Compensation Self Insurers Association* suggested that the maximum amount available for non-economic loss should be reduced from its current level (ie \$256,900, see Section 1.1) to \$180,000.<sup>23</sup>

### 3.2 The nature of economic loss damages to be available

The Inquiry recommended that economic damages remain capped, that they be calculated only to age 65 and that they may be taken as a structured settlement.

#### Retaining the cap on economic loss damages

Unlike common law damages for non-economic loss, there is currently no prescribed maximum amount of common law damages that can be received for economic loss. However, when determining the amount of economic loss suffered by a plaintiff, to establish the quantum of damages the plaintiff will receive, any weekly earnings above the maximum weekly payment that can be received under the statutory scheme (ie under s 35) are to be disregarded.<sup>24</sup> The maximum weekly payment that can be received under the s 35 is \$1,259.20 pw.<sup>25</sup> This effectively places a cap on the amount that can be awarded for economic loss. The Inquiry recommended that this cap be maintained.

#### Calculating economic loss damages to age 65

At common law, when calculating the amount of damages for future loss of earning capacity, there is presumption that a plaintiff would have continued in full time employment up to the normal retirement age. The normal retirement age is generally accepted at common law to be 60 years for women and 65 years for men.<sup>26</sup> Either party can seek to rebut this presumption by, for example, '...providing evidence of work patterns in a particular industry or evidence of a pre-accident intention to retire early or opportunities for old age part-time work'.<sup>27</sup>

<sup>23</sup> NSW Workers Compensation Self Insurers Association submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 25, p 1.

<sup>24</sup> *1987 Act*, s 1511(2).

<sup>25</sup> *1987 Act*, s 35(1). The amount is prescribed at \$1,000 and as of 1 October 2001 is indexed to the amount stated above.

<sup>26</sup> *Dykstra v Head* (1989) Aust Torts Reports 80-280 (CA NSW).

<sup>27</sup> The Laws of Australia, The Law Book Company Limited, 33.10 Damages, p 58.

This common law situation was reaffirmed by the NSW Court of Appeal in 1999 (emphasis added):

A court may assume without specific evidence that a plaintiff would, in the ordinary course, probably have continued to work in the pattern exhibited before injury until reaching the age at which the *age pension became payable* (*Dykstra v Head* 1989) Aust Torts Rep ¶80-280). But there is no fixed rule. In a particular case there may be a basis for finding that early retirement was likely or that the plaintiff might have continued to work beyond the ordinarily accepted age of retirement.<sup>28</sup>

The Inquiry recommended prescribing age 65 as the limit in relation to future loss of earning capacity. The recommendation would involve legislating to modify this common law presumption in relation to common law claims for injuries caused by an employer's negligence for both men and women. Whether or not to provide any exceptions to the rule, where there was clear evidence of a person's intention or capacity to work beyond this age, would have to be considered.

### Structured settlements

The recommendation regarding structured settlement is examined in Section 3.7.

### Submissions

Few submissions touched on the subject matter of these recommendations (except structured settlements, as discussed in Section 3.7).

The *NSW Workers Compensation Self Insurers' Association* suggested that calculation of economic loss should be limited to age 65 and the maximum payable should be consistent with s 35 of the *1987 Act*.<sup>29</sup>

### 3.3 20% threshold for access to common law damages for economic loss

The Inquiry recommended that only workers assessed to have a Whole Person Impairment of 20% or more should be entitled to make a claim for economic loss damages.<sup>30</sup>

Term of Reference One indicates the Government's intention to retain a threshold for access to common law and charges the Sheahan Inquiry with recommending what that threshold should be. The term requires the threshold to be 'consistent with the available measures of impairment in the statutory workers' compensation scheme and maintaining

The Inquiry explained the use of thresholds for access to common law, in the Issues Paper, in the following way:

Workers' compensation schemes usually try to make more benefits available to the most seriously injured workers. This is done primarily to ensure that, in the context of finite Scheme resources,

<sup>28</sup> *Bridge Printery Pty Ltd v Mestre* [1999] NSWCA 342 (5 October 1999).

<sup>29</sup> NSW Workers Compensation Self Insurers' Association, n 23..

<sup>30</sup> Sheahan Report, n 3, pp i and p 41.

available benefits are directed at areas of greatest need.

To identify the most seriously injured, workers' compensation laws try to describe a 'serious injury'. This is usually done by setting a threshold or a standard against which a worker can measure the level of severity of their injury. A worker who meets the requirements of a 'serious injury' is said to have met 'the threshold' for claiming particular benefits (in the case of this injury, common law damages).<sup>31</sup>

The Issues Paper directed a number of questions to the issue of the appropriate threshold. For example, it asked whether workers with 'serious impairments' were well served by the current threshold, whether there should be more than one threshold, and how the threshold should be set.<sup>32</sup>

The Inquiry examined two main issues. First, what type of threshold should be applied and second, the level of threshold that should be applied. The Inquiry identified its main criteria for determining the appropriate threshold:

- (a) It must be capable of objective and consistent consideration;
- (b) It must be consistent with the scheme's objectives;
- (c) It must be affordable by the scheme; and
- (d) It must be equitable among possible claimants.<sup>33</sup>

### **The type of threshold**

As noted in Section 1.2, the Government's original proposal in the Workers Compensation Legislation Amendment Bill 2001 was to introduce a 25% whole person impairment (WPI) threshold for access to common law. This remains the position of the NSW Government.<sup>34</sup>

Several submissions to the Inquiry advocated that a 'narrative test' be adopted, either in addition to, or instead of a WPI threshold. A narrative test can be applied to take into account the effect of an injury on the worker, in terms of earning capacity and/or lifestyle. The Inquiry rejected the notion of a narrative test, noting that in other jurisdictions, where a narrative (or economic or subjective) test has been applied '...they create scope for interpretation, and erode over time, leading to financial pressure on the scheme and further changes having to be made a few years later.'<sup>35</sup>

The Inquiry concluded that only one threshold should be prescribed and that it should be expressed as a percentage of WPI.

The Inquiry acknowledged that the use of guidelines for the assessment of WPI, for the purpose of establishing eligibility for compensation, has received much criticism. The Inquiry was nonetheless of the opinion that such guidelines represented the best method of

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<sup>31</sup> *Commission of Inquiry Into Workers Compensation Common Law Matters -Issues Paper, 4/7/2001, p 12.*

<sup>32</sup> *ibid, p 13.*

<sup>33</sup> Sheahan Report, n 3, p 38.

<sup>34</sup> WorkCover submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 32, p 9.

<sup>35</sup> Sheahan Report, n 3, p 38.



assessing impairment.<sup>36</sup> The guidelines being developed by WorkCover are discussed in Section 1.2.

### **The level of the threshold**

The Inquiry noted that there was no commonality in the approach to this matter taken in other Australian states.<sup>37</sup> Nor was there a common theme in the submissions to the Inquiry (see below). The Inquiry considered the range of levels in operation in other compensation schemes as well as those suggested in the submissions and settled on 20%.

In regard to a 10% threshold, the Inquiry stated that ‘...the existence of the underpinning statutory benefits scheme in the employment sector, and this Inquiry’s recommendation regarding heads of damages, dictate that the threshold for common law claims in the employment sector should be more than 10%.’<sup>38</sup>

In regard to a 25% threshold, the Inquiry was satisfied that this level would restrict common law to only the most catastrophic of injuries and that a broader class of seriously injured workers should be able to avail themselves of common law remedies.<sup>39</sup>

### **Submissions**

As the most controversial aspect of the Sheahan Inquiry, the question of the appropriate threshold was dealt with in detail in many of the submissions to the Inquiry. The submissions reveal the diversity of opinion on the issue of access to common law and how it should be determined.

In some submissions it was argued that access to common law should not be restricted at all. For example, the *Queensland Law Society* argued strongly for ‘unfettered’ access to common law damages.<sup>40</sup> *Injuries Australia* similarly advocated unrestricted common law rights for injured workers, arguing that ‘...it is philosophically unsound to place any restriction on an individual’s entitlements for compensation or damages when that person is the victim of a wrongdoing by another.’<sup>41</sup>

Other submissions acknowledged that some restriction on access to common law was desirable but there was a difference of opinion as to the appropriate threshold test.

