NSW Law Reform Commission

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

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

Terms of Reference and Participants

New South Wales Law Reform Commission
To The Honourable D P Landa, LLB, MP,

Attorney General For New South Wales

Accident Compensation Final Report 1 -

A TRANSPORT ACCIDENTS SCHEME FOR NEW SOUTH WALES

We make this Report under our reference from you to inquire into and review the law concerning the extent to which compensation should be payable in .aspect of death or personal injury.

Professor Ronald Sackville

(Chairman)

Deirdre O'Connor

(Commissioner)

Professor Colin Phegan

(Commissioner)

Marcia Neave

(Part-time Commissioner)

The Honourable Justice Andrew Rogers

(Commissioner)

Philippa Smith

(Part-time Commissioner)

H D Sperling, QC

(Commissioner)

22 October 1984

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.

New South Wales Law Reform Commission

The New South Wales Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:

Chairman

Professor Ronald Sackville

Deputy Chairman

Mr Russell Scott

Full-time Commissioners

Paul Byrne

Miss Deirdre O'Connor

Professor Colin Phegan

Part-time Commissioners

Associate Professor Bettina Cass

Mr Julian Disney

Her Hon Judge Jane Mathews

Ms Marcia Neave

The Hon Justice Peter Nygh

The Hon Justice Adrian Roden

The Hon Justice Andrew Rogers

Ms Philippa Smith

Mr H D Sperling, QC

Research Director

Mr Mark Richardson

Members of the research staff are:

Mr Ian Ramsay (until 7 August 1984)

Ms Roslyn Robertson

Ms Fiona Tito

Ms Judith Walker

Ms Meredith Wilkie

The Secretary of the Commission is Mr Peter Lemon and its offices are at 16th Level Goodsell Building, 8-12 Chifley Square, Sydney, NSW (telephone (02) 238 7213).

Current contact details for the New South Wales Law Reform Commission

PARTICIPANTS

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 Madden, 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.

Principal Researcher:

Ms Fiona Tito (Senior Legal Officer)

Research and Other Assistance:

Mr Mark Richardson (Research Director)

Ms Shelagh Coleman (Consultant)

Ms Fiona Curtis (Consultant)

Mrs Katherine Derham-Moore (Consultant)

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Ms Lette Clare (Consultant)

Ms Julia Hall (Consultant)

Miss Zoya Howes

Ms Marie-Louise Taylor (Consultant)

Table of Abbreviations

Actuary's Report	E S Knight and Co, *Cost Estimates for Motor Vehicle Accident Compensation, as Part of a Transport Accident Compensation Scheme* (1984).
Arnold Report	*Report of Committee to Investigate Compensation of Road Accident Victims Irrespective of Fault,* (1972).
Australian Woodhouse Committee	National Rehabilitation and Compensation Scheme Committee of Inquiry, chaired by the Hon. Justice O Woodhouse.
Australian Woodhouse Report	National Committee of Inquiry, *Compensation and Rehabilitation in Australia* (1974).
Bradley Report	*Report of the Northern Territory Inquiry into Motor Accident Compensation* (1979).
Case Study Booklet	New South Wales Law Reform Commission, *Case Study Booklet* (RP 2, 1984).
Conybeare Report	Workers' Compensation Commission of New South Wales, *Report on the Inquiry into the Feasibility of Establishing a System for the Rehabilitation of Injured Workers in New South Wales* (1971).
GIO	Government Insurance Office of New South Wales.
Gair Report	*Report of Select Committee on Compensation for Personal Injury in New Zealand* (1970).
Issues Paper	New South Wales Law Reform Commission, *Accident Compensation* (IP 2, 1982).

Lump Sum Survey	Colin Bass Human Resources, *Lump Sum Accident Compensation* (CP 1, 1983).
McLeay Report	Report from the House of Representatives Standing Committee on Expenditure, *In a Home or at Home: Accommodation and Home Care for the Aged* (1982).
Minogue Report	*Report of the Board of Inquiry into Motor Vehicle Accident Compensation in Victoria* (1978).
New Zealand Woodhouse Report	*Report of the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand* (1967).
Pearson Report	Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978).
Pearson Royal Commission	Royal Commission on Civil Liability and Compensation for Personal Injury, United Kingdom, chaired by Lord Pearson.
Quigley Report	Government Cabinet/Caucus Committee Report, *The New Zealand Accident Compensation Scheme: A Review* (1980).
Submissions	Submissions received by the New South Wales Law Reform Commission as part of this reference, as listed in Appendices B and C to this Report.
Traffic Accident Study	New South Wales Law Reform Commission, *Traffic Accident Case Studies* (RP 1, 1984).
Working Paper	New South Wales Law Reform Commission, *A Transport Accidents Scheme for New South Wales* (WP 22, 1983).

Glossary

AWE or Average Weekly Earnings
These terms are abbreviations for average weekly total earnings of adult male full-time employees in Australia. In this Report, this amount has been assumed to be $420 (Consulting Actuary's estimate at 30 June 1984). [1]

Common Law

The common law is the body of legal rules developed by the courts on the basis of judicial custom and precedent. It is distinguished from statute law, which is contained in legislation enacted by Parliament.

Common Law Negligence Action

A common law negligence action may be brought by a person (the plaintiff who has been injured as the result of the fault of another person (the defendant). The plaintiff in such an action claims damages for the loss sustained. The term is used in this Report to include statutory modifications to the common law, such as legislation allowing the dependents of the deceased person to claim damages for loss resulting from the death.

Compensable

The term "compensable" refers to a person I s entitlement to be compensated for losses or other ill effects of an injury.

Contract

A contract is an agreement between two or more people, which is intended to be legally enforceable.

Damages

This term refers (among other things) to the monetary compensation which may be awarded to the plaintiff by a court in a common law negligence action.

Disability

Disability is a measurable functional limitation or loss resulting from either a physical or mental impairment. [2] See also **Handicap** and **Impairment.**

Economic Loss

Economic loss refers to those consequences of an injury which have a monetary equivalent such as loss of wages or medical expenses. See also **Non-Economic Loss.**

Fault

Fault refers to the breach of a duty owed by one person to another, such as the duty to act carefully so as to avoid injury.

Funded Scheme

A funded insurance scheme is one in which the premiums collected in any given year are sufficient to meet all claims arising from accidents in that year, whether or not payments are actually made in that year. Under a fully funded scheme, the insurer should set aside reserves sufficient with investment income, to meet the estimated cost of outstanding claims. See also **Pay-As-You-Go Scheme.**

Handicap

Handicap is a social disadvantage resulting from an impairment or disability that limits or prevents the fulfilment of the role which is normal for an individual. [3] See also **Disability** and **Impairment.**

Impairment

Impairment is a medical term for anatomical loss or loss of bodily or mental function The interaction between disability, handicap and impairment can be explained in the following manner. Impairment is the medical condition-, disability is the functional effect-, and handicap is the social consequence. See also **Disability** and **Handicap.**

Incapacity

Incapacity in this Report refers to a person's inability to undertake paid work (employment or self-employment) arising from a disability.

Negligence

The term negligence can be used to describe a person's failure to act carefully. It also refers to the common law negligence action. To succeed in such an action it is necessary to prove that the defendant has failed to act carefully.

No-Fault Compensation

No-fault compensation is provided in a scheme for accident victims or their families without the need for a claimant to prove that the accident was caused by another person's fault. In a no-fault compensation scheme, it is not usually necessary to take legal proceedings in order to make a claim for compensation.

Non-Economic Loss

Non-economic loss refers to those consequences of an injury which have no monetary equivalent. The non-economic loss compensated at common law includes pain and suffering, loss of amenities and enjoyment of life and loss of expectation of life. See also **Economic Loss.**

Pay-As-You-Go Scheme

Pay-as-you-go insurance scheme operates on a cash flow basis, premium, income in each year being the source of pay-outs for that year. No substantial reserves are maintained to take account of outstanding claims, the cost of which must be met in future years. See also **Funded Scheme.**

Set-Off

This word is used in two different ways. In an action to recover money, a set-off is a cross-claim for money by the defendant which, if successful, will extinguish the whole or part of the plaintiff's claim. Secondly, the term can be used in an action for damages where the plaintiff has received benefits from other sources as a result of the injury in respect of which the legal proceedings are brought. If those benefits are subtracted from the damages otherwise recoverable, they are said to have been "set off". The term is generally used in the second sense in this Report.

Strict Liability

A tort of strict liability is one which does not depend upon proving that the defendant was at fault in order to establish liability. A person may therefore be liable to pay damages in a tort of strict liability even though he or she has acted with all reasonable care.

Table of Maims

This phrase refers to a table which specifies the amount of compensation payable to a person for particular injuries, such as the loss of a limb. A table of this kind is used in the New South Wales workers' compensation system for non-economic loss.

Tort

Tort is a civil right of action for damages available to a person sustaining injury or loss as the result of the acts or omissions of another person. A tort does not include a breach of duty arising from a contract.

FOOTNOTES

1. Actuary's Report, para.2.6.

2. For further definitions of this term, see Australian Bureau of Statistics, *Handicapped Persons Survey* 1981, Cat No.4343.0, p.173; and Australian Council for Rehabilitation of Disabled and the International Year of Disabled Persons National Committee of Non-Government Organisations, *Income Security Policies for Mentally and Physically Disabled People in Australia* (Discussion Paper 1981) para.2.3.

3. See Australian Bureau of Statistics, note 2 above, p.174.

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

Summary of Recommendations

I. INTRODUCTION

This Report describes existing compensation schemes for accident victims, including the common law negligence action, workers' compensation and the social security system (Chapter 2). A critique of the common law negligence action is made (Chapter 3) and proposals for reform of accident compensation arrangements in Australia and elsewhere are examined (Chapter 4). The Report considers the basic objectives which should be sought by a Transport Accidents Scheme and the general principles which the Scheme should implement (Chapter 5). Chapter 6 compares the comprehensive no-fault scheme for transport accident victims proposed in the Report with the "dual" scheme (whereby a limited no-fault scheme and the common law co-exist) proposed by some critics of the Commission's Working Paper Accidents Scheme. The Report then provides a detailed exposition of the proposed Transport Scheme.

The full text of the recommendations appears at the end of the Report (page 556). This Summary provides an outline of the Scheme, with appropriate references to the detailed recommendations and Chapters in the Report. The language of the summary often differs from that of the recommendations. Where this occurs, the Summary must yield to the Report and the detailed recommendations. The Summary is written in the present tense, but introduction of the Scheme in New South Wales will require legislative action.

II. THE TRANSPORT ACCIDENTS SCHEME

A. General

1. Transport Accidents

The Scheme covers death or bodily injury caused by or arising out of the use of

motor vehicles; and

forms of public transport, including

trains, taxis, buses and ferries,

but could be extended to other kinds of accidents. Bodily injury includes nervous shock.

2. Replacement of the Common Law

The Scheme creates a statutory entitlement to compensation for people injured or the families of people killed in transport accidents, regardless of whether they can or cannot prove that another person was at fault for the accident. This right applies in substitution for any action which the injured person or his or her family may have had under the common law negligence action for damages for personal injury or loss of support.

3. Administration

The Scheme is administered by an independent statutory authority called the Accident Compensation Corporation.

4. Benefits

The benefits under the Scheme include:

periodic compensation for loss of earning capacity;

a right to medical, vocational and social rehabilitation;

support services such as replacement household services and attendant care;

assistance with accommodation for disabled people such as 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, provided where possible through the general health care system.

5. Indexation

Monetary compensation under the Scheme is indexed to movements in Average Weekly Earnings (AWE), with adjustments made twice each year.

B. Compensation for Loss of Earning Capacity

1. Earners and Non-Earners

Generally speaking, the principles governing compensation for loss of earning capacity are similar for earners and non-earners, but there are some differences. An “earner” includes not only those employed or self-employed at the date of the accident but also those who, while not working when the accident occurred:

had worked for a significant period in the two years before the accident;

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

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

The definition excludes those who had permanently left the workforce at the date of the accident. A “non-earner” is a person who does not come within the definition of earner.

2. General Principles Governing Compensation

Right to Compensation

People incapacitated in transport accidents are entitled to compensation for loss of earning capacity. However, a non-earner is entitled to such compensation only if suffering long-term incapacity- that is incapacity for more than 104 weeks. Compensation is paid on a periodic basis in much the same way as earnings would have been received by the accident victim had the accident not occurred.

Loss of Earning Capacity

Loss of earning capacity is generally measured by deducting from the victims pre-accident earning capacity his or her post-accident earning capacity. Pre-accident earning capacity is measured in a number or different ways, depending on whether the person is employed, self-employed or a non-earner and depending on whether the incapacity is short or long term.

Post-Accident Earning Capacity

Post-accident earning capacity is usually measured by what the accident victim is actually earning after the accident. However this standard does not apply where the person:

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.

Proportion of Loss Compensated

Compensation for loss of earning capacity is paid at the rate of 80 per cent of the loss. As an incentive to rehabilitation this percentage may be increased if the accident victim undertakes part-time employment.

Limit on Compensation

The maximum earning capacity for which compensation can be paid is 150 per cent of AWE ($630 at June 1984). Thus, the maximum weekly compensation for loss of earning capacity is $504 (80 per cent of $630).

Notional Earning Capacity

An incapacitated person aged 21 or over, suffering long-term incapacity, is deemed to have a minimum (notional) earning capacity of 50 per cent of AWE ($210 at June 1984). Such a person, if totally incapacitated, would receive minimum weekly compensation of $168 (80 per cent of $210). Notional earning capacity is

40 per cent of AWE ($168 at June 1984) at age 18-20, and

30 per cent of AWE ($126 at June 1984) at age 16-17.

Age Limits

In general, compensation for loss of earning capacity is payable, during the period of incapacity, to a person who has reached the age of 16 and is not over 65. However, compensation may be paid to a person under 16 or over 65 in certain circumstances.

Redemptions

There can be no redemption of entitlement to compensation for loss of earning capacity by payment of a once-and-for-all lump sum, 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 person's capacity for work is subsequently reduced, for example because his or condition worsens, periodic payments are resumed.

Assessment of Permanent Incapacity

Where a transport accident victim has:

sustained a permanent disability;

suffered a loss of earning capacity which is likely to continue indefinitely; and

taken advantage of rehabilitation opportunities,

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

3. Compensation for Earners

Employees

The pre-accident earning capacity of an employee is usually measured by his or her normal weekly earnings at the date of the accident. “Earnings” includes income from personal exertion and covers the value of board and lodging and some other benefits in kind. In determining the level of normal weekly earnings account can be taken of 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.

Self-Employed

It is not always possible to adopt the same method of assessing loss of earning capacity for a self-employed person as is applied to an employed person. Depending on the circumstances loss can be assessed by reference to:

the difference between pre- and post-accident earnings;

the cost of providing a replacement worker; or

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

Waiting Periods

Where an earner was working at the date of the accident, compensation for loss of earning capacity generally commences after five working days of incapacity. Different provisions apply where the person is not working at that date.

Age Limits

Full-time earners under the age of 16 can receive compensation for loss of earning capacity. 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.

Potential for Advancement

The Scheme provides compensation for loss of potential for advancement where an earner has sustained long-term incapacity (104 weeks or longer). “Potential for advancement” 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 factors, such as opportunities for promotion or professional advancement or increases in earnings resulting from further education or training, which might otherwise not be considered. Only those events likely to occur within 10 years of the accident are taken into account in considering potential for advancement.

4. Compensation for Non- Earners

A non-earner incapacitated for 104 weeks or more is entitled to compensation for loss of earning capacity, regardless of whether he or she would have entered or returned to the workforce. Ordinarily compensation is assessed by reference to the non-earner’s “notional earning capacity”, a totally incapacitated non-earner receiving 80 per cent of that notional figure. However, a non-earner may apply for compensation on the basis of “potential for advancement”, which is assessed on the same principles as those applying to an earner. A non-earner can also apply for assessment of permanent incapacity.

C. Rehabilitation

1. The Right to Rehabilitation

Transport accident victims have a right 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.

To encourage prompt intervention and the coordination of services, the Corporation has a Rehabilitation Section, which is under a duty to seek Out accident victims requiring rehabilitation as soon as possible after the accident. The Scheme meets the costs of rehabilitation services required by transport accident victims, including necessary travel and accommodation expenses.

2. Aids, Pharmaceutical Supplies and Medical Equipment

The Scheme provides aids and appliances (such as artificial limbs and organs and wheelchairs), pharmaceutical supplies and medical equipment required by transport accident victims. Aids and equipment are replaced as often as is necessary.

3. Workforce Rehabilitation

Vocational rehabilitation is available not only to disabled transport accident victims, but also to the dependent spouses of people killed in transport accidents. The Scheme encourages return to the workforce by empowering the Corporation 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 Scheme makes available financial counselling services to transport accident victims and has power to make or guarantee loans to such people to start or maintain a business.

4. Social Rehabilitation

The Scheme provides leisure counselling, assistance for independent living, family counselling and other services necessary for social rehabilitation.

D. Support Services and independent Living

Disabled transport accident victims require support services to compensate for the inability to perform everyday tasks. Other forms of assistance are necessary for independent living and to avoid institutionalisation. The Scheme applies the principle that the highest priority should be to meet the needs of the most seriously disabled.

1. 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.

2. Attendant Care

A person disabled in a transport accident, whether temporarily or permanently, is entitled to attendant care services required to provide for his or her personal care.

3. Emergency Family Support

Emergency family support is payable for a limited period to immediate family members who have to attend the transport accident victim continuously.

4. 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 required on more than one occasion. The Corporation also makes loans to finance the purchase of a home.

5. Mobility

A mobility allowance of 5 per cent of AWE ($21 in 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.

E. Compensation for Permanent Disability

Lump sum compensation related to the degree of permanent disability suffered by a transport accident victim, is payable up to a maximum of 208 times AWE at the time of payment($87,360 at June 1984). Variations are made to the amount of compensation payable, depending upon the age of the disabled person. No compensation for permanent disability is payable where the degree of disability is 4 per cent or less. If the assessed degree of disability is 90 per cent or more, the maximum amount is payable. Compensation for permanent disability is paid in addition to all other benefits.

The degree of disability is assessed using an Australian adaption of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, which adopts a "Whole Person" approach to the assessment of disability. The Whole Person approach is comprehensive in the range of impairments covered and includes, for example, loss of limb or organ function loss of sexual and reproduction capacity and disfigurement.

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

F. Compensation on Death

1. Eligibility

On the death of a person in a transport accident

a dependent spouse;

dependent children; and

other dependent relatives

are entitled to compensation "Dependence" is not confined to financial dependence, but includes interdependence.

2. The Surviving Spouse

A dependent spouse may claim the following benefits.

The spouse is entitled to the whole or a share of a standard lump sum of 130 times AWE at the time of the accident ($54,600 at June 1984). The share varies according to whether other dependents can also claim part of the lump sum. The lump sum is payable whether the deceased was an earner or non-earner.

Where the deceased was an earner, a spouse with child-care responsibilities receives periodic compensation for loss of support regardless of the spouse's own earnings. The compensation is paid f or a period of up to five years at the rate of 50 per cent of the deceased s net earnings. A spouse with child-care responsibilities who has special needs receives limited compensation for loss of support beyond the five year period.

Where the deceased was an earner, a spouse who has no child-care responsibilities but is in poor health is over 50 years of age and lacks work skills, or is caring for an aged or infirm relative, receives limited compensation for loss of support for up to five years.

A spouse may be entitled to replacement household services for a period of up to two years, depending on the extent of the services provided by the deceased and certain other factors.

3. Dependent Children

Dependent children may claim:

a share of the standard lump sum;

periodic compensation of 8 per cent of AWE ($33.60 at June 1984), regardless of compensation paid to the surviving parent; and

replacement household services.

4. Other Family Members

Other family members who were dependent upon the deceased may claim a share of the standard lump sum.

5. Funeral Expenses

The Scheme meets reasonable funeral expenses of a person killed in a transport accident.

G. Medical, Hospital and Related Expenses

1. Medical and Hospital Services

Prompt and effective medical and hospital treatment is 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, are provided through Medicare and service providers are paid in accordance with procedures established by Medicare.

The cost implications of extending general health care arrangements to transport accident victims is to be the subject of negotiations between the State and the Commonwealth. It is appropriate, given the savings accruing to the Commonwealth from the Scheme, that it should provide a substantial subsidy, preferably by financial integration of the Scheme and the general health care system in relation to medical hospital and related services.

2. Ancillary Services

The Scheme provides ancillary services, such as physiotherapy, occupational therapy, dental and optical services and home nursing care, to transport accident victims. For this purpose arrangements are negotiated with service providers. Appropriate arrangements are also made for nursing home and long-term institutional care required by transport accident victims.

H. Scope of the Scheme

1. Coverage of the Scheme

The Scheme covers any person killed or injured in a transport accident, where any two of the following three criteria are met:

the person is a New South Wales resident;

the accident occurred in New South Wales; or

the means of transport involved was registered in New South Wales or was operated by a State authority.

In general, the Scheme does not provide benefits to people not resident in Australia at the date of the accident.

2. Work-Related Accidents

Actions Against Employers

A worker's right to claim common law damages from a negligent employer for a transport accident occurring in the course of employment is unaffected by the Scheme.

Workers' Compensation

A worker injured in a transport accident, which is also covered by the workers' compensation system, retains his or her right to seek workers' compensation.

3. Compensation from Other Sources

A person who has rights to compensation under another scheme or system including workers' compensation, 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 another 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 to be affected by the receipt of collateral benefits from other sources, such as insurance policies, pensions schemes, or superannuation funds.

4. Indemnity

A New South Wales resident who incurs common law liability in a transport accident in another Australian jurisdiction while driving a New South Wales vehicle is indemnified against that liability.

5. Exclusions

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.

I. Administration of the Scheme

1. Principles of Administration

The Accident Compensation 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.

2. Corporation's Functions

The Corporations functions include claims assessments 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 their needs are met. The Corporation administers the Scheme on a decentralised basis.

3. Policy Review Committee

An independent Accident Compensation Policy Review Committee reviews the practices of the Corporation and the Scheme generally and recommends changes to the Government and the Corporation.

J. Decision-Making: Assessment and Appeals

1. Assessment

The Corporation assesses and investigates claims for compensation. However, it is also under a duty to assist accident victims to present their claims and to further assist claimants, by providing funds to enable independent or other organisations to engage claimant-representatives. A claims manual, which details the practices and policies of the Corporation, is made available to the public.

The determination of each claim is the responsibility of a single assessing officer, who has the authority to make the necessary investigations and decisions. The claimant is notified of an adverse decision within 14 days and given reasons for the decision.

2. Appeals

The appeal structure is designed to provide an opportunity for full review on the merits of Corporation decisions, yet to avoid formality, delay and substantial costs. The structure is based on the federal system of administrative appeals, with particular reference to social security appeals.

The appeal structure is two-tiered. The first appeal lies to an independent compensation Review Panel, of 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 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.

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. The Corporation is a party to these proceedings, and legal representation of the parties is 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.

K Funding

1. Sources of Funds

The Scheme is financed on a pay-as-you-go basis from the following sources.

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

A subsidy is also 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 treatment to transport accident victims.

2. Cost

The estimated cost of the scheme, on a “plateau” pay-as-you-go basis, is $177 per vehicle per annum. This estimate does not take into account any possible Commonwealth subsidy. The estimated cost of the current third party system on the same basis, is $225 per vehicle per annum.

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

Preface

This Report has been a team effort and represents the culmination of three years of intensive work by many people. I wish to pay particular tribute to Ms Marcia Neave, who was the Research Director of the Commission until February 1984, and to Justice J R T Wood, who was a full time Commissioner until his appointment to the Supreme Court of New South Wales in January 1984. Both made a major contribution to the Accident Compensation reference and shaped its course. They have each continued to take an active interest in the reference, Ms Neave as a part-time Commissioner.
Ms Fiona Tito, Senior Legal Officer, has participated in the reference from the outset I wish to acknowledge specifically the outstanding contribution she has made to this Report. She has been primarily responsible for preparing chapters on Rehabilitation, Support Services Compensation for Permanent Disability and Hospital and Medical Services, and the statistical material in Appendix A. Without Ms Tito's dedication, expertise and thoroughness, the Report would have been very much the poorer and very much delayed.

Professor Colin Phegan and Miss Deirdre O'Connor joined the Commission when the reference was well under way and this Report in preparation. Each played a major role in writing the Report and in formulating the recommendations. Their work has been central in bringing the Report to finality and it is a tribute to their ability and enthusiasm that they have been able to contribute so much in such a short time.

Mr Mark Richardson, the current Director of Research, has tackled the difficult task of co-ordinating and ensuring the completion of a partly written Report meticulously and diligently. He has shown great organisational ability and persistence in a role which has proved invaluable.

Ms Meredith Wilkie and Ms Judith Walker undertook important research for the Report. Ms Wilkie completed detailed research and prepared drafts for the chapters on Administration and on Decision-Making: Assessment and Appeal and performed valuable work for other chapters. Ms Walker also provided valuable research assistance.

I am grateful for the work of those who proof-read the manuscript, checked footnotes and assisted with other tedious but necessary tasks. I mention particularly Ms Shelagh Coleman, Ms Fiona Curtis, Ms Julia Hall and Maureen Tangney. The excellent work performed by the editors and indexer was also invaluable.

For this Report, as for others, the Parliamentary Counsel, Mr D R Murphy, QC, has made available the resources of his office to prepare draft legislation. Mr Michael Orpwood, Deputy Parliamentary Counsel, has undertaken the extraordinarily onerous task of preparing draft legislation. As always, Mr Orpwood has handled his task with great professional skill, insight and courtesy.

Finally, I wish to express my appreciation for the important contributions made by the administrative, library, word processing and secretarial staff. In particular, I wish to mention Ms Mariella Lizier, who was the Commission's Secretary until August 1984, and my own Secretary, Mrs Sarah Cheillah, who is a continual source of support. The word processing of this Report has been a monumental task in which many have assisted. I mention particularly Ms Rose Ong and Ms Lorna Clarke.

Professor Ronald Sackville

Chairman

Accident Compensation Reference Publications

The following publications have been issued up to the present time in the course of the Accident Compensation Reference.

Reports

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 RT 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 Papers

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 Victortan 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

R Sackville, *Compensation for Future Medical and Related Expenses in Personal Injury Cases* (February 1982).

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).

C P 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).

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

1. Introduction

I. BACKGROUND TO THE REPORT

A. Terms of Reference

1.1 The terms of reference which are set out on pages iii-iv are very broad. They cover compensation arrangements in New South Wales in respect of death and personal injury generally and are not confined to particular categories of accidental injury, such as those sustained in transport or work-related accidents. However, the terms of reference specifically refer to the question of 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. They also ask whether any such no-fault compensation scheme should be in substitution for all or any rights to compensation under existing law. The term “no-fault compensation” means compensation for accident victims or their families without the need for a claimant to prove that the accident was caused by another person’s fault whether in the form of negligence, breach of statutory duty or otherwise.

1.2 This Report does not cover all the terms of reference. It deals only with compensation for victims of transport accidents and their families. It is anticipated that other matters within the terms of reference will be dealt with in later reports, although future progress will depend in part on the response to this Report. If, for example, the Government indicated its intention to act on the whole or part of the recommendations in the Report, this might influence the Commission’s priorities on other matters within the terms of reference. The reasons for concentrating on compensation for transport accident victims are discussed in paragraphs 1.33-1.42.

B. Publications

1.3 A list of publications prepared by the Commission in this reference appears on pages vii-viii. These included two Interim Reports, requested by the Attorney General to deal with specific questions within our terms of reference. The first Report in February 1982 related specifically to proposals for the periodic payment of future medical and related expenses, while the second Report in June 1983 examined the Bills then before Parliament to alter the structure and administrative arrangements of the Workers’ Compensation Commission. Both Interim Reports responded promptly to requests for information, while reserving the Commission’s right to propose further and far-reaching changes in any relevant final report. Of particular importance to this Report are the Issues Paper and Working Paper No. 1.

1. Issues Paper

1.4 In June 1982, the Commission published an Issues Paper entitled Accident Compensation. This Paper was designed to provide background information for the guidance of individuals and organisations wishing to make submissions to the Commission. Some 2,500 copies were distributed. The Issues Paper examined the major systems in New South Wales for compensating accident victims, discussing the main features of each and noting criticisms of them. It also discussed the available statistics on accidental death and injury in New South Wales and on the operation of compulsory third party and workers’ compensation insurance. Four main approaches to reform of accident compensation arrangements were identified for discussion purposes:

modifications to existing systems;

introduction of a no-fault scheme to supplement existing arrangements;

introduction of a no-fault scheme to replace existing arrangements; and

a comprehensive no-fault scheme to cover injuries and death however sustained.

2. Working Paper

1.5 In May 1983, the Commission released a Working Paper entitled *A Transport Accidents Scheme for New South Wales*, over 2,500 copies of which were distributed. A detailed costing of the proposed scheme by Mr J R

Cumpston. a consulting actuary, was published as a companion document to this Paper. A summary of the costing appeared in Chapter 13 of the Paper.

1.6 The Working Paper suggested the introduction of a scheme which would provide no-fault compensation, in substitution for the right to sue for damages in a common law negligence action (on proof of fault) for people injured, or the families of people killed, in transport accidents. It was suggested that the scheme should cover accidents involving the use of cars, taxis, trucks, buses, trains and ferries. The proposals in the Working Paper were, however, tentative and subject to modification in the Final Report. They were set out in detail in the Working Paper in order to provide commentators with an opportunity to assess whether the scheme would be capable of implementation and to allow a careful costing of the proposals to be made.

C. Research Program

1.7 The Commission has conducted an extensive research program. Three major surveys were completed, and a number of research papers were prepared by consultants or undertaken within the Commission.

1. Case Studies

1.8 As part of its research program, the Commission collected information about the experiences of accident victims. Three case study programs of accident victims were conducted:

the Lump Sum Survey undertaken by Colin Bass Human Resources;

the Commission's case study program; and

the Traffic Accident Study undertaken by MSJ Keys Young, Planners Pty Ltd.

Both the Lump Sum Survey and the Traffic Accident Study were funded by the Law Foundation of New South Wales. The Commission wishes to acknowledge the invaluable support provided by the Law Foundation for these studies.

The Lump Sum Survey

1.9 In 1982-83 Colin Bass Human Resources undertook a survey of 263 people who received lump sum accident compensation verdicts or settlements in 1976. The survey covered motor vehicle compensation claims, workers' compensation redemptions and common law industrial claims. The conclusions drawn from the survey have statistical validity because the respondents were representative of transport accident victims who receive high or medium amounts of compensation. A Report on the survey entitled *Lump Sum Accident Compensation* was published in June 1983.

The Commission's Case Study Program

1.10 The Commission's Case Study Program was designed to collect information from accident victims on a wide range of matters covered by the reference. It was not confined to accident victims but included, for example, those injured in the workplace, in transport accidents or as the result of a crime. The program covered accident victims who sporting received no compensation, those who received compensation and those awaiting compensation In total 150 accident victims were interviewed. The respondents were not necessarily representative of all accident victims. However, their experiences illustrate many of the problems of accident victims, in relation to the compensation system.

1.11 A Research Paper called the Case Study Booklet was released in September 1984. The Booklet concentrates on the problems of transport accident victims. It includes case studies from the Commission's Case Study Program. It also contains some case studies from the Lump Sum Survey and summaries of reported and unreported judgments. The Booklet describes the approach adopted in the Commission's Case Study Program and highlights the major themes that can be drawn from the case studies themselves.

The Traffic Accident Study

1.12 The Traffic Accident Study compiled 86 case studies of people who received compensation either by settlement or verdict for injuries sustained in transport accidents. The study produced detailed information about the problems and experiences of transport accident victims. A special questionnaire was developed which was administered either by personal interview or by telephone. Each interview took between two and four hours. Unlike the Lump Sum Survey the Traffic Accident Study was not designed to produce statistically valid results, but rather to illustrate the difficulties that can be encountered by people who received lump sum compensation following transport accidents. The Commission prepared a Research Paper on the study called Traffic Accident Case Studies, which was released in May 1984. The Research Paper describes the method used, presents major findings drawn from the study and incorporates summaries of selected case studies.

2. Other No-Fault Compensation Schemes

1.13 The experience of other no-fault schemes was of special interest to the Commission, particularly the motor vehicle schemes operating in Victoria, Tasmania and the Northern Territory. It was also important to examine the New Zealand comprehensive accident compensation scheme and other proposals for no-fault schemes. The following papers were prepared to meet these requirements.

> “Cost estimates for a Victorian no-fault motor accident compensation scheme in New South Wales”, July 1982, by Mr J R Cumpston, E S Knight and Co, Consulting Actuaries. This paper assesses the cost of introducing a scheme in New South Wales providing identical benefits to the Victorian scheme.
>
> “No-Fault Road Accident Schemes”, August 1983, Ms R Graycar, Lecturer, Faculty of Law, University of New South Wales. This paper describes the historical development and administration of the no-fault schemes in Victoria, Tasmania and the Northern Territory.
>
> “Options for An Ideal No-Fault Accident Compensation Scheme”, August 1982, Ms F Tito, Legal Officer, New South Wales Law Reform Commission. This paper sets out options for a no-fault scheme based on recommendations in reports and no-fault schemes in other jurisdictions.

3. Modification of the Common Law

1.14 Several projects explored the possibility of achieving reforms through modifications to the common law.

> “Options as to the Form of Compensation - Lump Sums, Periodic Payments, Redemptions, Structured Settlements”, December 1982, Mr J Brownie, QC, New South Wales Bar. This paper canvasses the various means by which compensation might be paid to accident victims, and discusses the advantages and disadvantages of each.
>
> “A Legal Analysis of the Relationship between the Principal Commonwealth Social Security Benefits and Other Forms of Compensation”, December 1982, Mr J L R Davis and Mr N Seddon, Faculty of Law, Australian National University. This paper analyses the interaction between social security legislation and certain compensation arrangements, including the common law and workers’ compensation.
>
> “Common Law Proceedings in Respect of Personal Injury - Consideration of Procedural Problems”: July 1983, Mr J C S Burchett, QC, New South Wales Bar. This paper analyses possible procedural reforms in respect of common law claims for personal injuries.
>
> “Accident Compensation- Proposals to Modify the Common Law”, July 1983, Professor M Chesterman, Faculty of Law, University of New South Wales. This paper identifies policy options for modifying the common law relating to personal injury actions, taking into account the possibility of introducing no-fault schemes in specific areas.
>
> “Structured Settlements”, October 1983, Ms C Strange, Temporary Research Officer, New South Wales Law Reform Commission. This paper examines the operation of structured settlements in the United States and Canada. Including the advantages and disadvantages for accident victims, insurers, defendants and lawyers.

