

# NSW Law Reform Commission

## REPORT 43 OUTLINE (1984) - ACCIDENT COMPENSATION: TRANSPORT ACCIDENTS SCHEME FOR NEW SOUTH WALES

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## The Division and Participants

### New South Wales Law Reform Commission

#### THE DIVISION

On 5 November 1982, pursuant to section 12A(1) of the Law Reform Commission Act, 1967, the Chairman constituted a Division of the Commission for the purposes of the reference. The Division comprised the following members of the Commission:

Professor Ronald Sackville (Chairman)

Mr J R T Wood, QC

The Hon Justice Andrew Rogers

Ms Philippa Smith

Mr H D Sperling, QC

Mr Wood left the Commission on 31 January 1984 to take up an appointment to the Supreme Court of New South Wales. Upon the resignation of Mr Wood and following the appointments of Miss D O'Connor in November 1983 and Professor C Phegan in February 1984 as Commissioners, the Chairman reconstituted the Division on 7 February 1984. The Division now comprises the following members:

Professor Ronald Sackville (Chairman)

Miss Deirdre O'Connor (Commissioner)

Professor Colin Phegan (Commissioner)

Ms Marcia Neave (part-time Commissioner)

The Hon Justice Andrew Rogers (part-time Commissioner)

Ms Philippa Smith (part-time Commissioner)

Mr H D Sperling, QC (part-time Commissioner)

Dr R Maddem then Deputy Secretary of the Health Commission of New South Wales, was a Principal Consultant to the Commission in connection with the reference until October 1983, when he accepted a senior position in the Northern Territory.

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## REPORT 43 OUTLINE (1984) - ACCIDENT COMPENSATION: TRANSPORT ACCIDENTS SCHEME FOR NEW SOUTH WALES

### Preface

This is an Outline of the Commission's Final Report on a *Transport Accidents Scheme for New South Wales*, presented to the Attorney General of New South Wales, the Hon D P Landa, LLB, MP, on 22 October 1984. The Report was prepared in the course of the Commission's reference on Accident Compensation the terms of which are reproduced in the Appendix to this Outline.

The Final Report follows publication of an Issues Paper, entitled *Accident Compensation*, published in June 1982 and a Working Paper, entitled *A Transport Accidents Scheme for New South Wales*, published in May 1983. The Issues Paper provided background information and raised a number of questions concerning accident compensation generally. The Working Paper set out tentative proposals for a no-fault scheme providing compensation for death and personal injury arising out of transport accidents. The Final Report, while recommending such a scheme, differs from the proposals in the Working Paper in a number of important respects.

This Outline summarises the main arguments and recommendations in the Final Report and is preceded by a brief statement of the major features of the Scheme. However, the Report is the authoritative statement of the Commission's views and, in the event of inconsistency, the Report prevails over the Outline. Printed copies of the Final Report will be available from the New South Wales Law Reform Commission from early 1985.

Inquiries and comments should be directed to:

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## The Transport Accidents Scheme at a Glance

### NATURE OF SCHEME

provides compensation for death or bodily injury to all transport accident victims without the need to prove somebody else was at fault;

replaces other forms of compensation including the common law negligence action, except that workers' compensation and the workers' common law rights (if any) against the employer are not affected;

all monetary benefits automatically indexed to movements in Average Weekly Earnings (AWE).

### BENEFITS

#### Periodic Compensation for Loss of Earning Capacity

calculated by reference to the difference between pre-accident and post-accident earning capacity;

generally paid at 80 per cent of the loss (gross earnings);

maximum loss compensated is 150 per cent of AWE (\$630 at June 1984), so that maximum compensation actually payable is \$504 (80 per cent of \$630);

private top-up insurance is available;

as an incentive to resumption of employment, the percentage of compensation is increased (up to 100 per cent) if accident victim undertakes part-time employment;

payable after five working days;

special provision for self-employed;

victims suffering long-term incapacity (more than 104 weeks) deemed to have notional or minimum earning capacity of 50 per cent of AWE (\$210 if over 21), so that minimum compensation for total incapacity is \$168 (80 per cent of \$210)

notional earning capacity applies to non-earners suffering long-term incapacity regardless of intention to return to workforce;

both carriers and non-earners suffering long-term incapacity entitled to compensation for loss of "potential for advancement" (that is, likely increases in earning capacity had the accident not occurred);

assessment of permanent incapacity can be made to relieve accident victims of the need to undergo regular reassessment.

## **Rehabilitation**

highest priority after accident prevention;

right to prompt and effective rehabilitation;

variety of measures to promote medical, functional, vocational and social rehabilitation, including incentives to employers to retain or engage disabled people;

provision of aids and appliances such as wheelchairs and prosthetics.

## **Support Services**

replacement household services for the accident victim and his or her family;

emergency family supports;

attendant care required by disabled people;

home modifications;

mobility allowance and vehicle modifications;

support services are provided in *addition* to other forms of compensation.

## **Compensation for Permanent Disability**

lump sum compensation for permanent disability to maximum of 208 times AWE (\$87,360 at June 1984);

amount payable depends on degree of disability and age;

degree of disability based on "whole person" approach adapted from American Medical Association Guides to the Evaluation of permanent Impairment;

compensation for permanent disability is *in addition* to other forms of compensation.

## **Compensation on Death**

lump sum equivalent of 130 times AWE (\$54,600 at June 1984) to dependent family members;

additional periodic compensation to an earner's surviving spouse who has child care responsibilities or who is unable to resume or undertake employment;

additional periodic compensation to child of 8 per cent of AWE (\$33.60 at June 1984);

replacement household services;

reasonable funeral expenses.

### **Medical, Hospital and Related Expenses**

provision of medical and hospital care;

integration with existing health care system, in particular Medicare;

provision of ancillary services (physiotherapy, occupational therapy, dental and optical services and home nursing care) as required;

nursing home and long-term institutional care.

### **EXCLUSIONS**

no benefits for self-inflicted injuries or for injuries sustained while committing a serious crime of violence or during periods of imprisonment

### **ADMINISTRATION AND DECISION-MAKING**

#### **The Corporation**

independent statutory authority (Accident Compensation Corporation);

the Corporation to assist claimants in receiving other statutory entitlements;

emphasis on speed and high-quality decision-making;

scrutiny of the Corporation by an independent Policy Review Committee and by Parliament.