For example, in regard to damages for non-economic loss, the *Labor Council* argued that the monetary threshold, determined by a judge should be maintained. The Council was reluctant to make recommendation in relation to the use of the impairment threshold until

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<sup>36</sup> Sheahan Report, n 3, pp 40-41.

<sup>37</sup> Sheahan Report, n 3, p 40.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> Queensland Law Society, submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 40.

<sup>41</sup> Injuries Australia, submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 17, p 1.

the guidelines for measuring impairment were finalised, although it was adamant that permanent injury thresholds must not disadvantage injured workers in relation to their current entitlements.<sup>42</sup>

The *Law Society of NSW* submitted that: '...the "gateway" to bringing a common law action for the recovery of economic loss should be percentage loss of earning capacity occasioned by the relevant work related injury'. It also suggested that in relation to non-economic loss, either a narrative test should be used or the threshold set by the existing Table of Disabilities should be maintained.<sup>43</sup>

Other submissions argued that a single threshold of percentage of WPI was not satisfactory because it did not adequately take into account the effect of an injury on individual employees. For example, the *ALP Blackwattle Branch* submitted that thresholds for serious and permanent injury should not be based solely on strict medical criteria:

Discretion should exist for a court to regard an injury as serious having considered other factors such as future employment prospects and other social consequences arising from injuries ... Whole of body thresholds are an arbitrary measure which do not adequately reflect the effect of an injury on an individual employee.<sup>44</sup>

The use of a narrative test was also raised by the *NSW Bar Association*,<sup>45</sup> the *Law Society of NSW* (see below) and the *Australian Plaintiff Lawyers Association*. The latter argued that '...the narrative threshold has certain advantages in terms of fairness of the outcome. It takes into account the full impact of an injury on people. It takes into account their individual circumstances'.<sup>46</sup>

In those submissions that supported the use of a single WPI threshold, a range of percentages was recommended from 10% to 30%. For example, the *Hon Peter Breen MLC* suggested a 10% WPI threshold was appropriate as applies in the NSW motor accident compensation scheme.<sup>47</sup> *WorkCover*, *Sims Metal Ltd*, and the *Australian Retailers Association* (among others) recommended a 25% WPI threshold.<sup>48</sup> The *NSW Workers' Compensation Self Insurers' Association* and *BOC Gases Australia Ltd* suggested a 30%

<sup>42</sup> Labor Council, submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 29, p 3.

<sup>43</sup> Law Society of NSW, submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 22, p 3.

<sup>44</sup> Australian Labor Party Blackwattle Branch submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 27.

<sup>45</sup> NSW Bar Association, submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No18, p 10.

<sup>46</sup> Australian Plaintiff Lawyers Association, Oral submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, 31/7/01, T 14, L 9-20.

<sup>47</sup> The Hon Peter Breen MLC submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 42, p 2.

<sup>48</sup> WorkCover, n 34, p 9, Sims Metal Ltd Submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 39, p 2, Australian Retailers Association on behalf of the Combined Employers Group submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No, p 3.

WPI threshold.<sup>49</sup>

### 3.4 Abolishing the ‘election’ requirement

The Inquiry recommended that the requirement for an injured worker to ‘elect’ between common law damages and permanent loss compensation under the statutory scheme be repealed, but that recovery of economic loss damages preclude the receipt of any further statutory benefits.<sup>50</sup>

#### The current law

The *1987 Act* provides that an injured worker is not entitled to make a claim for common law damages (both economic and non-economic) *and* a claim for permanent loss compensation under the statutory benefits scheme (ie lump sum compensation for non-economic loss under Division 4, Part 3 of the *1987 Act*).

Therefore a worker is required to *elect* whether to claim common law damages or make a claim for permanent loss compensation.<sup>51</sup> 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).<sup>52</sup>
- 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).<sup>53</sup>

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 worker’s condition.<sup>54</sup>

<sup>49</sup> NSW Workers Compensation Self Insurers Association n 23, p 1 and BOC Gases Australian Ltd submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 41, p 1.

<sup>50</sup> Sheahan Report, n 3, pp i and 36.

<sup>51</sup> S 151A.

<sup>52</sup> S 151A(3)(a).

<sup>53</sup> S 151A(3)(b).

<sup>54</sup> S 151A(4) & (5).

## The recommendation

The Inquiry recommended that, in light of its other recommendations, election serves no useful purpose and therefore the requirement should be repealed.<sup>55</sup> The Inquiry noted that the effect of recovering damages (albeit only for economic loss) at common law vis-à-vis the statutory scheme should remain the same, namely that:<sup>56</sup>

- 'Recovery of common law damages (albeit only for economic loss) should continue to have the effect of commuting or redeeming all of the plaintiff's remaining rights to statutory benefits<sup>57</sup> and the benefit of the scheme's injury management programs'; and
- 'Workers cannot be compensated for the same loss twice. If past loss is paid as damages on a total loss and 'gross' basis, statutory benefits already received in regard to it should

<sup>58</sup>

## Submissions

The submissions did not address the issue of abolishing elections in the context considered by the Inquiry (as outlined above). However a few comments were raised about the election requirement.

The *Labor Council* submitted that the requirement to make an election should be abolished because of the deleterious effect on a worker's health:

The most deleterious effect on an injured worker's health in the current process is caused by the often-agonising decision to elect between the two available remedies including consideration of thresholds. This agony continues while the injured person waits to see whether the right election has been made. The agony of election should be removed as it has in Victoria. Bearing in mind that statutory benefits are deducted from any verdict its continued existence is hard to justify and its removal would improve the quality of life of an injured worker.<sup>59</sup>

Other submissions noted the difficult choice that the election requirement posed.<sup>60</sup>

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<sup>55</sup> Sheahan Report, n 3, p 36.

<sup>56</sup> *ibid.*

<sup>57</sup> As provided in s 151B of the *1987 Act* (except where, because of statutory thresholds, damages for economic loss or non-economic loss are not recoverable: s 151B (2) and (3)).

<sup>58</sup> As provided in s 151B of the *1987 Act*.

<sup>59</sup> Labor Council n 42, p 23. See also Labor Council oral submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, 26/7/01, T 8, L 12-27.

<sup>60</sup> See for example, Austlaw Group of Law Firms oral submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, 18/7/01, T 5, L 21-33.

### 3.5 Indexation and maximum amount recoverable under the statutory scheme

The Inquiry recommended that as soon as the scheme's financial position permits:

- (a) Indexation of s 66 benefits, pursuant to Part 3 Divisions 6 of the *1987 Act*, should be reinstated; and
- (b) The maximum amount recoverable under the combined operation of ss 66 and 67 be increased gradually to \$250,000 and indexed thereafter.<sup>61</sup>

S 66 and s 67 of the *1987 Act* provide for compensation for non-economic loss under the statutory scheme. S 66 provides for compensation for non-economic loss in relation to permanent injuries and s 67 provides compensation for non-economic loss in relation to pain and suffering.

These recommendations are consistent with the Inquiry's approach to addressing Term of Reference Four: to close the differential between the benefits available under the statutory scheme and at common law, by changing both avenues of redress, rather than just the common law avenue.

The Inquiry stressed that both of these recommendations are premised on the improved financial status of the WorkCover scheme and cannot be implemented immediately. While the Inquiry was supportive of improving the statutory scheme, it recognised that the detrimental effect to all injured workers of prematurely increasing benefits necessitated a cautious approach.<sup>62</sup>

#### Indexation

Compensation for personal injuries in statutory schemes is usually determined by reference to amounts prescribed in legislation. These amounts are generally adjusted on a regular basis to keep pace with variations in average weekly earnings, or the consumer price index. This adjustment is commonly referred to as 'indexation' and the process and timing of indexation is usually prescribed in the legislation.

S 66 states that a worker who has suffered a permanent injury is entitled to receive by way of compensation for non-economic loss the amount equal to the percentage of \$100,000 set out opposite the relevant injury in the Table of Disabilities.<sup>63</sup> The legislation provides that this amount may be adjusted, or indexed, according to Part 3, Division 6 of the *1987 Act*.<sup>64</sup> However, indexation was frozen in relation to s 66 (and s 67) in 1995, through the passage of the WorkCover Legislation Amendment Bill 1995, before any indexation occurred.<sup>65</sup> The

<sup>61</sup> Sheahan Report, n 3, pp i and 35.

<sup>62</sup> Sheahan Report, n 3, p 35.