4. Health Care and Rehabilitation

1.15 Health care and rehabilitation arrangements are very complex in New South Wales, because of the number and range of service providers and funding sources. The following papers were prepared to examine these issues.

> "The Estimation of the Costs of Accidents to the New South Wales Health Care System", March 1983, Ms J Ellen, Department of Community Medicine, Westmead Hospital. This paper describes generally the provision of health welfare and rehabilitation with particular reference to the funding sources of the organisations concerned.

> "Accident Compensation: Policy and Administration in Health Funding", August 1983, Mr M McHarg, CHS Consulting Pty Ltd. This paper describes the current system for payment of medical and hospital expenses, with particular reference to motor vehicle accident victims.

> "The Aftermath - Caring for Accident Victims in New South Wales", December 1983, Professor J Dewdney, School of Health Administration, University of New South Wales and Mr I Irwin. This paper discusses existing rehabilitation and related programmes and services available to accident victims in New South Wales.

5. Workers' Compensation

1.16 Research was also undertaken in the field of workers' compensation.

> "Report on Modification to the Workers' Compensation System", August 1983, Mr F Marks, solicitor. This report analyses the operation of the existing workers' compensation system and examines possible modifications.

> "Modification of the Workers' Compensation System", August 1983, Associate Professor C P Mills, Faculty of Economics, University of Sydney. This report examines certain modifications proposed in this and other jurisdictions and contains an historical account of the development of the present law.

6. Aspects of the Transport Accidents Scheme

1.17 Research was also commissioned on particular questions relevant to the scheme proposed in the Working Paper.

> "Cost estimates for motor vehicle accident compensation", April 1983, Mr J R Cumpston, E S Knight and Co, Consulting Actuaries. This report contains a detailed costing of the proposed scheme.

> "Report on Conflict of Laws Aspects of Transport Accidents", November 1983, by Associate Professor C Phegan, Faculty of Law, University of Sydney. This paper assesses the conflict of laws problems which might arise in the context of a no-fault transport accidents scheme operating in New South Wales.

> "Taxation Implications of the Transport Accidents Scheme Proposals", February 1984, Mr S Cavanagh, Senior Lecturer, Faculty of Law, University of New South Wales. This paper examines the implications of proposed transport accident benefits in the fields of income tax, sales tax and other tax areas.

D. Public Consultations

1. Preliminary Discussions

1.18 In the early stages of the reference, discussions were held with representatives of interested organisations, including the Insurance Council of Australia, the Compensation Reform Action Group, the Law Society of New South Wales, the New South Wales Bar Association, the Government Insurance Office of New South Wales, NRMA Insurance Ltd, and the Labor Council of New South Wales.

2. Submissions

1.19 The Commission received 94 submissions in response to the Issues Paper. Bodies making submissions represented a wide cross-section of the community. Representations were received from the insurance industry, workers' and employers' organisations, safety and rehabilitation groups, the medical profession the legal profession, women's groups, migrant associations, the welfare sector, and other individuals and organisations. A list of individuals and organisations who responded to the Issues Paper is contained in Appendix B.

1.20 Since publication of the Working Paper, the Commission has received 92 further Submissions. Again, representations and comments were received from a variety of individuals and groups. A list of individuals and organisations who responded to the Working Paper is included as Appendix C.

1.21 Meetings were held with a number of the individuals and organisations who made Submissions, in addition to consultations with other interested organisations. A list of those with whom Such meetings were held is attached as Appendix D.

1.22 The Submissions have been very influential in shaping our thinking. Even those submissions that rejected the very basis of the proposals in the Working Paper were important because they focussed attention on weaknesses and inconsistencies in our reasoning. The fact that we have not abandoned our general approach, but have preferred to modify the proposals, does not detract from the value of these contributions. As will be seen, this Report departs in significant ways from the suggestions tentatively put forward in the Working Paper. We refer frequently in this Report to submissions made both before and after preparation of the Working Paper. We are grateful to all those who took the time and trouble to express their views to us.

3. Meetings and Seminars

1.23 During the latter months of 1982, the Commission's involvement in discussions on accident compensation intensified. A similar process of public consultation was repeated following the release of the Working Paper in May 1983. A list of seminars addressed and meetings attended by representatives of the Commission is included as Appendix E. Those seminars and meetings which the Commission organised or assisted in organising are marked with an asterisk.

1.24 A seminar entitled "Accident Compensation: The Prospects for Reform" was held on 4 August 1983 in Sydney. It was organised by the Faculty of Law, University of New South Wales, in conjunction with the Commission, and was attended by approximately 280 people, including members of the insurance industry, the legal and medical professions and disabled people's organisations. The seminar was opened by the State Attorney General, the Hon D P Landa, LLB, MP. The following papers were presented by Commission members and staff

> "The New South Wales Law Reform Commission's Reference on Accident Compensation", Professor R Sackville.
>
> "The Problem of Non-Earners under a Statutory Scheme", Ms F Tito.
>
> "Administrative Aspects of a Statutory Scheme of No-Fault Compensation", Mr J R T Wood, QC.

In addition, papers were presented by Professor M Chesterman, Mr J R Cumpston, Mr M McHarg and Professor H Luntz, Faculty of Law, University of Melbourne.

1.25 Members and staff of the Commission also attended a seminar on 21 October 1983 entitled "The Compensation of Motor Accident Victims in Victoria - A Model for Australia?" The seminar was organised by the Law Institute of Victoria, and was opened by the Commonwealth Attorney-General, Senator the Hon G Evans, QC. The Chairman of the Commission presented a paper outlining the scheme proposed in the Working Paper. In addition, practising members of the legal and medical professions delivered papers. These have been published by the Law Institute of Victoria.

1.26 More recently, representatives of the Commission attended a conference in Adelaide on 31 May-1 June 1984 entitied "Workers' Compensation - New Directions?" and organised by the South Australian Department of Labour. In addition to papers presented by representatives of the legal profession, insurance industry, workers' compensation administration and the South Australian Government, the Chairman of the Commission delivered a

paper entitled “New Directions for Australia”. There were also several overseas speakers, including the Hon Sir Owen Woodhouse, President of the Court of Appeal of the Supreme Court of New Zealand; Mr J L Fahy, General Manager of the New Zealand Accident Compensation Corporation, and Professor T Isom Professor of Law at York University, Canada.

1.27 On 18-19 August 1984, Commission members and staff attended a conference on “Accident Compensation”, in Canberra, organised by the Australian National University. The Chairman presented a paper, again outlining the Commission’s proposals for a transport accident compensation scheme. Overseas speakers included Sir Owen Woodhouse; Professor J O’Connell, Professor of Law, University of Virginia; Professor G Schwarz, Professor of Law, University of California at Los Angeles School of Law; and Professor D Harris of Oxford University’s Centre for Socio-Legal Studies. The Commonwealth Attorney-General also addressed the conference.

4. Interstate and Overseas Contacts

1.28 The Commission was visited by a number of distinguished people with expertise in the area of accident compensation. These included:

The Hon Sir Owen Woodhouse (February 1982);

Mr B D Inglis, QC, Chairman of the Board of Directors of the Accident Compensation Corporation of New Zealand, Mr J W Brown, Deputy Managing Director and Mrs V M Duncan, Member of the Board (April 1982);

Justice A Sangster of the Supreme Court of South Australia (June 1983);

Dr H Burry, Medical Controller of the Accident Compensation. Corporation of New Zealand, and Mr K Prisk, New Zealand Government Actuary (October 1983);

Professor J O’Connell, John Allan Lowe Professor of Law, University of Virginia, USA (July 1984);

Professor J O’Connell, John Allan Love, Professor of Law, University of Virginia, USA;

Professor G Schwarz, Professor of Law, University of California at Los Angeles School of Law, USA (July 1984); and

Mr D Harris, Director of Centre for Socio-Legal Studies, Oxford University, England (August 1984).

1.29 Commission members and staff also made several visits to other Jurisdictions to gain detailed information on the operation of other existing schemes of accident compensation. Examples are given below:

In the course of a visit to Brisbane in June 1983, members of the Commission examined the Queensland workers’ compensation system as a possible model for New South Wiles, with particular reference to the use there of medical boards. Meetings were held at the Queensland Law Society, a Workers’ Health Centre, the Workers’ Compensation Board, the Queensland Confederation of Industry, the Queensland Branch of the Australian Medical Association, and the Queensland Trades and Labor Council.

In July 1983, representatives of the Commission visited the Motor Accidents Board in Melbourne for meetings with its officers. In addition, a meeting was held with the Litigation Committee of the Law Institute of Victoria.

In November 1983, two members of the Commission, the Chairman and Mr Wood, visited New Zealand for an intensive examination of the detailed administration of the New Zealand comprehensive no-fault accident compensation scheme by the Accident Compensation Corporation. Discussions were held with representatives of the Health Department. the Transport Ministry, the insurance industry, the union movement and the legal profession, as well as with officers of the Corporation.

1.30 The Commission also hosted the inaugural meeting of the Interstate Working Party on Workers’ Compensation in July 1983. Representatives from South Australia, Western Australia and Victoria met in Sydney

with officers of the Workers' Compensation Commission of New South Wales, the New South Wales Law Reform Commission and the New South Wales Attorney General's Department. The aim of the Working Party is to achieve some uniformity in the area of workers' compensation.

5. Consultative Committees

1.31 To assist us in specialised areas, the Commission formed three consultative committees. In October 1983, the Workers' Compensation Consultative Committee was formed. This Committee was constituted by representatives of the Workers' Compensation Commission, the insurance industry, the New South Wales Labor Council, the Compensation Reform Action Group and the New South Wales Bar. In December 1982, the Medical Practitioners' Consultative Committee was established with senior representatives from the medical profession, especially those involved in rehabilitation. In January 1983, a Community Consultative Committee was formed. This Committee included representatives from a range of welfare, community and ethnic groups.

6. Rehabilitation

1.32 It became evident at an early stage that the question of rehabilitation is particularly important in this reference. Accordingly, members of the Commission met widely with rehabilitation workers, including medical practitioners and other rehabilitation specialists, rehabilitation counsellors and representatives from self-help organisations. These meetings are included in Appendix E.

II. TRANSPORT ACCIDENTS: A FIRST STEP

A. Motor Vehicle Accidents

1.33 Paragraph 1.1 referred to the breadth of the terms of reference and the fact that this Report is confined to proposing a scheme for compensating transport accident victims. The Working Paper gave a number of reasons for concentrating initially on motor vehicle and other transport accident victims, leaving until later the compensation arrangements for other categories of accident victims. The reasons were the following:

- the large number of people killed or injured in motor vehicle accidents, and the comparative severity of injuries sustained in those accidents;
- the failure of current arrangements to provide adequate compensation for many motor vehicle accident victims;
- community criticism of current arrangements for compensating motor vehicle accident victims;
- the recent introduction of no- fault motor accident schemes in other parts of Australia;
- the serious cost pressures on the existing compulsory third party insurance system; and
- the ready availability of a source of funds to provide compensation for the victims of motor vehicle accidents.

The following paragraphs briefly refer to each of these matters, although all are dealt with in more detail elsewhere in the Report.

1. The Magnitude of the Problem

1.34 In Australia generally, and New South Wales in particular deaths and injuries arising out of motor vehicle accidents occur on a large scale. During 1983, 966 people were killed and almost 34,000 people were recorded by the police as injured in New South Wales motor vehicle accidents. [1] About half the victims of motor vehicle accidents are under 25 years of age, reflecting the vulnerability of young adults to injury and death in this way. [2] The evidence shows that motor vehicle accidents are one of the most common causes of severe handicap in Australia. [3] A recent study of patients with spinal cord injury suggests that motor vehicle accidents are the major single cause of catastrophic injury in the form of quadriplegia and paraplegia in New South Wales, with more than half of the victims being injured in motor car and motor cycle accidents. [4] Similarly, a recently published survey

shows that, of handicapped people whose disability arose from an accident, 36.1 per cent were handicapped as the result of an accident occurring on a street, road or highway. [5] It follows that the compensation arrangements for motor vehicle accident victims are of major importance to the community.

2. Failure to Compensate Motor Vehicle Accident Victims

1.35 In the Working Paper we estimated that approximately one-third of people injured (or the families of people killed) in motor accidents are unable to claim compensation in the form of damages in a common law negligence action because they are unable to prove that their injuries were caused by another person's fault. [6] This estimate is supported by surveys and other empirical studies (paragraphs 3.18-3.20). In addition, motor vehicle accident victims who can prove fault may have their damages reduced because they were deemed to be partly responsible for the accident (contributorily negligent) or because they settle their claims out response of court at a "discount" (paragraphs 3.22-3.26). Sometimes the reductions can be substantial. The failure of the present system to provide adequate compensation to many motor vehicle accident victims, including some who have clearly not been guilty of any wrongdoing themselves, is a major deficiency that requires careful attention from policy-makers.

3. Community Concern

1.36 The Issues Paper drew attention to criticisms of current accident compensation arrangements expressed in the media and by community groups and concerned individuals. [7] Criticism had been directed specifically at the failure of the system to provide compensation for many accident victims and at the delay and expense often involved in common law negligence actions. judges, too, have been vigorous critics of the system. For example, in a Supreme Court case decided during the course of the reference, one judge commented:

> This case, as do many others like it, demonstrates the urgent necessity for the establishment of a no-fault scheme of compensation for victims of accidents on the highways and elsewhere. The present defendant suffered far greater damage than did the plaintiff. The number of victims unable to obtain compensation grows daily. The plaintiff is indeed fully entitled to compensation but it causes me personal and judicial distress at having to leave the defendant uncompensated. [8]

1.37 In the course of the reference, the media have continued to be critical of current arrangements and to stress the need for reform. For example, an editorial in the *Sydney Morning Herald,* appearing after publication of the Working Paper, observed that:

> ... the great anomaly, amounting to serious injustice, in the present third party system is that about one-third of traffic accident victims cannot claim damages because there is nobody at fault whom they can sue. Many a paraplegic or quadriplegic has thus been reduced to near-desperation with only a grossly inadequate invalid pension as a safety net. [9]

This concern was reflected in submissions. While commentators were far from unanimous as to the best means of overcoming the deficiencies of the current system, virtually all agreed that reforms were required, including some form of no-fault compensation. [10]

4. No-Fault Motor Vehicle Accident Compensation Schemes

1.38 A further reason for placing a high priority on compensation arrangements for motor vehicle accident victims is that no-fault motor vehicle accident schemes have been introduced in Victoria, Tasmania and the Northern Territory. Consequently, people injured in motor vehicle accidents in New South Wales may be substantially worse off than people injured in States which have no-fault schemes.

1.39 The no-fault motor vehicle accident schemes in Victoria and Tasmania, which are described in Chapter 4, have been in operation since 1974. These schemes supplement the common law negligence action while the Northern Territory scheme, which came into force in 1979, now totally replaces the common law. The experience of these schemes has been taken into account in formulating proposals and in testing assumptions.

5. Cost Pressures

1.40 The Working Paper drew attention to the concern expressed by the GIO about the escalation of damages awards in common law negligence actions and the inadequacy of reserves set aside to meet outstanding claims arising out of motor vehicle accidents (that is, claims which have been incurred but not finalised). During the period 1977 to 1983 compulsory third party insurance premiums[11] were tied by legislation in New South Wales to the Consumer Price Index.[12] even though claims generally increased at a higher rate than the rate of inflation. This led the GIO to report in 1983 that its third party fund stood at $1,280 million while outstanding claims were estimated to cost $1,555 million, or $275 million more than the funds available to pay them.[13] In December 1982 an actuary advised the GIO that a 37 per cent rise in premiums would be necessary to cover liability for accidents occurring in 1983.[14] The GIO has repeatedly argued that consideration be given to increasing premiums beyond the inflation rate, or to introducing measures designed to contain the escalation of the cost of claims.[15]

1.41 In February 1984 the Premier announced that compulsory third party premiums would be reduced. This was to be achieved, by moving from a “funded” to a “pay-as-you-go” system of financing the third party scheme,[16] and by measures designed to reduce the level of damages awards in cases of serious injury.[17] The point for present purposes is that financial pressures have prompted important legislative changes to the compensation system, each of which raises difficult policy questions. Our view is that the recently announced changes do not solve the problems generated by the underlying financial difficulties faced in the current compensation arrangements. Accordingly, pressures for a fundamental review of those arrangements remain.

6. Funding Source

1.42 While the compulsory third party motor vehicle insurance system is experiencing cost pressures, it provides an identifiable and substantial source of funds for compensation of motor vehicle accident victims. During 1982-83, a total of $399 million was paid in third party premiums in New South Wales.[18] Owners of motor vehicles, and motorists in general appear to accept the principle that compensation for victims of motor vehicle accidents should be financed through insurance premiums, although in practice not all the costs of death and injury in such accidents have been met from this source. Consequently, if it is desirable to restructure compensation arrangements, and if the restructured system is no more expensive than current arrangements, existing sources of finance can be used for the new scheme at no additional cost to the State or to motorists. This is an important consideration which suggests that attention should first be devoted to compensation arrangements in this area before other issues are tackled.

1.43 There is a ready source of funds to compensate victims of work-related accidents. The workers’ compensation system is, generally speaking, funded by compulsory insurance paid by employers. During 1982-83 almost $952 million was in premiums by premiums by employers or was notionally paid by self-insurers (employers authorised to carry their own insurance).[19] However, the workers’ compensation system provides benefits to persons injured in work-related accidents on a no-fault basis.[20] Thus, what ever the deficiencies of the scheme, it does not leave gaps of the kind that characterise the system applicable to motor vehicle accident victims. For this reason, the need for review in this area, at least on grounds of equity, is less pressing thin in relation to motor vehicle accidents.

1.44 If new compensation schemes, offering substantial benefits, were to be introduced or extended into other areas of accidental injury, such as home or leisure-time accidents, it would be necessary to tap new sources of finance. While New South Wales has limited compensation schemes operating in certain areas,[21] they are restricted in scope and the funds allocated are relatively insignificant.

B. Public Transport Accidents

1.45 It is proposed that the Scheme should also extend to people injured, and to the families of people killed, in public transport accidents. Thus the Scheme would apply to transport provided by public authorities such as the State Rail Authority and the Urban Transit Services Authority, and to services provided by licensed private bodies such as bus companies. The arguments in favour of this extension are as follows.

> Some forms of public transport, such as taxis and private buses, are already covered by compulsory third party insurance and would, in any case, be included within any motor vehicle accidents scheme.

Anomalies would arise if the Scheme applied to some forms of public transport (such as private buses and taxis) and not to others. There is no sound policy reason for distinguishing between the compensation entitlements of people injured in, for example, a private bus or taxi accident, and those who are injured as the result of a train derailment or a ferry collision.

While a person injured in a public transport accident may have a better chance of establishing fault and obtaining damages in a common law negligence action than a person injured in an ordinary motor vehicle, he or she may face similar difficulties and delays in obtaining compensation. If the compensation system can be improved for motor vehicle accident victims, there is no reason why the position of people injured in public transport accidents should not similarly be improved.

Public transport accidents may cause extremely serious injuries, creating the same need for adequate and speedy compensation which arises in motor vehicle accident cases. This is illustrated by the Granville train disaster of 1977, in which 83 people died.

As in the case of motor vehicle accidents, there is a funding source liable for compensation payments arising out of public transport accidents.[22] At present Government public transport authorities are self-insurers (that is, they cover their own although this is ultimately guaranteed by the State), while virtually all private companies providing public transport services carry insurance against their liability to pay damages. If new compensation arrangements were established, there would not appear to be any difficulty in allocating funds presently devoted to meeting common law damages claims to the Scheme.

1.46 Since publication of the Working Paper, which suggested the inclusion of Public accidents within any new compensation arrangements, we have received a submission transport from the Ministry of Transport supporting a no-fault transport accidents scheme along the lines proposed in the Working Paper. [23] Accompanying letters from the State Rail Authority of New South Wales and the Urban Transit Authority of New South Wales also support the scheme, and suggest that funding proposals should be a matter for further discussion with the public transport authorities concerned. [24] These reinforce our view that any reassessment of compensation arrangements for victims of motor vehicle accidents should extend to people injured or killed in public transport accidents.

III. STRUCTURE OF THIS REPORT

A. Background

1.47 Chapter 1 outlines the historical background to the references and the sources used in the preparation of this Report. The Chapter also explains why the recommendations are confined to a scheme compensating victims of transport accidents, despite the broad terms of reference.

B. Existing Compensation Systems

1.48 The next three Chapters examine existing compensation systems in New South Wales and other Australian and overseas jurisdictions. Chapter 2 outlines the sources of compensation currently available in New South Wales for personal injury and death caused by transport accidents. Because of the important role of the common law negligence action in providing compensation to transport accident victims, Chapter 3 makes a critical evaluation of the common law's approach to compensation. Chapter 4 describes alternative compensation systems operating in other jurisdictions or proposed in studies undertaken in Australia and elsewhere.

C. General Principles

1.49 Chapter 5 analyses the objectives of a compensation system and the principles that should govern the award and assessment of compensation in the no-fault scheme. The Chapter explains the emphasis on rehabilitation and the extent to which the Scheme should adopt restitution as the basis for assessing compensation. The Chapter also deals with the form in which compensation should be provided and the nature of the decision-making process.

D. A Comparison

1.50 Since publication of the Working Paper, there has been much discussion of the comparative merits of a no-fault scheme which replaces the common law and of a “dual” scheme which provides limited no-fault benefits, but retains the right to sue at common law. Chapter 6 makes the comparison and explains why a scheme replacing the common law is better able to fulfil the objectives identified in Chapter 5.

E. A Transport Accidents Scheme for New South Wales: Detailed Proposals

1.51 Chapters 7 to 13 describe in detail the compensation available under the Scheme including the rules governing the assessment of compensation, and the approach to rehabilitation

> Chapters 7 and 8 recommend periodic compensation for loss of earning capacity of both earners and non-earners incapacitated in transport accidents. These Chapters provide for compensation for loss of potential for advancement and for assessment of permanent incapacity.
>
> Chapter 9 considers the means by which the emphasis on rehabilitation can be translated into practical policies. The Chapter traces the evolution of rehabilitation services and explains the role that should be played by the Accident Compensation Corporation in promoting rehabilitation, including the provision of necessary aids and appliances.
>
> Chapter 10 covers the provision of support services to disabled accident victims. These include attendant care services required by severely disabled people, emergency family support accommodation and home modifications and mobility allowances. The Chapter is also concerned with replacement household services where the disabled person is precluded from providing them.
>
> Chapter 11 takes up the problem of compensation for non-economic loss. It recommends that compensation should be provided for permanent disability, according to the degree of disability.
>
> Chapter 12 deals with the benefits payable to the family member of a person killed in a transport accident. In the case of a surviving spouse and children these will usually consist of a lump sum supplemented by periodic payments for a period varying according to the ages and circumstances of the survivors.
>
> Chapter 13 explains the approach to be taken to the provision of medical hospital and ancillary services, such as paramedical services, home nursing and long-term institutional care. The Chapter considers the relationship between the general health care system (Medicare) and the Transport Accidents Scheme.

F. Scope of the Scheme

1.52 Chapter 14 is concerned with the coverage of the Scheme and its relationship with other systems and sources of compensation. The issues dealt with include the definition of a transport accident, the effect of abolition of common law rights, the geographical scope of the Scheme, the relationship with the workers’ compensation system and the exclusions that should be made on public policy grounds.

G. Administration and Decision-Making

1.53 Chapter 15 describes the proposed administrative structure of the Scheme including the establishment of an independent Accident Compensation Corporation and the principles that should govern its operations. The Chapter considers means of encouraging high quality decision-making within the Corporation and the most effective ways of discharging the statutory responsibilities. Chapter 16 outlines the decision-making process within the Corporation and the appeal structure necessary to protect the rights of claimants. The proposal put forward in the Chapter is an adaptation of the system of administrative review operating under Commonwealth law and includes a full right of appeal to a judicial tribunal.

H. The Cost of the Scheme

1.54 The estimates of the cost of the Scheme are based on detailed actuarial calculations summarised in Chapter 17. That Chapter also identifies the ways in which the Scheme can be funded and related matters such as the transition from the existing third party insurance system and the financial assistance that could be provided by the Commonwealth.

1. The Scheme in Context

1.55 Chapter 1 explains the reasons for confining this Report to transport accidents. The final Chapter (Chapter 18) briefly discusses the implications of the Scheme in broader context of compensation for personal injury in general at both State and Federal level.

FOOTNOTES

1. Traffic Authority of New South Wales, *Road Traffic Crashes in New South Wales - Statistical Statement Year ended December 31st, 1983*, pp.6, 20. These figures were considerably lower than those in 1982, partly because of the effect of random breath testing.

2. *Id.,* pp.11-12, 21-22. Of the 33,978 people recorded as suffering injuries, 17,518 (51.6 percent) were under 25 years of age. Almost half of those killed were aged less than 25 years (46.5 per cent).

3. Australian Bureau of Statistics, *Handicapped Persons Australia* 1981, Cat. No.4343.0, p.3 1, table 2.17. The survey shows that 26,300 persons whose accident occurred on a street, road or highway were “severely handicapped”. This was only exceeded by the 26,800 persons who suffered severe handicap as a result of an accident at work.

4. See D. Dowda, *Spinal Cord Injury Physical and Social Outcomes* (unpublished thesis, University of Sydney 1982), p.34, table 2. This confirms the results of other studies quoted in the Issues Paper, para.4. 10.

5. See note 3 above, p.30, table 2.16.

6. Working Paper, paras.3.10-3.14.

7. Issues Paper, paras.2.19-2.25.

8. Moore v. Court, 23 September 1982, Supreme Court of New South Wales, Maxwell J, transcript of judgment at p.8. See also *Walling v. Nominal Defendant*, 22 May 198l, Supreme Court of New South Wales, Maxwell J, transcript of judgment at p.13: *Elchab v. Brown,* 9 June 1977, Supreme Court of New South Wales, Court of Appeal, transcript of judgment at p. 10, per Reynolds, J A, and *Sheridan v. Luvis,* 7 August 1981, Supreme Court of New South Wales Court of Appeal, transcript of judgment at p.6, per Samuels, J A.

9. 31 May 1983, p.6. See also *Daily Telegraph,* 1 July 1983, p.3; *Canberra Times* 5 July 1983, p.2.

10. See eg. Submissions W1, W2, W3, W5, W8, W17, W18, W20, W24, W26, W28, W29, W30, W32, W3,’, W38, W41, W44, W48, W49, W50, W51, W52, W53, W56, W57, W59, W60, W63 and W71.

11. These premiums are used to fund the present common law based system of compensation for motor vehicle accident victims. Section 7 of the Motor Vehicles (Third Party Insurance) Act, 1942 requires all motor vehicles used on public streets to be covered by a third party insurance policy. This policy insures the owner and any driver of the vehicle against all liability incurred in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in New South Wales or elsewhere in Australia: s.10(1).

12. Motor Vehicles (Third Party Insurance) Act, 1942, ss.33A-33E inserted by Motor Vehicles (Third Party Insurance) Amendment Act 1977.

13. GIO, *Annual Report 1982 - 1983*, p.8.

14. E S Knight & Co, *Motor Vehicle Third Party Insurance Premium Rates 1983* (Report to GIO), dated 24 December 1982, p.23.

15. Thus in its submission to us the GIO commented that a limit of $500,000 should be placed on common law damages for personal injury. See Submission S51, p.5.

16. See Glossary. A move from a funded to pay-as-you-go scheme produces “one-off” savings. See also Chapter 17.

17. These included introducing a higher “discount rate” (5 per cent instead of 3 per cent) for calculating the present value of future economic loss, Such as lost earning capacity. The effect of a higher discount rate is to depress the level of damages in serious cases.

18. Until the enactment of the Motor Vehicles (Third Party Insurance) Amendment Act 1984, the GIO transacted approximately 98 per cent of the compulsory third party insurance in New South Wales, and NRMA Insurance Ltd. the remainder. The GIO is now the sole third party insurer.

19. Workers’ Compensation Commission of New South Wales, *Fifty-Seventh Annual Report Year Ended 30 June 1983,* p.6.

20. Injured workers able to prove that their employer was negligent also have an action for damages against the employer, but in this case the workers’ compensation benefits are deducted from the common law award.

21. Notably in relation to certain sporting injuries and injuries caused by criminal misconduct. See paras. 2.50-2.51; 2.47-2.49 respectively.

22. Provision for public risks is made by both the State Rail Authority of New South Wales and Urban Transit Authority of New South Wales. Sums put aside are not simply to cover personal injury damages, but also compensation for property damage. For bus services, the Current reserve is $1.2 million. For ferry services, the current reserve is almost $0.6 million: Urban Transit Authority of New South Wales, *Annual Report 1982-1983*, p.30. The State Rail Authority of New South Wales has a Current Fire and Accident Reserve Provision of $7.2 million: State Rail Authority of New South Wales, *Annual Report 1983*, p.18.

23. Submission W41.

2. The Compensation System

I. INTRODUCTION

2.1 This Chapter contains a history of accident compensation together with a description of the current arrangements in New South Wales for compensating accident victims. In moving away from the laissez-faire philosophy of the nineteenth century, two major trends in accident compensation have emerged. These are:

> the expansion of the class of injured people entitled to receive compensation for their disability or incapacity; and
>
> the emergence of more sophisticated mechanisms for shifting financial ability for providing compensation from the individual who caused the injury, to the community, or at least sections of the community.

In describing current compensation arrangements we refer not only to the common law negligence action and to statutory compensation schemes, but also to the social security system financed and administered by the Commonwealth Government While the system is not specifically concerned with compensating accident victims, it does provide income maintenance and additional assistance to some victims not entitled to receive or awaiting compensation and others whose compensation has proved inadequate.

II. HISTORICAL BACKGROUND

A. The Common Law

1. Negligence as a Basis for Compensation

2.2 In its early stages the common law imposed liability on individuals responsible for causing harm regardless of whether the harmful act was intentional or unintentional. [1] The main concern was causation, that is, the connection between the plaintiff victim's injury and the defendant wrongdoers act.

2.3 The principles of the early common law were appropriate in a predominantly agricultural community in which entrepreneurial activities were rare and the risks of accidental death and injury were relatively low. But the emergence of the machine age and concentrated urban populations dramatically increased the rate of accidental death and injury, especially in work and transport accidents. These new risks highlighted the weaknesses of the common law and suggested that a fresh approach was needed.

2.4 An answer was found in the embryonic negligence action, which struck a balance between the conflicting demands of an expanding industrialised society. Viewed in historical perspective, the development of the modern negligence action restricted the liability of those who caused injury, rather than expanded it. The law responded both to the perceived need to encourage individual initiative and the desirability of compensating individuals who had sustained injury as the result of another person's activities. The principle of "no liability without fault" was a product of the laissez-faire philosophy of the time, since it provided for the loss to be " shifted" from the victim only in cases where the person causing it was deemed culpable.

2.5 These principles of liability could be justified on grounds of social morality, since liability depended on showing that the defendant had failed to exercise reasonable care (that is, that he or she was negligent) over a matter which was within his or her own control. This was reinforced by the fact that the fault principle evolved before the widespread availability of liability insurance, at a time when the individual wrongdoer was normally obliged to pay compensation from his or her own pocket liability could be justified as a means of exacting retribution from a negligent defendant and as a device for

deterring careless behaviour. [2] The justification became more difficult to sustain as the ambit of negligence expanded and became divorced from moral culpability. [3]

2.6 Preference for the concept of negligence, although understandable, was not inevitable. In the second half of the nineteenth century, the courts applied a principle of “strict liability” to certain high risk activities. [4] Under this principle a person conducting a dangerous enterprise was liable to a person injured as a result, regardless of whether negligence could be proved. Strict liability was consistent with an individualistic approach because it wis based on the view that a person should pav for the costs to others inevitably associated with undertaking a highly dangerous activity. [5] Given the innovation and extent of judicial law-making in the nineteenth century, it would not have been altogether surprising had the courts extended strict liability to such inherently dangerous areas as the workplace or the highway. But the concept of negligence proved the more appealing and the courts declined the opportunity. Indeed, the danger of the roads was used as an argument to support the view that people using them accepted the inherent risk of injury unless another’s negligence could be proved. [6]

2. Restrictions on the Common Law Negligence Action

2.7 The common law negligence action denied compensation to those who could not prove that the injury had been caused by a defendants failure to take reasonable care. Even where negligence could be proved, the law developed additional rules which prevented many injured people from recovering damages, which included:

- the long-standing rule that one spouse could not sue the other, which applied in negligence actions as it did to any other tort; [7]

- the principle, established at the beginning of the nineteenth century, that damages could not be recovered for the death of a human being; [8]

- the immunity of highway authorities from liability for failure to keep highways safe and in good repair; [9] and

- the refusal of the courts to award damages in respect of nervous shock [10] or prenatal injuries. [11]

2.8 Perhaps the most restrictive rules were developed in the context of compensation claims resulting from work-related injuries, although some applied elsewhere. Reflecting highly individualistic notions of responsibility, these rules helped to cushion the entrepreneur against any serious addition to his or her overhead costs. They have been described as the unholy trinity”: [12]

- the defence of contributory negligence which defeated the worker s claim totally if the injury was partly the result of his or her own carelessness;

- the defence of voluntary assumption of risk which applied if the injury was the result of risks inherent in the work even if the worker effectively had no choice about the work to be performed; and

- the doctrine of common employment which denied compensation where the injury was caused by the negligence of a fellow worker for whom the employer would otherwise have been liable. [13]

B. Expanded Compensation Arrangements

2.9 While the common law limited the ability of accident victims to recover compensation by choosing negligence rather than strict liability as the principal basis for compensation (paragraph 2.6), there has been a consistent trend towards expansion of the compensation system over a period of a century or more. Sometimes the expansion has been achieved by judicial innovations. On other occasions the legislature has intervened, either to establish new compensation schemes, such as the workers’ compensation system, or to remove restrictions on the scope of the common law negligence action. In

at least one instance it has been the product of a combination of legislative change and judicial initiative. The willingness of courts and legislatures to expand the class of accident victims entitled to compensation has been prompted by a range of factors which clearly include the greater opportunities available to defendants, through insurance and other arrangements, to spread the cost of compensation to the community at large. We return to this aspect of the compensation system in paragraphs 2.17-2.23.