#### **Appeals**

full system of appeals from decisions of the Corporation;

the system emphasises accessibility, informality, expedition and minimisation of cost;

a two-tiered system, with the first appeal to a three-member Panel and the second to a Tribunal headed by a judge;

both the Panel and the Tribunal determine claims on the merits and can substitute their views on policy for those of the Corporation;

representation permitted and provision for costs of successful appellants.

## FUNDING

funds for the Scheme contributed by motor-vehicle owners (in the same way as they now pay third party insurance premiums) and public transport authorities, together with a levy on drivers licences;

Scheme to operate on a “pay-as-you-go” basis (contributions each year meet actual expenditure in that year);

estimated cost of the Scheme less than either the current common law system or a “dual” scheme (that is, limited no-fault benefits as a supplement to the common law negligence action).

## TRANSITIONAL

Scheme to apply to all transport accidents after date of commencement;

residue of common law claims, arising out of accidents before that date, dealt with in the usual way.

## **Outline**

### **1. WHAT ARE THE PRESENT ARRANGEMENTS FOR COMPENSATING TRANSPORT ACCIDENT VICTIMS?**

At present, the two main sources of compensation for people injured in transport accidents are the common law negligence action and, to a lesser extent, the workers' compensation system. A person not eligible for compensation from these sources may be entitled to Commonwealth social security payments. Other sources of assistance include occupational sick pay, pension entitlements and private insurance arrangements.

#### **The Common Law Negligence Action**

A person injured in a transport accident who can prove that the injuries were caused by the negligence (or fault) of another person, may recover compensation in what is known as a common law negligence action. This compensation takes the form of a lump sum award of "damages", assessed on a once-and-for-all basis. The lump sum award covers an estimate of both past and future losses and cannot be varied, even if these predictions turn out to be incorrect.

In New South Wales, a system of compulsory third party motor vehicle insurance is in force. Under this system, motor vehicle owners are required to insure against the legal liability of the driver of the vehicle to pay compensation to any other person (the third party) injured through the use of the vehicle. It follows that an injured person, provided that he or she can establish fault, will be paid compensation by the sole third party insurer (the Government Insurance Office-the GIO) and not by the person at fault. In practice, legal proceedings are now instituted, not against the person allegedly at fault, but directly against the GIO *who is now the defendant in all such cases*.

Public transport authorities are self-insurers. This means that where a person is injured and can show an authority was at fault the authority must pay compensation from its own resources.

#### **Workers' Compensation**

A person injured in a transport accident at work (a "course of employment" accident), or while travelling to or from work (a "journey accident"), is normally entitled to workers' compensation. Workers' compensation is a no-fault scheme, in the sense that compensation is payable by the employer (or the insurer) regardless of whether any other person was at fault. Workers' compensation benefits include periodic compensation for loss of earnings and lump sum payments for certain kinds of physical impairment, such as loss of limbs.

An injured worker who can prove that the negligence of another person, such as the employer or another road user, caused the accident may also claim compensation from that person in a common law negligence action. If the worker succeeds, workers' compensation payments are deducted from the common law damages.

Employers in New South Wales are required to ensure against their liability to pay workers' compensation or common law damages to employees. However, some employers are licensed to act as self-insurers.

## **Social Security**

The social security "safety net" supports transport accident victims who have no other source of compensation or whose compensation from other sources has proved inadequate. To be eligible an accident victim must satisfy income and other eligibility criteria. But these criteria may be met in some cases, even if compensation has been received from another source. This may lead to double compensation for the same loss, for example where a lump sum, which was intended to provide full compensation has been dissipated.

Social security pensions and benefits of special relevance to transport accident victims include the invalid pension and sickness and unemployment benefits. Pensions and benefits are generally fixed at subsistence level and paid on a periodic basis. The system is funded from general taxation revenue.

## **2. WHAT IS WRONG WITH THE COMMON LAW NEGLIGENCE ACTION?**

Except for social security, the common law negligence action is currently the principal source of compensation for victims of transport accidents. Even those who do not support a comprehensive no-fault scheme acknowledge that the common law action has serious deficiencies. It is important to see where it has failed.

### **Uncompensated Transport Accident Victims**

A number of studies confirm that approximately one-third of people injured (or families of people killed) in motor vehicle accidents are unable to obtain any compensation through a common law negligence action, because they cannot prove fault. This is usually the case, for example, with single vehicle accidents.

### **Failure to Provide Full Compensation**

Despite claims made on its behalf, the common law negligence action does not provide full compensation to most accident victims. Apart from its failure to do so where fault cannot be proved, damages may be reduced because of the victim's "contributory negligence" (that is, where the victim is regarded as partly at fault). Over 90 per cent of motor accident victims settle their case out of court and often accept substantially less than "full compensation"

as a discount for settlement. The Commission's case studies show that many people are forced to settle because of the financial hardship and other stress they endure while waiting for the claim to be decided.

### **Practical Problems in Proving Fault**

The fault principle requires judgments to be made about events which involved split second observations and decisions. The question often has to be decided years after the accident on the basis of imperfect and uncertain recollections of witnesses, or on an assessment of incomplete or unreliable information.

### **The irrelevance of the Fault Principle**

Not only are the results arbitrary but the person "at fault" does not face the prospect of having to pay compensation personally. Even the pretence of that person's involvement has been removed, now that proceedings are taken directly against the GIO. Thus the common law negligence action can hardly be expected to deter careless or dangerous driving.

### **Once-and-For-All Assessment**

Since common law damages are awarded in a once-and-for-all lump sum, it is necessary to make predictions, in serious cases, on such matters as the injured person's likely medical condition, life expectancy, residual earning capacity and need for attendant care. It is impossible to predict all these matters accurately over a period of many years. This is graphically demonstrated in the commission's case study program, which confirms that there is only one certainty in serious cases: the compensation is bound to be wrong. A further consequence of once-and-for-all assessment is that awards cannot be reopened if they prove to be inadequate. Inaccurate predictions, unexpectedly high rates of inflation and mismanagement of the lump sums often leave the accident victim - even one who appears at the time of compensation to receive a substantial amount - destitute and dependent on social security after a relatively short period. The case study program has provided many illustrations of such cases.