<sup>63</sup> Note that this section applies to claims made after 12 January 1997 for which the date of injury was no later than 1 February 1992. For claims made prior to 12 January 1997 different maximums are applicable.

<sup>64</sup> Other prescribed amounts are similarly adjusted in the *1987 Act*. See ss 25(4) and (4A), 35(2), 37(6A), 40(7), 67, 151G and 151H.

<sup>65</sup> WorkCover Legislation Amendment Bill, Schedule 1 [106] - inserted Schedule 6, Part 6(13) into the *1987 Act*. Indexation did occur however in relation to claims made prior to

cessation was a cost saving measure to attempt to address the financial difficulties faced by the scheme at the time:

As a cost control measure, further indexation increases in the maximum lump sums under those provisions - currently \$160,950 for disability and \$66,200 for pain and suffering - will be suspended. Maximum entitlements will thus be frozen at those levels, pending reactivation of indexation at some future date.<sup>66</sup>

The Inquiry has recommended the 're-activation' of indexation of s 66 as soon as the schemes financial situation permits. Re-activation of indexation will increase the level of compensation available under s 66.

### **Increase in maximum amount**

The Inquiry has also recommended that the maximum amount recoverable under the combined operation of ss 66 and 67 be increased gradually to \$250,000 and indexed thereafter. At present the maximum amount recoverable under the combined operation of ss 66 and 67 is \$150,000<sup>67</sup> and as stated above, these amounts are no longer indexed.

In recommending this amount the Inquiry noted the figure was less than that available for non-economic loss under other NSW legislation. Under the *Health Care Liability Act 2001* the maximum amount that can be awarded at for non-economic loss is \$350,000 (this amount is to be indexed).<sup>68</sup> Under the *Motor Accidents Compensation Act 1999* the maximum amount that can be awarded for non-economic loss is \$284,000.<sup>69</sup> This amount is indexed and from 1 October 2001 is set at \$296,000.<sup>70</sup>

In relation to the disparity, the Inquiry concluded that the figure was appropriate as '...injured workers have substantial additional benefits under the statutory scheme and ...the Government is committed to their improvement as financial capacity of the scheme improves...'<sup>71</sup>

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12 January 1997. The maximum amounts applicable at the time indexation of ss 66 and 67 of all claims was frozen in relation to all claims are stated in the Hansard quote above.

<sup>66</sup> NSWPD 6/12/95, per Hon P Whelan MP, Minister for Police, second reading speech of the WorkCover Legislation Amendment Bill, p 4256.

<sup>67</sup> For claims made after 12 January 1997 and date of injury later than 1 February 1992.

<sup>68</sup> S 13 (this amount is to be indexed: s 14). Note that under the *Health Care Liability Act 2001* 'non-economic loss' means any one or more of the following: (a) pain and suffering, (b) loss of amenities of life, (c) loss of expectation of life or (d) disfigurement: s 4.

<sup>69</sup> S 134 (this amount is indexed). The definition of 'non-economic loss' is the same as under the *Health Care Liability Act*.

<sup>70</sup> Motor Accidents Compensation (Determination of Loss) Order No 2, Gov Gaz 135, 2/9/01, p 7574.

<sup>71</sup> Sheahan Report, n 3, p 35.

## Submissions

The *Labor Council's* submission argued that an increase in statutory scheme benefits was overdue. It recommended that s 67 benefits should be increased to \$100,000 and that 'the large claims cap' should be increased from \$150,000 to \$240,000 commensurate to the average pay out at common law.<sup>72</sup>

### 3.6 Claims for non-economic loss to be dealt with under the statutory scheme

The Inquiry recommended that all claims in respect of non-economic loss be dealt with only under the statutory scheme pursuant to ss 66 and 67 of the *1987 Act*.<sup>73</sup>

As discussed in Section 3.1, the Inquiry recommended that common law claims be limited to economic loss. It recommended abolishing damages for non-economic loss at common law, leaving the statutory scheme as the only avenue for an injured worker to pursue compensation for non-economic loss, pursuant to ss 66 and 67 of the *1987 Act*.

Recent amendments were made to ss 66 and 67 by the passage of the *Workers Compensation Legislation Amendment Act 2001* ('the *2001 Act*'), which was assented to on 17 August 2001. However, Schedule 3 of the *2001 Act*, which contained the amendments to ss 66 and 67 (as well as amendments to lump sum compensation), was suspended until such time as the guidelines with respect to the assessment of the degree of permanent impairment have been made.<sup>74</sup> As noted in Section 1.2 of this paper, the guidelines are still being developed.

A brief description of the compensation available under ss 66 and 67 as they currently operate, and as they will operate once the amendments commence, is contained below.<sup>75</sup>

#### S 66 - Compensation for permanent losses

*Current law:* A worker who has suffered permanent incapacity of part of his or her body or faculties, as a result of a work related injury, is entitled to receive compensation for the loss. The benefit payable is determined by reference to the Table of Disabilities. The Table lists certain permanent impairments such as, loss of an arm or sight, severe facial disfigurement, or HIV infection/AIDS. Not all injuries are included on the Table and therefore compensation for permanent impairment is not available for all injuries. The Table specifies the amount recoverable for each loss, by according each a percentage of the maximum amount that can be received.<sup>76</sup> 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

<sup>72</sup> Labor Council, n 42, p 5. Note that the Labor Council made several other suggestions for ways to improve the operation and financial status of the statutory scheme.

<sup>73</sup> Sheahan Report, n 3, pp i and 34.

<sup>74</sup> *Workers Compensation Legislation Amendment Act 2001*, s 2(3).

<sup>75</sup> For a more detailed examination of the current provisions and the amendments, as well as the amendments to s 66 and 67 as proposed in the original Workers Compensation Legislation Amendment Bill 2001, see Briefing Paper No 8/01, n 2, Section 3.1.2.

<sup>76</sup> *1987 Act*, ss 65 and 66.

benefit for a single loss is \$100,000 and for multiple losses is \$121,000.<sup>77</sup>

*Operation of s 66 when the amendments come into effect:* 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.<sup>78</sup> The degree of permanent impairment is to be assessed 'in accordance with the WorkCover guidelines issued for that purpose'. 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 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.<sup>79</sup>

### **S 67 – Compensation for pain and suffering**

*Current law:* 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. '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'.

Compensation for pain and suffering is capped at \$50,000<sup>80</sup> and the maximum amount is only payable in the most extreme cases. An injured worker is only entitled to compensation for pain and suffering if the amount payable for the permanent loss or impairment of a body part under s 66 (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.

*Amendments to come into effect once guidelines are drafted:* 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 2001 Workers Compensation Legislation Amendment Bill stated a worker must have a degree of permanent impairment greater than 10% to be eligible for compensation for pain and suffering. The degree of permanent impairment is to be assessed 'in accordance with the WorkCover guidelines issued for that

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<sup>77</sup> These amounts are indexed on 1 April and 1 October each year.

<sup>78</sup> 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.

<sup>79</sup> NSWPD, 19/6/01, p 13 (Proof, LA).

<sup>80</sup> *ibid.*



### 3.7 *Griffiths v Kerkemeyer* damages

The Inquiry recommended that the common law head of damages known as *Griffiths v Kerkemeyer* be abolished in relation to claims against employers. It also recommended that a limited right to claim benefits in respect of the cost of ‘gratuitous domestic care’ be provided for in the statutory scheme.<sup>81</sup>

#### What are *Griffiths v Kerkemeyer* damages?

*Griffiths v Kerkemeyer* (*G v K*) damages are a head of common law damages, for personal injuries caused by negligence, that consist of the worth of gratuitous services provided to a plaintiff by friends, relatives, neighbours etc. These damages were first identified as recoverable in 1977 in the case of *Griffiths v Kerkemeyer* (1977) 139 CLR 161. The damages are calculated with reference to the commercial rate that a person would have to pay for services if they were not provided gratuitously. If there is no agreement between the parties about the rate that should be applied then the rate asserted by the plaintiff will have to be proved. Future *G v K* damages can also be awarded if gratuitous services will be provided to the plaintiff in the future. An amount awarded for the future will be discounted.

There is considerable controversy and differences of opinion amongst judicial officers concerning *G v K* claims. For example, the Sheahan Report noted as a significant criticism, that the money awarded goes to the injured plaintiff and does not have to be given to the person freely providing the service.<sup>82</sup> However, as the Report also noted, *G v K* damages still enjoy the majority support of the High Court.