1. The Negligence Action

2.10 Legislative interventions which removed some of the restrictions on the common law negligence action included:

> Lord Campbell's Act 1846 (Fatal Accidents Act 1846 (UK)), which permitted close relatives of a deceased person to claim damages for loss of material support, where that person's death was caused by the negligence of the defendant; the English precedent was followed in New South Wales in 1847[14] and eventually adopted throughout Australia;
>
> the modification[15] and subsequent abolition[16] of the doctrine of common employment, one of the "unholy trinity" (paragraph 2.8);
>
> the abolition of the contributory negligence defence and its replacement with a statutory rule under which damages were reduced in proportion to the plaintiffs share of responsibility for the accident causing his or her injury;[17] and
>
> the abolition of the rule preventing one spouse from suing the other, initially in cases of motor vehicle accidents[18] but more recently for all purposes.[19]

2.11 The courts, too, were prepared to modify some restrictive rules. This became evident an early stage in relation to the principles which precluded injured workers from bringing negligence claims against their employers. For example, the concept of voluntary assumption of risk (paragraph 2.8) was redefined to prevent it applying to a worker merely because he or she undertook work knowing that there was a risk of injury. [20] This took account of the fact that ordinarily the worker was not in a position to exercise a choice about the work to be performed and thus could hardly be said to have consented to the risk of injury. [21] Later the courts changed their attitude towards claims for nervous shock and permitted such claims to be brought. [22] In the landmark decision in *Donoghue v. Stevenson*, [23] in which the House of Lords laid the foundations for the modern law of negligence, the scope of the duty to take reasonable case for the safety of another person was expanded and the opportunity created for continuing innovation by the courts. [24]

2.12 One consequence of the broad approach taken in *Donoghue v. Stevenson* was the gradual relaxation of the requirements that had to be satisfied in order to establish liability in negligence. Not only did the courts become more receptive to enlarging the scope of the duty to take care, but the rules governing the kind of damage for which the defendant was responsible were also relaxed. [25] Most important of all the concept of negligence itself was applied generously. The standard of reasonable care, by which the defendant s conduct was measured, was inherently flexible and, in the hands of a judge or jury charged with the responsibility of applying the standard, likely to be influenced by considerations outside the formal legal rules. A jury, or judge, faced with a seriously maimed plaintiff and a defendant who was insured [26] could be more readily persuaded that the defendant had failed to exercise the required degree of care. [27] Thus, in practice, the plaintiff s task of making out a claim against the defendant in negligence tended to be easier than the formal rules governing liability would suggest. [28]

2. Statutory Compensation Schemes

2.13 Concurrently with the expansion of the common law negligence action, legislatures both in Australia and overseas have established new schemes to compensate accident victims. These have

operated on a no-fault basis, in the sense that the entitlement of the injured person to claim compensation arises independently of his or her ability to prove that someone else was at fault for the accident which caused the injury. The statutory schemes, at least in Australia, have generally functioned alongside the common law negligence action although the benefits provided to accident victims are not usually cumulative. The schemes may be funded by contributions from particular classes of people such as employers or owners of motor vehicles, from potential beneficiaries such as participants in a particular activity, or from general taxation revenues.

2.14 Not surprisingly, industrial accidents provided the stimulus for the first statutory no-fault accident compensation schemes. In 1897 a Conservative Government in the United Kingdom passed the first workmen's Compensation Act, following the example of Bismarck's Germany. [29] This Act applied only to hazardous industries, and provided weekly compensation independently of proof of fault, not exceeding 50 per cent of pre-accident earnings and subject to a maximum. A similar approach was adopted in the first New South Wales legislation on this subject, [30] passed in 1910. Over the years, often as a result of union pressure, the benefits provided under the workers' compensation legislation have been increased substantially. [31] We briefly deal with the current legislation later in this Chapter (paragraphs 2.37-2.45).

2.15 No-fault compensation schemes have been created for other categories of accident victims, although the benefits are usually less generous than those available to victims of work accidents. In New South Wales, for example, a criminal injuries compensation scheme has operated since 1968, [32] and a sporting injuries scheme, providing benefits to participants injured in the course of organised sporting activities, was established in 1978 (paragraphs 2.47-2.5 1). Three Australian jurisdictions have adopted no-fault schemes providing limited benefits to motor vehicle accident victims (Chapter 4). In all cases the overriding consideration has been the desire to provide compensation even if limited in scope, to injured people who would otherwise have no claim to compensation (or, in the case of criminal injuries, no real possibility of recovering from the wrongdoer).

3. The Action for Breach of Statutory Duty

2.16 just as industrial accidents were the catalyst for the first statutory no-fault schemes (paragraph 2.14), they also generated an increasing amount of legislation aimed at ensuring minimum standards of industrial safety. Statutes and regulations imposed obligations on factory owners and other employers to implement and maintain a wide variety of measures aimed at improving working conditions and reducing risk, for example, the fencing of dangerous machinery. The consequence of a breach was normally a fine or other criminal penalty, but the courts grafted onto these criminal offences a right to damages when the statutory, requirements were not met. This became known as the action for breach of statutory duty [33] and because the statutory standards were often stated in absolute terms it operated effectively as a tort of strict liability. In addition it is no longer subject in New South Wales to the defences of contributory negligence [34] or voluntary assumption of risk. [35] However, for reasons that are not entirely convincing, [36] outside the area of industrial accidents the general principle has been that a breach of statute does not of itself entitle the person injured as a result to succeed in a claim for damages. For example, breach of a traffic regulation is at most evidence of a failure to exercise reasonable care in a negligence action. [37]

C. Distribution of Losses

1. Spreading the Risk

2.17 The expansion of the scope of the common law negligence action and the parallel development of no-fault schemes were influenced by the fact that the person responsible for the accident did not necessarily have to bear the cost of paying compensation personally. It is no coincidence that the common law negligence action expanded most markedly in areas such as work accidents, where the defendant was able to pass on the cost of compensation to others and thus ensure that the burden was shared evenly among a large class. Within the limits of a competitive market, it was open to employers engaged in business to charge marginally more for their goods and services to cover the cost of claims by injured workers (or by injured consumers). Passing the cost along the chain of production was not

the only method of loss distribution. The increasing availability of liability insurance presented a different means of spreading the cost. By paying the premium on an insurance policy, employers or owners of motor vehicles contributed to a fund from which compensation was available to pay for the consequences of the negligence of any one of them. Thus insurance relieved the defendant of the liability to pay compensation out of his or her own pocket and spread the cost among all those taking out the same class of insurance.

2.18 The earliest policies were taken out by firms owning horse-drawn vehicles, which sought indemnity against liability for injury caused to "third parties". [38] After the enactment in England of the Employers' Liability Act 1880, which limited the availability of the defence of common employment, employers began to insure against the consequences of liability for negligence causing harm to employees and third parties. The expansion of the railway industry contributed further to the popularity of liability insurance. [39] Although early workers' compensation legislation did not oblige employers to insure, it was expected that employers in practice would take out insurance against their new liability. In New South Wales, the passing of the Workmen's Compensation Act, 1910, resulted in the incorporation by the New South Wales Chamber of Manufacturers of the Manufacturers' Mutual Accident Indemnity Association Limited [40] which offered liability insurance to employers.

2. Compulsory Insurance

2.19 As liability insurance became increasingly common the desirability of protecting injured people against the insolvency of the uninsured became apparent. The New South Wales Workers' Compensation Act, 1926, like workers' compensation legislation elsewhere, imposed a compulsory insurance requirement on employers to cover liability for compensation payments under the Act, although at the time the legislation was introduced, there was considerable debate as to whether insurance should be under written by private insurance companies, or a government run insurance body. [41] In New South Wales, as in all other States employers are also required to take out insurance against their potential common law liability to employees. [42]

2.20 It was 16 years after the introduction of compulsory insurance in workers' compensation that the need for it in the area of road accidents was acknowledged. The rising toll of death and injury on the roads resulted in the introduction of compulsory third party insurance to ensure that plaintiffs were protected against the impecuniosity of defendants. [43] All motor vehicle owners were required to insure with an authorised insurer against the liability of the owner or driver of the vehicle to a person ("the third party") Injured by the use of the vehicle. Thus, a person injured in a road accident was protected against the possibility that someone held "at fault" for the accident would not have the resources to pay damages.[44] The legislation protects the injured person even where the defendant has failed to insure, or where the plaintiff is injured by an unidentified person. In these circumstances the legislation provides for proceedings to be brought against a "nominal defendant' and damages are paid out of money provided by authorised insurers from compulsory third party premiums. In relation to other transport accidents, the major statutory authorities in New South Wales, such as the Urban Transit Authority and the State Rail Authority, are self-insurers: that is, they make compensation payments out of their own resources and carry the risk of liability themselves.

2.21 In some countries, compulsory insurance has spread beyond work-related injuries and road accidents. Thus, for example, in England, liability insurance is compulsory in respect of nuclear installations, dangerous wild animals, riding establishments and oil pollution from merchant ships. [45]

2.22 One effect of compulsory insurance is to protect an injured plaintiff against risk that the defendant will prove to be insolvent or, at best, have assets which fall well short of the damages award. The sometimes devastating effect which little or no insurance can have outside those areas covered by compulsory insurance was recently illustrated in a case in which parents of a six year old boy were held liable in negligence for their failure to exercise proper control over their son who poured petrol over another boy and set him alight in a backyard shed. [46] The other boy suffered shocking burns especially to his face and was still undergoing extensive plastic surgery at the time of the trial 10 years after the accident. A judgment of $713,500 was awarded against the defendant parents, but the father was unemployed and relied on sickness benefits. Any attempt to enforce the judgment against their

assets would do little effectively to compensate the plaintiff and would certainly impoverish the defendants. The defendants were insured against public risk but the extent of the insurance cover was uncertain and at most would amount to $100,000, which was insufficient to cover even the continuing medical costs of the plaintiff. [47]

2.23 In practice a system of compulsory insurance relieves the individual wrongdoer (or other person liable to pay compensation) of the obligation to meet a compensation award from his or her own resources, thereby avoiding consequences of the kind described in the previous paragraph. This has very important implications when considering the justification for the continued application of the fault principle which underlies the common law negligence action. These issues are explored further in Chapter 3.

III. THE CURRENT COMPENSATION SYSTEM IN NEW SOUTH WALES

2.24 The four major components of the current accident compensation system in New South Wales, which are described briefly in this section, are:

> the common law negligence action which requires proof of fault, but aims to provide "full" compensation in the form of a once-and-for-all lump sum payment for economic and non-economic loss suffered by the victim or his or her family;
>
> the workers' compensation system which provides no-fault compensation for economic loss (with limited benefits for non-economic loss), in the form of periodic payments and (sometimes) lump sums, for most work-related injuries and diseases;
>
> limited statutory schemes, such as the criminal injuries and sporting injuries schemes; and
>
> the social security system which provides income maintenance payments, usually through sickness benefits or the invalid pension, to people incapacitated through injury who cannot support themselves.

Social security benefits are included in this description because they are the major source of assistance for many accident victims, including some who have previously received other forms of compensation which have proved inadequate. (paragraph 2.1).

A. The Common Law Negligence Action

1. Liability

2.25 In order to succeed in proceedings for damages for personal injuries in a common law negligence action, the injured party (usually the plaintiff must show that the other party (usually the defendant) owed him or her a duty of care, that the injury arose out of a failure on the defendants part to take reasonable care, and that the injury was not too remote a consequence of the breach. [48] True to its origins and its name, the negligence action still depends upon fault in the form of a failure to take reasonable care. In principle, the outcome of a negligence action should not be affected by the fact that a defendant is insured against liability, whether voluntarily or compulsorily. [49] However, knowledge of the existence of insurance has encouraged some judges and juries to impose a more rigorous standard on the defendant than if he or she had been left personally to bear the full cost of compensation.

2.26 For the purpose of proving negligence, "reasonable care" is the degree of care that a reasonable person would have taken in all the circumstances of the case. This standard does not usually take into account the personal characteristics of the particular defendant, such as inexperience or physical disability. Thus a person who has acted to the best of his or her ability may be adjudged as negligent if the conduct falls to measure up to the standard expected of a reasonable person. But an accident victim who is unable to establish that the accident was caused by the defendants negligence is not entitled to common law damages, even though he or she may not be to blame for the accident. For

example, a motor cyclist who is travelling at an apparently safe speed and is injured when the cycle skids on a slippery road, would not normally succeed in a common law negligence action. [50]

2.27 We have also referred to the statutory modification of the common law rule that the plaintiff's contributory negligence constituted a complete defence to a common law negligence action (paragraph 2.10). Since 1965 in New South Wales, where a person is injured 'dent in circumstances in which that person's partly to blame, damages are reduced in an accordance with his or her share of the responsibility. [51] For example, in a collision occurring at an intersection, the court may decide that both drivers were equally responsible for the accident. If both drivers are injured the damages to which they would otherwise be entitled ill be reduced by 50 per cent, and each will bear the remainder of their own loss. This principle is not confined to cases where the injured person is partly to blame for the accident itself, but extends to situations where he or she failed to take precautions which might have avoided or minimised its consequences. Damages have been reduced where a plaintiff failed to take a precaution such as wearing a seat belt [52] or a crash-helmet, [53] which would have made the injury less severe.

2.28 Apart from the necessity to prove that the defendant was at fault, the scope of the common law negligence action is limited by rules which have survived the expansionist tendencies of the last century. One example is the immunity of highway authorities for loss caused by their failure to keep the highway in good repair. [54] Another concerns the defence of voluntary assumption of risk. While the application of the defence to claims arising out of work accidents has been minimised (paragraph 2.11), the defence may prevent an action by a passenger against a negligent driver, where the passenger knew of the drivers reduced capacity to exercise the ordinary standard of care, perhaps because of inexperience [55] or the effects of alcohol. [56]

2. Damages

2.29 Common law damages for personal injury take the form of a lump sum which is awarded "once-and-for-all" to cover both past and future losses. The fundamental principles governing the assessment of damages in personal injury cases were recently restated by the High Court.

> In the first place, a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries. Secondly, damages for one cause of action must be recovered once and forever, and (in the absence of any statutory exception) must be awarded as a lump sum; the court cannot order a defendant to make periodic payments to the plaintiff. Thirdly, the court has no concern with the manner in which the plaintiff uses the sum awarded to him: the plaintiff is free to do what he likes with it. [57]

2.30 Damages are divided between economic and non-economic loss. Economic loss is made up of those consequences of the injury which have a monetary equivalent and includes lost earning capacity and hospital, medical and related expenses. Where a person is compensated for lost earning capacity while in hospital, the proportion of hospital expenses representing board and lodging as well as "saving" on other expenses such as fares are deducted from the damages. [58] In addition to medical expenses, damages may include the value of nursing services gratuitously rendered by family members and friends. [59] Non-economic loss has no real monetary equivalent. It includes pain and suffering, loss of amenities and enjoyment of life and loss of expectation of life. Since the major component of non-economic loss is the conscious experience of the loss, only a small amount can be awarded where the plaintiff has been rendered unconscious. [60] Later Chapters contain more detailed discussion of relevant aspects of the assessment of damages. [61] What follows is an explanation of the principal factors affecting the calculation of future economic loss for purposes of a once-and-for-all lump sum award.

Reduction for Vicissitudes

2.31 Damages for lost earning capacity are assessed on the basis of expected loss of earnings for the period of incapacity for work or, if the incapacity is total and permanent, for the estimated pre-accident

earning life of the plaintiff. [62] The damages are calculated on expected net earnings after tax [63] and are further reduced for so-called “vicissitudes” or “contingencies” of life. For example, a deduction of 15 per cent is often made from the lump sum calculated for future loss of earning capacity to take account of the risk that future earnings may have been terminated by death sickness or unemployment. Alternatively, the court may reduce the estimated working life of the injured person in recognition of the possibility that the working life of the injured person might have been shorter than anticipated. The practice of making deductions for contingencies means that if the plaintiff actually suffers the whole of the anticipated loss, he or she will not receive “full compensation”. [64]

Discount Rate

2.32 Because the compensation is paid as a single lump sum, the total amount calculated for future economic loss must be “capitalised”. This means that the court must arrive at a sum which will yield, in capital and interest, the amount required to cover the future loss. What has to be determined is the “present equivalent” of the estimated future loss. [65] The rate used in making this calculation is called the “discount rate”. In establishing a discount rate of 3 per cent in 1981, the High Court noted that:

> This rate is intended to make an appropriate allowance for inflation, for future changes in rates of wages generally or of prices, and for tax (either actual or notional) upon income investment of the Sum awarded. No further allowance should be made for these matters. [66]

This statement ended a period of speculation and wide differences in the practice of State courts. These differences were of very great significance, since even small changes in the discount rate can lead to substantial variations in the lump sum award. For example, the lump sum equivalent of $400 per week over a period of 25 years is $521,800 if a discount rate of 0 per cent is applied, $368,900 if the rate is 3 per cent, and $301,500 if the rate is 5 per cent. Although the High Court has ended speculation, there is still a substantial body of opinion, both Judicial and non-judicial, which regards a discount rate of 3 per cent as too high (that is, unfavourable to the plaintiff. [67] In 1984 the discount rate was increased by statute in New South Wales to 5 per cent for motor vehicle cases. [68]

Additional Benefits

2.33 The principle that damages awarded to the plaintiff must return him or her as far as possible to his or her pre-accident position is qualified by the refusal of the courts to set-off, in calculating damages for economic loss, certain benefits conferred on the plaintiff as a result of the injury. These include pensions, [69] ex gratia payments [70] and proceeds of accident insurance policies. [71] However, payments by way of sick pay [72] and unemployment benefits, [73] have been set-off. The reason given for not setting off benefits, such as pensions, is that they were intended to be enjoyed whether or not the damages claim was successful. It has therefore been suggested that in order to avoid double compensation, express provision should be made in the relevant legislation requiring repayment of benefits where the injured party succeeds in recovering compensation, as is now the case with sickness benefits. [74]

3. Wrongful Death Claims

2.34 Where a person is killed as the result of another person’s negligence, certain members of the family of the deceased may bring an action for damages under the Compensation to Relatives Act, 1897 (paragraph 2.10). The award of damages is based on the loss of material support caused by the death. The support may have been in the form of the financial contribution of a family breadwinner, the value of which is normally assessed by reference to the proportion of the deceased’s earning capacity applied to the maintenance of the family. Alternatively, support may take the form of household services and other unpaid work supplied by a homemaker. [75] In a claim under the Compensation to Relatives Act, the contributory negligence of the deceased does not affect the amount of damages recoverable. [76]

4. Loss of Consortium

2.35 Until recently in New South Wales, a husband had a common law right against a person who wrongfully injured his wife for the loss of his wife's *consortium*. This action included compensation payable to the husband for the wife's loss of ability to provide him with household services, as well as compensation for the loss of her society and assistance. [77] The wife had no corresponding right. [78] The action has been attacked as archaic and discriminatory and was abolished by statute in New South Wales 1984. [79] At common law only limited damages can be recovered by a injured person for the loss of his or her capacity to render services to others. [80] Consequently the abolition of the action for loss of consortium, while desirable in itself, has removed the principal means available at common law by which the immediate family of an accident victim could be compensated for loss of household support previously provided by that person.

5. Summary

2.36 In summary, the main features of the common law negligence action are:

the injured person is entitled to damages only if he or she can establish that the injury was caused by the defendant s fault that is, by a failure to take reasonable care for the safety of the injured person;

damages are reduced to the extent that the plaintiff, through his or her contributory negligence, was to blame for the accident;

damages are assessed in the form of a lump sum and are awarded on a once-and-for-all basis;

damages are designed, in theory, to provide "full" compensation for both the economic loss and non pecuniary loss sustained by the injured person; and

claims may be made by dependent relatives of a person killed as the result of another person's negligence.

B. Workers' Compensation

2.37 Legislation in all Australian States provides compensation, on a no-fault basis, to injured workers and the families of workers who have been killed in work-related accidents or accidents occurring on specified journeys including journeys between the worker's residence and work place. [81] Compensation is also provided for work-related disease. It is compulsory for employers to insure against their liability to compensate injured workers under workers' compensation legislation [82] and a large number of insurance companies are authorised to write workers' compensation insurance. A number of large employers act as self-insurers. Workers injured outside working hours or on journeys not covered by the legislation and most self-employed people, are not protected. They may, however, be able to recover damages in a common law negligence action.

2.38 The form of compensation varies from State to State, with New South Wales providing comparatively generous benefits. [83] In New South Wales, compensation includes:

payment of medical, hospital rehabilitation and related expenses;

periodic compensation for lost wages;

lump sum compensation provided in accordance with a statutory table, for specified injuries, regardless of the effect of those injuries on earnings; and

lump sum compensation to the dependents of a worker who is killed, together with periodic payments to the dependent children of the worker until they reach 16 years or, if they are students, 21 years.

2.39 In the case of total incapacity, the injured worker is entitled to receive compensation at the relevant award rate for his or her occupation for a period not exceeding 26 weeks. [84] This may not necessarily amount to "full compensation" since the worker's earnings may have exceeded the award rate, and payments for overtime or shiftwork are not included. If the worker remains incapacitated for work for longer than the 26 week period, he or she receives a periodic payment which is subject to maximum and minimum limits and, in practice, is usually considerably below and unrelated to the worker's pre-accident earnings. [85] The amount paid includes a component for any dependent spouse and children and payments are indexed. [86] If the worker is permanently disabled, periodic payments continue until death and unlike some jurisdictions, New South Wales imposes no dollar limit on the total amount payable. In addition to periodic payments, the worker is entitled to a lump sum as compensation for any injury which is specified in the statutory table. [87] Thus, for example, a worker losing an arm will be entitled to a lump sum payment whether or not the loss of the arm has affected his or her earning capacity.

2.40 An important feature of the workers' compensation system concerns the employer's ability for a partially incapacitated worker. The New South Wales Workers' Compensation Act, 1926, imposes the responsibility on the employer of providing suitable employment (light duties) for an injured employee partially incapacitated for work. [88] If the employer falls to provide suitable employment the worker is deemed to be totally incapacitated and is to be compensated accordingly. This provision is of particular significance in times of high unemployment, since large numbers of partially incapacitated workers, who cannot be offered light duties, are deemed to be totally incapacitated for compensation purposes.

2.41 Although the legislation contemplates that medical and related expenses will be covered as they arise, and that compensation for lost earnings will be provided on a periodic basis, it also enables an employer (with the consent of the worker and subject to the approval of the Workers' Compensation Commission) to pav a lump sum in place of the whole or any part of the liability to make weekly payments or to meet the worker's medical and related expenses. This procedure is known as "redemption". [89] An application for redemption may be made while the worker is receiving weekly payments, or in settlement of a disputed claim. It may also be used to extinguish any potential common law rights the worker may have. In New South Wales in recent years the use of redemptions has increased markedly. [90]

2.42 The administration of the workers' compensation systems in Australia differs quite considerably among the various jurisdictions. Some, for example, have moved from a multi-insurer to a single-insurer system, and the use made of non-legal personnel, such as medical boards varies. [91] In New South Wales a large number of licensed insurers operate in the field while some employers act as self-insurers. Disputes are determined by a court, the Workers' Compensation Commission, employing familiar adversary procedures. In the past the Workers' Compensation Commission has discharged both judicial and administrative functions, the latter including the licensing of insurers, the management of certain funds and the conduct of rehabilitation programs. Legislation has recently been enacted which, among other things, separates the two. [92] Judicial functions are to be allocated to a new Compensation Court while the administrative functions will become the responsibility of a State Compensation Board. The legislation is expected to be proclaimed early in 1985 and the separation of functions will become effective from the date of proclamation.

2.43 A worker who is entitled to workers' compensation may also bring a common law negligence action for damages against his or her employer, or against a third party who has negligently caused the injury. The Workers' Compensation Act, 1926, preserves the workers common law rights, but contains provisions preventing the worker from recovering double compensation for the same injury. [93] Once a worker receives common law damages, he or she cannot revert to the workers' compensation system for the same incapacity if the common law damages prove inadequate.

2.44 A transport accident injury, which is the subject of this Report, may come within the workers' compensation system. A worker who is injured in a transport accident will be entitled to claim workers' compensation if:

the accident occurred in the course of his or her employment; or

in the course of a journey (such as to or from work) covered by the Workers' Compensation Act.

If the worker has a common law action against the person at fault for the accident, the workers' compensation payments will be deducted from the common law award or settlement.

2.45 In summary, workers' compensation differs from a common law negligence action in several respects.

Injured workers, or their families in the case of death, are entitled to compensation regardless of proof of fault.

Unlike common law damages, workers' compensation is calculated by reference to statutory formulae. Generally speaking, the scheme is not designed to provide "full" compensation. Compensation is more generous for short-term than for long-term incapacity.

Compensation for loss of earnings is provided in the form of indexed periodic payments, although the right to receive periodic payments may be, and often is, redeemed by payment of a lump sum.

Compensation for non-economic loss is provided by way of a "table of maims" which applies to particular kinds of permanent physical disability.

In the case of a worker's death, lump sum payments are made to the surviving dependents, in combination with periodic payments for dependent children. Where there are no dependents, funeral expenses only are payable.

The system is funded by compulsory premiums which employers pay authorised private insurers, and by the direct payment of compensation costs by self-insurers.

C. Limited Statutory Schemes

2.46 The statutory compensation schemes in force in New South Wales, other than the workers' compensation system, are not directly relevant to the arrangements for transport accident victims. None the less it is appropriate to refer briefly to the specific schemes adopted in New South Wales.

1. Criminal Injuries Compensation

2.47 Injuries deliberately inflicted in the course of criminal conduct are not usually regarded as "accidents". Yet from the victim's point of view, they are "unlooked-for mishaps", capable of being described for legal purposes as "injuries suffered by accident". [94] Criminal injuries schemes operate in all Australian States including New South Wales where the major statutory scheme was established by the Criminal Injuries Compensation Act, 1967. [95]

2.48 Since 1900 courts in New South Wales have had power under the Crimes Act to order a convicted offender to pay compensation to any "aggrieved person" for personal injury (which includes pregnancy and nervous shock) and property loss caused by commission of the offence. [96] The maximum amount for which compensation can be awarded is $20,000 (August 1984). Under the Criminal Injuries Compensation Act 1967, which has provided a model for legislation in three other States, an "aggrieved person" (the victim or the family of a deceased person) who has obtained a compensation order against a convicted offender may apply to the Government for payment of the sum specified in the order. Even if the alleged offender is acquitted, the court has a discretion to grant a certificate stating the amount of compensation that would have been awarded had the accused been convicted. The State Treasury has a discretion as to the amount if any, to be paid to the aggrieved person whether or not the offender has been convicted. [97]

2.49 One obvious gap in the statutory scheme is that a person injured through criminal violence can receive no compensation if the alleged offender is not apprehended or brought to trial. To remedy this deficiency, an administrative scheme operates under which the victim may apply for payments, similar

to those that would have been available under the statutory scheme. The police investigate claims of this kind, since no court proceedings are involved. The administrative scheme is described as the "*Ex Gratia* Scheme". This is somewhat misleading as payments under both schemes are technically made by the State *ex gratia.* The same maximum of $20,000 currently applies.

2. Sporting Injuries

2.50 In New South Wales, the Sporting Injuries Insurance Act, 1978, estiblished a scheme[98] designed to provide no-fault benefits to people involved in organised sport on either an amateur or professional basis. An applicant for benefits must be a registered player of a Sporting Organisation who has suffered or contracted a personal injury or disease whilst participating in an authorised sporting activity. The injury must fall within a list of "compensable injuries", which include the permanent loss of various functions or use of parts of the body. [99] A maximum amount is recoverable for each type of loss with a set additional amount payable for quadriplegia and paraplegia. Where the person is over 18 and the injury results in death a benefit of $37,500 is payable to the legal personal representative of the deceased with $1,500 added for each surviving dependent child (August 1984). In some cases, there is a payment to cover funeral expenses. The overall maximum for injuries from one incident is currently $90,000. The scheme is funded by premiums collected from individuals or incorporated or unincorporated associations which have been declared "sporting organisations" under the Act. [100]

2.51 Recent amendments to the Sporting Injuries Insurance Act [101] have extended the benefits available under the sporting injuries scheme to schoolchildren injured in school sporting or athletic activities and people participating in sporting, athletic and recreational activities promoted by the Department of Leisure, Sport and Tourism. This supplementary scheme, when it comes into effect, will be financed out of consolidated revenue and in most respects, including benefits, it resembles the principal scheme. One difference is in relation to death benefits. Under the supplementary scheme payment of the $37,500 is conditional on there being at least one person who was wholly or partly dependent for support on the deceased immediately before the death occurred. [102] In addition, where a person entitled to benefit under the supplementary scheme recovers damages independently of the Act, including the proceeds of a contractor insurance or assurance, for the same injury or death for which benefits under the supplementary scheme are payable, any benefits already recovered are repayable out of the damages and no further benefits are recoverable. [103]

D. The Social Security System

2.52 The social security system provides a "safety net" for people who, for a variety of reasons, are unable to support themselves. The system provides benefits to a much wider range of people than those who have been incapacitated as the result of injury. Nonetheless, social security pensions and benefits are of considerable importance to accident victims and indeed, as the Pearson Commission commented in England, are the "biggest single source of compensation". [104] There are many ways in which accident victims or their families may come into contact with the social security system (otherwise than by claiming universal benefits such as non-means-tested allowances and pensions). These include cases where an incapacitated accident victim:

- is not entitled to compensation in a common law action or under any statutory scheme;
- has instituted a claim for compensation which has not been resolved;
- has been awarded compensation in respect of the incapacity, but the award has proved inadequate (perhaps because it was insufficient in the first place or not properly managed by the accident victim); and
- has been awarded compensation and, while the award has not necessarily proved inadequate, has arranged his or her own affairs to maximise entitlement to social security.

In addition the family of a deceased accident victim may be reliant on social security payments, such as the widow's pension, for their support.

2.53 This section briefly outlines the major pensions and benefits of special relevance to accident victims. These include:

> the invalid pension, sickness benefits; and
>
> unemployment benefits.
>
> Reference is also made to the Commonwealth Rehabilitation Service.

1. Invalid Pensions

2.54 In order to receive an invalid pension a person must be over the age of 16 and "permanently incapacitated for work" or permanently blind. [105] The Social Security Act 1947 (Cth) requires the degree of permanent incapacity to be not less than 85 per cent. [106] The criteria to be taken into account in determining whether a person is not less than 85 per cent incapacitated have caused considerable difficulty. [107]

2.55 The base rate for the invalid pension varies according to whether the recipient is single or married, and is indexed by reference to the Consumer Price Index, with adjustments being made in May and November each year. [108] Extra amounts are paid if the invalid pensioner has children, or dependent full-time students. [109] The base rate is at subsistence level only. Payment of the invalid pension is subject to a means test which is currently assessed on family income, although the Commonwealth Government has taken action to introduce an assets test. [110] Since the means test is based on family income a person who is incapacitated, and whose spouse is in paid employment, will not usually receive the invalid pension. [111]

2.56 The Act provides that an invalid pension shall not be granted to any person if he or she:

> ... has an enforceable claim against any person, under any law or contract for adequate compensation in respect of his permanent incapacity or permanent blindness. [112]

This provision has not been applied where the injured person has commenced a common law negligence action. [113] Consequently, the fact that an injured person has commenced an action for damages will not disqualify him or her from receiving an invalid pension. Where the person has a pending claim for workers' compensation it is not clear whether the legislation disentitles him or her from an invalid pension. [114] In practice, the Department of Social Security normally pays sickness benefits, rather than an invalid pension to people awaiting resolution of a workers' compensation claim, in part because the legislation enables sickness benefits to be recovered after the claim is completed (paragraph 2.60). It appears that receipt of a lump sum, whether by way of common law damages or workers' compensation is not a barrier to receipt of the invalid pension, [115] although, of course, the means test will apply to any income earned by way of interest on the lump sum. Thus an injured person may receive a substantial lump sum damages award and nevertheless be entitled to receive the invalid pension.

2.57 Some injured people invest their lump sum so that it produces little or no income, in order to qualify for the invalid pension. Yet others may become reliant on the pension because their lump sum is exhausted or because its income is insufficient to maintain them. [116] This involves double compensation, in the sense that the injured person receives support from both the social security and the compensation systems. By contrast with the position concerning invalid pensions, the legislation governing sickness benefits contains special provisions designed to prevent double compensation from occurring (paragraph 2.60).