### **Adverse Effects on Rehabilitation**

A system based on once-and-for-all assessment of compensation encourages the victim to maximise his or her physical disability and incapacity to work in order to attract the highest possible award. Early rehabilitation is therefore discouraged, as it will result in lower compensation. Similarly, the delays in resolving common law claims - which in serious cases take an average three to four years to complete - cause personal hardship and uncertainty and severely impedes successful rehabilitation. Substantial delays are inevitable in a system in which fault must be proved and injuries must stabilise before compensation can be assessed.

### **Use of judicial Resources and Cost of Administration**

While judicial impartiality has an essential role in the accident compensation system, the amount of valuable judicial time spent resolving questions of fault and assessing damages on a once-and-for-all basis cannot be justified. In 1983, for example, 80 per cent of cases completed in the civil as distinct from criminal, jurisdiction of the District Court were common law negligence actions. Of these, 81.9 per cent arose out of motor vehicle accidents. It is difficult to estimate precisely the legal, investigative and administrative costs of the current system, which vary as a proportion of the amount claimed in individual cases. There is little doubt that the costs are substantially greater than the equivalent costs of the proposed no-fault Scheme, which are likely to be in the order of 10 per cent of benefits.

### **3. WHAT ARE THE GOALS OF THE TRANSPORT ACCIDENT SCHEME?**

The Scheme aims to provide a fair and efficient system of compensation for transport accident victims. The Scheme also provides a suitable model for other kinds of accidental injury and, ultimately, for a national compensation scheme. A number of basic principles can be identified.

positive measures are required to promote safety and accident prevention and to reinforce the work of existing agencies in this area.

In the event of an accident, maximising opportunities for medical, social and vocational rehabilitation of the victim is the first priority.

Subject only to limited exceptions, all transport accident victims are entitled to compensation on a "no-fault" basis. Availability of benefits depends on the nature and seriousness of the disability or incapacity resulting from the accident, and not on whether the accident victim can demonstrate that someone else is at fault.

Compensation is generally provided in a form which matches the losses sustained by accident victims. Thus compensation for loss of earning capacity is paid on a periodic basis and medical, hospital and related services are provided as and when required. These include home and vehicle modifications, attendant care and replacement household and other support services, as well as other aids to independent living.

Since resources are limited, priority is given to meeting the long-term requirements of people sustaining serious and permanent disability and incapacity.

The Scheme makes adequate provision for those who are not earners at the time of the accident.

Generally speaking, the Scheme should attempt to compensate for economic loss such as reduced earning capacity, by restoring the injured person to his or her pre-accident financial position. But this principle is modified for some purposes, for example to provide incentives to rehabilitation,

The Scheme should be administered efficiently but not at the expense of claimants. The Corporation administering the Scheme is under a duty to ensure that accident victims receive their full statutory entitlement to compensation.

Individual claimants to have ready access to an independent appeal system providing review of decisions on the merits by a judicial tribunal.

### **4. WHY NOT A DUAL SCHEME?**

A dual scheme may broadly be described as one in which the common law negligence action co-exists with a no-fault scheme. Such schemes in a variety of forms, operate in Victoria, Tasmania and many United States jurisdictions. They usually involve no-fault benefits, which are subject to monetary limits or which are available only for limited periods. Under the Victorian scheme, for example, compensation for loss of earning capacity is currently limited to a total of \$20,800 while medical and related services are available only for five years. Additional compensation can be recovered in a common law negligence action, but only if the injured person can prove fault.

It is often suggested that such a scheme combines the best of both worlds. In fact it does not. It is basic to the notion of a dual scheme that the no-fault component does not provide adequate compensation to all accident victims. It is for this reason that an additional remedy is required.

Because of the limits imposed on no-fault benefits under the Scheme, the people most likely to receive inadequate compensation are the long-term disabled who cannot prove fault. These are precisely the people whose need for compensation is greatest.

The retention of the common law negligence action in a dual scheme means that many of the disadvantages of that action remain especially in cases involving the long-term disabled. These include the difficulties associated with once-and-for-all assessment of compensation, the adverse effects of the action on rehabilitation and the serious consequences flowing from substantial delays in resolving claims.

Apart from their adverse effects on rehabilitation, the most unacceptable feature of dual schemes is the priority given to the less seriously injured. They receive no-fault benefits covering all or most of their economic losses and have the choice of claiming additional compensation in a common law action for non-economic loss, such as pain and suffering. In contrast the maximum payment under the no-fault component of a dual scheme is grossly inadequate for the seriously disabled and incapacitated. Given limited resources, priority should be accorded to compensating these people adequately.

## **5. WHAT IS THE GENERAL NATURE OF THE PROPOSED TRANSPORT ACCIDENTS SCHEME?**

The proposed Scheme is a “pure no-fault” scheme. It creates a statutory entitlement to compensation for people injured or the families of people killed in transport accidents, regardless of whether they can prove that another person was at fault. This right replaces the *chance* which the injured person or his or her family may have had of recovering damages in a common law negligence action.

The Scheme is administered by an independent statutory authority called the Accident Compensation Corporation. The benefits provided by the Scheme include:

periodic compensation for loss of earning capacity, including provision for those who are non-earners at the date of the accident;

a right to medical, vocational and social rehabilitation;

support services such as replacement household services and attendant care;

assistance with accommodation for disabled people, including house modifications;

assistance with mobility through mobility allowances and vehicle modifications;

compensation for permanent disability by a lump sum payment *additional* to other benefits;

lump sum and periodic compensation to the family of a deceased person; and

a right to medical hospital and related services including home nursing services, provided where possible through the general health care system.

## 6. DOES THE SCHEME PROTECT A TRANSPORT ACCIDENT VICTIM AGAINST INFLATION?

Monetary compensation under the Scheme is automatically indexed by inflation to movements in Average Weekly Earnings (AWE), with adjustments made twice each year. AWE is the average weekly earnings of full-time adult male employees in Australia (\$420 at June 1984).

## 7. WHO IS ENTITLED TO COMPENSATION FOR LOSS OF EARNING CAPACITY?

In general, all transport accident victims of normal working age are entitled to compensation for any loss of earning capacity sustained. However, a distinction is drawn between carriers and non-earners.

### Earners

The term "earner" is defined broadly, to take account of community patterns of part-time and intermittent employment and of unemployment. The definition is not confined to those employed or self-employed at the date of the accident. It also covers those who:

worked for a significant period during the two years preceding the accident;

had firm arrangements at the time of the accident to enter or re-enter the workforce during the following two years; or

were incapacitated for at least six months and would have commenced work in the two years following the accident.