In relation to injuries caused by an employer’s negligence in NSW, *G v K* damages have been altered by statute. S 151K of the *1987Act* provides for ‘Damages for economic loss – maximum amount for provision of certain home care services.’ Under this provision, damages can be awarded for services of a domestic nature or services relating to nursing and attendance which have been provided by another person and for which there has been no payment or liability for payment. It is available only for those services that would not have been provided had worker had been injured. Damages will not be awarded for more than 40 hours per week and are to be assessed by reference to average weekly earnings figures, unless the employer establishes that a lesser amount is appropriate.

#### Recommendation to abolish *G v K* damages for common law claims against employers

As *G v K* type compensation is not presently available under the statutory workers’ compensation scheme, its availability at common law may influence a decision to make a common law claim. Abolishing this head of damages for common law for injuries caused by an employer’s negligence and introducing it into the statutory scheme reverses this incentive.

<sup>81</sup> Sheahan Report, n 3, pp i and 33.

<sup>82</sup> Sheahan Report, n 3, p 33.

### **Recommendation to provide for compensation for gratuitous domestic services in the statutory scheme**

The Inquiry recommended that *G v K* type compensation, ie the payment of occasional benefits for necessary domestic care, which may be provided by family, who can demonstrate cost (including opportunity cost), should be covered by the statutory scheme. This recommendation, coupled with the recommendation to abolish *G v K* damages for common law claims, represents a way to reduce the incentive for pursuing common law claims. It also reflects the thrust of Justice Sheahan's report, which is, that the statutory scheme should be significantly improved for the benefit of all injured workers.

The Inquiry stressed that implementing *G v K* type benefits under the NSW statutory workers' compensation scheme would have to be done with care:

It is certainly not my intention that the full amount of current *Griffiths v Kerkemeyer* damages will simply become some sort of 'structured settlement'. It should be a periodical statutory benefit payable to a provider, on satisfying the conditions I have described.<sup>83</sup>

In relation to 'conditions described', the Inquiry suggested that appropriate limitations such as those set out in s 151K of the *1987 Act* (as outlined above) and in s 12 of the *Health Care Liability Act 2001*, be put in place.<sup>84</sup> The Inquiry also foreshadowed that regard will need to be had to the current provisions of s 59 of the *1987 Act*, especially paragraph (f), and to the views and decision of the Court of Appeal in *Western Suburbs Leagues Club Illawarra Ltd v Everill* [2001] NSWCA 56. Finally, it was also suggested that detailed guidelines, procedures, and safeguards may have to be developed, as has been done by the Victorian Transport Accident Commission. These limitations and issues are outlined briefly below.

Like s 151K of the *1987 Act*, s 12 of the *Health Care Liability Act* modifies the common law head of damages known as *G v K*, in relation to common law claims for damages for medical negligence. S 12 states that damages for 'gratuitous attendant care services' cannot be awarded unless the court is satisfied that: there is (or was) a reasonable need for the services to be provided; the need has arisen (or arose) solely because of the injury to which the health care claim relates; and that the services would not be (or would not have been) provided to the claimant but for the injury. Gratuitous attendant care services is defined as 'attendant care services that have been or are to be provided by another person to a claimant, and for which the claimant has not paid or is not liable to pay'. 'Services' include services of a domestic nature, services relating to nursing, and services that aim to alleviate the consequences of an injury. There is no threshold for being eligible for these benefits nor a cap on the amount available.

Division 3 of the *1987 Act* deals with 'compensation for medical expenses, hospital and rehabilitation expenses etc'. Generally, if, as a result of an injury received by a worker, it is reasonably necessary that any medical or related treatment be given, the worker's employer is liable to pay, in addition to any other compensation under the *1987 Act*, the cost of that treatment and related travel expenses.<sup>85</sup> S 59(f) states that for the purposes of

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<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> *1987 Act*, s 60(1). Note that the employer is also liable to pay for hospital treatment, ambulance services and occupational rehabilitation services.

that division, ‘*medical or related treatment*’ includes: care (other than nursing care) of a worker in the worker's home directed by a medical practitioner having regard to the nature of the worker's incapacity.

In the *Western Suburbs Leagues Club* case, the NSW Court of Appeal was required to determine whether the definition in s 59(f) includes domestic assistance such as housekeeping, lawn mowing etc. In forming its opinion the Court considered conflicting judgments about this issue, concluding that the definition did not include domestic assistance. Pursuant to this decision, under the statutory scheme, an injured worker is not entitled to be compensated for the cost of domestic assistance. The Inquiry seems to be highlighting the fact that it would be anomalous to provide compensation for domestic assistance provided gratuitously (ie *G v K* type compensation) when the statutory scheme does not at present provide compensation for domestic assistance provided at cost that is needed because of the injury. In this regard, if *G v K* damages are to be made available under the statutory scheme, for gratuitous services, consideration would have to be made to amending s 59(f) to extent the provision of compensation for ‘medical or related treatment’ to cover paid domestic assistance.

The Victorian Transport Accident Commission (TAC) has developed comprehensive policies and guidelines regarding the benefits available under the transport accident compensation scheme.<sup>86</sup> These policies and guidelines regulate decision making by TAC staff to ensure accuracy and consistency in the delivery of TAC benefits. They are based on the *Transport Accident Act 1986* (Vic), case law and other relevant legislation and community standards. The guidelines and policies could be of assistance in developing similar operational policies for the provision of *G v K* types compensation in the NSW statutory workers’ compensation scheme, as envisaged by the Inquiry. However, there are no specific guidelines concerning benefits for the provision of gratuitous care as the scheme does not specifically provide for this type of compensation.

### Submissions

The *Law Society of NSW* considered *G v K* damages in the context of limiting the scope of the common law. It suggested that the scope of the common law damages could be narrowed to include economic loss to the age of 65 and non-economic loss as well as amounts for past and future medical expenses, thereby removing other amounts presently recoverable under the principles of *G v K*.<sup>87</sup> The Law Society considered that this proposal ‘...would reduce the differential between the cost of common law matters to the NSW WorkCover Scheme and do so without disadvantaging workers negligently injured by their employer.’<sup>88</sup>

In oral evidence presented to the inquiry, members of the *NSW Bar Association* commented that the current limits on claiming common law damages, including thresholds and the limitations on claiming the *G v K* head of damages, are sufficient limitations to access to common law. A member of the Association noted that ‘...in terms of the availability of

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<sup>86</sup> These policies and guidelines can be viewed on the TAC web site at: <http://www.tac.vic.gov.au/TAC\00000242.NSF/HeadingPagesDisplay/Benefits+and+Policies?OpenDocument> (accessed 10/10/01).

<sup>87</sup> Law Society of NSW, n 43, p 4.

<sup>88</sup> *ibid.*

common law entitlement, the effect of the current regime had already been to restrict access to common law to a very small percentage indeed of the workforce.<sup>89</sup> It was argued that this restriction, coupled with the fact that the amount of compensation available for injured workers compared to personal injuries at large is significantly reduced, means that it '...does not seem unreasonable to leave access to *Griffiths v Kerkemeyer* for care for what must only be very severely injured people.'<sup>90</sup> It was also noted that such damages are only awarded if they are needed and that '...judges are fairly robust in looking at whether it is

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The *NSW Workers' Compensation Self Insurers' Association* suggested that damages for domestic assistance should be consistent with the NSW Motor Accident Authority Guidelines and that a threshold should be introduced with no damages payable under this head unless the plaintiff is at least 50% of a most extreme case.<sup>92</sup>

### 3.8 Structured settlements

The Inquiry recommended that common law damages for economic loss should be able to be taken as a structured settlement and that structured settlements should also be available for statutory lump sums and possibly for commutations. The Inquiry recommended that consideration should be given to expanding the Court's discretion to order structured settlements. The Inquiry also recommended that the NSW Government should maintain pressure on the Commonwealth Government to reform tax laws to facilitate structured settlements and that some mechanism be devised to protect structured settlements in the event of insurer collapse post-settlement.<sup>93</sup>

#### What are structured settlements?<sup>94</sup>

Structured settlements are a way of paying compensation or damages for personal injury that involves a smaller lump sum payment plus periodic payments for life, rather than a single lump sum. The periodic payments are facilitated by the purchase of an annuity from a life insurance company for the plaintiff. Until recently there was a tax disadvantage to choosing a structured settlement because while lump sum payments are tax free, periodic payments were not. As discussed below, the Commonwealth Government has recently agreed to amend its tax laws to facilitate the use of structured settlements for personal

<sup>89</sup> NSW Bar Association oral submission to the Commission of Inquiry into Workers Compensation Common Law Matters, 30/7/01, T 5 L 21-25.