2. Sickness Benefits

2.58 An applicant for sickness benefits is required to satisfy the Director-General of Social Services that

> ... throughout the relevant period, he was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he has thereby suffered a loss of salary, wages or other income. [117]

Usually sickness benefits are payable seven days after the date of incapacity for work. Adult sickness beneficiaries receive similar amounts to those payable to invalid pensioners, but are subjected to a more rigorous means test. [118]

2.59 Sickness benefits are frequently paid while an injured person is awaiting receipt of common law damages or workers' compensation. Since August 1982, however, a new Division in the Act [119] has regulated the interaction between sickness benefits and compensation. The purpose of the Division is to prevent double compensation and to relieve the Commonwealth of the burden of providing social security in cases where the injured person has been compensated for the injury. The Division is applicable to amounts received by way of common law damages, workers' compensation, and compensation provided under limited statutory schemes. [120]

2.60 A person who is receiving sickness benefits, or who has been paid sickness benefits in the past, in respect of a particular incapacity, is required to notify the Department if he or she receives compensation for that incapacity. [121] In these circumstances, the Director-General may refuse a claim for sickness benefits or cancel the benefits. In addition, elaborate provisions enable recovery of an amount equal to the whole or part of sickness benefits paid in the past, either from the recipient of compensation, the person liable to pay compensation or his or her insurer. Difficulties may arise in determining the amount of the repayment which should be made where compensation is provided in a lump sum, intended to cover both past and future earnings loss, or where the lump sum includes a component for non-economic loss. It may be argued that not all the compensation received relates to the incapacity for which sickness benefits were paid. [122] Where a person settles a common law claim, or obtains a redemption under the workers' compensation system it is customary to obtain information from the Department of Social Security on the amount to be repaid, and negotiations between litigants take this factor into account. Where a lump sum is received, and the recipient later applies for sickness benefits, benefits may be refused until, in the Department's opinion. the period of future income loss, covered in the lump sum, has expired.

3. Unemployment Benefits and Sheltered Employment Allowances

2.61 A person who has been partially incapacitated, but has recovered sufficiently to resume work, may apply for unemployment benefits if he or she is willing to undertake suitable work, but such work cannot be found. [123] The fact that a person has received compensation will not disentitle him or her to unemployment benefits although, of course, the means test applies to any income of the individual and spouse. In addition, the Act provides for the payment of a sheltered employment allowance to people who are employed in a sheltered workshop and would otherwise be eligible for a pension or benefit. [124] People in an approved activity centre or adult training centre are currently paid an "incentive" allowance of $10 per week which is not means tested. [125] The sheltered employment allowance and incentive allowance are paid instead of supplementary assistance.

4. Services and Fringe Benefits for Social Security Recipients

2.62 In addition to income maintenance payments, social security recipients may be eligible for various concessions and health care benefits. For instance, a pensioner whose income falls below a certain level [126] is entitled to a Pensioner Health Benefits card and other Commonwealth concessions. These entitle the holder to optometrical hearing, and pharmaceutical concessions. The holder is also entitled to various "fringe benefits", such as transport concessions, reductions in council and water rates, telephone rentals and costs associated with other utilities. Some of these concessions also apply to sickness and a limited range of unemployment beneficiaries. [127] Again, a person who has received compensation in the past may be entitled to fringe benefits provided he or she satisfies the means test.

5. Commonwealth Rehabilitation Service

2.63 The Department of Social Security is responsible for the administration of the Commonwealth Rehabilitation Service. The Service provides treatment and training for people suffering from mental or physical disabilities which constitute a substantial handicap in undertaking employment, or which prevent them living “an independent life”. [128] A person receiving treatment continues to be entitled to an invalid pension or sickness benefit, but may also receive a training allowance. Where a person who has been given treatment or training later receives compensation in respect of the disability, he or she maybe required to pay for the cost of treatment or training. [129] Alternatively, the cost of the treatment or training may be recovered directly from the person liable to pay compensation.

6. Summary

2.64 The main characteristics of the Australian social security system are as follows.

> The system operates as a “safety net”, providing pensions and benefits to people unable to support themselves. Payments are means tested.
>
> In general, pensions and benefits are payable regardless of the cause of incapacity, although applicants have to show that they suffer from a particular disability such as unemployment, temporary sickness or permanent invalidity, old age or widowhood.
>
> Accident victims who satisfy eligibility criteria may be entitled to social security, whether or not they have previously received compensation. This may involve “double compensation” for the same loss.
>
> Pensions and benefits are generally fixed at subsistence level and are not designed to compensate fully for “losses” suffered by the recipient.
>
> Income maintenance payments are made on a periodic basis. Support is also provided in the form of services.
>
> The system is funded from general taxation revenue.

IV. SUMMARY

2.65 This Chapter describes the development of the common law negligence action to its now dominant position in the compensation system, especially in transport accidents. The modern law of negligence has been marked by the gradual removal of a number of earlier limitations to recovery. This expansion of liability has been encouraged by the development of third party insurance and other mechanisms for shifting the loss from the individual wrongdoer to the community in general, or at least a significant part of it. In the case of motor vehicles, third party insurance has been compulsory in New South Wales since 1942 and, as a result, the cost of compensating motor vehicle accident victims, who establish a right to damages, is borne by all registered motor vehicle owners in the form of third party premiums. The authorities responsible for the provision of public transport services act as self-insurers and meet the cost of compensating accident victims out of their own revenue. This cost is reflected in the price paid by the community for the use of public transport or in taxation In areas outside transport accidents, no-fault schemes provide compensation up to certain limits. The most important of these is workers’ compensation which, in the case of a transport accident in the course of employment or on a journey to or from work, provides no-fault compensation to the injured worker. Limited no-fault schemes operate in New South Wales in the areas of criminal and sporting injuries. Finally, social security supplies a safety net for accident victims not in receipt of other forms of compensation, in the form of pensions and benefits based on need.

2.66 While some attempts have been made to integrate the various compensation systems, this has not been done systematically and there is considerable overlap and inconsistency of approach. Compensation systems other than the common law negligence action play an important, although limited role, in compensating transport accident victims. This is true particularly of the workers’ compensation system (in relation to course of employment and journey accidents) and the social

security system (by providing a safety net based on needs). Nonetheless an evaluation of the existing compensation system for transport accident victims must centre on the common law negligence action.

FOOTNOTES

1. CHS Fifoot, *History and Sources of the Common Law: Tort and Contract* (1949), ch 9.

2. J G Fleming, *The Law of Torts* (6th ed. 1981), pp.6-7.

3. J G Fleming, “The Role of Negligence in Modern Tort Law” (1967) 53 *Virginia Law Review* 815.

4. An assortment of early actions based on this idea are collected in *Rylands v Fletcher* (1866) LR 1 Ex. 265, (1868) LR 3 HL 330.

5. J G Fleming, *An Introduction to the Law of Torts* (1967), ch.8.

6. *Rylands v Fletcher* (1866) LR 1 Ex. 265, at p.286, per Blackburn J.

7. This was justified on the theological ground that husband and wife were one and that a person could not sue himself or herself. The social justification was that litigation between spouses would encourage marital disharmony,.

8. *Baker v Bolton* (1808) 1 Camp. 493;. The consequence of this rule is that a family left destitute through the death of the breadwinner had no recourse even against the person whose negligence had caused the death.

9. *Russell v. Men of Devon* (1788) 2 TR 667. For a more recent example of immunity. See *Searle v. Wallbank* [1947] AC 341 where it was decided that landowners were not liable for injuries caused by straying stock.

10. *Victorian Railways Commissioners v. Coultas* (1888) 13 App. Cas. 222.

11. *Walker v. Great Northern Railway Co. of Ireland* (1891) 28 LR Ir.69.

12. See note 3 above, at p.818.

13. As a general rule an employer was liable to a third person for injury done to that person by an employee acting in the course of employment.

14. Fatal Accidents Compensation Act, 1847, later replaced by Compensation to Relatives Act, 1897.

15. Employers’ Liability Act 1880 (UK). Damages were limited to the equivalent of three years loss of earnings.

16. In England the doctrine was not abolished until 1948: Law Reform (Personal Injuries) Act 1948. In New South Wales abolition came in 1926: Workers’ Compensation Act, 1926, s.65.

17. Law Reform (Contributory Negligence) Act 1945 (UK): Law Reform (Miscellaneous Provisions) Act. 1965.

18. Section 16 of the Married Persons (Property and Torts) Act, 1901 was amended to this effect in 1964: Law Reform (Married Persons) Act, 1964, s.2.

19. Family Law Act 1975 (Cth.), s.119.

20. Smith v. *Charles Baker & Sons* [1891] AC 325.

21. *Bowater v. Rowley Regis Corporation* [1944] KB 476.

22. *Dulieu v. White & Sons* [1901] 2 KB 669. In New South Wales statutory provision has now been made for recovery of damages for injury arising from nervous shock: Law Reform (Miscellaneous Provisions) Act 1944, part III.

23. [1932] AC 562. The issue concerned the liability of manufacturer for negligently, caused injury to the consumer of the product.

24. Pre-natal injury has more recently been held compensable: *Watt v. Rama* [1972] VR 353.

25. These are the rules governing “remoteness of damage”: *Overseas Tankship* (UK) *Ltd. v. The Miller Steamship Co. Pty*. [1967] AC 617.

26. Strictly the availability, of insurance wis not to be disclosed in the proceedings but its existence was often Common knowledge, especially where insurance was compulsory.

27. The flexibility could of course operate in the opposite direction if the tribunal of fact (whether judge or jury) was especially sympathetic towards the defendant: see note 2 above, p.117.

28. A A Ehrenzweig, *Negligence Without Fault* (1951).

29. P S Atiyah, *Accidents, Compensation and the Law* (3rd ed. 1980), pp. 360- 366; H. Luntz, A D Hambly and R Haves, *Torts: Cases and Commentary* (1980), para.1.3.01.

30. G Cass, *Workers’ Benefit or Employers’ Burden: A History of Workers’ Compensation New South Wales* 1880-1926 (unpublished thesis, University of Sydney, 1982), pp.89-91.

31. C P Mills, *Modification of the Workers’ Compensation System* (unpublished Commission document, 1981), pp.31ff, 57ff.

32. While criminal injuries, generally speaking, are deliberately inflicted, from the victim’s point of view, they can be described as accidental injuries.

33. See generally, H H Glass, M H McHugh and F M Douglas, *The Liability of Employers* (2nd ed. 1979). esp. ch.8.

34. Although early High Court authorities took the view that contributory negligence was not a defence to an action for breach of statutory duty, *Bourke v. Butterfield and Lewis Ltd.* (1926) 38 CLR 354, they were overruled in *Piro v. W. Foster & Co. Ltd.* (1943) 68 CLR 313, in which the defence is upheld. However, that decision was abrogated almost immediately in New South Wales by the Statutory Duties (Contributory Negligence) Act, 1945.

35. *Wheeler v. New Merton Board Mills Ltd.* [1913] 2 KB 669.

36. See W L Morison, C S Phegan and C Sappideen, *Cases on Torts* (5th ed. 1981), ch.15, esp. pp.806-817.

37. *Abela v, Giew* (1965) 65 SR (NSW) 485; *Strohfeldt v. Francis* [1968] 1 NSWR 251.

38. The pioneer in issuing policies was the London and Provincial Carriage Insurance Co. Ltd., which in 1875 issued policies covering liability for use of horse-drawn vehicles.

39. A G M Batten and W A Dinsdale, *Public Liability* Insurance (1967), ch.1.

40. See note 30 above, pp.94-95. The company is now Manufacturers Mutual Insurance Limited.

41. *Id.,* p.100ff.

42. Workers' Compensation Act 1926, s.18. Unlike the situation in some other States, insurance must provide coverage unlimited as to amount. The Act provides for employers to be licensed as self-insurers (see para.2.42 below) if they meet certain conditions: s.18(1A).

43. Motor Vehicle (Third Party Insurance) Act, 1942. The cover was originally limited. For background, see New South Wales Parliamentary Debates, Legislative Assembly, 23 April 1942, p.3004. Mr O'Sullivan, Minister for Transport, introducing the Motor Vehicles (Third Party) Insurance Bill, 1942,

44. *Id*., 29 April 1942, p.3085. Mr O'Sullivan, Minister for Transport, second reading of the Motor Vehicles (Third Party) Insurance Bill, 1942.

45. Pearson Report, vol.1, para.120.

46. *Maklouf v. Tannous,* 2 August 1984, Supreme Court of New South Wales, Cantor J.

47. Sydney *Morning Herald,* 4 August (1984, p.5; *Sunday Telegraph,* 5 August 1984, p.8.

48. For more detailed exposition of the three elements of duty of care, breach of duty and remoteness of damage, see note 2 above, chs.7-9; H Luntz, A D Hambly and R Hayes, note 29 above, chs.2-5; and note 36 above, chs.7-9.

49. *Davie v. New Merton Board Mills Ltd.* [1959] AC 604, at p.627; *Lister v. Romford Ice & Cold Storage Co. Ltd.* [1957] AC 555, at p.572.

50. The cyclist might be able to maintain an action if the condition of the road was due, for example, to oil which had been carelessly spilled from a tanker.

51. Law Reform (Miscellaneous Provisions) Act 1965.

52. *Froom v. Butcher* [1976] QB 286.

53. *O'Connell v. Jackson* [1972] 1 QB 270.

54. *Gorringe v. Transport Commission (Tas.)* (1950) 80 CLR 357. In England the nonfeasance rule was abolished in the Highways (Miscellaneous Provisions) Act 1961.

55. *Gent-Diver v. Neville* (1953) St RQ 1.

56. *Insurance Commissioner v. Joyce* (1948) 77 CLR 39; *Roggenkamp v. Bennett* (1950) 80 CLR 292. Australian courts have refused to accede to the view now taken in England which applies the same limited scope to the defence in passenger/driver cases as is universally applied in industrial accidents: *Nettleship* v. *Weston* [1971] 2 QB 691.

57. *Todorovic v. Waller* (1981) 56 ALJR 59, at p.61, per Gibbs CJ and Wilson J.

58. *Sharman v. Evans* (1977) 138 CLR 563. This rule applies equally to general damages for future economic loss (see para.2.31 below).

59. *Griffiths v. Kerkemeyer* (1977) 139 CLR 161.

60. *Skelton v. Collins* (1966) 115 CLR 94.

61. For example, Chapter 10 (attendant care): Chapters 3 and 11 (non-economic loss).

62. *Skelton v. Collins* (1966) 115 CLR 94.

63. *Cullen v. Trappell* (1980) 146 CLR 1.

64. But if in the light of subsequent events the discount for contingencies is not sufficient, the plaintiff will be *overcompensated.* Logically, the possibility of favourable contingencies should be taken into account This would include, for example, the possibility that the deceased would have been employed for longer than anticipated.

65. H. Luntz, *Assessment of Damages* (2nd ed. 1983), ch.6.

66. A statement made by the Chief justice when judgment was delivered in *Todorovic v. Waller* (1981) 56 ALJR 59, at p.60. The discount rate has been increased to 5 per cent by statute in Queensland (Common Law Practice Act 1867-1981, s.5) and in New South Wales for the purpose of motor vehicle accidents (Motor Vehicles (Third Party Insurance) Act, 1942, s.35B inserted by Motor Vehicles (Third Party Insurance) Amendment Act, 1984). 67. In *Todorovic v. Waller* (1981) 56 ALJR 59 the minority preferred no discount rate at all: at p.72, per Stephen J: at p.78, per Murphy J. See also JLR Davis, “Damages for Personal Injury and the Effect of Future Inflation” (1982) 56 *Australian Law Journal* 168.

68. See note 66 above.

69. *National Insurance Co. of New Zealand Ltd. v. Espagne* (1961) 105 CLR 569; *Jones v. Gleeson* (1965) 39 ALJR 258.

70. *Wollington v. State Electricity Commission of Victoria* (No. 2) [1980] VR 91.

71. *Bradburn v. Great Western Railway Co.* (1874) LR. 10 Ex. 1.

72. *Graham v. Baker* (1961) 106 CLR 340, but some allowance should be made for loss of sick leave credits.

73. *Evans v. Muller* (1983) 57 ALJR 393.

74. *Redding v. Lee* (1983) 57 ALJR 393, at p.406, per Murphv J at p.413, per Deane J. For discussion of sickness benefits, see paras.2.58-2.60 below.

75. *Rowe v. Scanlan* [1969] 1 NSWR 43.

76. Law Reform (Miscellaneous Provisions) Act 1965, s,10(4).

77. *Toohey v. Hollier* (1955) 92 CLR 618; *JR Kealley v. Jones* [1979] 1 NSWLR 723.

78. *Best v. Samuel Fox & Co. Ltd.* [1952] AC 716.

79. Law Reform (Marital Consortium) Act 1984.

80. *Burnicle v. Cutelli* [1982] 2 NSWLR 26.

81. Workers’ Compensation Act 1926, s.6 (definition of injury), s.7.

82. *Id*., s. 18.

83. See eg. Department of Social Security, *Workers’ Compensation Legislation in Australia* 1980 (1981).

84. Workers’ Compensation Act 1926, s.9(1).

85. *Id*., s.9(1), (2).

86. *Id*., ss.9(1)(b), 9A.

87. *Id.,* s.16.

88. *Id.,* s.11(2).

89. *Id.,* s.15.

90. Issues Paper, paras.3.50-3.51. The reasons for this increase are discussed below (see paras.8.4-8.12).

91. See eg. Workers' Compensation Act 1916 (Qld.) which provides for compulsory State insurance. The Workers' Compensation Board is the monopoly insurer. As regards the use of non-legal personnel, the Workers' Compensation Board (a statutory board) consists of six members, one of whom is a legally qualified medical practitioner and three who are representatives of employees, employers and the State government Moreover, the Workers' Compensation Board in Victoria comprises of judicial member and two lay members who represent insurers and workers (Workers' Compensation Act 1958 (Vic.), s.80).

92. Compensation Court Act, 1984 and four cognate Acts Workers' Compensation (Amendment) Act 1984; Workers' Compensation (Brucellosis) Amendment Act 1984, Sporting Injuries Insurance (Workers' Compensation) Amendment Act, 1984; and Miscellaneous Acts (Workers' Compensation) Amendment Act, 1984. See also New South Wales Law Reform Commission, Interim Report, *Accident Compensation, Workers' Compensation* (Amendment) *Bill 1982 and Cognate Bills* (1983).

93. Workers' Compensation Act 1926, s.63.

94. In *Weston v. Great Boulder Gold Mines Ltd.* (1964) 112 CLR 30, a worker on duty was assaulted by an intruder. The assault was not related to the victim's work, but arose out of a personal dispute. The High Court held that the worker had suffered "personal injury by accident".

95. See generally, Australian Law Reform Commission, *Sentencing of Federal Offenders* (Interim Report No.15, 1980), ch.12.

96. Crimes Act, 1900, ss.417, 554; *Fleming v. White* [1981] 2 NSWLR 719.

97. Criminal Injuries Compensation Act 1967, s.5(2B).

98. For a discussion of the problems which preceded the establishment of the scheme, see Issues Paper, para.3.74.

99. Sporting Injuries Insurance Act, 1978, s.4(1), schedule 1.

100. *Id*., s.5.

101. Sporting Injuries Insurance (Amendment) Act. 1984.

102. Sporting Injuries Insurance Act, 1978, s.26(2A).

103. *Id.,* s.35A.

104. Pearson Report, vol.1, para.32.

105. Social Security Act 1947 (Cth.), s.24(1). See also the other requirements in ss.24(1)(b), 25.

106. *Id*., s.23.

107. Guidelines released by the Minister for Health and Social Security in May 1981 are reproduced in (1981) 1 SSR 7.

108. Social Security Act 1947 (Cth.), s.28A.

109. *Id*., s.28(1B).

110. *Id*., s.28(2). In relation to the assets test proposals, see *Report of the Panel of Review of Proposed Income and Assets Test* (May 1984). The proposals have now been debated in Parliament: see Social Security and Repatriation (Budget Measures and Assets Test) Bill 1984 (Cth.); second reading, Commonwealth Parliamentary Debates, House of Representatives, 5 September 1984, pp.573, 635 and 6 September 1984, p.523. See also Commonwealth Parliamentary Debates, Senate, 10 September 1984, pp.1-12,732.

111. Generally speaking, there is no means test for permanently blind pensioners: Social Security Act 1947 (Cth.), s.28(2AA).

112. Social Security Act 1947 (Cth.), s.25(1)(d).

113. *National Insurance Co. of New Zealand Ltd. v. Espagne* (1960) 105 CLR 569; *Markovic and Director-General of Social Services* (1982) 5 SSR 48.

114. See N Seddon and J L R Davis, *A Legal Analysis of the Relationship Between the Principal Commonwealth Social Security Benefits and Other Forms of Compensation* (unpublished Commission document, 1982), pp.1-10. In some cases, however, the Department has used s.25(1)(d) to deny payment of an invalid pension to persons receiving workers' compensation: *Boak and Director-General of Social* Security(1982) 9 SSR 90.

115. *Id.,* N Seddon and J L R Davis, pp.11-15.

116. See eg. Traffic Accident Study, appendix, Case Studies AY, Q.

117. Social Security Act 1947 (Cth.), s.108(1)(c).

118. *Id.,* ss.112, 112AA.

119. *Id*., division 3A.

120. *Id.,* s.115(2).

121. 0n the matters referred in this para, see *id.,* ss.115A-115 D.

122. For a more detailed discussion of these questions, see N Seddon and J L R Davis, note 114 above, pp.33-50.

123. Social Security Act 1947 (Cth.), s.107.

124. *Id.,* s.133E.

125. *Id.,* s.33JA.

126. The current income limit for fringe benefits and the Pensioner Health Benefits card is $57 per week for a single pensioner, $94 per week for a married pensioner, with an additional $20 per week for each dependent child.

127. The unemployed are entitled to a Health Care card, which does not carry with it the same entitlement to concessions that a Pensioner Health Benefits and offers. Sickness beneficiaries receive a Health Benefits card, which has similar entitlements to a Pensioner Health Benefits card.

128. Social Security Act 1947 (Cth), s.135A.

129. *Id.,* s.135R.

3. The Common Law Negligence Action

I. INTRODUCTION

3.1 In Chapter 2 the history and present state of compensation arrangements in New South Wales were outlined. Except for the safety net of social security, the common law negligence action remains the principal source of compensation for victims of transport accidents. This Chapter assesses the adequacy of the common law negligence action as a means of compensating accident victims. Identifying the deficiencies of the action will assist in charting the course of reform and in evaluating the many proposals for change discussed in Chapter 4. For this purpose the term “common law” includes not only the negligence action as developed by the courts but also legislative changes which have modified specific aspects. The latest example is the recent legislation in New South Wales increasing the discount rate and limiting damages in other respects (paragraphs 2.32, 2.97).

3.2 *In its current form* the common law system has received virtually no support in submissions. Nor has it been supported by recent official inquiries in other Australian jurisdictions. Almost all have argued for substantial changes to the present system. While such criticism of the common law negligence action shows the need for reform, it does not necessarily establish that one alternative should be preferred over another. In particular, there are some who consider that the deficiencies of the common law negligence action can best be remedied by the addition of limited no-fault benefits to supplement it. [1] Accordingly, in Chapter 6 we explain why we prefer a no-fault transport accidents compensation scheme which would replace the common law negligence action rather than a limited no-fault scheme which would operate as a supplement to the common law.

3.3 The Issues Paper identified the main arguments in favour of retention of the common law. While we reject many of the claimed advantages, others have considerable force and should influence the shape of new compensation arrangements. The real challenge is to devise a scheme which effectively overcomes the deficiencies of the common law, while not abandoning its more positive features.

II. A CRITIQUE OF THE COMMON LAW

A. Arguments in Support

3.4 The arguments most frequently made for the retention of the common law negligence action and identified in the Issues Paper are:

> the fault principle is in accordance with community expectations;
>
> liability based on fault acts as a deterrent against conduct which is dangerous to others;
>
> lump sum awards promote rehabilitation and encourage independence on the part of the accident victim;
>
> only individual assessment of the kind applied at common law takes into account the special needs and circumstances of the plaintiff, and therefore provides full compensation; and
>
> victim s rights are protected by the courts which are best able to determine the appropriate level of compensation are responsive to community needs and are not vulnerable to political control.

1. The Fault Principle

3.5 A number of submissions referred to the fault principle as fulfilling community expectations.

> Where the death or injury of a person is the fault of a third party, then the injured person or dependent should have the right to recover damages at common law ... Community concepts of fairness and justice demand that if a person is injured through the fault of some other person and his life is thereby interrupted he should be compensated.[2]

The role of the common law in making good a perceived injustice to the accident victim has been described as its "corrective" justice function. [3] The victim of another's fault, because he or she has suffered as a result of the other's negligence, has a right to be indignant about the injury. The recovery of damages, especially for pain and suffering, satisfies this feeling of indignation. [4] The fact that compensation is actually paid by the third party insurer is not inconsistent with this philosophy. [5] It merely ensures that the victim receives the compensation, while the party at fault is not subjected to financial disaster.

3.6 Corrective justice can also be achieved by reducing the compensation otherwise payable to a plaintiff at fault. Because the defendant at fault is not being made to pay where compulsory third party insurance exists, fault has a greater relevance when applied to the plaintiff rather than the defendant. While the plaintiff is made to bear part of his or her loss if damages are reduced on grounds of contributory negligence, the defendant is never made to pay, even if he or she is wholly to blame. A number of submissions argued that it was just to compensate those who have brought injury on themselves less generously than those innocent of fault. [6]

2. Deterrence

3.7 Historically, one of the important justifications for the fault principle was its deterrent effect in relation to careless and potentially dangerous conduct. Since the wrongdoer was liable to pay compensation for the consequences of his or her carelessness, the fault principle provided a powerful incentive to take the precautions necessary to avoid accidents. The introduction of compulsory third party motor insurance has left no room for fault to have a deterrent effect in this immediate sense. However, it is argued that the deterrent effect of fault can operate in a number of other ways.

3.8 Because of apportionment of damages on the grounds of contributory negligence, the prospect of a reduction in compensation because of the victim's failure to take care for his or her own safety is seen as a deterrent of the same kind as that which operates when a defendant does have to pay for his or her carelessness towards the safety of others. It has also been argued that litigation may expose the negligent defendant, even if covered by third party or liability insurance, to public condemnation and that this prospect acts as a deterrent. [7]

3.9 Fault can also be used as a basis for premium loadings, [8] although in practice this is done only in cases of property, not personal injury insurance, in New South Wales. In theory, a motor vehicle owner could be deterred from negligent conduct by the prospect of having to pay a higher third party insurance premium. If this were done, it could, in a limited way, make the party at fault pay for his or her negligence, although the burden is far less onerous than having to pay compensation to the victim.

3.10 Fault can have a more general deterrent effect. The maintenance of a system of liability based on fault, even if underwritten by third party insurance, is said to encourage a continuing awareness of the need for the exercise of reasonable care. [9] It is one of the responsibilities of the law, which is fulfilled by the common law negligence action, to encourage an appropriate level of personal responsibility. [10] In economic terms fault is regarded as a measure of conduct which causes accidents unnecessarily and therefore makes the cost of the activity, such as car ownership, more expensive. There is therefore an incentive to drive carefully and avoid accidents, in order to keep the cost of owning a car as low as possible. [11] This process is sometimes described as "general deterrence [12] because the incentive to drive carefully has a general influence on those taking part in the activity. The cost of careless driving falls on the *activity* as a whole, and therefore those who finance it, rather than on the individual who happens to be careless.

3. Lump Sum Awards

3.11 The award of damages by way of a lump sum is supported on several grounds. Its most obvious advantage is that it promotes finality in litigation and therefore saves costs. It eliminates the prospect of ongoing medical examinations and review. [13] It is said that this element of finality is an aid to rehabilitation.

> The award of a lump sum has the effect of pushing the trauma of the accident into the past and allowing the victim to concentrate on the future. [14]

3.12 This rehabilitative effect is reinforced by the independence and restoration of personal dignity which the receipt of the lump sum provides. A common assertion is that a lump sum makes it possible for the victim to adjust to a new lifestyle. [15] A typical example is the purchase of a small business to provide income in place of the pre-accident earnings from employment made impossible by the injury. [16] For these sorts of reasons it is said the lump sum is what most litigants prefer. [17]

> The possession of a lump sum gives the injured victim some freedom, dignity, and independence which he could never enjoy while kept on the "charity" of weekly periodic payments. [18]

4. Individual Assessment and Full Compensation

3.13 The proponents of the common law claim that it is the only system which attempts to assess compensation not according to a prescribed formula, but on an individual basis taking into account the special circumstances and needs of the plaintiff. [19] The principle of restitution upon which compensation at common law is based, rests on the assumption that no two people and no two injuries are exactly the same. [20] Individual assessment permits account to be taken of an individuals earning capacity and his or her pre-accident lifestyle in order to identify what has been lost. In addition to recognising individual differences, the principle of restitution is, by definition aimed at replacing the loss caused by the injury in full. It is frequently argued by proponents of the common law that it is the only system which makes good all aspects of the plaintiff s loss and thus provides full compensation. [21]

5. The Decision-Making Process

3.14 Another attribute of the common law is said to be the fact that liability and assessment of damages are determined by judges whose independence and impartiality are beyond question and whose actions are open to public scrutiny and review by appellate courts. A fair result is more likely when produced from a dispute between adversaries, both legally represented, which will be resolved objectively in accordance with well established principles, [22] than when it is the response, to an unrepresented claimant, of a bureaucrat with an "insurance mentality". [23] This phrase is used to describe an attitude unsympathetic to the claimant. It is based on the assumption that because insurance companies insure defendants, they pay the lowest possible compensation in order to minimise losses.

3.15 It is also said that the courts are flexible and responsive to community pressures and changing needs. [24] By contrast, it is argued, an administrative system for the payment of benefits to accident victims would be less responsive to public criticisms and more vulnerable to political control. In particular, the level of benefits would be more likely to be influenced by government economic policy and financial stringencies affecting the public sector.

B. Arguments Against

3.16 A number of criticisms have been made of the common law negligence action as the basis for compensating transport accident victims, especially motor vehicle accident victims. These include answers to many of the above arguments. Main criticisms are:

> the failure of the common law negligence action to provide compensation for a substantial proportion of transport accident victims;
>
> the failure of the fault principle to fulfil its stated aims and the practical difficulties in its application;
>
> the deficiencies of assessing damages on a once-and-for-all basis;
>
> the difficulties and inconsistencies which arise in assessing damages for non-economic loss;
>
> the adverse effects of the common law negligence action on the rehabilitation of many transport accident victims;
>
> the delays and consequent hardship experienced by many transport accident victims in obtaining common law damages;

the burden on the court system, and the drain on judicial resources, caused by deciding claims arising out of transport accidents;

the substantial legal and administrative costs associated with common law. negligence actions; and

the increasing cost to the community of a compensation system relying heavily on the common law negligence action.

1. The Fault Principle

The Uncompensated or Under compensated Accident Victim

3.17 The common law negligence action is not, by definition, a remedy available to all injured people. An injured person, or the family of a person who has been killed, can claim compensation only where it is proved that another person was legally at fault for the accident. In addition, there are some cases, identified in Chapter 2, where an injured person can be denied compensation, even though the negligence of the defendant can be clearly established, as where a negligent drunk driver can rely on the defence of "voluntary assumption of risk" by a passenger. [25] The use of the fault principle as a criterion for entitlement to compensation has attracted criticism from members of the judiciary on many occasions. [26]

3.18 In the Working Paper, [27] we estimated that approximately one-third of people injured (or the families of people killed) in motor vehicle accidents, are unable to obtain any compensation through a common law negligence action because they are unable to prove fault. This estimate was originally challenged by the Law Society of New South Wales [28] but in a recent report to the Attorney General conveying the Law Society's proposals for change, it was stated, in relation to those who cannot prove fault, that

> [t]his gap in the law is estimated to affect between twenty and thirty per cent of persons injured in transport accidents. [29]

Since publication of the Working Paper, further evidence has been obtained supporting the estimate in the Working Paper and indeed suggests that the proportion of *severely injured* people unable to obtain damages may be even higher.

3.19 A survey of spinal injuries patients admitted to the Royal North Shore Hospital in Sydney over a 25 year period, suggested that 44 per cent of those injured in all kinds of motor vehicle accidents were not entitled to common law damages. For the victims of motor cycle accidents, nearly two-thirds (63 per cent) were not entitled to common law damages. [30] These conclusions receive support from information obtained by the Law Society from a survey of 200 paraplegics and quadriplegics, which it conducted in September 1983. This showed that of the 106 victims who sustained their injury on the roads, at least 38 per cent [31] had failed to prove fault. [32]

3.20 The Tasmanian Motor Accidents Insurance Board is responsible for processing compulsory third party claims, as well as for paying no-fault benefits under the Tasmanian motor vehicle accidents scheme. [33] The Board provides information on the proportion of claimants who applied for scheduled benefits and common law damages.

Table 3.1: Tasmanian Motor Accidents Insurance Board:

Financial Year Ended 30 June	Scheduled Benefits	Common Law	CL/SB %
1983	3178	1721	(54.0)
1982	3547	2260	(63.7)

1981	3402	1722	(50.6)
1980	3379	1544	(45.7)
1979	3297	1505	(45.6)
1978	3617	1611	(44.5)
1977	3064	1259	(41.1)
1976	2814	1212	(43.1)

Source: Motor Accidents Insurance Board, Report for Year 1982-83.

Allowance must be made for the fact that the figures are based on claims received and it is possible that some accident victims on scheduled benefits make no common law claim even though entitled to do so. [34] Against this, some common law claims received may ultimately prove unsuccessful and some accident victims may not claim scheduled benefits. On balance, therefore, the figures are likely to give a reliable indication of the proportion of motor accident victims with a valid common law claim. It is therefore significant that, over the eight year period, the average ratio of common law claims to scheduled benefit claims was not quite 1:2 (48.8 per cent).

3.21 It is often alleged that people who cannot show fault must in some sense be at fault themselves and therefore do not deserve to recover compensation. [35] However, in many cases, the person's injuries are the result of a pure accident. [36] The following case studies illustrate this.