### Non-Earners

Despite the broad definition of “earner”, many transport accident victims will still be classified as non-earners. These include home makers not necessarily in the workforce, children and full-time students. It is only during the two years immediately following the accident that the entitlement of the non-earner differs from that of the earner. During that time no compensation for loss of earning capacity is payable to a non-earner although he or she is entitled to all other benefits available under the Scheme.

At the end of the two year period (that is, in cases of long-term incapacity) compensation for loss of earning capacity of non-earners is assessed on the same principles as those applying to earners. These include the principle that an incapacitated person, whether or not an earner, is deemed to have a minimum (or “notional”) pre-accident earning capacity of 50 per cent of AWE (\$210 at June 1984).

## **8. HOW IS LOSS OF EARNING CAPACITY ASSESSED?**

A transport accident victim's loss of earning capacity is usually the difference between his or her pre-accident and post-accident earning capacity. Pre-accident earning capacity can be measured in a variety of ways depending on the circumstances.

### **Pre-Accident Earning Capacity**

The pre-accident earning capacity of an employee is usually equal to his or her normal weekly earnings at the date of the accident. “Earnings” includes income from personal exertion, as well as the value of board and lodging and some other benefits that may be received in kind. In determining the level of normal weekly earnings, account can be taken of average weekly earnings over a period of up to two years. Adjustments can be made for periods of abnormal income and for variations in earnings from seasonal employment or changes (actual or proposed) in employment or working hours. A broadly similar approach is taken for self-employed people, although it may be necessary to take account of average weekly earnings over a longer period up to four years.

### **Post-Accident Earning Capacity**

Post-accident earning capacity is usually measured by what the accident victim is actually earning after the accident. If, for example, the victim has no earnings, earning capacity would normally be assessed as nil. However, the Corporation may depart from the standard of actual earnings where the accident victim:

is capable of undertaking work which is reasonably available, given his or her disability and other personal characteristics such as age, education, place of residence and work experience; and

is capable of competing in the labour market for this kind of work at no significant disadvantage by reason of the disability, when compared to non-disabled applicants.

## **Self-Employed People**

It is not always appropriate to assess the loss of earning capacity of a self-employed person by reference to the difference between pre and post-accident earning capacity. In some circumstances it may be appropriate to assess the loss by reference to:

the cost of providing a replacement worker; or

the wage or salary the self-employed person could have earned in employment.

## **9. WHAT PROVISION IS MADE FOR THE PERSON WHOSE PRE-ACCIDENT EARNING CAPACITY IS NOT A TRUE INDICATION OF HIS OR HER CAPACITY?**

To some extent this problem is overcome by the wide definition given to an earner and the effect which this has on the calculation of earning capacity. For example, the Corporation may take into account matters such as:

the seasonal nature of the claimant's employment;

firm arrangements to enter or re-enter the workforce or take up new and more remunerative employment; or

a contractual entitlement to significant increases in salary or wages.

People who would benefit from this approach include the homemaker who has been caring for children for some years but has arranged to return to work; the student or school leaver who has accepted a position but not commenced duties at the time of the accident; and the person who has taken steps to establish himself or herself in a business or profession by purchasing stock or leasing office space.

## **Potential for Advancement**

However, the Scheme goes further and, in cases of long-term incapacity, provides specifically for "potential for advancement". This phrase refers to the earnings the person could have been expected to earn over the likely period of incapacity had the accident not occurred. It takes account of such factors as opportunities for promotion or professional advancement, a move from part-time to full-time employment or increases in earnings resulting from further education or training, which might otherwise not be considered.

A transport accident victim who has been incapacitated for at least 104 weeks is eligible to apply for assessment on the basis of potential for advancement. In such cases the Corporation is required to assess compensation on that basis. However, only those events likely to occur within 10 years of the accident are taken into account. Both earners and non-earners can take advantage of this procedure.

## 10. HOW IS COMPENSATION FOR LOSS OF EARNING CAPACITY CALCULATED?

### Proportion Compensated

Compensation for loss of earning capacity is generally paid at the rate of 80 per cent of the loss or impairment, calculated by reference to gross (pre-tax) earnings. It is anticipated that the victim will pay income tax on the compensation in the same way as income tax would have been paid on his or her wage or salary. As an incentive to resumption of employment, the percentage of loss compensated maybe increased, to up to 100 percent of previous earnings, if the accident victim resumes employment for a substantial part of the working week.

### Ceiling

The maximum loss of earning capacity for which compensation can be paid is 150 per cent of AWE (\$630 at June 1984). Thus the maximum compensation for loss of earning capacity is \$504 (80 per cent of \$630) per week. Only some 4 per cent of the workforce are above the ceiling and it is reasonable to expect such people to take out accident insurance as a "top-up", which may be marketed by the Corporation.

### Notional Earning Capacity

A transport accident victim who suffers long-term incapacity (more than 104 weeks) is deemed to have a minimum or "notional" earning capacity. For an incapacitated person aged 21 or over this is set at 50 per cent of AWE (\$210 at June 1984) and is scaled down for age groups 18-20 (40 per cent) and 16-17 (30 per cent). The notional earning capacity is applied whether the victim was previously an earner or non-earner. Thus a victim who suffers total long-term incapacity receives a minimum compensation equal to 80 percent of his or her notional earnings. For example, a victim over the age of 21 receives 40 per cent of AWE (\$168 at June 1984).

## 11. CAN PERIODIC COMPENSATION BE CONVERTED TO A LUMP SUM?

Some schemes, Such as the New South Wales workers' compensation system, permit a person entitled to periodic compensation to "redeem" that entitlement by accepting a lump sum in lieu of future periodic payments. Widespread reliance on redemptions is, however, inconsistent with the principle that compensation should match losses. Accordingly, no redemption of entitlement to compensation for loss of earning capacity by payment of a once-and-for-all lump sum is permitted tinder the Scheme, unless the periodic amount is so small that the cost of paying the sum unnecessarily burdens the administration of the Scheme. Where such a redemption occurs and the transport accident victim's capacity for work is subsequently reduced, for example because his or her condition worsens, periodic compensation may be resumed. One possible reason for seeking a redemption is to set up a business. In addition to providing lump sum compensation for permanent disability, the Corporation may guarantee a loan for business purposes in certain circumstances.