<sup>90</sup> *ibid*, T 18, L 50-52.

<sup>91</sup> *ibid*, T 18, L 58 and T 18, L1.

<sup>92</sup> See also NSW Workers Compensation Self Insurers Association, n 23, p 1.

<sup>93</sup> Sheahan Report, n 3, pp i, 36 and 45-46.

<sup>94</sup> Only a brief explanation of structured settlements is undertaken here. For further information see the Structured Settlement Group web site at: [www.structuredsettlements.com.au](http://www.structuredsettlements.com.au). See also the section on structured settlements in the NSW Parliamentary Library Research Service paper: *Medical Negligence and Professional Indemnity Insurance*, Briefing Paper No 2/01, by Rachel Callinan.

injury claims at common law, although to the *specific exclusion* of compensation or damages that arise in relation to an action against employers.

### **Current provision in the 1987 Act for structured settlements**

Currently, under the *1987 Act*, lump sum compensation/damages is available for:

- Common law damages for economic loss (Part 5, Division 3);
- Common law damages for non-economic loss (Part 5, Division 3);
- Statutory compensation for non-economic loss (Part 3, Division 4);
- Commuted statutory weekly compensation payments (Part 3, Division 2).<sup>95</sup>

While there are various forms of lump sums that can be received by an injured worker under the *1987 Act*, at present, structured settlements are only available in relation to common law damages for economic loss. S 151Q of the *1987 Act* provides that a court may determine that an award for common law damages for future economic loss is to be paid in accordance with such arrangements as the court determines or approves (ie structured settlements), if both parties agree.<sup>96</sup> When considering whether or not to make an order, the Court is required to have regard to several matters specified in s 151Q, including, the ability of the plaintiff to manage and invest any lump sum award of damages. The Supreme Court of NSW has noted that s 151Q confers a very wide judicial discretion as to how the periodic payments would be made.<sup>97</sup>

Despite the ability of the court to order a structured settlement it appears that this power is rarely exercised. In this regard, the Australian Plaintiff Lawyers Association (APLA) submitted to the Inquiry that its members were ‘...not aware of any such arrangements’<sup>98</sup> It is APLA’s submission that the reason for this is that plaintiffs do not have a preference for structured settlements, rather they prefer the whole lump sum that enables them to make a fresh start in life. However, others argued that it is the tax disadvantage that has prevented plaintiffs from pursuing this option.<sup>99</sup>

### **The recommendations**

*Continued availability of structured settlements and possible extension:* The Inquiry expressed its support for the continued availability of structured settlements for common law damages under s 151Q and suggested that structured settlements should also be

<sup>95</sup> For information about commutations and the recent amendments to commutations procedures, see Briefing Paper No 8/01, n 2, Section Part B, Section 2.1.

<sup>96</sup> Originally s 151Q required enforced structured settlements in instances where damages were awarded over a certain amount. The provision was changed to a voluntary one in September 1995: Australian Plaintiff Lawyers Association submission to the Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No, 23, p 15.

<sup>97</sup> *Hadley v Michell (t/a Castletop Pastoral Company)* (unrep, 17/12/1991, SC NSW, 16178 of 1990, Lee A J at 21.

<sup>98</sup> Australian Plaintiff Lawyers Association, n 96, p 15.

<sup>99</sup> See for example, Australian Retailer Association n 48, p 19-20 and NSW Treasury and NSW Department of State and Regional Development to Commission of Inquiry Into Workers Compensation Common Law Matters, Submission No 38, Appendix 1, p 22.

available for statutory lump sums, and possibly commutations as well.

*Consider expanding the Court's discretion to order structured settlements:* As stated above, the consent of both parties is necessary for the Court to order a structured settlement under s 151Q. In his advice to the Inquiry, E J O'Grady<sup>100</sup> expressed his opinion that the Court should be able to override either the worker or the insurer (or both of them) in deciding what is in the worker's best interests. In this context he stated that:

...it is fairly clear that the Court which has found, and possibly quantified, an obligation by the insurer to compensate the worker should be able to direct the insurer as to the form in which that obligation is to be met. Less clear is whether the Court should be able to become involved in a paternalistic attempt to make the best decision for the worker despite the workers' pleas to the contrary. The Court has some experience in similar matters through its involvement with infant settlements. In any event, there is no other body to make the decision, and I believe that it should be within the Court's discretion.<sup>101</sup>

The Inquiry recommended that the Government should give further consideration to O'Grady's suggestion regarding the possible extension of the judge's discretion in such matters. However, Justice Sheahan also stated his belief that structured settlements should be voluntary.

*Urging the Commonwealth Government to change its tax laws:* The Inquiry recognised the tax disadvantage to undertaking a structured settlement, and recommended that the NSW Government urge the Commonwealth Government to pursue changes to tax laws to facilitate the use of structured settlements.

Lobbying efforts to convince the Commonwealth Government to change its tax laws to facilitate structured settlements for personal injury claims at common law have been undertaken for several years by the Structured Settlement Group (SSG). The SSG is made up of several organisations including the Australian Medical Association, the Motor Accidents Authority of NSW and the Law Council of Australia. On 26 September 2001, the Federal Government announced that it will introduce legislative amendments designed to encourage the use of structured settlements for personal injury compensation. Senator Rod Kemp, Assistant Treasurer, described the changes in the following way:

The amendments will ensure that gravely injured people who are eligible to receive large tax-free lump sum compensation payments can negotiate to receive all or part of their compensation in the form of a tax free annuity or annuities. Currently, if an annuity were purchased out of a lump sum tax free payment, it would be taxable to the extent that the annuity payments include a component related to the investment earnings on the underlying sum. The amendments are targeted at seriously injured people who will be reliant on their compensation settlement for the rest of their lives. Consistent with this aim, tax-free annuities will be required to provide a minimum level of income support over the annuitant's life.<sup>102</sup>

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<sup>100</sup> The Inquiry sought the opinion of Mr E J O'Grady on several matters. Mr O'Grady is the *District Court Practice*, Law Book Company Limited, and a former Registrar of the District Court of NSW (as well as holding other senior public sector appointments): Sheahan Report, n 3, Appendix Q.

<sup>101</sup> Sheahan Report, n 3, Appendix Q, para 8.5.

<sup>102</sup> 'Tax changes to encourage the use of structured settlements for personal injury compensation', *Media Release*, Senator the Hon Rod Kemp, Assistant Treasurer, 26/9/01.

The SSG has welcomed the Government's decision.<sup>103</sup> However, the decision specifically excludes compensation that arises in relation to an action against employers.<sup>104</sup> Senator Kemp stated that the tax changes are targeted at seriously injured people who may not have otherwise have access to periodic compensation payments,<sup>105</sup> such as those available under the NSW workers' compensation scheme and worker's compensation schemes in other Australian jurisdictions. The SSG believes that the Government may have had concerns that the tax changes may distort the statutory workers' compensation schemes.<sup>106</sup> This concern is particularly relevant in the NSW context where the balance between common law claims and the statutory benefits scheme is central to the current reform debate.

While the SSG's lobbying efforts sought a tax change that would make structured settlements available in all personal injury common law matters, the Commonwealth Government's reluctance to include compensation arising in the employment context at this stage necessitated a compromise. The Commonwealth Government has indicated its preparedness to review the situation as part of a statutory review of the effectiveness of the tax changes to be undertaken no later than five years from its introduction.

*Protecting against insurer collapse:* The Inquiry's recommendation to protect structured settlements in the event of insurer collapse appears to reflect widespread concern about the stability of the insurance industry in the wake of the recent collapse of HIH.

## Submissions

Several submissions raised the issue of structured settlements, and there were a range of opinions expressed.

Several submissions noted the tax disadvantages to structured settlements and the discouraging effect that this may have on a decision to pursue a structured settlement.<sup>107</sup>

*WorkCover* presented information to the effect that '...the object of full restitution is not met via the payment of a once and for all lump sum...'<sup>108</sup> *WorkCover* also stated that it did not recommend any changes that would *require* structured settlements over lump sums, given the current tax laws.<sup>109</sup>

The *Australian Retailers Association* expressed its support for the use of structured settlements as a more appropriate method of compensating injured workers who are unable to return to the workforce, than a lump sum. The Association argued that structured

<sup>103</sup> 'Accident victims finally get choice in pay-out management', *Media Release*, Structured Settlement Group, 26/9/01.