> Early in 1979, Ms T was driving on a country road when a tyre blew out and the car hit an oil slick. The car flew through the air and rolled a couple of times. Ms T is now quadriplegic. She was a primary schoolteacher and assisted her husband with his electrical business. After the accident she was hospitalised for 13 months and has had to return to hospital on several occasions. She received legal advice that she had no grounds to claim compensation. Ms T is in financial difficulties and receives a full invalid pension. [37]
>
> Mr G was riding a motorcycle in 1964 when he hit an oil slick, lost control of the cycle and collided with an oncoming car. He is now quadriplegic. He was 21 years old at the time of the accident and worked as a cement renderer. Mr G spent 16 months in hospital after the accident and has had to return to hospital on several occasions. He received legal advice that he had no grounds to claim compensation. Mr G had no health insurance at the time of the accident and was forced to rely on the government to pay medical costs. Mr G has married since the accident. He and his wife are dependent on the invalid pension. [38]

3.22 In addition to the accident victims who receive no compensation at common law are those who do not recover "full" compensation because their damages are reduced by reason of their contributory negligence. [39] There is no recent statistical information which enables us to estimate the proportion of cases in which damages are reduced because of contributory negligence. However, a survey of closed insurance files conducted by the Australian Woodhouse Committee throws some light on this question. [40] In New South Wales, an examination of files closed during 1972 showed that 20.5 per cent of successful plaintiffs suffering permanent disability and 14.6 per cent of plaintiffs with no permanent effect from the accident, had some reduction in damages for contributory negligence. [41] Overall, approximately one-sixth of successful plaintiffs had their damages reduced. The average reduction in total damages for such cases was almost 50 per cent. [42] In other States reductions ranged between 30 and 40 per cent. [43] There is no obvious reason for the proportion to be any less today than in 1972.

3.23 This reduction in damages can be substantial and may lead to severe financial difficulties for the injured person and his or her family. One case from the Traffic Accident Study illustrates this.

> Ms CG suffered brain damage in an accident in 1970 when aged 18. It had been anticipated by her lawyer that Ms CG would receive close to $400,000 compensation. The third party insurer had made an opening offer of $80,000. The possibility of finding some contributory negligence had been considered. However, the

court found Ms CG almost entirely responsible for the accident and only awarded her $50,000 gross compensation in 1978. Only $12,000 remained after the deduction of past accident related expenses. Ms CG was a trainee phyiotherapist prior to the accident. Since the accident she has worked in a sheltered workshop on a full-time basis. She has been dependent on the invalid pension since the accident. [44]

3.24 Apportionment of damages on grounds of contributory negligence not only has the potential to operate harshly on plaintiffs at fault, it also assists in working injustices of different kinds. When fault is a criterion of both liability and reduction of damages, as it is in the common law negligence action, an entirely innocent plaintiff who cannot prove fault, and therefore gets nothing, is worse off than the grossly negligent plaintiff, who can prove fault but still recovers a proportion of the damages. [45] Where compulsory third party insurance exists, the unfortunate injured plaintiff is made to pay for his or her contributory negligence while the negligent defendant, who may be fortunate enough to escape injury, is not made to pay at all.

Settlements

3.25 Other injured people may receive less than “full compensation” because they settle their claims. The vast majority of motor vehicle accident claims are settled. In 1982,90.9 per cent of motor vehicle accident cases in the Supreme Court were settled.[46] In 1983, in the District Court, 88.6 per cent of such cases were settled.[47] About 65 per cent of the cases settled were settled prior to the hearing. Of the remaining 35 percent, at least 86 per cent were settled within one hour of the commencement of hearing. [48]

3.26 One reason a plaintiff may settle is that there may be difficulty in proving fault. [49] Where claims are settled, the plaintiff may receive substantially less than the amount which a court might be expected to award if the defendant s liability were established and if the plaintiffs evidence of loss were accepted. In such cases the reduction is the price the plaintiff pays for certainty of outcome. In addition to difficulties of proof, a person may settle because he or she has pressing financial needs and cannot afford to wait for the determination of the claim by the courts. [50] Once again, the cost of a speedy outcome may well be a reduction in damages. This is discussed further in paragraphs 3.80-3.83 below.

3.27 In exposing the extent to which the common law negligence action fails to compensate, or to compensate fully, the fact should not be overlooked that in some cases other sources of compensation ma be available, such as workers’ compensation, [51] social security [52] or even, occasionally, another common law action such as breach of statutory duty. [53] However, the concern of this Chapter is to evaluate the adequacy of the common law negligence action as such, as a system of compensation.

Community Expectations

3.28 Reliable information on community attitudes to accident compensation is very limited. However, the available studies do not bear out the assertion that the community expects the right to compensation to depend on someone else’s fault. In one English survey of over 1,000 accident victims, only half (210 out of 410) of those injured, who thought that they should be compensated, were of the opinion that the compensation should be paid by the person at fault. [54] But even amongst those who expressed the view that the right to compensation should depend on fault, opinions may have been conditioned by the existing state of the law as they understood it. [55] Despite claims of community attachment to fault at the time of the introduction of comprehensive no-fault compensation in New Zealand, [56] community support for fault-based compensation could not be found after eight years of no-fault. [57]

2. Other Inadequacies of the Fault Principle

Evidentiary Problems

3.29 The failure of the common law to compensate all victims is almost universally recognised as a deficiency requiring remedial action. But the shortcomings of the fault principle as a criterion for the award of compensation are not confined to the obvious fact that some victims are excluded from compensation. Problems of proof often produce quite arbitrary results. Many commentators [58] have pointed out the difficulties of applying the fault principle to high speed traffic situations which involve varying forms of transport and drivers of uneven experience

and ability. Transport accidents usually occur suddenly and unexpectedly. Consequently great difficulties may arise in ascertaining who was at fault in a legal sense. judgments are made in respect of events which take place quickly, and which often involve split-second observations and decisions. [59]

3.30 In attention is not only the cause of most accidents; it is also the reason why so much evidence is unreliable. Usually witnesses who give evidence were not paying close attention at the time of the accident Reliability of evidence is further undermined because the question of fault often has to be determined many years after the accident, on the basis of the imperfect and uncertain recollections of witnesses. [60] The judge or court may be forced to make an assessment of fault on the basis of incomplete or unreliable information. [61] Witnesses generally do not have the training or experience to gauge speed or distance, matters which may be crucial in determining liability. [62]

3.31 Judges themselves have frequently commented on the difficulties of resolving the issue of fault, and have suggested that the decision often involves elements of artificiality and arbitrariness.

> The Court is asked to come to a conclusion on what the fictional reasonable and prudent man would have done in the circumstances which more often than not required split-second decisions. Witnesses are asked to tell months or years after the event, with great accuracy, their observation of events prior to and leading up to an accident when they had no occasion whatever to make any observations because no accident was anticipated. The evidence in the ordinary intersection case affords the best example of the unreality of evidence of this character. It would require several witnesses observing the accident armed with directors and stopwatches to give the sort of evidence witnesses are continually asked to give in these cases ... A great part of the evidence in actions arising out of motor vehicle accidents is in fact reconstruction and too often reconstruction with an eye on the result. [63]

3.32 Difficulties of proof and uncertainty of result are especially likely in cases involving unidentified vehicles, which require an action against a nominal defendant[64]. Because the allegedly negligent driver has not been identified and very often there are no witnesses apart from the victim,[65] the accident has to be reconstructed from circumstantial evidence. The special difficulties faced in such circumstances are demonstrated in the differences of opinion found in the High Court decision in *Holloway v. McFeeters.*[66]

3.33 Problems of proving negligence are not confined to those arising from insufficient or equivocal evidence. Transport accidents often involve family vehicles in which the victim has to prove the negligence of another family member to recover compensation. Submissions referred to the reluctance of some accident victims to give evidence supporting their case [67] even though failure to do so was contrary to their own financial interests. [68] This may be offset by the knowledge that the third party insurer would pay the damages award and relieve the party at fault from having to bear the loss. Thus the victims attitude will vary depending on the extent of his or her understanding of the system. [69] Given the often crucial role of the victim's evidence in proving fault, the attitude of the victim is yet another variable likely to produce inconsistences.

Decline of the Significance of Fault

3.34 The use of motor vehicles and public transport services is almost universal in Australia and the accidents which occur are among the inevitable hazards of modern life. Indeed, it is largely for this reason that the system of compulsory third party motor vehicle insurance was instituted. Both the Australian Woodhouse Committee and the Pearson Royal Commission in the United Kingdom have pointed out that it is unrealistic to assume that a motorist can drive safely at all times and that lapses into carelessness can be avoided. [70] In the words of the Pearson Commission:

> [e]ven good drivers make mistakes. A study by the World Health Organisation in 1962 found that a good driver makes a mistake every two miles; and an American study in 1964 suggested that on average a good driver makes nine mistakes every five minutes. A detailed investigation of over 2,000 road accidents in the Thames Valley, carried out over a four year period by the Transport and Road Research Laboratory, concluded that human mistakes were the sole cause of 65 per cent of accidents, and a contributory factor in a further 30 per cent. [71]

> The commonest contributory faults were carelessness or lack of attention and, for motorists, driving too fast. As a cause of accidents, irresponsible or reckless driving was relatively infrequent, and deliberate aggressive driving relatively rare. [72]

Similarly, a report of a Study of accidents occurring in the Adelaide metropolitan area in 1976 concluded as follows:

> [M]ost of the accidents involved ordinary drivers behaving in an ordinary way. There were some others who were intoxicated, or inexperienced, or who were speeding. But it would be wrong to assume that the road accident problem can be solved by concentrating solely on these few well recognised risk factors, important though they are. [73]

In a study carried out under normal driving conditions, in Washington DC, it was found that "good" drivers committed an average of nine driving errors of four different types every five minutes. [74]

3.35 Findings of this kind suggest that the fault principle as it is now applied in motor accident cases has lost a great deal of its original meaning. A breach of duty in a negligence action involves a departure from the standards of the ordinary and reasonable road user. Yet by those standards, if they were to be applied stringently, relatively few defendants would be held liable. The trend to extend compensation to a wider class of claimants has expanded the notion of "fault" as a criterion of liability in transport accident cases. This has increased the apparent arbitrariness of decisions as to whether an individual has departed from standards of reasonable care and, if anything, has added to the already considerable uncertainty surrounding the application of the fault principle. Such discrepancies between the theory of fault and its application undermine its alleged role in fulfilling community expectations.

3.36 Another important consideration is that human error is not the only cause of motor vehicle accidents. Other circumstances, such as lighting, road construction, or roadside structures obstructing vision may also be significant.[75] The search for fault on the part of a driver may divert attention from the role that these matters have played and may play in future accidents.[76] Mr DC Herbert, Superintendent of the Traffic Accident Research Unit, made the following submission in his private capacity.

> The consequence (of the 'fault concept') [is] that there is little or no financial or other incentive for measures to be taken to prevent a recurrence of the crash and resulting injuries -measures largely out of the hands of the individuals (usually drivers) who are blamed for crashes -measures that could, however, readily be instituted by various corporate bodies that have the capacity and technology to provide a safe vehicle and road environment ... [B]y focusing attention upon individual drivers, the common law positively discourages remedial work by corporate bodies to produce a less risky environments.[77]

Fault and Deterrence

3.37 The system of compulsory third party insurance is one which recognises that accidental injury is an inevitable consequence of the ownership and management of motor vehicles.[78] Under the system in force in New South Wales (and elsewhere in Australia) the cost of paying compensation is spread more or less evenly among all motor vehicle owners. Negligent motorists pay nothing extra for the additional risks or losses they create. Accordingly, to the negligent motorist, fault in the common law sense is irrelevant. It is the criminal law which, in a wide range of driving offences, is the instrument of deterrence. What we now have in New accidents which has many of the South Wales is a system of compensation for motor accidents which has many of the trappings of a no-fault scheme. This includes funding from a compulsory levy on car ownership, to which direct access is now provided without even the pretence of naming the negligent motorist as defendant in the proceedings (the GIO being named instead).[79] As noted earlier (paragraph 3.8), the proponents of the deterrent value of fault have been forced to direct their attention to the allegedly deterrent effect on the plaintiff of apportionment on grounds of contributory negligence.

3.38 Contrary to confident assertions by the proponents of fault, it is difficult to find any empirical evidence which proves that, whether plaintiff or defendant at fault is made to pay, fault operates as an effective deterrent It may well be that other factors, such as fear for one's own safety, are much more likely to influence a person's conduct. [80] To put it another way, anyone not deterred by a risk to his or her own personal safety is unlikely to be

deterred by the possibility of having to pay damages [81] or having his or her own damages reduced. As to the argument that public exposure of those found to be at fault can act as a deterrent (paragraph 3.8), commentators agree that, to the extent that this may be true, it applies only in certain areas, such as manufacturers' liability for defective products, but not negligent driving. [82]

3.39 Other deterrent effects which the common law negligence action is claimed to have could be incorporated in a no-fault compensation scheme if shown to be effective. Premium contribution adjustment (paragraph 3.9) does not have to depend on liability for damages based on fault. It could be based on accident records kept independently of court proceedings, or on conviction records for driving offences. This would mean that a person with a bad driving record would be made to pay indirectly for the cost of transport accidents, assuming that the cost is met from contributions from motor vehicle owners and levies (see Chapter 17). As to the general deterrence theory (paragraph 3.10), this is equally relevant to a no-fault system as it is to one based on fault. There is the same incentive to keep down contributions by driving carefully and thus avoid the overall cost of transport accidents.

3. Once-and-For-All Assessment

3.40 Common law damages are awarded in the form of a single lump sum which covers past and future economic loss and non-economic loss. [83] Since the award is made once-and-for-all, it cannot be altered if it turns out to have been based on false predictions. Many commentators [84] have criticised the once-and-for-all rule, as have a number of people who made submissions. [85] Although criticisms of it are not confined to common law negligence actions arising out of transport accidents, they are of particular importance in this area. The reason is that motor vehicle accident victims tend to suffer relatively serious injuries and are thus more likely to become reliant on their lump sum awards to provide for future needs for long, perhaps indefinite, periods.

3.41 The grounds of criticism, accepted even by many who otherwise support retention of the common law negligence action, include the following:

- the difficulty, if not impossibility, of accurately estimating future economic losses;
- the danger that even very large awards may prove to be inadequate to meet the injured person's losses during the period of incapacity;
- the absence of any requirement that the injured person use the award to provide for his or her future expenses or support; and
- the risk of the community paying "double compensation" where awards are exhausted or diminished and the injured person has recourse to the social security system for support.

3.42 Because the payment of damages on a once-and-for-all basis is a central feature of the common law negligence action in New South Wales and one that has received strong support in some quarters, we considered it important to gather information about the experiences and attitudes of accident victims who have received lump sum awards or settlements. As is noted in Chapter 1, three surveys of accident victims were conducted. Information gathered in these surveys supports the criticisms which have been made of once-and-for-all assessment.

Estimating Economic Loss

3.43 In order to assess damages for economic loss, the court must make a number of predictions. These include predictions as to:

- the life expectancy of the victim;
- the likelihood of the victim returning to work and contingencies such as future unemployment, sickness or further accident;

> the nature and extent of medical, hospital and nursing services that the victim will require and the costs of these services in the future; and
>
> the extent to which care of the victim will be provided by his or her family in the future.

3.44 The extraordinary difficulty of making accurate predictions on these matters, often over a lengthy period, makes it almost certain that a seriously injured person will be over-compensated or under compensated for future loss. The plaintiff will be under compensated if his or her life is longer than estimated if the award is discounted to take into account predicted developments (such as improved capacity for work) which do not occur, or if medical and related expenses are higher than anticipated. Overcompensation will occur if the plaintiff dies sooner than expected (in which case there will be a windfall for the estate); if the loss of earning capacity is less than anticipated; or if the plaintiff s rate of recovery is more rapid than predicted. in the words of Lord Scarman:

> [k]nowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering -in many cases the major part of the award -will almost surely be wrong. There is really only one certainty. the future will prove the award to be either too high or too low. [86]

3.45 The task is particularly difficult in the case of seriously injured children whose losses may endure for many years. For example, in a case involving a four year old boy who sustained brain damage in a road accident, a Judge of the Court of Appeal commented on the task of the trial judge in assessing damages.

> Where the earning capacity of a four year old has been destroyed and he comes to trial aged nine, it must be an exercise of a most speculative character upon which the law requires a judge to embark. [87]

In another recent case the problem of assessment in relation to a boy aged 13 was said to be “a task worthy of Solomon”, and one in which

> ... different minds could come to wide-ranging figures and it would be impossible to say that they are wrong, once the fundamental findings of fact as to the impact of the injury are reached. [88]

Of course, where a young person has been severely disabled there are likely to be difficult problems of prediction whatever the system and form of compensation. However, an approach which requires compensation to be assessed on a once-and-for-all basis must exacerbate the inherent problems.

3.46 There are no studies which have systematically attempted to ascertain the proportion of cases in which over and under-compensation occurs because of inaccurate predictions. Such a study would require a detailed comparison of the assumptions made by the court at the time of the award, and the situation of the accident victim some years later. In the Traffic Accident Study, however, we were able to make this comparison for 17 recipients whose cases were decided between 1973 and 1982. (The remainder of cases involved settlements or unreported judgments which could not be found).

3.47 The comparison revealed that in 16 of the 17 cases, predictions made by the court as to the future needs and circumstances of the victims were inaccurate. In all but two cases the inaccurate prediction disadvantaged the victim. Of the 14 disadvantaged victims, 10 had adequate incomes at the time of the survey, but nine of these had received compensation after 1979 and therefore it was too soon to judge whether their incomes would continue to be adequate. The most common reason for inaccuracy was an underestimation of future medical expenses.

3.48 One cause of inaccuracy was an unexpected deterioration in the victims health after the award of damages. [89] A second cause of inaccuracy was the failure to make adequate allowance for the effects of inflation on the cost of items and services including wheelchairs, pharmaceuticals, home nursing and domestic assistance. This occurred even over relatively short periods. [90]

3.49 A third cause of inaccuracy was the failure to assess accurately the physical capabilities of the victim and his or her likely lifestyle. [91] Inaccurate predictions were also made in respect of employment prospects. [92] In one case, an inaccurate prediction relating to life expectancy resulted in a windfall to the estate of the accident victim. [93]

Inadequacy of Lump Sum Awards

3.50 As already noted, the vast majority of plaintiffs in common law negligence actions settle their claims, often at a substantial discount from their theoretical entitlements to “full” compensation. However, even where damages are assessed by a court, the compensation often turns out to be inadequate to meet the needs of the injured person arising out of the accident in serious cases. In some cases this happens because the lump sum has not been invested or managed wisely. It may also occur, for example, because of factors of the kind referred to in paragraphs 3.48-3.49, or because of the effects of inflation which in areas such as medical and nursing expenses, may exceed the general rate of price increases.

3.51 In the Lump Sum Survey an attempt was made to measure the adequacy of awards and settlements in two different ways. These involved:

an examination of the subjective attitudes of recipients of awards and settlements; and

an objective analysis of their present financial situation.

Interviewees were asked whether they had been satisfied with the amount of damages they received in 1976. They were also asked whether they were satisfied with this amount at the time of the interview. The answers displayed a considerable change in the level of satisfaction between the time the award was received and the time of the interview.

Of the 26 motor vehicle accident victims who received damages awards, or settlements, of $100,000 or more, 18 (69 per cent) had been satisfied with the amount received in 1976. By the time of the interview, which took place in early 1983, only four (15 per cent) were satisfied. The level of dissatisfaction was highest in this group, which included some record verdicts. [94]

Of the 112 motor vehicle accident victims who received medium awards or settlements, in the $20,000 - $35,000 range, about half (54) had been satisfied in 1976. By the time of the survey, less than one-quarter (25) were satisfied. [95]

3.52 Respondents who were dissatisfied with the amount they received were asked about their main reason for dissatisfaction. The reasons included inflation, limited job prospects, the fact that money could not compensate and extra medical costs. In the case of people receiving high awards for motor vehicle accidents, 10 of the 22 dissatisfied respondents (45.4 per cent) said inflation was their main reason for dissatisfaction. In the case of dissatisfied recipients of medium awards for motor vehicle accidents, the most common reason for dissatisfaction was that “money could not compensate” for the injuries (52.9 per cent) and almost one-fifth of the group (19.5 per cent) gave inflation as their main reason. [96]

3.53 The Lump Sum Survey also made an objective assessment of the circumstances of recipients, by identifying those who were in a particularly weak or strong financial position. People were defined as “vulnerable” if they were either receiving income tested social security payments, or reported an income of under $150 per week, and as “secure” if they had an income of over $300 per week. [97]

3.54 A significant proportion of recipients of both “high” and “medium” damages fell into the “vulnerable” category. Almost 34 per cent of motor accident victims who received medium-range awards and 50 per cent of those who received high awards were financially vulnerable at the time of the survey. Only 21 per cent of accident victims who received high awards and around 19 per cent of those who received medium range awards were financially secure.[98]

3.55 In general there was a link between the objective financial circumstances of the interviewee and his or her satisfaction with the award or settlement at the time of the interview. Although the statistical differences must be interpreted cautiously, because of the small sample, those currently *dissatisfied* with their damages proved more likely to be vulnerable, while those currently *satisfied* with their damages were more likely to be secure. [99]

3.56 In the Traffic Accident Study, the adequacy of the award was measured in terms of whether it continued to meet accident related and reasonable living expenses at the time of the survey. This measure of adequacy is well

short of the avowed intention of the common law to restore the accident victim to a standard of living similar to that which he or she would have had but for the accident. Had the latter criterion been applied, there would have been many more respondents whose financial resources and income at the time of the survey were inadequate.

3.57 Table 3.2 presents the results of the analysis, although care must be taken as the Survey was not designed to be statistically valid. Even where compensation was received after 1 January 1979, there were some cases where income and financial resources were already failing to meet accident related and reasonable living expenses. For cases resolved before 1 January 1979 more than half of the awards have proved inadequate. A further 13 per cent of respondents were in a financially vulnerable position and for most of these it is likely, on our assessment, that the award will prove inadequate in the future. Nearly two-thirds of cases more than five years old involve inadequacy or financial vulnerability.

Table 3.2: Traffic Accident Study: Adequacy of Income at Time of Survey

New South Wales 1983

	Compensation Before 1979		**Compensation After 1979**		**Total**	
Financial Situation	**Number**	**%**	**Number**	**%**	**Number**	**%**
Inadequate Cases	28	52	5	17	33	39
Financially vulnerable cases	7	13	5	17	12	14
Adequate	19	35	20	66	39	47
TOTAL	**54**	**100**	**30**	**100**	**84**	**100**

Source: Traffic Accident Study, Table 3.1

3.58 The information in Table 3.2 paints only a general and impersonal picture. Individual case studies more graphically illustrate the hardship which may be experienced by accident victims whose income and financial resources prove inadequate.

> Mr B was a 26 year old machine mechanic before he became paraplegic in a car accident in 1975. After 10 months in a spinal unit he returned to work for his old company at a specially prepared bench. He earned about $120 per week. In 1976 his claim was settled for $210,000 on the basis that he was able to continue to work. After payments of expenses he received $186,000. In 1979, some three years after the settlement, a cyst developed in his spinal cord. Despite three operations he gradually lost the function of one arm and hand. He has not been able to work now for about a year. With the settlement money he purchased a specially fitted car, invested in second mortgages and repaid money owed to the Department of Social Security. He later realised many of his investments to purchase a house. The remaining money is gradually being used for general living expenses and medical costs. The three operations for the cyst cost over $20,000. He is now on an invalid pension. He can no longer afford a full-time nurse, and his wife gave up her job to look after him. M r B and his wife are very concerned that Mr B's increasing disability and continuously rising costs and medical expenses will necessitate the sale of their house. The continuing degeneration may leave Mr B quadriplegic. [100]

> Mr C suffered paraplegia as a result of an accident in 1948 when aged four. In 1954 he received 8,000 pounds net compensation. The lump sum was managed by a trustee for nine years. When Mr C married, he withdrew the lump sum to buy a house and flat. The flat was rented. Both Mr C and his wife received an invalid pension. The combined income from the pension and the flat was not sufficient to meet their living costs. Five years later, he sold the house and flat and bought a home unit in which he lived with his wife and child. After one year in the home unit, Mr C and his wife separated and Mr C went to live with his mother in a caravan. During this time he had a job working on an assembly line. He lost his job when the factory closed

down and is unfit for work because he suffers from continual health problems. Mr C, now aged 40, and his mother share a Housing Commission home. The compensation is exhausted and he relies on the invalid pension. He has been hospitalised nearly every year and makes regular visits to a clinic and his general practitioner. The cost of necessary pharmaceutical and medical aids is high. His medical costs, which should have been met by the compensation are covered by his pensioner health card. His aged mother provides attendant care to Mr C free of charge. [101]

Reliance on Social Security

3.59 In the recent Handicapped Persons Survey conducted by the Australian Bureau of Statistics, [102] more than 50 per cent of handicapped road accident victims in New South Wales were found to be on either the invalid pension or some other government pension or allowance. [103] Seventy per cent of road accident victims who were heads of family income units were in family units whose annual income was $8,000 or less. [104] While these figures include both accident victims who had recovered compensation awards at common law and those who had not, they underline the very substantial proportion of road accident victims for whom the common law for one reason or another has failed to provide adequately.

3.60 In the Lump Sum Survey nearly one-third of motor vehicle accident victims who received high awards or settlements were reliant, at the time of the survey, on social security benefits (excluding the age pension) or on a combination of social security benefits and other income. Over one-fifth of those victims who received medium awards or settlements are dependent in the same way. [105] Approximately one-third of respondents in the Traffic Accident Study were dependent on social security benefits. Some, whose income and financial resources were adequate to cover accident related and reasonable living expenses, had organised their affairs so as to preserve their entitlement to the pension. [106]

Full Compensation

3.61 The impossibility of accurate prediction in most cases, combined with the effects of inflation ensures that the majority of accident victims (especially those most seriously injured), however innocent of fault themselves, [107] are left with something well short of full compensation in the long term.

Use of Award by Plaintiff

3.62 A settlement or verdict is most likely to prove inadequate in cases where the person is seriously injured and has ongoing costs. However, there are some people with serious injuries who do not experience financial difficulty. Depending on such matters as their financial expertise and initiative and the availability of informed advice, they may manage very well. In both the Traffic Accident Study and Lump Sum Survey there were a number of recipients who were in relatively good circumstances. For example, in the Lump Sum Survey four out of the 19 motor vehicle accident victims who received “high” damages were classified as “secure” with incomes of over $300 per week. [108]

3.63 The problem with a once-and-for-all lump sum award in this regard is that courts must assume that all plaintiffs will prudently invest the sum awarded. However, once a court makes an award it has no control over how the award is used. [109] If a plaintiff dissipates the amount awarded, or if the amount proves to be inadequate because of imprudent investment decisions, the injured person will suffer considerable hardship and the community will ultimately have to provide further support through the social security and health care systems.

3.64 The award of a substantial lump sum to provide for the future imposes a very heavy responsibility on the injured plaintiff. The award is made on the theoretical basis that the lump sum, when invested, will allow periodic drawings from income and capital to be made so that the amount awarded will be exhausted at the expiration of the predicted compensation period. For the plaintiff to achieve this result, or to ensure that the award is not exhausted prematurely, considerable investment experience and skill are required. Injured people do not necessarily have this experience and may require expert advice to ensure that the lump sum is invested appropriately. Factors beyond the plaintiffs control may lead to the loss or severe reduction of the lump sum compensation award. Such factors include:

the liquidation of an investment company, [110] and

dishonest dealings by a business partner.

Some examples of the second factor were found in the case studies. [111]

3.65 Both the Traffic Accident Study and the Lump Sum Survey sought information on the extent to which victims received investment advice and the purposes for which damages were used. In the Lump Sum Survey, 72.3 per cent of recipients of medium level awards in motor vehicle cases did not receive any investment advice. Recipients of high level awards were much more likely to seek advice, although there was still a significant minority (23 per cent) who did not do so. The most common source of advice, when it was received, was the lawyer handling the case, who would not necessarily have specialist financial expertise. [112] The Traffic Accident Study supported the findings of the Lump Sum Survey in so far as most of the respondents who received large amounts of compensation sought professional advice before deciding on their investments. [113] Moreover, respondents in the Traffic Accident Study sought advice principally from the solicitor who had represented them in their compensation claim. [114] It is interesting to note that there does not appear to be a direct correlation between the seeking of professional advice and an adequate future income. [115]

3.66 In the Lump Sum Survey, the most common expenditure was for house purchase and/or improvements, although where the injured person received $100,000 or more this was often combined with income-producing investments. [116] A similar pattern of expenditure was observed in people interviewed for the Traffic Accident Study. [117] While expenditure on a house reflects the aspirations of many accident victims and may be a very sensible investment, it is not necessarily the purpose for which the award or settlement was designed. Excessive expenditure on a non-income producing asset may leave insufficient capital for income generation to meet the future needs of the accident victim. This may have been a contributing factor to the generally low level of income of participants in the Lump Sum Survey.

3.67 Some recipients found that the management of their damages caused considerable anxiety. [118] People who were relatively young at the time the money was received often commented that they made immature Judgements which they later regretted. [119] Some participants in the Traffic Accident Study commented that with hindsight they would have preferred a system of weekly payments, [120] though there were other participants who suggested that the lump sum gave them freedom and flexibility. [121]

4. Difficulties in Assessing Non-Economic Loss

3.68 Damages for non-economic loss include compensation for pain and suffering, loss of amenities and enjoyment of life and loss of expectation of life. [122] In some cases a separate amount has been included for “disfigurement”, [123] although there is no reason in principle why this could not be allowed for as an element of pain and suffering. A fundamental difficulty inherent in the award of damages for non-economic loss is that there is no monetary equivalent for what is being compensated. Without clearly defined standards, there is a real risk of inconsistency from one case to another. With respect of loss of expectation of life, [124] this risk is minimised by the rule that it should be kept to a “conventional sum” [125] damages for the other items of non-economic loss are under no such constraint.

3.69 In England, there has been a gradual evolution of a judicial “tariff” aimed at maintaining reasonable consistency in the awards for non-economic loss in similar cases. In a number of cases actual figures for specific disabilities have been suggested by the English Court of Appeal as the norm. [126] However, the High Court of Australia has consistently rejected attempts to introduce some uniformity in the assessment by reference to a norm or standard derived from other cases. [127] Notwithstanding this weight of opinion, some judges have expressed support for a principle of uniformity.

We are here dealing with incommensurables, the putting of a money value on such things as pain and loss of enjoyment of life. Looking at any case by itself, it is impossible to show that any figure must be right or must be wrong. In truth the only test which can be applied is whether the figure in question conforms approximately to what is normally allowed in somewhat similar cases. One merely has a series of conventional sums which for want of anything better, must be taken as establishing an acceptable pattern. [128]

3.70 A consequence of the High Courts position and the limited control which appellate courts have over individual assessment [129] is that the practices adopted by trial judges differ. It is well known that some judges are regarded as more generous than others, particularly in relation to compensation for non-economic loss. Indeed, some of the participants in the Traffic Accident Study commented that their main reason for settling the claim was that they had received advice from their legal advisers that the judge who was to hear the case was not likely to be sympathetic. [130] Any compensation system will encounter difficulties in determining the appropriate level of monetary compensation (if any) for non-economic loss. However, the inconsistencies that characterise the assessment of common law damages create the potential for unfairness among injured people, which may be avoidable in a different system.

5. Effects of the Common Law on Rehabilitation

3.71 There has been considerable debate about the effect of common law litigation on the rehabilitation of accident victims. It is alleged that the process may precipitate the condition called accident compensation neurosis. While there is still considerable debate in medical circles about the nature of this condition and its causes, [131] it appears to be closely linked with the anticipation of a pending claim whose outcome is uncertain. [132] It was originally believed that the finalisation of litigation “cured” the condition, [133] but later studies have not supported this conclusion. [134] The development of the condition is believed to be the product of a complex reaction between age, work satisfaction cultural and social conditions, physical injury and the litigation process, although it is not clearly understood. The condition has been medically acknowledged as verifiable, and not merely malingering or exaggeration for the purposes of maximising compensation. The common law also recognises that the condition exists and can have disabling effects. [135]

3.72 Many aspects ‘of the common law negligence action are said to inhibit rehabilitation. First, there is the highly adversary nature of the proceedings.

> These people have been made to feel responsible for their injury and have met responses of hostility and indifference from professionals. Soon after the injury they are allocated a sick role, then at a certain point there is a change and an attempt to disprove the legitimacy of their symptoms. The person is forced to maintain and demonstrate his symptoms as proof of his own validity. Symptoms become his major point of communication with others. He holds on to them with fury and resentment. Any attempts to give up symptoms are opposed by the demands of his legal entanglements. Recovery is seen as against his best interests [for compensation settlement], in his lawyer s view. The person withdraws into a state of learned helplessness, a parasite existence of dependency, where he sees the world as an unbearably hostile, foreign place. [136]

This was also noted in submissions received by the Commission as one important anti-rehabilitative aspect of the common law. [137]

3.73 Secondly, there is the necessity of awarding a once-and-for-all lump sum. Where a lump sum is the only form of compensation available, there is a certain financial incentive to maximise the damages payable by remaining as disabled as possible up to the date of trial or settlement In the vast majority of cases, this is not a conscious desire to defraud the system, but rather a sensible precaution to maximise compensation and thereby ensure future financial security. This goes some way to explain the alleged “curative” effects of the finalisation of litigation which can then be seen as simply a manifestation of delayed rehabilitation efforts. Some submissions have noted this effect. [138] These unconscious or conscious realisations of injured people that rehabilitation efforts may lead to reduced compensation are often reinforced by legal or medical advisors whose primary objective is to maximise the compensation paid for the injury. [139]

3.74 Delays, which are inherent in the adversary system (paragraphs 3.78-3.83) can also adversely affect the claimants prospects for rehabilitation. It is generally accepted that rehabilitative treatment is most effective where it is made immediately available to an accident victim. [140] For example, the submission of the Australian Council for Rehabilitation of Disabled referred to the harmful effect of delays as well as adversary court procedures on the rehabilitation of accident victims. [141] By the time the lump sum is delivered, the plaintiff s condition is often fixed and compensation neurosis or despair may have set in, reducing the opportunity for rehabilitation.

3.75 Atamorefundamentallevel,itmaybearguedthatthereisaconflictbetweenthegoals of rehabilitation and assessment of damages under the common law.

> Rehabilitation is taken to mean any of the activities aimed at the restoration of the accident victim ... which tend to shorten the period of disability, reduce pain and suffering and produce a reasonably satisfying adjustment in the shortest possible time. [142]

It is argued that from the victim's perspective, the assessment of common law damages is inimical to rehabilitation. The common law emphasises what was lost, be it quality of life, loss of earning capacity or loss of function. The greater these losses the larger the damages awarded. Rehabilitation will seek to minimise or eliminate these losses, and concentrate on remaining abilities, and so efforts to rehabilitate may result in reduction in damages awards. This possibility was vividly illustrated in a recent New South Wales decision. A young man suffered spinal injuries in a motor accident. At the trial in 1980 damages were assessed upon the basis that he would not walk again. Through determination and effort, and with the assistance of his family and friends, he taught himself to walk. The judgment quotes from his affidavit.