## 12. HOW AND WHEN IS COMPENSATION FOR LOSS OF EARNING CAPACITY PAID?

Compensation is paid on a periodic basis (fortnightly in arrears). Where an earner was working at the date of accident, compensation for loss of earning capacity is usually payable after the first five working days of incapacity. In general, compensation is payable to a person who has reached the age of 16 and is not over 65. However, full-time earners under the age of 16 can receive compensation for loss of earning capacity and earners who are incapacitated between the ages of 61 and 70 can be paid compensation beyond the age of 65 in certain circumstances. Earners aged 70 or over may be entitled to up to two years compensation for loss of earning capacity.

## 13. CAN REGULAR RE-ASSESSMENT OF CLAIMANTS BE AVOIDED?

A permanently incapacitated transport accident victim should not be obliged to undergo periodic re-assessment indefinitely. This objective can be achieved, within a system of periodic compensation, by providing for assessment of permanent incapacity, a concept that has been applied in New Zealand. Where an injured person has

- sustained a permanent physical or mental disability;
- suffered a loss of earning capacity which is likely to continue indefinitely; and
- taken advantage of rehabilitation opportunities,

the Corporation with that person's consent, can make an *assessment of permanent incapacity*, provided that the person consents. Compensation is thereafter paid in accordance with the assessment and cannot be decreased even if the person's capacity for work subsequently improves. However, the assessment can be reopened if the person's condition deteriorates or his or her employment status changes.

## 14. WHAT PROVISION IS MADE FOR REHABILITATION?

Rehabilitation is an essential objective of the Scheme. Transport accident victims have a right under the Scheme to prompt and effective rehabilitation. Where practicable, services are provided through existing hospitals and agencies, with the Corporation providing appropriate financial support. However, the Corporation may engage its own personnel to ensure that services are accessible on a decentralised basis and has power to establish new facilities. To encourage prompt intervention and the coordination of services, a special Rehabilitation Section within the Corporation is under a duty to seek out accident victims requiring rehabilitation as soon as possible after the accident.

The Corporation meets the costs of medical and functional rehabilitation services required by transport accident victims, including travel and accommodation expenses necessarily incurred in obtaining treatment. The Corporation also ensures that the accident victim is provided with aids and appliances (such as artificial limbs

and organs and wheelchairs), pharmaceutical supplies and medical equipment. Such aids and equipment are replaced as often as is necessary.

Vocational rehabilitation is available not only to disabled transport accident victims, but also to the dependent spouses of people killed in transport accidents. In order to encourage return to the workforce the Corporation has power to:

finance necessary workplace modifications;

promote actively the placement of disabled transport accident victims in employment; and

provide financial incentives (including assistance with workers' compensation premiums) to prospective employers.

The Corporation makes financial counselling services available to transport accident victims and has power to make or guarantee loans to such people to start or maintain a business. It also provides leisure counselling, assistance for independent living, family counselling and other services necessary for social rehabilitation.

## **15. WHAT SUPPORT SERVICES ARE AVAILABLE TO DISABLED PEOPLE?**

Disabled transport accident victims require support services to compensate for their inability to perform everyday tasks. Other forms of assistance are necessary to facilitate independent living and to avoid institutionalisation whenever possible. Even people who do not suffer permanent disabilities may require assistance in the short term either for themselves or their families.

### **Household Services**

Where the disabled person performed substantial household services before the accident replacement services are provided to the extent necessary for the maintenance and preservation of the household. The emphasis is on meeting the needs of the family in the period immediately following the accident. After the first four weeks, account is taken of the family's financial resources. Wherever possible household services are provided through existing agencies, although sometimes the Corporation may have to provide them directly.

### **Attendant Care**

A person disabled in a transport accident, whether temporarily or permanently, is entitled to services required to provide for his or her personal care. In cases of serious disability, very substantial attendant care services may be needed. Services are generally provided through existing agencies, although in some circumstances members of the disabled person's family may be paid to provide the required care.

## **Emergency Family Support**

Emergency family support is payable to immediate family members who have to attend a transport accident victim in hospital or at home during the first four weeks after the accident. In exceptional cases this period may be extended.

## **Accommodation**

A transport accident victim suffering long-term physical disability is entitled to the cost of necessary modifications to his or her residence. Modifications may be made, if required, on more than one occasion. The Corporation may also make loans to finance the purchase of a home where it is difficult to borrow from conventional sources, and negotiate arrangements for the provision of housing with relevant public authorities.

## **Mobility**

After the first six months of disability, a weekly mobility allowance of 5 per cent of AWE (\$21 at June 1984) is paid to disabled transport accident victims who cannot use public transport. The Scheme also meets the cost of necessary vehicle modifications for such people.

## **16. IS ADDITIONAL COMPENSATION PAYABLE FOR DISABILITY AS SUCH?**

In cases of *permanent disability*, compensation is justified over and above all of the other benefits available under the Scheme. Such compensation serves as a solace to the permanently disabled victim and an additional means of adjusting to the disability.

However, compensation is limited to cases of permanent disability and is not available, for example, to those suffering only short-term pain and suffering. There are three main reasons for this.

Compensation for non-economic loss should be directed to those suffering permanent rather than short-term disabilities.

Compensation should be assessed in a manner which promotes rehabilitation. Other approaches, particularly compensation for pain and suffering, detract from this objective by encouraging exaggeration of symptoms.

The criteria for measuring the extent of permanent disability can be applied uniformly and with a minimum of disputation. By contrast assessment of pain and suffering is subject to widely differing attitudes as to what is appropriate in a given case.

## Measurement of Permanent Disability

The degree of permanent disability is measured in accordance with the Whole Person Approach used in the Australian adaptation of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. The Whole Person Approach is comprehensive in the range of impairments covered and includes, for example, loss of sexual and reproductive capacity, disfigurement and pain as elements of permanent disability. The *Guides* enable an assessment to be made in percentage terms, of the injured person's degree of permanent disability.

## Assessment and Payment of Compensation

Compensation is paid in the form of a lump sum. This exception to the general rule of periodic compensation is justified on the grounds that the disabled person's economic losses are covered by periodic payments and a lump sum will give him or her freedom to purchase alternative forms of satisfaction without risk to long-term Security.