<sup>104</sup> Senator the Hon Rod Kemp, n 102, Attachment.

<sup>105</sup> *ibid.*

<sup>106</sup> Personal communication with the Manager of the SSG, 15/10/01.

<sup>107</sup> See for example, Australian Retailer Association n 48, p 19-20, NSW Treasury an 99, Appendix 1, p 22, *WorkCover*, n 18, p 6.

<sup>108</sup> *WorkCover*, n 18, p 20.

<sup>109</sup> *WorkCover*, n 18, p 11.

settlements are more consistent with the main scheme and that it safeguards the worker's compensation pay out by investing it wisely to sustain them for an extended period.<sup>110</sup>

The *Queensland Law Society* drew the Inquiry's attention to a disadvantage of structured settlements in that: '[t]he weight of informed medical and psychiatric opinion is that compensation by pension is counter-productive to the rehabilitation of the seriously injured'.<sup>111</sup> It also warned that '[p]rivate insurers are not interested in servicing a lifetime periodic payment arrangement and would transfer that tail liability to a capital market investor, the soundness of which is unlikely to be guaranteed by Government'.<sup>112</sup>

*NSW Treasury* in its submission noted that when s 151Q was first introduced it effectively compelled a structured settlement if damages for economic loss exceeded a certain limit.<sup>113</sup> The submission noted as an option the reintroduction of this element of the provision as a means to '...protect injured workers from dissipation of lump sums whilst simultaneously reducing the seductive allure of the common law option.'<sup>114</sup>

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<sup>110</sup> Australian Retailer Association, n 48, p 3 and 19-20.

<sup>111</sup> Queensland Law Society, n 40, p 4.

<sup>112</sup> *ibid.*

<sup>113</sup> NSW Treasury, n 99, Appendix 1: A Paper Prepared by the Manager of the Treasury Managed Fund, p 22. See also Australian Plaintiff Lawyers Association, n 96, p 15.

<sup>114</sup> NSW Treasury, n 99, p 19 and Appendix 1: A Paper Prepared by the Manager of the Treasury Managed Fund, p 22. See also Australian Plaintiff Lawyers Association, n 96, p 15.



#### 4. RECOMMENDATIONS ADDRESSING TERMS OF REFERENCE TWO AND THREE

Terms of Reference Two and Three required the Inquiry to examine more efficient ways to process common law claims and to identify ways to reduce unnecessary costs and inefficiencies in the processing of common law claims.

The Issues Paper posed several issues for consideration in relation to: the current process for dealing with common law claims; costs; arbitration and other alternative dispute resolution mechanisms; the effect of common law claims on an injured workers' health; and the relationship of common law to the statutory scheme.<sup>115</sup> The Inquiry also sought the advice of Mr E J O'Grady<sup>116</sup> on several related matters. Many of the submissions to the Inquiry did not touch on the issue of processing common law claims. The Inquiry made several recommendations as discussed below.

##### 4.1 Forum for dealing with common law claims

The Inquiry recommended that common law actions for employment injuries be dealt with normally by the District Court, but without juries.<sup>117</sup>

##### The current situation

Currently, claims of negligence brought against an employer by an employee at common law are heard in the Local Court, District Court or Supreme Court, depending on the amount of compensation claimed. Most common law claims are heard in the District Court which has a jurisdictional limit of \$750,000.

##### Recommendations

*Common law cases to be heard by the District Court:* The Inquiry considered that '...the common law work generated by the acceptance of this Inquiry's substantive recommendations does not require a specialist court. Such work would sit comfortably with the current civil work of the District Court.'<sup>118</sup> This view concurs with the opinion of O'Grady, who discounted the Local Court and the Compensation Court as appropriate forums.<sup>119</sup>

*Juries:* The Inquiry noted that while juries are said to reflect community values on questions of liability and damages, it saw no convincing reason why jury's should be retained for employment injuries cases and also noted the using juries increases costs and

<sup>115</sup> Issues Paper, n 31, p 16-17.

<sup>116</sup> The Inquiry sought the opinion of O'Grady on several matters. O'Grady is the author of *District Court Practice*, Law Book Company Limited, and a former Registrar of the District Court of NSW (as well as holding other senior public sector appointments): Sheahan Report, Appendix Q.

<sup>117</sup> Sheahan Report, n 3, pp i and 42-43.

<sup>118</sup> Sheahan Report, n 3, p 43.

<sup>119</sup> Sheahan Report, n 3, Appendix Q, para 1.1.

delays.<sup>120</sup>

The Inquiry also noted that juries have been abolished in relation to motor accident cases and recommended that jury trials be abolished for employment injury cases on the same terms as s 79 of the *District Court Act 1973* currently applying to motor accident cases. S 79 provides that motor accident cases may be tried by jury in the District Court, except cases involving 'an action for damages in respect of the death of or bodily injury to any person, where the action is based upon an act, neglect or default of the defendant for which, if proved, the defendant would, as the employer of that person and not otherwise, incur liability to the plaintiff'.<sup>121</sup>

O'Grady made the following comments about juries:

The potential to involve juries in personal injuries litigation is generally seen to be procedurally undesirable. The majority of jury demands filed in such matters are filed by defendants, and it is often said that they are filed for unworthy purposes. Despite emotive claims about rights to judgement by one's peers, a plaintiff in an action for damages for personal injuries is better off without a jury because:

- Costs are reduced, certainly to the extent of the substantial fees charges by the courts, and possibly be a reduction in the length of the hearing;
- There is at least a potential for getting the matter to hearing more quickly; and
- The decisions will come from a Judge experiences in hearing such matters and able to reach a finding consistent with current law and practice, and so less vulnerable to the possibility of appeal or new trial.<sup>122</sup>

## Submissions

O'Grady noted that '[t]he submissions received by the Inquiry generally suggest that common law claims for work injuries damages should remain in the Supreme Court and District Court.'<sup>123</sup>

However, the *Honourable Justice Campbell, Chief Judge of the Compensation Court of NSW* argued in his submission that common law claims should be determined, whether by first instance or by way of appeal from some alternative dispute resolution process, by the Compensation Court. Justice Campbell notes that the '...changes to be effected by the Worker's Compensation legislation Amendment Act 2001 will significantly reduce the workload of the Court and it can safely be assumed that the judicial strength of the Court will be sufficient to deal with all common law matters...'<sup>124</sup>

The *Australian Plaintiff Lawyers Association* gave evidence that juries are not very common, but that when they were used the costs and time it took to complete a case

<sup>120</sup> Sheahan Report, n 3, p 43.

<sup>121</sup> *District Court Act 1973*, s 79.

<sup>122</sup> Sheahan Report, n 3, Appendix Q, para 2.1.

<sup>123</sup> *ibid*, para 1.1. See for example, Labor Council, n 42, p 4.

<sup>124</sup> *Honourable Justice Campbell, Chief Judge of the Compensation Court of NSW, submission to the Commission of Inquiry into Workers Compensation Common Law Matters*, Submission No 4, p 2.

increased.<sup>125</sup>

The *Labor Council* submitted that WorkCover's procedures in relation to assessment and handling of common law claims should be investigated.<sup>126</sup>

## 4.2 Pre-litigation process

The Inquiry recommended a pre-litigation process for common law claims. It also recommended that compliance with a pre-litigation process, to be managed by the proposed Workers' Compensation Commission, and aimed at early and cost-effective settlement of the claim, is to be a condition precedent to commencing proceedings for common law damages.<sup>127</sup>

### The pre-litigation process recommended by the Inquiry

The Inquiry specifically sought the advice of O'Grady regarding the appropriate pre-litigation process. The Report states that the Inquiry adopted the thrust and most of the detail of the relevant part of O'Grady's advice in recommending the pre-litigation procedures set out below.<sup>128</sup>

1. Potential common law claimants should seek an admission from the employer/insurer that the claimant satisfies the WPI threshold.
2. If liability is not admitted, the claimant should apply to the Workers' Compensation Commission for an assessment of his or her WPI.
3. The claimant should then serve, without filing in court, his or her District Court statement of claim upon the employer/insurer. The statement of claim must be accompanied by a statement containing:
  - The evidence to be relied upon on the question of liability (if not already admitted);
  - Full particulars of the claims for economic loss;
  - Copies of the medical reports to be relied upon in support of that claims; and
  - A copy of the Workers' Compensation Commission's WPI certificate (if obtained).
4. Within 28 days after service of the statement of claim, the employer/insurer, if liability has not been admitted, should either do so, or serve on the plaintiff full particulars of the defence to be raised and the evidence to be relied upon.
5. If no response is made to the service of the statement of claim, within 42 days of that service, the plaintiff may file the statement of claim and apply, and obtain *instanter*, ie, summary judgment on the question of liability at 'common law'.