> I did not tell [the doctors] that I had been walking or doing the exercises designed to help me walk. I did not tell them because all the doctors who treated me and all the doctors who had seen me for medico-legal purposes prior to the trial, had told me that I would never be able to walk again; I thought they had all written me off as far as walking was concerned. I felt proud of my achievement ... I wanted to achieve for myself the ultimate goal of being able to walk and then when I could, show the doctors what I had done. [143]

Notwithstanding that one of the judges called his efforts a "miracle", [144] and that there was little evidence that the improvement in his condition would be permanent, the majority of the Court of Appeal held that judgment should be set aside and a new trial ordered, in the expectation that the damages assessed in the new trial would be less than those originally awarded.

3.76 While rehabilitation focuses the attention of the injured person upon the remaining abilities, the medico-legal process, which accompanies the common law assessment of damages, concentrates the mind of the injured person on his or her disability. Instead of minimising the disabling effects of any impairment a person must reinforce the attributes of the disability through frequent medical examinations and evidence collected for some years after the accident. in the words of submissions received by the Commission:

> [t]he present compensation system puts a priority on establishing an injured person's rights and entitlements. The first concern of the injured person is his legal rights. This is reinforced by vested interests, unions, peers and family. The injured person must spend a great deal of time reassuring himself and others that his legal rights are guaranteed and rehabilitation can only commence once his legal position is clear. [145] The necessity of proving the debilitating effects of an injury encourages and reinforces the prolonged adoption of the 'sick role' by many injured persons. [146]

3.77 Reports into rehabilitation have generally stated that at best, the common law is ambivalent towards promoting rehabilitation and, at worst, is a positive disincentive to efforts to rehabilitate. For example, the Conybeare Report in 1970 which canvassed the possibility of the establishment of a rehabilitation facility for workers under the Workers' Compensation legislation said in relation to the success of rehabilitation efforts in North America

> [t]his in my opinion rests upon two lynch-pins: an abundance of financial resources deriving largely from Federal-State co-operation and the absence of any rights of common law action in the injured worker. This negative factor prevents his seduction by the lure of a lump sum to be obtained from a jury verdict It was freely stated to me in Canada and America that any real success in rehabilitation could not have been expected if the common law action (without the common law defence) had been available alongside the workmen's compensation provisions. [147]

The Minogue Report into the Victorian combined no-fault/common law motor vehicle accident compensation system also expressed considerable reservation about the effect of the common law on efforts towards rehabilitation. [148] Further discussion of reports which have considered the effects of the common law upon efforts at rehabilitation appear in Chapter 9.

6. Delays

3.78 A number of factors can lead to delays in common law negligence actions, which are conducted on an adversary basis. These factors include:

the need to wait for the plaintiffs injuries to stabilise so that more accurate assessment of damages can be made;

where children are injured, the need to wait until they have gained maturity or attempted entry into the workforce in order to assess their employment prospects;

difficulties in the collection of evidence and the location of witnesses;

difficulties in arranging for examination and reports by medical practitioners, many of whom can give appointments for review of accident victims or reports only months ahead;

difficulties in arranging trial dates that are convenient for all the witnesses involved, especially expert witnesses; and

congestion of court lists due largely to other common law negligence actions awaiting hearing.

3.79 Table 3.3 shows the time from commencement of action to verdict from records kept by the GIO in 204 cases in which a Supreme Court verdict was obtained during the period September 1981 to September 1982. The Table indicates that the largest proportion of cases are completed between 25 and 36 months after commencement (41.7 per cent). The next largest proportion of cases (25 per cent) are completed 13-24 months after commencement. In nearly 10 per cent of cases the time exceeds five years. One case resolved in this period took over 15 years to complete. In the Traffic Accident Study the time period between the accident and receipt of compensation varied from a few months to 10 years. For most it took more than three years to receive compensation. [149]

3.80 Several submissions commented on the desirability of resolving claims speedily, and criticised the delays which occur under the present system. [150] Even those who ardently support the continuation of the common law recognise the difficulties of delay. [151] The consequence of delays to injured claimants may be very serious indeed. They may incur substantial expenditure and suffer financial loss while waiting for their cases to be heard. The financial problems, and the stress caused to an accident victim and to his or her family during the intervening period, are not the subject of special compensation at common law. Further, they may be such as to induce a plaintiff to settle for less than “full” compensation. Delays have the greatest impact on the most seriously injured victims whose need for prompt compensation will often be urgent.

Table 3.3: Motor Vehicle Common Law Negligence Actions: Supreme Court Delays

New South Wales, Year Ended September 1982

Period Between Commencement and Verdict	Number of Cases	Percentage of Cases
Up to 12 months	19	9.3
13-24 months	51	25.0
25-36 months	85	41.7
37-48 months	18	8.8
49-60 months	11	5.4

Over 60 months	20	9.8
TOTAL	**204**	**100.0**

Source: GIO statistics on Supreme Court verdicts obtained between September 1981 and September 1982.

3.81 The GIO attempts to alleviate financial hardship arising from delay in a number of ways. Many small claims are settled "over the counter" without the accident victim taking legal proceedings. Where proceedings are commenced, the GIO makes advance payments for hospital and, in some cases, medical expenses, where a verdict for the plaintiff can reasonably be expected but the extent of liability is in dispute. But such payments are dependent on the exercise of discretion and do not necessarily occur on a systematic basis or in cases where the need is greatest. The GIO, in its submission referred to the attempts it made to alleviate hardship, but commented that "for a variety of reasons (this) had not been particularly successful". [152] Another means by which the GIO has attempted to assist victims of compensable motor vehicle accidents is through the use of Paramedical Liaison Officers. In addition to encouraging claimants to deal direct with GIO, their work

> ... includes interviewing the victims in hospitals, recognising their practical needs and facilitating assistance from both the GIO (where financial assistance is necessary) and the various community resources. [153]

This arrangement appears to be in its infancy, with available staff being very limited in number.

3.82 The Traffic Accident Study has provided many examples of victims of motor vehicle accidents suffering hardship as a result of delay in finalisation of their claims. [154] Of the 86 respondents, only eight managed to survive during the period between their accident and receipt of compensation without financial assistance from the Department of Social Security or from relatives or friends. Of the remaining 77, 49 received social security benefits and 26 had to borrow from relatives or friends. In two cases, details about sources of income were unknown Since most respondents were forced to live on substantially reduced incomes, many exhausted their savings and amassed debts. Many settled their claims because they could not afford to continue without compensation. [155] The findings of the Traffic Accident Study concerning the problems associated with delays are supported by the Commission's own case study program. Most respondents experienced financial difficulties during this period. Some were dependent on social security benefits and others amassed debts which they could only hope to repay when or if, compensation was awarded.[156] We mention two here, by way of illustration.

> A motorist his wife and four children were involved in a head-on collision while holidaying in Queensland in 1981. Their vehicle collided with another driven by a young man who was allegedly under the influence of alcohol The motorist s wife and one of their children were killed, while the motorist himself and two other children sustained severe injuries. The motorist, who had previously been a company manager, had not worked for the 14 months since the accident because of his injuries. His only income during that period had been sickness benefits, later replaced by the supporting parent benefit and a housing rebate. At the date of the interview he required further surgery and suffered from extreme fatigue and depression. His condition was aggravated by worry over the rapid decline of his family into poverty and by his responsibility for the continuing care of his children without the assistance of his wife. He had received no rehabilitation treatment or interim compensation. [157]
>
> A 12 year old boy suffered a fractured skull and other injuries in 1970, when knocked off his bicycle. In 1976, when aged 18, he suffered a motor cycle accident and was off work for 10 months. He had a further accident in 1979. When he was interviewed in October 1982 none of the claims arising out of these accidents had been finalised, although some small payment had been received from one of the third party insurers in the proceedings. The claimant had seen more than 20 doctors in connection with his claims. He had suffered a variety of financial and psychological problems which had been aggravated by the delay in finalising the claims. [158]

3.83 Measures of the kind taken at the initiative of the GIO to alleviate hardship (paragraph 3.81) are at best erratic and inadequate. Another procedure which could be adopted to provide speedier assessment in order to ensure prompt payments is a system of arbitration of the kind recently introduced by the Law Society of New South Wales (paragraph 4.22). But any such solution can go only part of the way to overcome the problem. None

ensures immediate financial support of the kind necessary to stabilise the accident victim's condition and maximise his or her chances of rehabilitation.

7. Burden on the Court System

3.84 One of the principal criticisms of the common law negligence action in relation to personal injuries is that substantial resources are consumed in legal and administrative expenses. We deal with this general question later (paragraphs 3.89-3.94).At this stage we are concerned with the public resources required for courts to process these actions, specifically those related to motor vehicle accidents.

3.85 A significant proportion of the time of the Supreme Court and the District Court is taken up with common law negligence actions related to motor vehicle accidents. For example, analysis of the records of the District Court shows that in 1983, of the 8,679 cases completed in the civil jurisdiction 6,973 (or 80 per cent) were common law negligence actions. Of these, 5,714 (81.9 per cent of common law negligence actions) involved motor vehicle accidents. A survey of the use of Court time undertaken in 1981 showed that approximately 68 per cent of actual Court time in the civil jurisdiction was spent in hearing common law negligence actions, of which at least two-thirds could be attributed to motor vehicle cases. [159] Analysis of Supreme Court statistics for 1982 showed that of the 2,781 cases completed in the Common Law Division, which comprises 19 judges, 2,703 (96.8 per cent) were common law negligence actions, and of these 1,966 (72.7 per cent) were motor vehicle cases. [160]

3.86 We undertook a survey in the Common Law Division of the Supreme Court to determine the proportion of judicial time occupied in hearing common law negligence actions. Conducted over the period May-June 1982, it showed that more than half (about 52 per cent) of the sitting time of judges of the Common Law Division was occupied in hearing common law negligence actions. In addition 44 per cent of the time of four Masters and 31 per cent of the sitting time of the Court of Appeal were occupied in hearing such cases. The major reason for common law negligence actions occupying less sitting time than the proportion of common law negligence actions completed in the Common Law Division appears to be the high rate of settlement of common law negligence actions. It is also possible that our estimates of sitting time devoted to common law negligence actions, based on this two month period, are too low because this was not necessarily a typical period. Whatever the explanation it seems clear that if the trial of motor vehicle common law negligence actions were removed from the Supreme Court and District Court, substantial judicial resources would be available for other work. Of course it would be necessary to offset the time and resources required to determine appeals under the new Scheme (paragraph 3.88).

3.87 In order to estimate the approximate cost of deciding common law negligence actions in the courts, it was necessary to apportion the total administrative costs (including accommodation) of the District Court, Supreme Court, and Court of Appeal among common law negligence actions and other categories of cases. [161] On this basis the annual cost to the State of providing Supreme Court and District Court courtrooms, judges and supporting staff to decide and process common law negligence actions is approximately $8.9 million (in 1982 dollars), of which $4.5 million represents the costs of the District Court and $4.4 million the costs of the Supreme Court This estimate, which is necessarily imprecise, does not include the legal costs incurred by the parties to the litigation but is confined to the costs of providing courts, judges and support staff to decide and process common law negligence actions. If, as the material in paragraph 3.85 suggests, about 70 per cent of common negligence actions concern motor vehicle accidents, it would seem that the annual cost of providing superior courts to process motor vehicle common law negligence actions is in the order of $6.3 million.

3.88 One submission following the Working Paper was critical of an analysis of the time spent by judges in deciding personal injury matters arising out of the traffic accidents.

> It seems implicit in the criticism that determining the individual rights of compensation of an individual for the often catastrophic consequences of a motor vehicle accident is less socially important and less deserving of a judge's time than deciding a commercial dispute between two companies both of which will be in a far better position to withstand the consequences of loss than the injured individual. It seems indeed to suggest an elevation of money to a more important position than individual suffering. [162]

By drawing attention to the fact that the common law negligence action imposes a heavy burden on the court system, we do not suggest that the courts should have no significant role to play in a compensation system, nor

that injured people should be denied the right to independent Judicial review of decisions relating to their claims for compensation. As explained in Chapter 5, the new Scheme should provide the opportunity for full independent judicial review of decisions adverse to a claimant. Clearly this will require a significant allocation of judicial resources. Nonetheless, it is equally clear that a considerable proportion of judicial resources are currently used to decide questions of fault and to determine a single lump sum figure to provide the right amount of compensation taking into account all the possible contingencies. There is much to be said for the view that precious judicial time would be better spent on other pressing matters, the utility of which is less suspect.

8. Legal and Administrative Costs

3.89 Many critics have pointed to the costs to the community, aside from the judicial resources, of basing compensation on the common law negligence action The costs include the legal expenses incurred by both the plaintiff and the defendant (or the defendants insurer), the administrative expenses of insurers, and the fees and other costs of medical advisers, investigators and witnesses generally. The Issues Paper referred to some of the estimates that have been made elsewhere of these costs and the difficulties of obtaining accurate information of this kind. [163] For example, in New South Wales no information has been collected on the legal expenses incurred by the parties to motor vehicle common law negligence actions and the information cannot readily be obtained from insurers files because of the form in which records are maintained. [164] The Australian Woodhouse Committee, however, conducted a survey in 1974 of insurers' files in three States, not including New South Wales. The Committee found that as a percentage of the "net payment" to the claimant (that is, total payments less the amount allowed by the insurer for the claimants legal costs and disbursements), legal costs and disbursements amounted to 18.1 per cent in South Australia, 22.8 per cent in Queensland and 26.9 per cent in Victoria. [165] This percentage covered both the amount allowed by the insurer for the claimants costs and disbursements and the insurer's legal costs and disbursements. The reduction to a single insurer in both Victoria and New South Wales may have slightly decreased administrative costs relating to insurance.

3.90 In 1978 the Minogue Report in Victoria expressed the view that the Australian Woodhouse Committee's estimate of 26.9 per cent of net payments for legal costs and disbursements in Victoria was too high although the Report acknowledged that adequate statistics had been impossible to obtain. After reviewing insurance records and discussing the matter with experienced solicitors, the Report concluded that it was necessary to distinguish between large and small claims in estimating the proportion of legal costs and disbursements

> [I]t is clear that on a percentage basis cost results of under 10 per cent of total payout may be achieved once the sum at stake rises above $20,000. However, since the vast majority (more than 90 per cent) of cases involve less than $10,000, it may safely be said that in that majority, legal expenses can exceed 20 per cent of the total payout. [166]

3.91 In order to obtain information on legal expenses in common law negligence actions in New South Wales, we conducted a survey of legal firms which regularly act for plaintiffs and defendants in common law negligence actions. The actions were not confined to motor vehicle accidents although these would have constituted the substantial majority of cases. Unfortunately, there was a low response rate to the survey, only 16 out of the 40 firms responding. One firm provided information on 42 cases in which it had acted for the plaintiff, representing 25 per cent of all plaintiffs cases, and nearly 20 per cent of all cases. Consequently, the information obtained from the survey must be treated very cautiously indeed. Subject to this caution, we think it appropriate to note the results of the survey, although we restrict ourselves to a brief summary. [167] Legal costs, for the purposes of the survey, included the costs of solicitor and barrister acting for each party (plaintiff or defendant), but not disbursements for such purposes as investigative and medical services.

3.92 The plaintiffs legal costs were calculated as a percentage of the net amount received by the plaintiff by way of settlement or verdict, after deduction of the costs. The average ranged from 39.5 per cent for amounts between $1,000 and $5,000 to 4.5 per cent for amounts between $200,000 and $500,000. [168] The defendant s legal costs were calculated as a percentage of the gross amount of the verdict or settlement, that is the amount paid by the defendant including any sum for the plaintiff s legal costs. The average ranged from 33.5 per cent for amounts between $l,000 and $5,000 to 3.25 per cent for amounts between $200,000 and $500,000. [169]

3.93 Within a particular range of settlement or verdict there was considerable variation in legal costs. For example, where the net amount recovered by the plaintiff was under $5,000 the plaintiff s legal costs ranged from

26.7 per cent to 71.4 per cent of that total amount. The percentage of legal costs decreased with the size of the verdict or settlement, a trend similar to that observed by the Minogue Report in Victoria. Although the small sample size requires some caution in its interpretation, it indicates that the average legal costs of a plaintiff are likely to exceed 10 per cent of the amount recovered where the amount does not exceed $50,000. The combined cost of the plaintiff and the defendant in such cases is significantly higher, but cannot be estimated with any accuracy on the information available.

3.94 Further indications of the legal costs associated with common law negligence actions in motor vehicle cases are contained in guidelines issued by the Legal Services Commission of New South Wales. These guidelines are issued for the Commission's "lump sum costing" scheme for civil claims covered by legal aid. Table 3.4 reproduces the Legal Services Commission of New South Wales scale relating to proceedings in the Supreme Court arising out of a motor vehicle accident where both liability and damages are in dispute and covering full preparation of the case as well as presentation in court. The actual payments to solicitors, in accordance with the usual practice of the Commission, are 20 per cent less than the scale.

For example, solicitor and client costs for a case in which the plaintiff recovers up to $50,000, and which is settled on the eve of trial, would be $3,200 (that is $4,000 less 20 per cent). The amounts were arrived at after the Legal Services Commission of New South Wales had consulted with the GIO and representatives of the Law Society of New South Wales and were based on the level of costs which would be considered reasonable in a case which did not receive legal aid. Consequently, they provide some guidance on the level of solicitor and client costs, excluding barristers' fees and other disbursements, of plaintiffs in all motor vehicle common law negligence actions.

Table 3.4: Motor Vehicle Common Law Negligence Actions: Legal Aid Guidelines for Supreme Court Legal Costs [(a)]

Legal Services Commission of New South Wales 1982 [(b)]

		Legal Costs Legal Costs [(a)] Payable ($)	
Amount Recovered in Litigation ($)	**Settled on Eve of Trial**	**Tried in 1 Day**	**Tried in 2 Days**
Up to 50,000	4,000	4,500	5,000
50,001-100,000	5,000	5,500	6,000
100,001-150,000	6,000	6,500	7,000
Over 150,000	7,500	8,000	8,500

(a) Solicitor/client costs allowed when both liability and damages are in dispute.

(b) Applicable to cases where legal aid was granted after 16 April 1982.

Source: Legal Services Commission of New South Wales Lump Sum Costing Scheme

9. Judicial Independence

3.95 We referred in paragraph 3.14 to the value attached by the community to the independence and impartiality of the judicial process which is not necessarily shared by the administrative or bureaucratic process. While we accept that independent judicial review is an essential element in the Scheme, it does not necessarily follow that courts must make the initial determination of a claimants entitlement to compensation As the recent amendment to the law in New South Wales demonstrates,(paragraph 3.97), the common law is not immune from apparently arbitrary government intervention. There is no reason why a body administering a compensation scheme should be any more exposed to such intervention than the courts. Moreover, if the principles underlying the Scheme are

spelt out carefully in the governing legislation and its administration is under continuing review by an independent body, an “insurance mentality” (paragraph 3.14) can be prevented. There are steps, explained in Chapters 15 and 16 which can be taken to ensure that the Scheme is administered sympathetically to claimants. It is also misleading to suggest that the current system is not affected by the insurance mentality. Since approximately 90 per cent of third party motor vehicle claims for personal injury are settled out of court (paragraph 3.25), there is a strong possibility that anti-claimant considerations influence the amount of compensation paid to a large proportion of motor accident victims.

10. Increasing Cost of Motor Vehicle Third Party Insurance

3.96 For some years, concern has been expressed by the GIO at the escalating cost of third party motor vehicle insurance claims. [170] The escalation has been greater than the general level of inflation suggesting that the continuing increase in the level of motor accident compensation is due to factors over and above wage inflation which increases the amount recoverable f or lost earning capacity. [171] Factors, such as changes in the principles governing the assessment of damages, have put substantial strains on the system (paragraph 1.40).

3.97 If the present system is to remain viable, either compulsory third party premiums have to be increased or the benefits available to injured people have to be reduced. In recent amendments to the Motor Vehicles (Third Party Insurance) Act, 1942 [172] the New South Wales Government has opted for the second alternative. By transferring motor vehicle third party insurance from a “fully funded” to a partly “pay as you go” system, the amendments have relieved in the short term the financial strains in the system, although this of itself will do nothing to alleviate long-term difficulties. In addition, the amount recoverable by way of damages has been reduced by a legislative increase in the discount rate used to calculate the present value of future economic loss (paragraph 2.32), a statutory limit on the amount recoverable for the value of gratuitous home care (paragraph 10.24) and the abolition of interest on general damages for motor accident victims. [173]

3.98 Where measures of this kind reduce the amount of compensation intended for the maintenance and support of the long-term disabled victim, they will not have the effect of relieving the community of the ultimate burden of meeting the costs of injuries arising out of transport accidents. We made the point earlier that social security acts as a safety net in making good some of the inadequacies of the common law. A reduction in common law damages to the permanently disabled will inevitably lead to further burdens on the social security system, the cost of which the community (including New South Wales motor vehicle owners) must bear. Without more comprehensive reforms of the compensation system, piecemeal amendment of this kind only shifts the escalating costs from one branch of the system to another.

11. Incidental Costs to the Community

3.99 The total cost of the existing transport accident compensation system is not adequately reflected in motor vehicle third party insurance premiums. The point was made in the previous paragraph that where a system fails to meet the needs of the long-term disabled, the cost is shifted onto social security. Earlier in this chapter we described the substantial drain on the public purse resulting from the burden placed on the court system by the common law negligence action. But incidental costs do not stop there.

3.100 Submissions [174] described the cost both direct and indirect of the appearance of expert medical witnesses in court proceedings. Not only can this be disruptive and time consuming for the witnesses themselves, but others are often adversely affected. Since the witnesses are often called on short notice, previously arranged operation lists and outpatient attendances have to be cancelled with obvious inconvenience and delays to the hospital administration staff and the patients. Similarly adverse affects are caused to staff and patients in private consulting rooms.

C. The Need for Reform

3.101 While opinions differ on what should be done, the need for reform of the common law negligence action, as applied at present to transport accidents in New South Wales, is universally acknowledged. Its inadequacies are obvious and the variety of responses to these inadequacies will be the subject of the next chapter.

III. SUMMARY

3.102 This Chapter contains a critical evaluation of the common law negligence action as it applies to transport accidents. A number of arguments have been made in its support. It is said that the fault principle, which bases entitlement to compensation on the fault of both plaintiff and defendant, satisfies a community sense of justice and operates as a deterrent against negligent conduct. The lump sum award, characteristic of the common law, promotes rehabilitation. Only the common law provides full compensation and is protected by the independence and integrity of the courts. All of these alleged advantages can be shown wanting. There is no reliable evidence to support the assertions concerning the connection between fault, community justice and deterrence. On the other hand, inherent in the concept of fault is the failure to compensate a substantial proportion of accident victims at all and a further proportion at less than the full extent of the injury on grounds of contributory negligence. There are also practical problems associated with proof of fault, especially in transport accidents which almost always occur suddenly and unexpectedly making accurate observations by witnesses very difficult. The process is further complicated by the changing meaning of fault itself. The hardship caused by the failure to compensate in many cases and the practical difficulties associated with fault far outweigh the unproven advantages attributed to it.

3.103 Common law damages are awarded in a once-and-for-all lump sum. This form of award has proved inappropriate especially in cases of serious injury where difficulties of making accurate predictions and mismanagement of the lump sum often leave the accident victim destitute and dependent on social security. Again, these disadvantages more than offset any rehabilitative value attached to lump sums. Added to that is the anti-rehabilitative effect of a system which encourages maximisation of the victim's condition in order to attract the highest possible award. The incentive to maximise the victim's loss is also a factor, along with others such as the problems associated with preparation for a trial at which fault must be proved and general difficulties caused by a congested court list which combine to cause delays in reaching final assessment, causing personal hardship and impeding rehabilitation.

3.104 While availability of judicial determination of accident claims ensures impartiality and integrity, the trial of transport accident cases places a heavy and disproportionate burden on the courts. The fault system is costly in other respects due to:

- high legal and administrative costs;
- uncontrolled increase in damages awards which, in turn, encourages arbitrary legislative intervention; and
- incidental costs to the community through for example, the summoning of expert medical witnesses on short notice.

The total cost of the fault system cannot be justified and this underlines the importance of finding an alternative which can distribute the funds available for transport accident victims more equitably and efficiently.

FOOTNOTES

1. See eg. J Hanlon, QC, "The Victorian Motor Accidents Board and Common Law Rights", paper delivered at a conference entitled "The Compensation of Motor Accident Victims in Victoria - A Model for Australia?", Law Institute of Victoria (Melbourne, October 1983).

2. Submission S40, pp.1-2. See also Submission W4, p.1.

3. W Blum and H Kalven, "The Empty Cabinet of Dr Calabresi: Auto Accidents and General Deterrence" (1967) 34 *University of Chicago Law Review* 239, at p.268; S Stoljar, "Accidents, Costs and Legal Responsibility" (1973) 36 *Modern Law Review* 233.

4. W Blum and H Kalven, "Public Law Perspectives on a Private Law Problem-Auto Compensation Plans" (1964) 31 *University of Chicago Law Review* 641, at pp.673-674.

5. “Liability Without Fault-The Claim that a Change of Law is Necessary”(1963) 37 *Australian Law Journal* 209, at p.213: a report for the New South Wales Bar Council by N A Jenkyn, QC, H H Glass, QC and T E F Hughes, QC.

6. Submissions S43, p.5, W48, p.9; and W84.

7. C Brown, “Deterrence and Accident Compensation Schemes” (1979) 17 *University of Western Ontario Law Review* 111, at pp.120-121.

8. Submission S46, p.14.

9. See S. Stoljar, note 3 above, at p.239.

10. Submission S57, p.50. See also Pearson Report vol.1, p.363.

11. R Posner, *Economic Analysis of Law* (2nd ed. 1977), p.154.

12. G Calabresi, *The Costs of Accidents* (1970), ch.10.

13. Submission W28, p.8.

14. Submission W30, p.2.

15. Submission W52, p.3.

16. Submission W30, p.2.

17. Submission W48, p.16.

18. Submission W75, pp.2-3.

19. Submission W48, p.13.

20. Submission W28, p.2.

21. See eg. Submission S57, p.50.

22. J L Sher, QC, “The Case for the Retention of Common Law Rights” (1983) 57 *Law Institute Journal* 1356. at p.1358.

23. *Ibid.*

24. *Id.,* at p.1356.

25. See para.2.28.

26. See para.1.36. See also *Walling v. Nominal Defendant,* 22 May 1981, Supreme Court of New South Wales, Maxwell J., transcript of judgment at p.13.

27. See paras.3.10-3.14,

28. Submission W28, p.23.

29. Letter from Mr. R McGeoch to the Chairman dated 6 April 1984, para.1.2 of report annexed to the letter.

30. D Dowda, *Spinal Cord Injury Physical and Social* Outcomes (unpublished thesis, University of Sydney, 1982), p.52: p.53, table 12.31. In addition to the 38 per cent who had failed to prove fault 12 per cent of people had their cases pending. Since it is possible that some of these people would not be successful in proving fault the figure of 38 per cent is a minimum.

32. Submission W28, annexure, “A Survey of Attitudes Among Paraplegics and Quadriplegics to some Aspects of Compensation” (1983), table 2.

33. Described in para.4.39.

34. Some totally disabled earners may be better off remaining on no-fault benefits which have no upper monetary limit of the kind imposed under the equivalent Victorian scheme: see para.4.28.

35. See eg. Submissions W28, p.7; W30, pp.2-3; and W48, p.9.

36. See Case Study Booklet, ch.3.

37. *Id*., para.3.8, CS 91.

38. *Id*., para.3.12, CS 94.

39. See para.2.27.

40. For a discussion of the methodology, see Australian Woodhouse Report vol.3, p.82 ff.

41. *Id*., vol.1, p.52, table III.

42. *Id*., p.53, table IV.

43. *Ibid.*

44. Traffic Accident Study, appendix, Case Study CG.

45. P S Atiyah, *Accidents, Compensation and the Law* (3rd ed. 1980), p.483.

46. M. Smith, “Supreme Court Statistics” (internal Commission memorandum) dated 25 March 1983.

47. C Rizzo, “District Court Civil jurisdiction Statistics for 1983” (internal Commission memorandum) dated 29 June 1984.

48. *Id*., pp.4,5.

49. Traffic Accident Study, appendix, Case Study X.

50. See Lump Sum Survey, vol.1, p.56, table 24; Traffic Accident Study, para.5.1; and Case Study Booklet, para.4.18.

51. See paras.2.37-2.45.

52. See paras.2.52-2.64.

53. See para.2.16.

54. S Lloyd-Bostock, “Common Sense Morality and Accident Compensation” (1980) *Insurance Law Journal* 331, at p.338.

55. *Ibid.,* see also note 45 above, pp.530-531.

56. Described in paras.4.49-4.53.

57. T G Ison, *Accident Compensation* (1980), p.179.

58. See eg. JUSTICE (British Section of the International Commission of jurists), *No Fault on the Roads* (1974); E P Bernzweig, *By Accident, Not Design* (1980), esp. ch.3; and J O'Connell, *The Injury Industry* (1971).

59. See eg. *Utting v. Luhtala,* 9 November 1983, Supreme Court of New South Wales, Court of Appeal; *Livingstone v. Halvorsen* (1978) 53 ALJR 50.

60. *Warren v. Coombes,* 12 March 1976, Supreme Court of New South Wales, Yeldham J., which decision ultimately was reversed on appeal by the High Court of Australia. See (1979) 142 CLR 531. The appeal to the High Court was not on this point.

61. See eg. Submission S32, p.13.

62. See eg. *Halvorsen v. Livingstone,* 16 March 1970, Supreme Court of New South Wales, Court of Appeal, *Livingstone v. Halvorsen* (1978) 53 ALJR 50.

63. The passage was part of a paper delivered by a former Chief Justice of Ontario, McRuer C J, at the Third Commonwealth and Empire Law Conference in Sydney in 1965. The paper was reprinted in abbreviated form as a chapter in Linden(ed.), *Studies in Canadian Tort Law* (1968), where the relevant passage appears at pp.309-310.

64. See para.2.20.

65. This is typical in "hit-and-run" accidents.

66. (1956) 94 CLR 470.

67. See eg. Submission W83.

68. See eg. Case Study Booklet, para.4.11, C.S. 101.

69. See note 54 above, p.331.

70. Australian Woodhouse Report, vol.1, para. 118; Pearson Report, vol.1, para. 988.

71. Pearson Report, vol.1, para. 983.

72. *Id*., vol.2. para.197.

73. University of Adelaide, Road Accident Research Unit, *Adelaide In-Depth Accident Study 1975-1979,* part 1, p.42. See also, part 2. pp.23-28; part 3, pp. 13-17; part 4, p.37, table 24; part 5, pp.5-8-, and part 6, pp.25-3 1, table 3.23.

74. US Department of Transportation, *Driver Behavior and Accident Involvement: Implications for* Tort Liability(1970), pp.176-180. See also Australian Woodhouse Report, vol.1, paras.69-85, para.254; *Report by the Automobile Accident Compensation Committee* (British Columbia 1983), pp.50-57.

75. See eg. D Herbert *Road Safety in the Seventies:* Lessons for the Eighties (Traffic Accident Research Unit, Research Report 4/80,1980), esp. ch 9: J. R. Jamieson, *Road Environment Aspects of Fairfield In-Depth Crash* Study (Traffic Accident Research Unit, Research Report 5/80, 1980); note 73 above, part 7.

76. This tendency is the more likely because of the "highway nonfeasance rule," see para.2.28.

77. Submission S39, p.1.

78. G. Calabres, "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70 *Yale Law Journal* 499.

79. Motor Vehicles (Third Party Insurance) Act, 1942, s. 14, inserted by Motor Vehicles (Third Party Insurance) Amendment Act, 1984.

80. T G Ison, *The Forensic Lottery* (1967), ch.5.

81. R Keeton and J O'Connell, *Basic Protection for the Traffic Victim* (1965), p.253.

82. See eg. note 45 above, p.555; note 7 above; New Zealand Woodhouse Report, para.90.

83. See para.2.29.

84. See eg. note 45 above, pp.176-179; H. Luntz, *Assessment of Damages* (2nd ed. 1983), pp.17-22.

85. See eg. Submissions W62, W63, p.2, W7, p.8; and W8, p.2.

86. *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] AC 174, at p.183.

87. *Davis v. Kudrins*, 5 June 1975, Supreme Court of New South Wales, Court of Appeal, transcript of judgment at p.4, per Reynolds J A See also Denning v. Morris, 11 August 1978, Supreme Court of New South Wales, Court of Appeal, transcript of judgment, at pp.3-4 where Hutley J A made similar observations.

88. *Gillet v. Dean,* 7 June 1983, Supreme Court of New South Wales, Court of Appeal, transcript of judgment at pp.4-5, per Hutley J A.

89. See Traffic Accident Study, para.4.3, Case Study CD.

90. *Id*., para.4.4, Case Study AC.

91. *Id*., para.4.5, Case Studies AD,J.

92. *Id*., para.4.6, Case Study BV.

93. *Id*., para.4.6, Case Study AT.

94. Lump Sum Survey, vol.1, pp.49-51, p.55, table 23; and p.57, table 25.

95. *Ibid.*

96. *Id*., p.57, table 26.

97. *Id*., pp.72-73.

98. *Id.,* p.80, table 42.

99. *Id.,* p.111, p.127, table 64.

100. Case Study Booklet para.4.17, LSS 3.

101. See Traffic Accident Study, para.3.9.

102. The results of the survey were published in Australian Bureau of Statistics, *Handicapped Persons Australia* 1981, Cat No.4343.0.