The maximum lump sum is 208 times the value of AWE at the date of payment (approximately \$87,360 at June 1984). No compensation is payable where the degree of disability is 4 per cent or less but, if the degree is 90 per cent or more, the maximum amount is payable.

Some adjustment to the compensation is made for the age of the disabled person at the date of the accident, to take account of the length of time over which the disability must be endured. The maximum payment reduces by 1 per cent for each year the disabled person (at the age of the accident) is over the age of 25. The reduction ends at age 65, so that a victim aged 65 or over who is totally disabled receives 60 per cent of the maximum. The table below illustrates the impact of the age variation on six disabled people, aged 20 to 70, each with a 90-100 per cent disability.

Age	Percentage Entitlement	Compensation Payable at 90-100% Disability \$ (June 1984)
25	100	87,630
30	95	82,992
40	85	74,256
50	75	65,520
60	65	56,784
65+	60	52,416

The degree of permanent disability is generally assessed 12 months after the date of the accident, although earlier payment is possible where the disability is clearly permanent. Interim payments can be made where the degree of permanent disability cannot be finally assessed, but some disability is evident.

## **17. WHAT COMPENSATION IS PAYABLE WHEN A PERSON IS KILLED IN A TRANSPORT ACCIDENT?**

The Scheme provides for the immediate needs of dependent family members of a person killed in a transport accident through the payment of a lump sum. In addition, periodic compensation is paid to the surviving spouse and children. However, after a period of adjustment, it is reasonable to expect able-bodied surviving family members to become self-supporting. For this reason, the indefinite continuation of periodic compensation cannot be justified.

### **Lump Sum**

Dependent family members are entitled to a lump sum equivalent to 130 times AWE (\$54,600 at June 1984). For this purpose dependence means not only financial dependence, but other forms of material dependence or interdependence such as the mutual dependence of a married couple where one spouse is in paid employment and the other is a full-time homemaker. Thus the lump sum is payable whether the deceased was an earner or non-earner. Ordinarily the surviving spouse and children of the deceased share the lump sum but other members of the family, such as parents, may claim a share by establishing dependence.

### **Periodic Compensation**

A surviving spouse with child-care responsibilities is entitled to periodic compensation where the deceased was an earner. For the first five years, compensation is paid at the rate of 50 per cent of the net earning capacity of the deceased (subject to a ceiling), regardless of the earnings of the surviving spouse. If child-care responsibilities continue after the first five years, periodic compensation based on need may be payable to supplement the family's income to a maximum of 50 percent of AWE. Payments cease when the youngest child reaches 16 or the spouse remarries.

The surviving spouse of a deceased earner who has no child-care responsibilities, but whose capacity to resume or undertake employment is impaired, may be entitled to periodic compensation. The recognised causes of impairment are:

poor health;

advanced age and lack of relevant work skills; or

the need to care for an aged or disabled family member.

In such cases, periodic compensation based on need may be payable to supplement the survivors income for up to five years from the death of the earner-spouse.

A dependent child of the deceased is entitled to periodic compensation at the rate of 8 per cent of AWE (\$33.60 at June 1984). This is paid until the child:

attains the age of 16 years, or in the case of a full-time student or mentally or physically handicapped child, 21 years;

marries or enters into a de facto relationships; or

becomes self-supporting.

Periodic compensation to a child is paid regardless of whether the deceased was an earner or non-earner.

### **Other Compensation**

Replacement household services are available to dependent family members, where such services were provided by the deceased. The criteria upon which entitlement to such services is determined are similar to those applying in cases of injury.

Reasonable funeral expenses of people killed in transport accidents are met by the Corporation.

## **18. WHAT PROVISION IS MADE FOR MEDICAL, HOSPITAL AND RELATED SERVICES?**

### **Medical and Hospital Services**

As a matter of principle and for reasons of administrative efficiency and cost, the accident compensation and health care systems should be integrated. This means that medical and hospital treatment should be provided to transport accident victims through the general health care system on the same basis as it is provided to other sick and disabled members of the community. Medical services, for example, should be provided through Medicare and service providers should be paid in accordance with procedures established by Medicare. The introduction of such an arrangement would require Commonwealth cooperation but would have the advantage of making Medicare a more truly universal scheme.

Assuming Commonwealth cooperation a further question arises as to the cost of providing medical and hospital services through the general health care system. One approach would be for the Corporation to bear the cost of providing such services to transport accident victims, by reimbursing the Commonwealth or the State hospital system on a bulk basis, for services provided. It would be preferable, however, if there were complete financial integration of the health care and accident compensation systems. This would mean that the Commonwealth the State and the health funds would bear the cost of providing medical and hospital services to transport accident victims in the same way as they bear the cost of providing services to other sick and disabled people. The effect of this would be that the Commonwealth would provide a subsidy to the Scheme. Since the introduction of the Scheme would bring financial advantages to the Commonwealth in the form of increased taxation revenue and reduced expenditure in social security, there are good reasons for it to provide such a subsidy.

## **Related Services**

The Scheme provides ancillary services not covered by Medicare or other hospital arrangements, such as physiotherapy, occupational therapy, dental and optical services and home nursing care. For this purpose, arrangements will be negotiated with service providers. Appropriate arrangements will also be made for nursing home and long-term institutional care required by transport accident victims.

## **19. WHAT SORTS OF ACCIDENTS ARE COVERED BY THE SCHEME?**

The Scheme applies to death or bodily injury caused by or arising out of a transport accident. A transport accident is one involving the use of a motor vehicle or some form of public transport such as a train or ferry.

Because this is a New South Wales Scheme, financed primarily out of contributions from owners of New South Wales registered motor vehicles and holders of New South Wales drivers licences, the accident must have a significant connection with this State. The Scheme applies to death or bodily injury suffered by

- a New South Wales resident killed or injured in a transport accident in New South Wales;
- an Australian resident killed or injured in a transport accident in New South Wales, provided the vehicle or form of transport involved was registered in the State or operated by a State authority; and
- a New South Wales resident killed or injured elsewhere in Australia, provided the vehicle or form of transport involved was registered in New South Wales or operated by a State Authority.

## **20. WHAT EFFECT DOES THE SCHEME HAVE ON EXISTING COMPENSATION ARRANGEMENTS FOR WORK-RELATED INJURIES?**

### **Common Law**

A worker may have a right to claim damages against an employer in a common law, negligence action for a transport accident occurring in the course of employment. This would be the case, for example, if the employer negligently supplied a faulty vehicle or if the worker's co-employee was at fault in the accident. The worker's entitlement (if any) to damages is not affected by the Scheme.