<sup>125</sup> Australian Plaintiff Lawyers Association, Oral submission, n 96, T 42.

<sup>126</sup> Labor Council, n 42, p 4.

<sup>127</sup> Sheahan Report, n 3, p i and p 44.

<sup>128</sup> ie Sheahan Report, n 3, Appendix Q, Part 3. Note that O'Grady's advice also covered case management procedures, evidentiary issues, early settlement and offers of compromise.

6. If the proposed full and mutual disclosure takes place, the claimant should apply to the Workers' Compensation Commission for the appointment of a mediator to be chosen from a panel appointed by the President, and the parties should be entitled to be legally represented at the mediation
7. The defendant or its insurer should be entitled to refuse to mediate. The role of legal representatives in mediation is more an adviser than advocate, but workers need and deserve high quality advice and assistance in considering settlement proposals, especially in a mediation.
8. If the claim goes to mediation but is not settled, the last offers made by the parties at the mediation, should be deemed to be offers of compromise in the proceedings.
9. Proceedings will be properly commenced by filing in the District Court those documents previously served, plus a certificate of refused or unsuccessful mediation and a certificate of service, within time, of the plaintiff's documents.
10. Once court proceedings have commenced, the parties should be free to pursue either a further mediation, or some other non-curial dispute resolution technique, such as a neutral evaluation.

#### 4.3 Procedural reforms and reforms to legal costs

The Inquiry recommended a range of procedural reforms and new rules regarding legal costs.<sup>129</sup>

##### Procedural reforms

The Inquiry made recommendations about *admission of liability or guilt*:

- A specific statutory provision to make clear that any admission of liability in common law proceedings cannot be relied upon in any prosecution of the employer under occupational health and safety legislation but that any admission of guilt in such prosecution proceedings, in so far as that admission concerns negligence or breach of statutory duty, may be relied upon by the plaintiff in any common law proceedings against the entity making the admission;
- Any statutory provisions, regulations or court rules which currently preclude the plaintiff in a common law employment injury case having a full opportunity to prepare his or her case on liability, without the benefit of subpoena and like procedures, should be repealed, or amended as appropriate; and
- Disputes about such matters, prior to the filing of the plaintiff statement of claims in the District Court, should be resolved by the Workers' Compensation Commission.<sup>130</sup>

*Medico-Legal fees*: O'Grady asks whether it would be possible to build into the fees for medical reports a disincentive to delay. He envisages that a smaller fee for medical reports

<sup>129</sup> Sheahan Report, n 3, pp i and 45.

<sup>130</sup> *ibid.*

could be set which could be increased if the report is furnished within a set time frame.<sup>131</sup> The Inquiry recommended that this suggestion be pursued.<sup>132</sup>

### Legal costs

The Inquiry generally accepted the advice of O'Grady regarding costs, except regarding costs when liability is not admitted. O'Grady's recommendations regarding costs are as follows:

- (a) The *District Court Act 1973* should be amended to allow party-and-party costs in work injury damages cases (other than the costs of ancillary proceedings) only as required by Court Rules relating to offers of compromise.
- (b) The costs Regulation should:
  - (i) Provide an events-based scale, concentrating on early preparation and settlement and providing only the minimum fair remuneration for work done in an actual hearing (or arbitration);
    - Provide, as an exception to the events-based approach, for a substantial fee to Counsel for an advice on settlement if no Counsel is briefed on hearing in the proceedings
  - (ii) Apply to solicitor-and-client costs if a conditional costs agreement provides for a premium on successful outcome of more than 10%;
  - (iii) Not allow separate charges for typical 'overhead' costs such as photocopying, telephone etc.
- (c) The *1998 Act* should ensure that the Commission can tax or assess costs in proceedings for work injury damages, and assessment under the *Legal Profession Act 1987* should be excluded.<sup>133</sup>

### *Costs when liability is not admitted*

The Inquiry recommended that '...if liability is not admitted by the defendant prior to the final determination of the common law proceedings, and the plaintiff succeeded at the arbitration or other final hearing, he/she should be entitled to recover all of his/her costs of that issue on an indemnity basis, provided that the plaintiff is found to have sustained a permanent loss of earning capacity of not less than one third.'<sup>134</sup>

### Submissions

The *Labor Council* submitted that legal costs should be returned to the system of scales of costs and that these should be fixed by the Court and independent of WorkCover and the Government.<sup>135</sup>

<sup>131</sup> Sheahan Report, n 3, Appendix Q, par 5.4.

<sup>132</sup> Sheahan Report, n 3, p i and 45.

<sup>133</sup> Sheahan Report, n 3, Appendix Q, recommendation 9.

<sup>134</sup> Sheahan Report, n 3, p 45.

<sup>135</sup> Labor Council, n 42, p 45.

## 5. RESPONSE TO THE SHEAHAN INQUIRY RECOMMENDATIONS

**The NSW Government:** In a media release announcing the completion of the report of the Sheahan Inquiry, on 11 September 2001, the Hon John Della Bosca MLC, Minister for Industrial Relations described the recommendations as 'sensible and original', as well as 'innovative and thoughtful.'<sup>136</sup> The Minister announced in the Legislative Council on the same day that he expected '...further reforms to be introduced by the Government in the coming weeks after the Government and major stakeholders have assessed the Sheahan report'.<sup>137</sup> A week later, the Minister stated that '...the Government and WorkCover will continue to analyse the report and discuss the recommendations with the various stakeholders. That will include costings relating to the various provisions that Justice Sheahan has recommended.'<sup>138</sup>

**Labor Council:** At the time of writing, the Labor Council had provided the Government with a qualified response to the Sheahan Inquiry recommendations. The response noted that while some of the recommendations appear, on the face of it, to be reasonable, the Labor Council could draw no firm conclusions on the effect of the recommendations in the absence of further information. Nevertheless, the Labor Council provided some comments on the various recommendations made by the Inquiry. Of particular note is the strong rejection of the 20% threshold proposed by the Inquiry.<sup>139</sup> A copy of the Labor Council's response is contained in Appendix I.

**The Australian Retailers Association:** It has been reported that the Association has urged the Government to consider implementing in full the recommendations of the Sheahan Inquiry.<sup>140</sup> Bill Healey of the Association is reported as saying that employer groups are still working out the implications of the report but believe it should be considered as a whole:

Justice Sheahan has made it quite clear that the recommendations are a package and that they all hang together and to unbundle the package would lead to consequences that he couldn't foresee. We would suggest that if we are going to go forward with this recommendation it should be done in accordance with what Justice Sheahan has recommended.<sup>141</sup>

**Employers First:** Garry Brack, head of Employers First, is reported to have commented that the exact outcome of the Sheahan Inquiry recommendations was uncertain, '...but the costs of WorkCover could be increased under the changes that brought some compensation claims back into the plan by excluding them from court action...Other concerns included the continuation of a three-year time limit for claims, and increases to the maximum benefit...'<sup>142</sup>

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<sup>136</sup> 'Judicial Inquiry into Workers Compensation', *Media Release*, the Hon John Della Bosca, MLC, Minister for Industrial Relations, 11/9/01.

<sup>137</sup> NSWPD, the Hon John Della Bosca, MLC, Minister for Industrial Relations, 11/9/01, p 16.

<sup>138</sup> NSWPD, the Hon John Della Bosca, MLC, Minister for industrial Relations, 18/9/01, p 17.

<sup>139</sup> See also, 'Comp Showdown set', *The Newcastle Herald*, 12/9/01, p 19.

<sup>140</sup> The Australian Retailers Association made a submission to the Sheahan Inquiry on behalf of the Combined Employers Group on Workers Compensation.