103. This information is not published in the document noted above but was provided from special computer runs undertaken by the Australian Bureau of Statistics. See C Rizzo, "Handicapped Persons Survey" (internal Commission memorandum) dated 27 February 1984, pp.9-10, table 10.

104. *Id*., pp.10-11, table 11.

105. Lump Sum Survey, vol.1, p.104, table 52.

106. Traffic Accident Study, paras.3.8, 3.17 and 6.12.

107. Further reduction is caused by contributory negligence: see paras.3.22-3.24.

108. See Lump Sum Survey, vol.1, p.113, table 55(b).

109. *Cullen v. Trappell* (1980) 146 CLR 1, at p.15, per Gibbs J.

110. In 1983 the Trustees Executors and Agency Co. Ltd., had receivers appointed. See, eg. *Australian Financial Review,* 27 May 1983, p.1; *National Times,* 17 June 1983, p.16, and Australian Financial Review, 7 June 1983, p.1.

111. Traffic Accident Study. appendix, Case Study Q; Case Study Booklet, para.4.14, CS 99.

112. Lump Sum Survey. vol.1, p.63, table 28.

113. *Ibid.*

114. See Traffic Accident Study, para.6.2.

115. *Id*., para.3.18.

116. Lump Sum Survey, vol.1, p.60; p.64, table 30.

117. See Traffic Accident Study, para.6.8.

118. *Id*., paras.6.15-6.17.

119. *Id*., para.6.11.

120. *Id*., appendix, Case Studies AZ,Q.

121. *Id*., appendix, Case Study BL

122. See para.2.30.

123. See H. Luntz, note 84 above, pp.183-185.

124. And by analogy loss of amenities and enjoyment of life where the plaintiff is unconscious: see para.2.30.

125. The maximum permitted by the High Court of Australia in the most serious cases has so far been $2,000; *Sharman v. Evans* (1977) 138 CLR 563.

126. See note 45 above, pp.220-223.

127. See eg. *Arthur Robinson (Grafton) Pty. Ltd. v. Carter* (1968) 122 CLR 649; *Planet Fisheries Pty. Ltd.* v. *La Rosa* (1968) 119 CLR 118, at pp.124-5.

128. *Musca v. Colombini* [1970] WAR 33, at p.41, per Hale J.

129. *Bellingham v. Dykes*, 22 August 1983, Supreme Court of New South Wales, Court of Appeal. transcript of judgment at p.2, per Moffit P.

130. See Traffic Accident Study, para.5.7.

131. See eg. H Miller, “Accident Neurosis” (1961) *British Medical Journal* 919; G N Thompson, “Post-traumatic Psychoneurosis-A Statistical Survey” (1965) *The American Journal of Psychiatry* 1043; R Culpan and C Taylor, “Psychiatric Disorders following Road Traffic and Industrial Injuries” (1973).7 *Australian and New Zealand Journal*

of Psychiatry 32; WAR Thomson, “Accident Neurosis” (1982) 22 *Medicine, Science and the Law* 143; and V E Weighill, “Compensation Neurosis’: A Review of the Literature” (1983) 27 *Journal of Psychosomatic Research* 97.

132. See V.E. Weighill, *ibid*.

133. See eg. H Miller, note 131 above.

134. See eg. F A Allodi, “‘Accident Neurosis’ Whatever happened to male hysteria?” (1974) 19 *Canadian Psychiatric Association Journal* 291, G. Mendelson, “Not cured by a verdict’-Effect of legal settlement on compensation claimants” (1982) *Medical Journal of Australia* 132.

135. For a general discussion of the common law’s position in relation to compensation neurosis, see H. Luntz, note 84 above, para.1.2.21.

136. J. Lloyd and B. Stagoll, “The Accident Victim Syndrome-’Compensation Neurosis’ or latrogenesis” (1979) *13 New Doctor* 29. at p.331-see also J.H. Lloyd, “Compensation Neurosis” (1980) 9 *Australian Family Physician* 84, at pp.85-87.

137. See eg. Submissions S47, p.1: S22, p.1.

138. Submission S43, p.16.

139. Submission S93, p.5.

140. Submission S49; see also paras.9.35-9.36 below.

141. Submission S47. See also Submission S43, p.28.

142. J. Henle, *Rehabilitation of Auto Accident Victims* (US Department of Transportation Automobile Insurance and Compensation Study, 1970), p.5.

143. *Bogan v. Hutchings,* 28 March 1983, Supreme Court of New South Wales, Court of Appeal, transcript of judgment, at p.3, per H utley J.A.

144. *Ibid.*

145. Submission S47, p.6.

146. Submission S93, p.2.

147. Conybeare Report, p.6.

148. Minogue Report, paras.7.29-7.30.

149. See Traffic Accident Study, para.5.2.

150. See eg. Submissions S43, p.28; S40, p.2, and S37, p.5.

151. See eg. Submissions W28, p.24: W52, pp.9-10.

152. Submission S51, p.6.

153. Submission W72, p.1.

154. See Traffic Accident Study, paras.5.1-5.7.

155. *Id*., para.5.5.

156. See Case Study Booklet, ch.6.

157. *Id*., para.6.8, C.S. 30.

158. *Id*., para.6.9, C.S. 19. See also para.4.13, C.S. 28.

159. Report on District Court Statistics (unpublished Commission document).

160. Report on Supreme Court Statistics (unpublished Commission document).

161. For the purposes of apportioning judges' salaries, superannuation and other costs associated with judges, we employed a formula based on the proportion of judicial time spent in hearing common law negligence actions. For the purposes of allocating general costs of civil administration, such as the costs of accommodation and sub-departments servicing the courts, we employed a formula based on a comparison of the number of common law negligence actions commenced in a particular period, compared with other matters commenced during the same period. See Working Paper, para.3.23.

162. Submission W30.

163. See Issues Paper, paras.4.19-4.23.

164. The Australian Woodhouse Report, vol.1, para.154, noted this and our enquiries yielded similar results.

165. *Id*., para.153.

166. Minogue Report, para.8.15.

167. For more detail see Working Paper, para.3.27.

168. *Id*., table 3.2.

169. *Id*., table 3.3.

170. See eg. GIO, *Annual Reports* 1980-1981 and 1981-1982.

171. This additional inflation rate is known as "superimposed inflation". See E S Knight & Co, *Motor Vehicle Third Party Insurance Outstanding Claims at 31 December 1981,* (Report to GIO), dated 23 December 1982, para.4.1.

172. Motor Vehicles (Third Party Insurance) Amendment Act, 1984, schedule 3.

173. *Id*., schedule 3, cll 35C, 35D.

174. See Submissions S80, S82.

4. Proposals for Reform

I. THE RANGE OF PROPOSALS

4.1 The criticisms of the common law negligence action, which are described in the previous chapter, are not new. Academic commentators, judges and official inquiries have drawn attention. over a long period, to the inadequacies of a compensation system which relies very heavily on the common law. Their analyses have produced a continuing stream of reform proposals, ranging from relatively minor modifications to the common law negligence action to a comprehensive national compensation scheme designed to replace the common law, the workers' compensation system and a substantial proportion of the social security system. In some cases the proposals have been stimulated by long-standing dissatisfaction with the common law. In others, inquiries have been initiated in response to a particular injustice, as in the United Kingdom and where the Pearson Royal Commission was established in 1973 after public criticism of the lack of compensation for thalidomide victims. [1] Whatever the stimulus for reform there has been a clear and consistent trend, in Australia and elsewhere, towards modification of compensation arrangements based on the common law negligence action. While not all proposals have been implemented, many have. Indeed even a brief account of them suggests that the most surprising aspect of compensation for transport accident victims in New South Wales is how little it has changed.

4.2 This Chapter contains a description of reforms, both proposed and implemented, affecting transport accident victims. It concentrates on those made for Australian jurisdictions with some reference to important developments in New Zealand and the United Kingdom. Many similar inquiries have been conducted in Canada [2] and the United States [3] but it is not possible to discuss these in depth. Consideration is given to proposals for:

modification of the common law;

no-fault schemes to supplement the common law;

no-fault schemes replacing the common law;

and comprehensive schemes.

The Chapter concludes with an account of proposals for reform of transport injury compensation in New South Wales.

II. MODIFICATION OF THE COMMON LAW

4.3 Suggestions for modification of the common law cover a variety of matters, of which the following are the most important:

interim assessment and periodic payment of damages;

limits on damages awards, or on components in damages awards; and

procedural changes to the common law negligence action.

A. Interim Assessment and Periodic Payments

4.4 The common law rule requiring a once-and-for-all lump sum award has been modified by legislation in Western Australia [4] and South Australia. [5] Inquiries in Victoria, [6] New South Wales [7] and Tasmania [8] have examined modifications to lump sum payments and in Western Australia [9] the question of extending the existing power to make periodic payments has been discussed.

1. Western Australia

4.5 In Western Australia legislation has been in force since 1966 giving power in an action under the Motor Vehicle (Third Party Insurance) Act 1943 to award damages by way of either a lump sum or periodic payments or both. [10] The court may order payment of damages on a periodic basis for any length of time and the order may be terminated or varied by the court acting on its own motion or on the application of either party. [11] In 1968 the Western Australia Law Reform Commission was asked

> ...to consider the need for legislation to provide for hearings limited to the question of liability in personal injury cases where the prognosis as to the plaintiffs condition is in doubt and the making of awards for the payment of interim damages. [12]

The investigation expressed doubts whether the motor vehicle periodic payment legislation permitted the payment of an interim award, prior to the final assessment of damages. [13]

4.6 The 1969 Report of the Western Australia Law Reform Commission recommended extensions to existing powers. The report suggested that the court should have power to make interim awards in all personal injury cases, [14] following a separate trial on the issue of liability. [15] Such interim awards could include “special damages” (that is, compensation for losses already incurred at the date of assessment), and periodic payments to cover estimated future loss of earnings, hospital and medical expenses and other necessary outgoings pending a further hearing. [16] The Commission recommended that the court should also have power to vary or discharge an interim award for periodic payments. [17] No legislative action has yet been taken on the recommendations. The existing power to make awards for periodic payments is infrequently exercised in Western Australia. [18]

2. South Australia

4.7 Legislation on periodic payments was enacted in South Australia in 1967 when section 30b was inserted into the Supreme Court Act 1935. The court now has power, in an action for damages, to enter a declaratory judgment on the question of liability. The court may then adjourn the final assessment of damages and, in the meantime, order the defendant to make such payments on account of damages as appear just. The interim order may include an order for periodic payments to the plaintiff. Any party is entitled at any time to apply for a variation of the interim order or for a final assessment of damages. In a personal injuries action the judge must proceed to a final assessment if:

> the medical condition of the plaintiff has stabilised; or
>
> a period of four years has expired since the declaratory judgment (unless the judge considers there are special circumstances warranting deferment of the final assessment for a longer period).

A final assessment is in the form of a lump sum order which determines the defendants liability once-and-for-all. The South Australian courts have interpreted the section broadly so as to permit an interim assessment of damages in a wide range of circumstances. [19] Although the powers were used fairly frequently in the early years, they are now rarely used in practice [20] so that their interference with the principle of once-and-for-all assessment of damages has not been significant. As far as we are aware, no study has been carried out in either Western Australia or South Australia into the reasons why little use has been made of the periodic payments in either State. It is therefore impossible to be certain about what the reasons are. It may be that limited access by choice to periodic payments is never likely to be encouraged in a system where once-and-for-all lump sum payments are so entrenched.

3. United Kingdom

4.8 A majority of the Pearson Royal Commission in the United Kingdom recommended a scheme of indexed periodic payments for future pecuniary loss in cases involving death or “serious and lasting injury”. [21] The scheme envisaged that the court would be *required* to make an order for periodic payments unless satisfied that a lump sum would be more appropriate in the circumstances. A plaintiff who received an award for periodic payments could ask the court to commute the award to a lump sum, but the court would have a discretion to approve or reject the request. [22] In cases where the injury was serious and lasting, but no pecuniary loss had

been caused at the time of the trial, a declaratory judgment could be made, but only if the defendant was a public authority or was insured in respect of the plaintiff s claim. [23] Awards for periodic payments could be reviewed in cases of change in the plaintiff s medical condition or where a declaratory judgment had been made. [24]

4.9 Although these recommendations of the Pearson Royal Commission have not been implemented, section 6 of the Administration of justice Act 1982 (UK) [25] provides for provisional (interim) damages awards. This section, which has its origins in a report of the Law Commission, [26] applies where a plaintiff in an action for personal injuries may develop some serious disease or suffer some serious deter oration in his or her condition in the future. The section provides for rules to be made to enable the court to assess damages on the assumption that the disease or deterioration will not occur, but to make a further award if either does occur.

4. New South Wales

4.10 In 1969 this Commission published a Working Paper on *The Deferred Assessment of Damages for Personal Injuries and Interim Payments During the Period of Assessment*. The Paper tentatively suggested the introduction of interim assessments where the plaintiff s medical condition was so uncertain that a final assessment would involve the risk of gross injustice. A final assessment was to be made after a maximum of seven years from the date of interim assessment. The proposal was not implemented.

5. Victoria

4.11 In 1959 a Royal Commission on Motor Car Third-Party Insurance was established in Victoria to explore aspects of the common law negligence action as it applied to motor vehicles, including the introduction of "periodical payment...as compensation in lieu of damages". [27] In his report in 1960, the Royal Commissioner, Dr E G Coppel, expressed reluctance to deal with this question in the limited context of compulsory third party insurance, since it raised an issue of general tort law. [28] In 1968 a subcommittee of the Chief Justice's Law Reform Committee reported on *Damages by Way of Periodical Payments. A* majority of the subcommittee, while conceding that it might be theoretically desirable to award periodic payments in respect of future economic loss, doubted the practicability of any such system. They considered that the volume of litigation would increase and that the courts would require an entirely new administrative machinery. Mr. (now Professor) H. Luntz dissented from the majority view, arguing that none of the difficulties were insurmountable. No legislation has been introduced in Victoria providing either for periodic payment or interim assessment of damages.

6. Tasmania

4.12 In 1980 the Law Reform Commission of Tasmania published a Working Paper on *Compensation for Personal Injuries Arising out of Tort*. [29] The Paper suggested that in cases of serious or lasting injury the Supreme Court should have power to make a preliminary damages award and an order for periodic payments. It also made tentative recommendations about compensation payable to widows and other dependent survivors on the death of an injured person. No final report has yet been published on the proposals in the Working Paper. Another Board of Inquiry was established in March 1983 [30] to explore both the operation of the no-fault scheme and various aspects of the common law, apparently as a result of increasing losses being incurred by the Motor Accidents Insurance Board. [31] No report of this Board of Inquiry has been publicly released to date.

7. Structured Settlements

4.13 A structured settlement is a scheme of periodic payments to an injured person, designed to provide full compensation. Any description of the operation of a structured settlement can only be general because of the wide variety of possible forms. It can, for example, be based on an annuity, a trust or a bond and stock portfolio, or any combination of these. These arrangements, which are mainly found in the United States and, to a lesser extent, Canada, are relatively uncommon elsewhere, although there are signs of their increasing use in New South Wales (paragraph 4.15). They vary in their complexity, according to the level and type of need which is to be met during the injured person's lifetime.

4.14 A structured settlement has the same consequence as a traditional lump sum settlement for the defendant, in that it releases the party who is considered liable for the injury from future claims by the injured person or her or his spouse and dependents. It is generally negotiated and agreed to by the parties and their legal

representatives, though it may require the court s approval in cases involving minors. [32] The periodic payments or instalments payable under a structured settlement are paid according to a pre-arranged schedule or "structure". In the United States, this is designed to take account of all those elements normally considered in calculating a lump sum settlement These include past and future lost earnings, medical and rehabilitation expenses and legal fees. They are often structured, as far as possible, to minimise taxation liability and may also have some fixed indexing provision to as protect the settlement against inflation. [33]

4.15 In one recent New South Wales case, [34] a settlement negotiated by the GIO provided for periodic payments for the injured persons future domestic, personal and nursing care as well as hospital, medical and related expenses. Unlike the typical American structured settlement, the ongoing liability is not subject to monetary limits but only to what can be regarded as "reasonable". Any disagreement on medical hospital and related expenses, is to be referred to a registered medical practitioner nominated by the President of the Australian Medical Association (New South Wales Branch) or by the Secretary of the Department of Health. If structured settlements of this kind were used more generally, they would have significant cost implications and would require an administrative and dispute-resolving structure not readily available within the existing system.

B. Limits on Awards

4.16 An obvious way of limiting the escalating costs of compensating transport accident victims is to impose limits on the amount of damages that can be awarded by a court, either generally or in respect of particular losses. Another purpose of such limits may be to reorder compensation priorities, for example by directing scarce resources away from people who suffer relatively minor injuries towards accident victims sustaining severe, long-term incapacity.

4.17 One measure designed to effect a general reduction in damages awards is the alteration of the formula by which the courts assess the present value of future economic loss. Both New South Wales and Queensland have recently adopted such a measure (an increase in the discount rate) as a means of depressing damages awards in serious cases. [35] An alternative is to impose an upper limit on the total amount recoverable. [36] The risk inherent in measures of this kind is that they inevitably discriminate against those who are most seriously injured and who can least afford reduced financial support. Referring to the possibility of an upper limit, the Victorian Royal Commission on Motor Car Third-Party Compulsory Insurance commented that

> ... the effect of imposing any such limit would be that in the relatively small number of cases in which grievous injuries are sustained the victim would generally fail to recover more than a fraction of his loss, so that the maximum injustice would be done to those least able to bear it. [37]

4.18 An alternative to a general limit is the imposition of limits on the amounts recoverable for particular items. This approach offers the opportunity to be more selective and to avoid penalising unduly the most seriously incapacitated victims. The Pearson Report, for example, recommended that no damages should be recoverable for non-economic loss suffered during the first three months after the date of the injury, [38] nor for permanent unconsciousness. [39] A dissenting minority of two members recommended abolition of pain and suffering as a head of damages. [40] The Pearson Royal Commission was equally divided on the question whether a ceiling (suggested as five times average annual industrial earnings) should be imposed on damages for non-economic loss. [41]

4.19 The recommendations of the Pearson Royal Commission on non-economic loss have not been implemented in the United Kingdom. However, prior to the abolition of this remnant of the common law in the Northern Territory, a ceiling of $100,000 had been imposed on damages for non-economic loss. [42] A measure closely related to a monetary limit is the adoption of a legislative tariff or schedule to govern compensation for non-economic loss. This proposal was rejected by the Pearson Royal Commission, [43] but has recently been supported in general terms by the Premier of New South Wales. [44]

4.20 The Pearson Report also recommended the abolition of damages for loss of expectation of life as a separate head of damage. [45] Unlike the proposals referred to in paragraph 4.18 this recommendation has been implemented. [46] However, given the relatively small number of claims in which such damages are available and

the small amounts involved, [47] such a measure will have little effect on the overall cost of the common law negligence acttion.

C. Procedural Changes

4.21 Since the common law has been criticised for the delays and expense inherent in the adversary system, [48] measures designed to reduce either or both would go some way towards alleviating some deficiencies in the system. One frequent complaint is the lack of adequate control over the use of expert medical witnesses. The insistence, particularly by the defendant, on a certain (and presumably sympathetic) medical witness giving evidence can often lead to long delays. [49] Perhaps more important is the tendency under the existing Rules of Court to postpone exchange of medical reports between plaintiff and defendant until shortly before the trial a practice which clearly discourages settlement at an earlier and therefore less expensive stage. A change in the Rules to require exchange of medical reports at an early stage would facilitate settlements. [50]

4.22 More generally any measure which reduces the number of cases which go to court will be likely to assist in reducing costs. This may be achieved by expanding the pre-trial procedures aimed at obtaining a settlement acceptable to both parties [51] or replacing court hearings with less formal and less expensive procedures such as arbitration. In its most recent proposal to the New South Wales Government, the Law Society of New South Wales advocates extension of current pre-trial hearings and expansion of the new system of arbitration of civil claims [52] to reduce court delays and the costs of litigation. [53]

4.23 One particular suggestion made to us concerned payment into court. [54] In contrast to the practice in other States, very little use is made of this procedure in common law motor accident claims in New South Wales. If, in a case where liability was not in dispute, payment was made into court at the earliest possible stage and this was reinforced by awarding costs against a plaintiff who proceeded to trial and recovered no more than the amount paid in by the defendant, there would be a strong disincentive against wasteful litigation.

D. Other Modifications

4.24 In addition to modifications of the kind described above, Professor Chesterman identifies a large number of other possible changes such as more rigorous rules against double recovery and the elimination of damages for the “lost years”, subject to a provision for dependants. [55] While we are not persuaded that the modification of the common law, however extensive, is the best way to proceed with reform in this area, the variety of measures and proposed measures canvassed in this context have influenced the shaping of our recommendations on particular forms of compensation under the Scheme.

III. NO-FAULT SCHEMES TO SUPPLEMENT THE COMMON LAW

4.25 The most obvious deficiency of the common law negligence action is that it fails to compensate, or seriously under compensates, a substantial proportion of transport accident victims. [56] In an attempt to remedy this deficiency, yet preserve the common law negligence action for those who are able to prove fault inquiries in several jurisdictions have recommended that the common law should be supplemented by a scheme providing compensation for motor vehicle accident victims on a no-fault basis. Such schemes have been established in Victoria [57] and Tasmania [58] and have been recommended by the Pearson Report in the United Kingdom. [59] Submissions which argued in favour of retention of the common law negligence action, including those of the Law Society of New South Wales,[60] and the Law Institute of Victoria, [61] generally supported the introduction of a Victorian-style no-fault scheme, possibly with some extension and modification.

A. Victoria

4.26 Legislative changes [62] in Victoria after the 1960 Royal Commission [63] led to an increase in both the number and size of common law claims by motor vehicle accident victims. The consequent delays and increased costs prompted the establishment of the Delays Committee [64] in 1969, which recommended a combined no-fault common law scheme for motor accident victims. [65] The Arnold Report [66] which followed in 1972, assumed that

the common law should continue to operate alongside the proposed no-fault scheme. In 1973 a scheme was introduced along the lines recommended in those Reports. [67]

4.27 The scheme is administered by the Motor Accidents Board, a statutory authority separate from the State Insurance Office, which is the sole remaining compulsory third party insurer in Victoria. Recourse to the scheme is available to residents of Victoria injured or killed in Victoria, any person injured or killed elsewhere in the Commonwealth while driver or passenger in a Victorian registered vehicle, and to non-residents injured or killed in Victoria as the result of the use of a vehicle registered in Victoria or of an unidentified vehicle. [68] Non-residents injured or killed in Victoria where no Victorian registered vehicle was involved, or elsewhere in the Commonwealth while not an occupant of a Victorian registered vehicle are not covered. [69]

4.28 The Board provides the following compensation on a no-fault basis:

> payments for loss of earning capacity based on pre-accident net (after tax) earnings to a maximum of $20,800; [70]
>
> eighty per cent of hospital medical and paramedical expenses for a maximum period of five years; [71]
>
> where, for one month prior to the accident, the injured person was engaged mainly in unpaid housekeeping or child care, 80 per cent of costs incurred for household help or child care for a period of two years (within five years of the accident), to a maximum of $2,000; [72]
>
> eighty per cent of funeral and burial expenses to a maximum of $2,000; [73] and
>
> a lump sum payment to the dependents of a deceased person calculated by reference to the amount payable to the victim if he or she had lived, subject to a maximum of $20,800; [74]

Certain classes of people, including unlicensed and unregistered drivers, people convicted of driving under the influence of alcohol or a drug, or driving with a blood alcohol level in excess of the 0.05 limit, and people injured while using the car in connection with an indictable offence are excluded from compensation for loss of earning capacity but may receive other forms of compensation. [75]

4.29 In 1979, section 25 of the Victorian Act was amended to provide that injured people should recover an amount up to $20,800 for deprivation or impairment of earning capacity. This section had previously provided for the compensation of employees for loss of earnings, and of the self-employed for reduction in the capacity to earn income by personal exertion subject to a statutory maximum. The reasons for this amendment are discussed in the following paragraph. The Act is now silent as to whether people not in paid employment at the time of the accident such as unpaid homemakers or the long-term unemployed, may claim benefits for loss of earning capacity. However, the Board does pay the benefit to totally permanently incapacitated children and students on the basis that they were likely to have become engaged in some occupation had it not been for the accident. [76] Compensating the self-employed for loss of earning capacity can be a problem due to the poor records kept by small businesses. Long delays are often experienced before accurate assessment of the loss of income is made. In addition, loss of profits, loss of custom and retardation of the development of small businesses are not compensable. The following table shows the percentage of claimants within four employment categories who succeeded in recovering loss of earning capacity payments.

Table 4.1: Motor Accidents Board: Incoverage [(a)] Claimants in Employment Groups Who Received Lost Earning Capacity Payments [(b)]

Victoria 1979-1982 [(c)]

	Percentage of Incoverage Claimants Who Received Lost Earning Capacity Payments			
Employment Group	**1979**	**1980**	**1981**	**1982**

Employed (d)	58.6	60.7	61.5	61.7
Self-Employed (d)	60.2	55.5	50.0	41.7
Unemployed (d)	11.6	14.7	16.2	16.5
Non-Earners (d)	2.5	3.7	4.3	4.0

(a) “Incoverage claimants” are those claimants whose payments from the Board are over a minimum level which varies from time to time.

(b) Incoverage claimants whose employment groups were not known were omitted from this table.

(c) Years ending 30 June 1979-30 June 1982.

(d) These classifications have been developed by the Motor Accidents Board. They have no legislative basis.

Source: Information provided by the Motor Accidents Board of Victoria.

The main reason for the small percentage of non-earners and unemployed people who received compensation for lost earning capacity in the year ended 30 June 1979 was that, prior to 18 December 1979, [77] compensation was provided for lost earnings not lost earning capacity. Notwithstanding this change in 1979, the proportion of non-earners who receive such compensation has not increased very rapidly.

4.30 Section 25 of the Act was amended in 1979 principally to avoid the liability of people receiving earnings-related compensation to federal income tax on the payments, though it had beneficial side effects in relation to some injured non-earners. Although payments were calculated by reference to after-tax earnings, the Federal Commissioner of Taxation considered, and the Federal Court agreed, [78] that the payments were made to replace lost earnings and were therefore taxable. The 1979 amendment expressed these payments to be for deprivation of earning capacity and the Federal Court has held that they are not liable to federal income tax. [79] The Court noted that the Board is no longer “empowered to determine the appropriate amount of payment to be made to the injured person by a formula based on lost earning”. [80] The Court continued

> ... the exercise in which the Board is required to engage by the Act is not merely one of assessing lost earnings. It is in fact an exercise in valuation. It is true to say that the amount of compensation payable to an injured person is quantified by a consideration of what the use of the lost or diminished earning capacity might be expected to produce. In some simple situations the amount of lost earnings may be a certain and ready guide to the amount of entitlement But the Board’s task is essential y to determine the compensation payable to a person having regard to the deprivation or impairment of his earning capacity by reason of the injury ... [81]

The Court noted further that the Act did not require the payments to be made on a regular or periodic basis. [82] The Court concluded that these were not payments in partial substitution for earnings which would have been earned but for the accident. Instead

> ... the essential character of those payments is, in our opinion, as compensation for loss or impairment of earning capacity. The receipt of those payments is a capital receipt. [83]

4.31 The Victorian no-fault scheme does not provide compensation for non-economic loss such as pain and suffering or loss of enjoyment of life. However, where fault can be established, the injured person or the family of a person who is killed, may bring a common law negligence action. Damages will include both non-economic loss, and loss of earning capacity and other economic loss, assessed in accordance with the usual principles. Any damages awarded in the common law proceedings are reduced by the amounts which the plaintiff received or is entitled to receive from the Motor Accidents Board.

4.32 In 1981 the Victorian Act was further amended to impose positive duties upon the Board with respect to rehabilitation services. [84] Thus the Board has a duty to design and promote a program to secure the early and effective medical and vocational rehabilitation of accident victims. [85] The Board is empowered to provide rehabilitation services and to assist in obtaining employment for victims. [86]

4.33 To provide for rehabilitation the Board established, in 1981, a Rehabilitation Account [87] in addition to its two existing accounts, the Special and General Accounts. The Special Account was established to meet the cost of benefits for those injuries and deaths which occurred in the first thirteen weeks of operation of the no-fault scheme. [88] The General Account covers benefit payments and administrative expenses for accidents occurring on or after 14 May 1974. The table below shows benefits paid from each of the Special and General Accounts and total administrative costs.

Table 4.2: Motor Accidents Board: Benefits Paid and Administrative Costs

Victoria 1974-1982

Year Ended 30 June	**Benefits Paid From**			**Administrative Costs**
	Special Account $,000	**General Account $,000**	**$,000**	**% (b)**
1974	710.0	24.3	186.0	(25.3%)
1975	1,631.3	7,849.8	950.0	(10.0%)
1976	431.1	15,056.0	1,573.3	(10.2%)
1977	201.6	18,641.6	1,976.6	(10.5%)
1978	145.2	25,227.5	2,669.5	(10.5%)
1979	56.4	29,043.7	3,243.1	(11.1%)
1980	4.3	37,639.7	3,552.0	(9.4%)
1981	71.2	51,985.1	4,428.7	(8.5%)
1982	1.9	58,919.1	5.357.7	(9.1%)
1983	8.5	74,369.4	6,455.5	(8.7%)

(a) Administrative costs under the Rehabilitation Account were not recorded separately at 30 June 1983, mainly because this account did not operate until 22 December 1981. Any such costs to 30 June 1983 were included in the total administrative costs, which were divided between the Special and General Account.

(b) This figure is total administrative costs as a percentage of benefits paid under both accounts.

Source: Motor Accidents Board Annual Reports and the Actuary's Report 17 September 1984 Appendix P.

The Board's establishment costs were approximately $70,000. [89] This figure is not included in the above table. It can be seen that, although the annual total administrative costs have risen gradually over the period, the proportion of such costs to benefits paid has tended to fall slightly.

4.34 In the year ending 30 June 1983 the Board accepted 46,279 claims and paid compensation totalling $48,109,073. That sum was distributed as shown in Table 4.3.

Table 4.3: Motor Accidents Board: Compensation Paid

Victoria 1982-1983

Type of Payment	**Amount Paid $**
Hospital	20,429,495
Medical	7,459,686
Ambulance	1,986,848
Loss of Earning Capacity	15,369,460
Other	2,863,585
TOTAL	**48,109,073**

Source: Motor Accidents Board, *Statistics of Persons Killed or Injured* in *Road Accidents Occurring Year Ended 30 June 1983,* p.1, table 2.

4.35 One major review of the Victorian no-fault scheme has taken place since its introduction. A Board of Inquiry conducted by Sir John Minogue was asked to examine the suitability of the dual scheme for present-day needs in Victoria, to consider the reasons for differences in premiums between the States, and to decide if another system of compensation should be adopted in Victoria. [90] The Board's attention was specifically drawn, among other things, to the possibility of providing a single no-fault scheme or a scheme in which a common law damages award was only available for non-economic loss.

4.36 The Minogue Report, which was presented in 1978, suggested substantial changes to both the no-fault scheme and the common law, including:

extension of monetary benefits to retirement age and removal of the monetary ceiling; [91]

increased emphasis on rehabilitation in the no-fault system; [92]

increase in the level of periodic payments from 80 per cent of lost income to 85 per cent after two years incapacity; [93]

indexation of payments; [94]

increased provision for household help for "as long as the requirement exists"; [95]

retention of common law rights, but the injured person to elect within two years between no-fault and common law benefits; [96]

power in the courts to award damages periodically, by lump sum or by a combination of these methods; [97]

power in the courts to vary periodic awards as circumstances change; [98] and

a change in the funding base from fully funded to pay-as-you-go. [99]

Other difficult questions about compensation for the self-employed, compensation for lost economic potential and administrative arrangements were discussed. [100]

4.37 The Minogue Report was critical of the fault system for which it had difficulty finding “a convincing justification”.

> It could perhaps at one time have been said with justification, that it was only just and proper that where injury and loss were suffered by a person, that loss should be shifted from the shoulders of the innocent victim to those of the party who had by his fault brought about the loss ... But since the introduction of compulsory third party insurance, that justification seems to have disappeared. The loss is now not shifted to the shoulders of the wrongdoer but distributed amongst premium paying motor vehicle owners if there has been fault on the part of someone in the handling or use of a motor vehicle. However, there may be a moral relic of the older philosophy in the notion that it is unfair that the innocent party should bear the loss which he suffers and it seems that it is upon that notion that the proponents of fault liability must rest their case. [101]

Bearing in mind this fact and the proposed extensions to the no-fault scheme, the Board of Inquiry concluded that common law damages should remain for the moment, but that people should be given the election because it was

> ... both costly and unsatisfactory from an administrative point of view to have the two systems of compensation lasting indefinitely side by side and further it sees no reason why a claimant should be tempted to use the processes of the court to test whether he can do better by such means than under a no-fault scheme and if he fails or does not receive as much as he expected to then go back and resume payments under the no-fault scheme. [102]

Notwithstanding the detailed exposition and proposals, few of the Minogue Reports recommendations have been implemented. The notable exceptions are the proposals relating to the rehabilitation of accident victims. [103]

4.38 In a recent paper on suggested amendments to the Victorian scheme, [104] the Law Institute of Victoria has made the following proposals:

> an increase in the maximum payment for loss of earning capacity (after tax) from $20,800 to $28,900 and a corresponding increase in the maximum lump sum death benefit payable to dependents; [105]
>
> indexation of periodic payments; [106]
>
> provision for extension of payments for lost earning capacity, household help and child care beyond the maximum limit, on application byway of a case stated to the Motor Accidents Tribunal; [107] and
>
> a right to apply to the Motor Accidents Board for the continuation of payment of hospital, medical and paramedical expenses beyond the five year period. [108]

These proposals are referred to further in paragraph 6.8.