## **Workers' Compensation**

Rights to workers' compensation are also not affected by the Scheme. A worker injured in a transport accident in the course of employment or on a journey to or from work retains his or her right to workers' compensation.

### **21. WHAT HAPPENS IF A TRANSPORT ACCIDENT VICTIM, COVERED BY THE SCHEME, IS ALSO ENTITLED TO COMPENSATION FROM ANOTHER SOURCE?**

A transport accident victim may have rights to compensation under another scheme such as workers' compensation or under the laws of another State or Territory. Such a person has three months in which to decide whether to proceed under the Scheme or to enforce the other rights. A person electing to proceed under the Scheme must account for compensation received from the other source, and his or her entitlement under the Scheme is reduced accordingly. An exception is that a person entitled to workers' compensation upon electing to claim under the Scheme, may retain certain workers' compensation benefits such as compensation for the first five days incapacity.

Compensation under the Scheme is not affected by the receipt of collateral benefits from other sources, such as insurance policies, pensions schemes, or superannuation funds.

### **22. WHAT HAPPENS WHERE A NEW SOUTH WALES VEHICLE INCURS COMMON LAW LIABILITY IN ANOTHER AUSTRALIAN JURISDICTION?**

The owner and/or driver of a motor vehicle or other form of transport registered in New South Wales is indemnified for any liability for death or bodily injury arising under the law of any other State or Territory.

### **23. IN WHAT CIRCUMSTANCES IS COMPENSATION NOT PAYABLE UNDER THE TRANSPORT ACCIDENTS SCHEME?**

Compensation under the Scheme is not payable:

for intentionally self-inflicted death or bodily injury;

for death or bodily injury sustained by a person while committing a serious crime of violence; or

while a person is in prison.

Where a transport accident victim has been guilty of a driving offence, it is appropriate that punishment be inflicted through the criminal justice system, rather than simply by withholding benefits. That punishment could include removing some benefits under the Scheme from the offender.

## **24. HOW IS THE SCHEME ADMINISTERED?**

### **Principles of Administration**

The quality of administration of the Scheme is of fundamental importance in attaining the objectives of the Scheme. The Corporation administers the Scheme in accordance with five principles:

- entitlement of transport accident victims to compensation;
- independence of the Scheme from the Government of the day;
- flexibility in administration;
- high quality decision-making; and
- speed in decision-making and in providing compensation.

### **The Corporation's Functions**

The Corporation's functions include claims assessment, the provision of benefits and services, the formulation of policy and the promotion of safety and accident prevention. The Corporation has a duty to inform the public about entitlements under the Scheme and to seek out potential claimants to ensure that appropriate claims are lodged. The Corporation administers the Scheme on a decentralised basis.

### **Accountability**

Although an independent statutory authority, the Corporation is subject to external scrutiny and made accountable in a number of ways. It is required to report annually to Parliament and to submit its accounts for audit by the Auditor General. Its policies and practices are kept under review by an independent Policy Review Committee, reporting directly to Parliament. In addition, dissatisfied claimants have full rights of review and appeal.

## 25. HOW ARE CLAIMS ASSESSED?

The Corporation assesses and investigates claims for compensation. However, it is under a duty to assist accident victims to present their claims. In addition, it provides funds to other organisations to engage claimant representatives who assist claimants. A claims manual which details the practices and policies of the Corporation is made available to the public.

In accordance with the principle of high quality decision-making, the determination of each claim is the responsibility of a single assessing officer, who has the authority to make the necessary investigations and decisions. This officer is the point of contact for the claimant.

## 26. WHAT CAN A PERSON DO IF DISSATISFIED WITH A DECISION OF THE CORPORATION?

The appeal system is designed to provide an opportunity for full review on the merits of Corporation decisions, yet avoid formality, delay and substantial costs. Appeal tribunals should be readily accessible to dissatisfied claimants who should be notified of unfavourable decisions by the Corporation and advised of their right of appeal. The two-tiered appeal structure is based on the model for social security appeals under the Commonwealth law, as modified by proposals of the Administrative Review Council.

### **Compensation Review Panel**

The first appeal is to an independent Compensation Review Panel. The Panels each comprise three members, with a legally qualified chairperson. The Panel conducts appeals speedily and informally and has power to substitute its own decision on the merits of the claim for that of the Corporation. An appellant may be represented by a person of his or her choice, whether or not legally qualified. A successful appellant is reimbursed for the necessary costs of appeal, including legal costs, in accordance with a modest fixed scale. In special circumstances, costs of an unsuccessful appellant will be paid by the Corporation.

### **Compensation Appeal Tribunal**

The second level of appeal is to the Accident Compensation Appeal Tribunal, which is constituted by a judge and two non-judicial members with relevant expertise. Like the Panel, the Tribunal is not bound by the rules of evidence and conducts proceedings with as little formality and technicality as fairness permits. It also has power to substitute its own view of the merits of the case and is not bound by the Corporation's policies. The Corporation is a party to these proceedings, and legal representation of the parties is likely to be more common than before a Panel. The Tribunal has power to award costs. An appeal on a question of law may be taken to the Court of Appeal of the Supreme Court of New South Wales.

## 27. HOW IS THE SCHEME FINANCED?

The Scheme is financed from the following sources:

Motor vehicle owners pay contributions, in the same manner as compulsory third party motor vehicle premiums have been paid. Contributions may vary according to the risks associated with particular classes of vehicles.

The holder of a driver's licence pays a levy on issue or renewal of the licence. The levy may include a penalty loading to take account of a poor driving record.

Public transport authorities meet the costs of compensation arising from accidents in which they are involved.

As indicated earlier, a subsidy is to be sought from the Commonwealth to take account of the savings and additional revenue to the Commonwealth from the Scheme. Ideally this should take the form of a contribution to the cost of providing hospital and medical services to transport accident victims.

### **Pay-As-You-Go**

The Scheme is operated on a pay-as-you-go basis. This means that, subject to maintaining a basic reserve, the income of the Scheme each year should be sufficient to pay actual outgoings in that year.