<sup>141</sup> 'Retailers urge NSW Government to accept WorkCover Report', *ABC Online*, 11/9/01: [www.abc.net.au/news/state/nsw/archive/metnsw-11sep2001-17.htm](http://www.abc.net.au/news/state/nsw/archive/metnsw-11sep2001-17.htm) (copy with author).

<sup>142</sup> 'New barrier to workers compensation', *The Sydney Morning Herald*, 11/9/01, p 3.

## **6. CONCLUSION**

The recommendations of the Sheahan Inquiry posed a solution to the issue of access to common law that had not been foreseen by many. As Section 5 of this paper indicates, only a few interested parties have to date finalised their reactions to the Report and made their views publicly known. While some recommendations may not have come as a surprise, others would have and it will no doubt take time for the likely effect of the package as a whole to be assessed and for final views to be formulated.

The Government has stated its intention to legislate on common law workers' compensation matters in this session of Parliament and that it is in the process of consulting with stakeholders. The completion of the guidelines for the assessment of permanent impairment seems to be the next awaited step. In this regard, the Labor Council has stressed that it is difficult to reach conclusions about the recommendations until the guidelines for permanent impairment have been finalised and examined.

**Appendix I**

Copy of the Labor Council of New South Wales' initial response to the Sheahan Inquiry recommendations - Correspondence to the Hon John Della Bosca, Minister for Industrial Relations from the Secretary of the Labor Council, 25/9/01



24<sup>th</sup> September 2001

The Honourable John Della Bosca MP  
Minister for Industrial Relations  
Special Minister of State  
Level 30, Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

‘WITHOUT PREJUDICE’

Dear Minister

**SHEAHAN INQUIRY INTO COMMON LAW – RECOMMENDATIONS**

After having perused the report of His Honour Mr Justice Sheahan the Unions wish to meet with representative of Government as soon as possible.

Whilst some of the recommendations contained within His Honour’s report appear, on the face of it, to be reasonable, it is not possible for Labor Council to be certain of the effect of His Honour’s report until such time as we are provided with a “complete picture”.

Accordingly, could you provide, for circulation to our affiliates, the Guidelines for Impairment Assessment which have been developed in regard to all injury types, and a model of the way in which the Workers Compensation Commission will operate. Until this material is supplied it is difficult to make an informed decision.

For your assistance, we have outlined our thoughts in regard to each recommendation below. It should be noted however, that the thought outlined herein are made in the absence of all appropriate information.

**Recommendation (A) – “that common law actions available to workers against employers be limited to recovering only economic loss damages, relatively defined in s151I of the 1987 Act, as:**

- **Past economic loss due to loss of earnings; and**
- **Future economic loss due to deprivation or impairment or earning capacity.”**

In order for this recommendation to be acceptable to the Unions there must be a commitment by Government, to a finite time frame for indexation and increase of benefits paid under Sections 66 and 67. In addition, this recommendation is not acceptable to Unions if the impairment threshold is set at 20% whole person impairment and economic loss is capped at

age 65. The issues of impairment threshold and economic loss being capped at age 65 are discussed further in this document.

**Recommendation (B) – “that economic loss damages remained ‘capped’, that they be calculated only to age 65, and that they may be taken as a ‘structured settlement’.”**

This recommendation will only be acceptable to Unions if the ‘cap’ on economic loss is removed. Retirement age is being “pushed out” and if economic loss were calculated only until age 65 this would clearly result in a financial loss for a number of injured workers.

The issue of “structured settlements” is one that clearly rests with the State Government to resolve with the Federal Government in terms of tax implications. If Government can guarantee a change in the way “structured settlements” are to be taxed, the introduction of structured settlements may be acceptable to Unions.

**Recommendation (C) – “that only workers assessed to have a whole person impairment of 20% or more should be entitled to make a claim for economic loss damages.”**

This recommendation is totally unacceptable to the Unions.

A 20% whole person impairment threshold is exceedingly high and would effectively restrict all but the most horrendously injured workers having access to common law. The Unions will oppose, in the strongest possible way, an impairment threshold of 20% whole person impairment.

A single threshold for access to common law is also unacceptable to Unions. There must be a second gateway for access to common law to properly allow an injured worker access. It is Labor Council’s intention to pursue a second narrative gateway or provision for judicial discretion.

**Recommendation (D) – “that the requirement of “election” be repealed, but that the recovery of economic loss damages preclude the receipt of any further statutory benefits.”**

We understand future medicals would still be met under the statutory scheme and provided our understanding in this regard is correct and the age to which economic loss is calculated is increased beyond 65, this recommendation is acceptable.

Could you please confirm your understanding of ongoing payment of future medicals under the statutory scheme correlates with Labor Council’s view.

**Recommendation (E) – “that, as soon as the scheme’s financial position permits:**

- (i) Indexation of s66 benefits be reinstated; and**
- (ii) The maximum amount recoverable under the combined operation of ss66 and 67 be increased gradually to \$250,000.00 and indexed thereafter.”**

This recommendation is acceptable only if it is introduced, as discussed above, within a finite period of time.

Labor Council requests to provide detail as to how payments under the statutory scheme will operate within the context of the Workers Compensation Commission and the recommendation (E).

**Recommendation (F) – “that all claims in respect of “non-economic loss” be dealt with pursuant so ss66 and 67 of the 1987 Act”.**

This recommendation is acceptable only if increases to Section 66 and 67 benefits are introduced within a finite period of time.

**Recommendation (G) – “That a limited right to claim benefits in respect of the cost of “gratuitous domestic care” (Griffiths v Kerkemeyer) be provided for in only the statutory scheme, but on very strict conditions.**

On the face of it, this recommendation appears acceptable, again subject to the increase in Section 66 and 67 benefits. However, we are presently obtaining additional information in relation to the recommendation. After that information is available we will be in a better position to discuss the impact of this recommendation.

The Unions will oppose this recommendation if there are to be onerous conditions placed upon an injured worker in order to obtain benefits relating to gratuitous domestic care. Could you please provide us with detail as to how this provision will operate.

**Recommendation (H) – “that the Government maintain pressure on the Commonwealth Government to reform the tax laws to facilitate “structured settlements”.**

This recommendation has been referred to previously in this correspondence, and if the option to take a ‘structured settlement’ is the choice of the injured worker this recommendation would generally be supported by Unions subject to previous comments.

**Recommendation (I) – “that common law actions for employment injuries be dealt with normally by the District Court, but without juries.”**

The Unions do not have any objection to this recommendation.

**Recommendation (J) – “that compliance with a pre-litigation process, to be managed by the proposed Workers Compensation Commission, and aimed a early and cost-effective settlement of the claim, is to be a condition precedent to commencing proceedings for common law damages.”**

This recommendation appears to relate entirely to process – as the Commission has not yet commenced operation it is difficult, if not impossible, for the Labor Council to form a view on this recommendation. Again, we ask that detail as to how the Commission will operate be provided as a matter of urgency.

**Recommendation (K) – “a range of procedural reforms and new rules regarding legal costs. A plaintiff must succeed in establishing a one-third permanent loss of earning capacity to recover costs of his/her common law claim.**

This recommendation is unacceptable. It will effectively be another “hurdle” for an injured worker to pursue common law. Unions have always said they would not accept more than one “hurdle. It will also create conflict between solicitors and clients, possible resulting in many legal practitioners declining to practice in this area of law.

The report of His Honour was silent on the issue of psychological and psychiatric injuries. This causes the Unions a great deal of concern.

It is understood that the group developing guidelines on such injuries has reached an ‘impasse’ and in discussions with Ms Kate McKenzie, General Manager, WorkCover Authority, it has been suggested that a great deal of research, including conducting validation studies, should be put into developing National guides for the assessment of Psychological and Psychiatric injuries.

The Unions support this view and urge the Government to maintain the existing situation in relation to psychological and psychiatric injuries until such time as a properly tested and validated tools for the assessment of such injuries have been developed after which time compensation for psychological and psychiatric injuries should be available under the statutory scheme.

This research should be conducted and finalised as soon as possible. Unions will not accept an inordinate time delay.

An issue, which is of concern to all unions, is privatisation. The results of privatisation of the Motor Accidents Scheme speak for themselves. Labor Council and Unions are adamant that the Government should not privatise the Workers Compensation Scheme of this state and amend the Act to remove the provision allowing for such action.

Could you please arrange a meeting to further discuss this matter as soon as possible.

Yours sincerely

JOHN ROBERTSON  
SECRETARY