## **28. WHAT WILL THE SCHEME COST?**

If the Scheme were financed only out of contributions from motor vehicle owners (comparable to current compulsory third party insurance premiums) the estimated cost on a "plateau" pay-as-you-go basis would be \$177 per vehicle per annum. This compares with the estimated pay-as-you-go cost of the existing third party system of \$225 per vehicle per annum. The comparable cost of a dual scheme, of the type currently operating in Victoria, would be \$255 per vehicle per annum. If the Commonwealth were to subsidise the Scheme in the manner proposed, the cost per vehicle would be reduced by about \$24 per annum making the estimated contribution \$153 per vehicle per annum.

### **Transitional Arrangements**

The Scheme applies to all transport accidents occurring after the date of commencement. It will take some time for the residue of common law claims, arising out of transport accidents occurring before the date of commencement, to be finally determined. Assuming the Scheme is financed on a pay-as-you-go basis, there should be no difficulty in providing funds for the residue of common law claims.

## **29. CAN THE SCHEME BE EXTENDED TO OTHER AREAS?**

The Scheme is self-sufficient and is capable of being confined to injuries and deaths arising out of transport accidents. However, subject to resources, it is also capable of being extended to new areas, such as medical misadventure, sporting injuries, criminal injuries and accidents occurring at home or school.

### **A National Compensation Scheme**

Ideally, accident compensation should be governed by the principle of comprehensive entitlement - the notion that every person suffering incapacity through accidents of any kind (and, ultimately, through illness of any kind) should be compensated in accordance with the same principles. The only practicable means of implementing the principle of comprehensive entitlement is by the introduction of a national compensation scheme. Such a scheme could be phased in gradually, with co-operation between the Commonwealth and the States, by extending uniform no-fault arrangements into new areas. The Transport Accidents Scheme could provide the model for a step-by-step approach to national compensation. In this way the Scheme could prove of benefit to all Australians.

## **Appendix - Terms of Reference**

On 12 November 1981, the then Attorney General of New South Wales, the Hon F J Walker, QC, MP, made the following reference to the Commission:

To inquire into, report on and make recommendations concerning the extent to which compensation should be payable in respect of death or personal injury and in particular, without affecting the generality of the foregoing, to consider

- (a) whether "no-fault compensation" should be payable in respect of death or personal injury suffered by any person through the use of a motor vehicle or other means of transport;
- (b) whether "no-fault compensation" should be payable in respect of death or injury suffered by any person in circumstances other than the use of a motor vehicle or other means of transport;
- (c) whether a "no-fault compensation" scheme or schemes should be introduced in New South Wales and if so, to consider further the nature and scope of any such scheme including
  - the benefits to be provided;
  - the basis on which claims should be determined;
  - the means of financing the scheme;
  - the manner in which the scheme is to be administered;
  - the relationship between the benefits under the scheme and other forms of assistance or entitlements, whether provided under legislation or otherwise;
- (d) whether any "no-fault compensation" scheme should be in substitution for all or any rights to compensation under existing law;
- (e) whether the principles and practices relating to compensation for death or personal injury under
  - workers' compensation legislation;
  - other legislation;
  - the tort or common law system;should be modified and, if so, in what way:
- (f) any matter incidental to the above including transitional arrangements for the implementation of recommendations.

For the purpose of this reference, "personal injury" includes pre-natal injury, illness resulting from injury and occupational disease.

## Accident Compensation Reference Publications

The following publications have been issued to date in the course of the Accident Compensation Reference.

### Reports

New South Wales Law Reform Commission, *Compensation for Future Medical and Related Expenses in Personal Injury Cases* (Interim Report, LRC 42, 1982), prepared by Professor R Sackville.

New South Wales Law Reform Commission, *Workers' Compensation (Amendment) Bill, 1982 and Cognate Bills* (Interim Report, LRC 41, 1983), prepared by Professor R Sackville, Mr H D Sperling, QC and Mr J R T Wood, QC.

New South Wales Law Reform Commission, *A Transport Accidents Scheme for New South Wales* (LRC 43, 1984).

### Issues Paper

New South Wales Law Reform Commission, *Accident Compensation* (IP 2, 1982).

### Working Paper

New South Wales Law Reform Commission, *A Transport Accidents Scheme for New South Wales* (WP 22, 1983).

### Research Papers

New South Wales Law Reform Commission, *Traffic Accident Case Studies* (RP 1, 1984).

New South Wales Law Reform Commission, *Case Study Booklet* (RP 2, 1984).

## Consultancy Papers

Colin Bass Human Resources, *Lump Sum Accident Compensation* (CP 1, 1983).

M Chesterman, *Accident Compensation Proposals to Modify The Common Law* (CP 2, 1983).

## Consultant Actuary's Reports

E S Knight and Co, *Cost Estimates for a Victorian No-fault Motor Accident Compensation Scheme in New South Wales* (1982).

E S Knight and Co, *Cost Estimates for Motor Vehicle Accident Compensation* (1983).

E S Knight and Co, *Cost Estimates for Motor Vehicle Accident Compensation, as part of a Transport Accident Compensation Scheme* (1984).

## Unpublished Background Reports

F Tito, *Options for an Ideal No-Fault Accident Compensation Scheme* (August 1982).

J Brownie, QC, *Options as to the Form of Compensation - Lump Sums, Periodic Payments, Redemptions, Structured Settlements* (December 1982).

J L R Davis and N Seddon, *A Legal Analysis of the Relationship between the Principal Commonwealth Social Security Benefits and Other Forms of Compensation* (December 1982).

J Ellen, *The Estimation of the Cost of Accidents to the New South Wales Health Care System* (March 1983).

J C S Burchett, QC, *Common Law Proceedings in Respect of Personal Injury- Consideration of Procedural Problems* (July 1983).

R Graycar, *No-Fault Road Accident Schemes* (August 1983).

M McHarg, *Accident Compensation: Policy and Administration of Health Funding* (August 1983).

F Marks, *Report on Modification to the Workers' Compensation System* (August 1983).

CP Mills, *Modification of the Workers' Compensation System* (August 1983).

C Strange, *Structured Settlements* (October 1983).

C Phegan, *Report on Conflict of Laws Aspects of Transport Accidents* (November 1983).

J Dewdney and I Irwin, *The Aftermath - Caring for Accident Victims in New South Wales* (December 1983).

S Cavanagh, *Taxation Implications of the Transport Accidents Scheme Proposals* (February 1984).