B. Tasmania

4.39 The Tasmanian scheme is similar to that operating in Victoria, although there are significant differences. The Tasmanian Motor Accidents Insurance Board is a statutory authority responsible for administering both the no-fault scheme and the compulsory third party motor vehicle insurance system. [109] This arrangement is claimed to be more efficient than the Victorian system where compensation and insurance are administered by different organisations. [110] The Tasmanian scheme indemnities vehicle owners in respect of their common law liability to victims of motor accidents occurring in Tasmania, [111] although the Board has a discretion with respect to vehicles registered outside the State. [112] Medical, funeral and death benefits, and disability allowances are extended to residents of Tasmania injured or killed in the State, or elsewhere in the Commonwealth in a Tasmanian vehicle, as well as to non-residents injured or killed in Tasmania as a result of the use of a Tasmanian vehicle. [113]

4.40 The benefits under the scheme include the following.

Periodic payments made to those people wholly disabled in vehicle accidents. The disability allowance is 80 per cent of an earners average net weekly pre-accident earnings. For the first 104 weeks it is payable where an employed or self-employed person is wholly disabled from engaging in his or her usual occupation or business. Thereafter the allowance is payable while the injured person is wholly disabled from engaging in any employment or occupation for which he or she would, but for the disability, be reasonably suited. [114]

A housekeeping allowance of 80 per cent of replacement cost may be paid for 104 weeks where the injured person was engaged in specified housekeeping activities at the time of the accident. [115] Unlike the Victorian scheme, in Tasmania compensation is not payable to a child or student for the deprivation or reduction of earning capacity.

Benefits in the event of the death of a family member include a lump sum up to $10,000 for a surviving head of household plus a further $2,000 for each dependent. In addition, periodic allowances may be paid for up to two years. [116]

Allowances are not indexed for inflation in contrast to the situation in Victoria. [117]

All medical expenses reasonably incurred up to a limit of $25,000, [118] and contributions to funeral expenses. [119]

These benefits are not payable to, or in respect of, persons injured or killed as a result of intentionally causing or attempting to cause injury to themselves or others, [120] or in the course of committing an offence of dishonesty or violence. [121] Medical benefits and the disability allowance are also withheld from drunker dangerous and unlicensed drivers. [122]

4.41 In 1981-82, 3,547 claims for statutory benefits were lodged with the Board. [123] Statutory benefits paid in that year totalled just over $3 million. [124] Sixty per cent of that amount was paid for medical and related expenses. [125] The annual levy on motor vehicle owners to finance the operations of the Board is very low by Australian standards, being $63 for a private vehicle in April 1982, [126] compared with $149 at that time for a private vehicle in the Sydney metropolitan area. In its Annual Report for 1982, however, the Board recorded a substantial loss [127] blaming, among other things:

claims with respect to off-road vehicles which do not have to be registered and yet are covered by the scheme; [128]

large and rapid increases in hospital and medical expenses; [129] and

the economic situation which makes it difficult for partially-incapacitated people to re-enter the workforce leaving them instead, to continue to be dependent on disability allowances. [130]

Of a premium income of almost $13.5 million in 1981-82, the Board's operating expenses took 6.3 per cent. [131] Claims paid in that year exceeded premium income by about $0.5 Million. [132]

IV. NO FAULT-SCHEMES REPLACING THE COMMON LAW

4.42 Most reports concerned with compensation for transport accident victims have discussed whether no-fault benefits should operate in substitution for the right to claim damages at common law. Even in jurisdictions which have adopted a no-fault scheme as a supplement to the common law negligence action official bodies have either recommended or supported in principle no-fault arrangements which replace the common law negligence action. For example, in Tasmania, a majority of the Committee whose report preceded the introduction of the dual scheme in 1973, came

> ... to the clear conclusion that the defects of the tort liability system in relation to compensation for motor accident victims are so substantial and the operation of that system so ineffective, that it should be almost wholly replaced in favour of a no-fault system of compensation available in virtually all cases. [133]

This recommendation of the Committee, whose members included representatives of the Bar Association and the Law Society of Tasmania was not, however, accepted. Consequently the common law remedy remains in Tasmania, alongside a no-fault scheme which also differs substantially from that proposed by the Committee.

4.43 In Victoria, the Delays Committee, whose work is referred to in paragraph 4.26, was more cautious in its 1969 Report. Having set out the requirements of "an ideally satisfactory system of road accident insurance", [134] they stated that

> ... such a system would be on a completely different basis to that currently in operation based on fault with a once o settlement basis. In effect it would attempt to continually correct the changed financial situation, as assessed, of all victims of road accidents.
>
> ... At this stage it is felt that the community is probably not ready to meet the costs or implications of such a system that some adjustment to the present fault system to overcome the hardships involved in delays in settlement would more likely to prove acceptable at the present time. [135]

The Committee did, however, anticipate that in the future a system which pays benefits to motor vehicle accident victims irrespective of fault may be gradually accepted as being in "society's interest". [136] We referred in paragraph 3.77 to criticisms in the Minogue Report of the common law action.

4.44 In Australia only the Northern Territory has replaced the common law with a no-fault scheme as a remedy for victims of transport accidents. In 1979 the Bradley Report, which examined compensation for transport accident victims, rejected in principle the suggestion that common law remedies should be abrogated, arguing that common law assessment of damages was most suited to considering fully the effects of an accident in an individual. [137] The Committee recommended retention of common law damages with the imposition of a ceiling of not less than $200,000 (the Committee preferred $300,000), limitations upon the availability of compensation for medical and other expenses, and the removal of hospital expenses from both no-fault and common law compensation. There was also to be a limit of 104 weeks on compensation for loss of income. However, the Report was not accepted by the government of the day. In tabling the Report, the Chief Minister of the Territory rejected the continuation of the common law as a means of compensating economic loss.

> The government is committed to the principle that every Territorian injured in a vehicle accident should receive necessary hospital, medical and rehabilitative services, and, if earning capacity is diminished, he or she should receive regular compensation out of a common pool of contributions to relieve hardship for so long as that disability persists. I cannot, therefore, accept an arbitrary time limit to an entitlement to compensation after which those victims without a right of action are thrown onto the social services scrap heap...[138]

The Chief Minister also emphasised the fact that damages awards, although large, might not prove adequate to meet the needs of the claimant and noted the substantial losses incurred by third party motor vehicle insurers (related to the Territory's sparse population and high accident rate), [139] and the delays and expenses associated with complex court proceedings.

4.45 When it was first introduced, the Northern Territory scheme retained the common law negligence action for pain and suffering and loss of enjoyment of life, for which damages were limited to $100,000. [140] However, common law rights have now been abolished and the scheme provides a lump sum for scheduled permanent disabilities up to a current maximum of $50,000. [141] This form of compensation had only been previously

available where the accident victim was prepared to forego the residual common law right (if any) to damages for pain and suffering and loss of enjoyment of life.

4.46 The Northern Territory scheme is administered by the Territory Insurance Office. [142] Benefits provided by the scheme, in addition to the lump sum for permanent disability, include the following:

> compensation to people in employment at the time of their accident for reduced capacity to earn income at a level which is equivalent to the difference (after tax) between 85 per cent of the equivalent Territory male or female average weekly earnings and the amount the accident victim is capable of earning in employment whilst incapacitated. [143] Such benefits commence seven days after the accident [144] and continue during incapacity until age 65. [145] Periodic payments in respect of incapacity are indexed on an annual basis;
>
> payment for the medical treatment of accident victims to a limit of $50,000 for any one accident. [146] Standard hospital charges for those people who are not Commonwealth assisted patients and are not otherwise indemnified may also be paid; [147]
>
> benefits for home and vehicle modifications and also for the supply of aids and appliances to a ceiling of $20,000; [148]
>
> periodic payments for loss of earning capacity may be commuted to a lump sum by the Board [149] (if each payment is very small) or at the request of the beneficiary; [150]
>
> benefits in the event of death including:
>
> > (a) in the case of the death of a head of household-an income-related benefit to the dependent spouse;
> >
> > (b) in the case of the death of a dependent spouse-a modest lump sum;
> >
> > (c) in the case of the death of a child-a small weekly benefit to any dependent parent; and
> >
> > (d) in the case of the death of a person leaving dependent children-the same small weekly sum for the benefit of each dependent child, [151] and
>
> in addition, a contribution is made to funeral expenses. [152]

4.47 The benefits of the scheme extend to residents of the Territory only, provided the accident occurred in the Territory or as a result of the use of a vehicle registered in the Territory. [153] Non-residents will be covered only if it is considered that they are likely to reside in the Territory for a period not less than six months after the date of the accident. [154] No benefits under the Act will be extended to, or in respect of, people injured or killed while using a motor vehicle in the course of committing an indictable offence, resisting arrest, or inflicting injury on him or herself, or another. [155] Compensation for loss of earning capacity and lump sum compensation for permanent disability are withheld from drunken, reckless, dangerous and unlicensed drivers. [156]

V. COMPREHENSIVE NO-FAULT SCHEMES

4.48 There have been two major reports proposing the establishment of a comprehensive no-fault system of compensation-one in New Zealand and one in Australia. The proposals were comprehensive in the sense of providing compensation to all accident victims regardless of the cause of their injuries. In the Australian proposals such compensation was also to be extended to those who suffered incapacity through illness. Both the New Zealand Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand, and the Australian National Committee of Inquiry into Rehabilitation and Compensation were chaired by Justice A O Woodhouse of New Zealand and shared a common underlying philosophy.

Community responsibility for all people suffering disability by reason of accident.

Comprehensive entitlement, requiring equal treatment for equal claims, whatever the cause of the incapacity.

Complete rehabilitation, so that every injured person recovers the maximum state of health, vocational utility and social well-being at the earliest time.

Real compensation providing income-related benefits during the period of incapacity and the opportunity for incapacitated persons to maintain living standards.

Administrative efficiency allowing the economic collection and distribution of funds. [157]

A. New Zealand

4.49 The New Zealand Woodhouse Report was presented to Parliament in 1967. The terms of reference of the Royal Commission, which had been established in 1966, related specifically to industrial injuries, [158] but the Report went much further. By contrast with the narrow interpretation later applied by the Pearson Royal Commission in the United Kingdom to its much wider terms of reference, [159] the members of the New Zealand Royal Commission stated that

> ... we have found it essential to examine the social implications of all the hazards which face the workforce, whether at work or during the remaining hours of the day. Only by doing this have we been able to make recommendations which we believe can be handled comfortably by the country in terms of cost, and which will provide a coordinated and sensible answer to a series of interrelated and complex problems. [160]

This led the New Zealand Royal Commission to recommend a comprehensive no-fault scheme of accident compensation which would provide earnings-related compensation to all accident victims. All members of the community would be covered, twenty-four hours a day, seven days a week. The right to claim common law damages for negligence was to be removed, since the new scheme provided compensation to accident victims independently of the need to prove fault. The workers' compensation system was to be dismantled. Injured workers would receive greater benefits under the comprehensive scheme (workers' compensation payments at the time were low by Australian standards).

4.50 The main recommendations of the New Zealand Woodhouse Report were:

an integrated program of safety, rehabilitation and compensation;

abolition of the common law remedy;

periodic earnings-related compensation for earners at a level of 80 per cent of previous net income within the upper limit prescribed;

for non-earners, periodic flat-rate compensation and a lower limit to compensation equivalent to single persons' sickness benefit;

compensation for permanent disability, by additional periodic payment;

small lump sums for minor permanent disabilities;

automatic adjustment of periodic compensation at two-year intervals in accordance with the Consumer Price Index;

payment of all medical fees and provision of free hospital care under the national health services;

provision of rehabilitation expenses and attendant care as needed; and

provision for dependent survivors where a person is killed. [161]

When the scheme was finally implemented after wide scrutiny by a number of committees, organisations and individuals, it was considerably different in detail from the Royal Commission's proposals, though in its 1974 form it retained most of the philosophical essence of what the Report called its "single purpose" of providing:

> 24-hour insurance for every member of the work force, and for the housewives who sustain them. [162]

4.51 The first step towards implementation of the Report was its examination by an Interdepartmental Committee of Public Servants which presented two reports, in 1968 and 1969. [163] Secondly, a White Paper was published in October 1969 covering

> ... the form in which the scheme envisaged by the Royal Commission would operate, if adopted, and dealing with variants or alternatives which might be preferred, and especially the question of cost. [164]

At the same time, a ten-member Parliamentary Select Committee, under the chairmanship of Mr G F Gair, was formed to "consider and report" on the New Zealand Woodhouse proposals and the subsequent White Paper. The Gair Committee Report, tabled in November 1970, [165] favoured a more limited scheme than that proposed by the New Zealand Royal Commission. It recommended a scheme covering all earners 24 hours per day and all people injured in motor vehicle accidents, [166] whether earners or not. Common law remedies were to be retained for all non-earners injured in non-motor vehicle accidents. [167] Legislation based upon this Report was introduced in December 1971, [168] and was again referred to a special Parliamentary Select Committee, chaired by Mr A A C McLachlan. [169] This committee recommended many amendments during its nine months of consideration and the Bill in final form was presented to and passed by Parliament in October 1972. Before the Accident Compensation Act 1972 (NZ) commenced on 1 April 1974, the new Labor Government enacted substantial amendments. [170] The amendments included some cover for non-earners, but stopped short of implementing the New Zealand Royal Commission recommendation of periodic payments for non-earners. [171] Injured non-earners were, and are still limited to lump sum benefits for non-economic loss and medical and rehabilitation expenses. [172]

4.52 A Committee to examine the extension of the scheme to incapacity arising from illness was established in 1975, but following another change of government at the end of 1975, the Committee was disbanded in early 1977. [173] It was decided in 1979 to set up a Government Cabinet/Caucus Committee to review the operation of the Accident Compensation Act since 1974. The Committee was chaired by Mr D F Quigley and it reported in October 1980. [174]Having reaffirmed the acceptance of the no-fault concept and the New Zealand Royal Commission's five basic principles [175] it recommended, among other things:

the establishment of an Accident Compensation Corporation in substitution for the existing Accident Compensation Commission; [176]

the abolition of lump sums for minor permanent disabilities of less than 15 per cent; [177]

an increase in the maximum lump sum for permanent disabilities from $7,000 to $17,000; [178]

the abolition of lump sum compensation for pain and suffering; [179]

the introduction of exclusions from compensation where a person is injured in the commission of a crime, for which he or she is convicted and imprisoned; [180]

the introduction of a two-week waiting period for periodic compensation following a non-work accident; [181] and

the gradual movement from a fully funded to a pay-as-you-go scheme. [182]

4.53 Some of the recommendations of the Quigley Committee have been implemented and were incorporated into the new consolidated and reorganised Accident Compensation Act 1982. [183] For example, a threshold of 5 per cent disability has been introduced for the lump sum for permanent impairment, [184] and its size has been increased to $17,000, [185] but the pain and suffering award of up to $10,000 remains. [186] The Commission has become a Corporation, [187] and an exclusion covering those injured in the course of criminal conduct, for which they are convicted and imprisoned, has been introduced where it "would be repugnant to justice" for the compensation to be paid. [188] The new Act also incorporates other changes to methods of assessments administration and benefits. [189]

B. Australia

4.54 After the election of a Labor Government in 1972, justice Woodhouse was asked to chair the National Committee of Inquiry into Rehabilitation and Compensation for personal injury in Australia. [190] The original terms of reference received in 1973 [191] did not include compensation for sickness, but were extended in 1974 to cover this area. [192] The three-volume Australian Woodhouse Report was tabled in July 1974, [193] and the National Compensation Bill 1974 194 was introduced to the House of Representatives in October 1974. [194] The report and subsequent Bill embodied the five principles noted earlier, and was designed to be "universal and comprehensive", providing coverage to all members of the community at all times regardless of the cause of incapacity or disability. It acted upon the premise that

> ... needs of men and women are not mitigated by the chance visitation of sickness rather than injury. A man hit by disease is no more able to resolve his problems than his neighbour hit by a car. In terms of equity, therefore, and as a matter of logic, there should be equal treatment for equal losses. [195]

In this regard, it was a considerably wider proposal than its New Zealand counterpart.

4.55 The main features of the scheme were similar to that proposed in New Zealand, although they differed in detail:

the common law negligence action was to be abolished;

earners were to receive earnings-related compensation at a level of 85 per cent of gross earnings;

benefits were to be taxable;

weekly benefit limits (in 1974 dollars) were to be $50 minimum to $500 maximum;

benefits were to be adjusted automatically in line with the Consumer Price Index, with an additional 1 per cent per annum increase to take account of increases in living standards;

health care costs were to be met through Medibank;

compensation by periodic payments for permanent partial incapacity was to be related to degree of impairments; [196] and

compensation was to be provided to surviving dependents on the death of an injured person. [197]

4.56 The Bill introduced in October 1974 was in similar terms to the Committee's draft legislation, although the intention was that only the accidental injury component of the scheme would come into force immediately. The Bill was passed by the House of Representatives, in which the Government had a majority, but was referred by the Senate to the Standing Committee on Constitutional and Legal Affairs. The Committee reported in July 1975 that the bill should be withdrawn and redrafted. [198] It was critical of several aspects of the 1974 Bill notably the lack of information as to the financing of the scheme, the dubious constitutionality of some key provisions and the effect of the proposal on the insurance industry. The Senate Committee specifically recommended that the proposals relating to sickness be reconsidered with respect to cost and economic practicability and that the operation of the scheme be delayed sufficiently to enable the important constitutional issues to be resolved by the High Court.

4.57 The Senate Committee's Report prompted a reconsideration of the legislation and a revised proposal was developed relating only to incapacity and death caused by injury. At the time of the Labor Governments dismissal from office in November 1975, the revised Bill was ready to be introduced into Parliament Cost estimates and financing proposals for the revised scheme were tabled in the Senate by the then Minister of Repatriation and Compensation in October 1975. [199] In February 1977 the then Leader of the Opposition (the former Prime Minister Mr E G Whitlam QC) introduced a Private Membef s Bill which, in substance reproduced the legislation which had been awaiting introduction into Parliament in November 1975. [200] The Private Member's Bill was not supported by the Government and therefore was not enacted.

4.58 Following the defeat of the Whitlam Bill, little progress occurred or seemed likely to occur at a Commonwealth level in relation to any comprehensive accident compensation reform initiative until early 1983, when another labor Government was elected. The platform of the new Labor Government recognises the difficulties which would be encountered in attempting to introduce a national scheme. The platform continues:

> It seems apparent that the common law fault principle cannot be eliminated in all fields overnight. Accordingly, Labor will adopt a step-by-step approach in which the three major problem areas-motor accidents, industrial accidents, and 'other accidents' (including criminal sporting and domestic injuries)-are tackled successively rather than all at once.
>
> Labor's ultimate objective is to have an integrated Commonwealth-State nationwide scheme which ensures speedy compensation at reasonable levels for all persons injured in any kind of accident ...
>
> As presently contemplated, the proposed Commonwealth-State model will involve successive adoption of the following steps:
>
> > (i) no-fault motor accident compensation scheme to be introduced, accompanied by abolition of common law claims arising from such accidents;
> >
> > (ii) increase workers' compensation benefits under existing statutory system to match bench-marks set by motor accident scheme;
> >
> > (iii) extend workers' compensation to 24-hour-a-day cover for earners, with abolition of common law claims;
> >
> > (iv) 24-hour-a-day cover for non-earner non-road accident victims. [201]

VI. PROPOSALS IN NEW SOUTH WALES

4.59 In Chapter 2 the principles and practices governing compensation for transport accident victims in New South Wales were outlined. Unlike other Australian jurisdictions, there has been relatively little interference with the common law negligence action, either by way of statutory modification to the manner in which compensation is assessed and paid (as has occurred in South Australia and Western Australia) or through supplementary no-

fault schemes (as in Victoria and Tasmania). We have referred already to changes that have occurred in New South Wales (paragraphs 2.25-2.35) or have been recommended, such as the proposal by this Commission in its 1969 Working Paper on *Deferred Assessment of Damages for Personal Injuries* that the courts have power to defer the assessment of damages in appropriate cases (paragraph 4.10). This section briefly outlines proposals for change in New South Wales, not all of which have been made public, from the time of the publication of the Working Paper in 1969 to the making of the reference to this Commission.

4.60 After completion of the 1969 Working Paper this Commission continued work on the topic of assessment of damages until October 1972, when a consultative committee, under the chairmanship of the then Justice C L D Meares who was Chairman of the commission at that time, was established to consider no-fault compensation for motor vehicle accident victims. The committee was constituted to advise the Commission

> ... on the feasibility of establishing a scheme, funded by insurance, under which compensation would be payable, regardless of fault, in respect of the death of or bodily injury to a person caused by or arising out of the use of a motor vehicle. [202]

Specific questions referred to the committee were:

> 1. The nature, extent and limits, if any, of compensation to be provided.
>
> 2. In what cases, if any, the right to compensation under the scheme should be excluded.
>
> 3. Before what courts or tribunals and by what methods any dispute as to the right to or measure of compensation payable under the scheme should be determined.
>
> 4. By what methods of insurance the scheme should be funded.
>
> 5. An estimate of the premiums which may be payable in order to establish the financial viability of the scheme.
>
> 6. The relationship between rights to damages in tort and right to or payment of compensation under the scheme. [203]

4.61 The committee was disbanded in January 1973 when its work was superseded by the establishment of the Australian Woodhouse Committee, the membership of which included Justice Meares. After the Australian Woodhouse Committee reported in 1974, the New South Wales Government sought advice on the constitutionality of the draft National Compensation Bill which was under consideration by the Australian Government The Bill was also discussed by an interdepartmental committee established in 1974 by the New South Wales Government. This committee expressed grave concern at the ramifications for the New South Wales insurance industry if the draft Bill were to be passed unamended. [204]

4.62 Early in 1975, the General Manager of the GIO wrote to this Commission which was then working on a reference on court procedures, proposing simplified procedures in motor vehicle accident cases. [205] Under the procedures, which were designed to curtail escalating costs and delays, the injured person was to claim directly against the third party insurer. The GIO proposed that there should be a period of three months after a claim was made against the GIO during which period no action would lie at common law. This was designed to discourage motor vehicle accident victims from automatically instructing solicitors, since no legal costs incurred in that period would be payable by the GIO and any court action would be limited to the difference between the amount claimed and the amount paid on the claim by the insurer. Thus, where the insurer was prepared to accept liability fora reasonable sum, legal action would serve little or no purpose. In the first instance an action was to be heard by a court officer such as a Master, Registrar or Adjudicator, with an incentive to accept the decision of that officer in

the form of a fixed lump sum for costs. A sanction of costs would be imposed if the adjudicator s decision was not accepted and the case went to a court hearing. [206]

4.63 Later that year the Attorney General was asked to consider, as a matter of urgency, the practicality of the GIO proposal. [207] The following points were made in a departmental memorandum in response to the proposal

> All States had rejected the recommendation of the Australian Woodhouse Committee to abolish common law actions.
>
> The GIO proposal while similar in some respects to the approach of the Australian Woodhouse Committee's inquiry, did not involve abolition of fault liability.
>
> The GIO proposal could be regarded as a useful transition to the national scheme in that it would allow for "tapering off" of common law actions.
>
> Alternatively, if the national scheme did not go ahead, the GIO proposal could be regarded as a "mini-Woodhouse" for New South Wales(although this seems to have been a somewhat overstated description).

Accordingly, the Attorney General instructed his department to prepare draft amending legislation. [208] However, this action was pre-empted by the defeat of the then Liberal Government at the elections in March 1976.

4.64 During the 1976 election campaign as a result of which it gained government the Labor Party promised that third party motor vehicle premiums would be "pegged". [209] In 1977 the Motor Vehicles (Third Party Insurance) Act, 1942, was amended to introduce a formula for calculating the adjustment of premiums each year by reference to the Consumer Price Index (all Groups Index) for Sydney, published by the Australian Statistician. [210]

4.65 In October 1976 the New South Wales Labor Council made submissions to the Attorney General on the proposed National Compensation Scheme and the continuing role of the State in relation to compensation. The Council stated that the benefits conferred by the National Scheme should be in addition to, and neither in substitution for, nor less than, already existing rights and entitlements. The Council called for the New South Wales Government to give consideration to the feasibility of establishing its own scheme with appropriate priorities for accident prevention and rehabilitation. [211] The approach from the Labor Council revived the Attorney Generals interest in a no-fault scheme for New South Wales and it was suggested that a State inquiry should be established. However, no public inquiry was set up.

4.66 In the 1978 State election campaign the Government foreshadowed proposals for a no-fault scheme for motor vehicle accident victims where no common law remedy was available. [212] Compensation levels were to be similar to those available under the Sporting Injuries Compensation Scheme. [213] Further proposals for a no-fault scheme were submitted to the Minister of Transport by the GIO in 1979. [214] Under the scheme, benefits would be paid in respect of death or injury to a person caused by or arising out of the use of a motor vehicle on a public street without the need for the claimant to establish fault on the part of another. The recommended benefits were equivalent to the lump sum payments, but not the periodic earnings-related benefits, available under the Workers' Compensation Act, 1926. Reasonable medical, hospital and related expenses would also be paid. Those with a right to claim workers' compensation benefits were to be excluded and people who had an action at common law were to retain this right. Lump sums paid under the scheme would be repaid out of a later common law award or settlement The scheme was to be financed from third party premiums. [215] An Interdepartmental Committee was formed comprising representatives of the Department of Motor Transport the GIO, the Department of the Attorney General and of Justice, the Public Transport Commission and the Ministry of Transport, to consider the scheme proposed by the GIO.

4.67 The interdepartmental Committee held its first meeting on 12 September 1979 and its second meeting on 14 November 1979. Arising out of these meetings, a Cabinet Minute was prepared and submitted by the Minister for Transport proposing legislation for a no-fault compensation scheme for death or injury arising out of a motor vehicle, but confined to those who could not obtain compensation under the existing law. The proposals broadly

adopted the GIO's suggestions. That Minute was considered by Cabinet on 26 February 1980 when it was deferred. It was finally withdrawn on 13 January 1981.

4.68 From December 1979 to April 1981, the GIO continued to express concern at the escalation of third party claims, particularly through court decisions which appeared to increase damages awards in respect of future economic loss. In August 1981, a four member committee was established, with the approval of the Premier and the Treasurer, to advise on

> the desirability of legislating "as an interim measure" to provide that in calculating damages for future economic loss a discount rate of five per cent should be applied; and
>
> the whole question of lump sum verdicts, ways of limiting the effect of recent decisions and alternative schemes to compensate persons sustaining personal injury in circumstances giving rise to actions at Common Law. [216]

The Committee made two brief Reports, in September 1981 and in October 1981.

4.69 The first Report considered the escalation of insurance claims, especially in third party and workers' compensation cases. After considering the *Barrell Insurance Case,* [217] which had been decided a short time earlier, the committee recommended that a discount rate of 5 per cent be adopted in New South Wales. On 10 November 1981, Cabinet approved the preparation of legislation to give effect to this proposal. However, on 16 August 1981 the High Court handed down its judgment in *Todorovic v. Waller* [218] which provided for a discount rate of 3 per cent-in personal injury cases. Drafting of the legislation was then deferred.

4.70 TheCommittee'ssecondReportnotedthebasiccommonlawprinciplethataplaintiff in an action for personal injuries must receive damages in the form of a lump sum paid on a once-and-for-all basis. The Committee referred to the main deficiencies associated with the common law principle concerning the assessment of future economic loss, and questioned the ability of the community to afford payments of the magnitude awarded by New South Wales courts in 1981. The Report rejected a no-fault scheme as a solution to the problems identified, on the ground that such a scheme was likely to prove too expensive, although no costing was attempted in the Report. Instead the Committee discussed the means by which the common law negligence action could be modified, specifically in relation to cases involving serious incapacity or disability. The Committee renewed the recommendation for a 5 per cent discount rate. It also recommended that the court should be empowered to order the defendant to pay the plaintiffs future medical and related expenses as and when these expenses arose, rather than pay them in a single lump sum.

4.71 On 10 November 1981, shortly after receiving the committee's second Report Cabinet authorised the giving of a reference to the New South Wales Law Reform Commission to inquire into accident compensation, and on 12 November, the current reference was formally given to the Commission. We have referred already to the legislative action taken independently of the work of the Commission during the course of this reference. [219] One of the most significant changes is the raising of the discount rate to 5 per cent, a measure advocated in the first and second reports of the 1981 committee (paragraphs 4.69-4.70).

VII. SUMMARY

4.72 This Chapter describes the most important responses to the acknowledged deficiencies of the common law negligence action. A number of examples can be found of modifications to the common law rules of assessment Interim awards and periodic payments, instead of the once-and-for-all lump sum, have been provided for by statute in Western Australia and South Australia and have been recommended elsewhere. The once-and-for-all lump sum has begun to be circumvented by the use of structured settlements. Other modifications to common law damages which have been suggested include limiting or abolishing particular heads of damage, such as pain and suffering. Another shortcoming of the common law is unnecessary delay in the conduct of proceedings. A number of improvements in this regard have been suggested, ranging from more efficient use of medical evidence to the expansion of informal pre-trial procedures to reduce the number of cases reaching court.

4.73 No modification of the common law negligence action can over come its most serious deficiency, namely, its failure to compensate a substantial number of transport accident victims. This can only be remedied by supplementing the common law action, or replacing it altogether, with a no-fault system of compensation. The former solution has been adopted in Victoria and Tasmania where all motor accident victims are entitled to limited no-fault benefits. To obtain additional compensation the accident victim must rely on the common law negligence action and thus must be able to establish fault In the Northern Territory, a no-fault scheme for motor vehicle accident victims has now replaced the common law. A comprehensive no-fault scheme for all accident victims has operated in New Zealand since 1974 and a similar scheme was recommended for Australia by the Australian Woodhouse Committee of Inquiry in 1974. The National Compensation Bill 1975, which adopted these recommendations, providing a universal and comprehensive coverage for all forms of incapacity and disability caused by accidental injury, was not enacted after the change of government in November 1975.

4.74 Except for legislative modifications to particular heads of damage, no significant reform of the common law negligence action as it applies to transport accidents has occurred in New South Wales. This Commission produced a Working Paper on deferred assessment in 1969 and during the 1970 as the GIO put forward a proposal for simplified procedures. A no-fault scheme was foreshadowed by the Government in 1978 and a limited scheme was drafted, but the proposal was abandoned in 1981. In the meantime, the GIO initiated further consideration of measures to reduce the cost of motor vehicle third party insurance. Some of these measures, such as increase in the discount rate designed to reduce the level of damages in serious cases, have been introduced since the receipt of the current reference by the Commission.

FOOTNOTES

1. Pearson Report, vol.1, para.2.

2. See eg. *Report of the Royal Commission on Automobile Insurance* (British Columbia 1968): Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation* (1973), *Report of the Committee of Inquiry on Automobile Insurance* (Quebec 1974).

3. See eg. New York State Insurance Department, *Automobile Insurance... For Whose Benefit?* (1970); US Department of Transportation, *Automobile Insurance and Compensation Study: Economic Consequences of Automobile Accident Injuries* (1970).

4. See paras.4.5-4.6.

5. See para.4.7.

6. *Report of the Royal Commission on Motor Car Third-Party Compulsory Insurance* (1960): see also Report of the Victorian Chief Justice's Law Reform Committee Subcommittee, *Damages by Way of Periodical Payments* (1968).

7. New South Wales Law Reform Commission. *Deferred Assessment of Damages for Personal Injuries and Interim Payments During the Period of Postponement of Assessment* (1969).

8. Law Reform Commission of Tasmania, *Compensation for Personal Injuries Arising out of Tort* (1980).

9. Western Australia Law Reform Committee, *Project No. 5-Damages in Personal Injury Claims-Report* (1969).

10. In 1966 the relevant powers were conferred on the Third Party Tribunal. In 1972 the Tribunal was abolished and the powers transferred to the courts.

11. See Motor Vehicle (Third Party Insurance) Act 1943-1976 (WA), s.16(4).

12. See note 9 above, para 1.

13. *Id*., para.7.

14. *Id*., para.18.

15. *Id*., para.29.

16. *Id*., para.36.

17. *Id*., paras.49-50.

18. Justice A K Sangster, *Compensation to Road Traffic Victims-A Paper Proposing Abolition of Common Law Liability and Dealing with Other Matters* (1983), annexure L, p.5.

19. See eg. *Nathan and James v. Vos* [1970] SASR 455; *Grabkowski v. Maichrowski* (1978) 19 SASR 290.

20. Letter to this Commission from the Law Reform Committee of South Australia, dated 2 February 1982.

21. Pearson Report, vol.1, ch.14; and p.375, recommendations 40-42. At the courts discretion, periodic payments could be extended to cases where the injuries were not serious and lasting: recommendation 43.

22. *Id*., recommendation 44.

23. *Id*., recommendations 45-46.

24. *Id*., recommendation 48.

25. Section 6 is not yet in force.

26. Law Commission, *Report on Personal Injury Litigation-Assessment of Damages* (Law Com. 56 1973), p.66, recommendations 239-243.

27. Royal Commission Report, see note 6 above, p.4.

28. *Id*., p.40.

29. The Working Paper was prepared by R.W. Baker, Q.C.

30. Board of Inquiry into the operation of the Third Party/No Fault Insurance Premiums Scheme in Tasmania. The Chairman is Mr C Brettingham-Moore.

31. The Board incurred a $22 million dollar loss in the financial year ended 30 June 1982, following a $10 million dollar loss in the previous year. See Motor Accidents Insurance Board, *Annual Report for Year Ended 30 June 1982*, revenue statement.

32. In the United States, most settlements involving minors require court approval. See eg. D Moore, “The Use of Annuities in the Settlement of Personal Injury Cases” (1982) *Insurance Counsel Journal* 50, at p.55.

33. For some examination of different types of settlements, designed with this and other purposes in mind, see eg. E McGinn, “Structuring Settlements-Old Concept: New Approach” (1982) 18 Trial 58; C Krause, “ Structured Settlements for Tort Victims” (1980) 66 *American Bar Association Journal* 1527; F McKellar, “Structured Settlements-A Current Review” [1979-81] *Advocates Quarterly* 389, and E. Veitch, “Cosmetic Reform: Periodic Payments and Structured Settlements” (1982) 7 *University of Tasmania Law Review* 136.

34. *Archer v. Richards,* 28 June 1984, terms of settlement lodged in Supreme Court of New South Wales. Common Law Division.

35. See para.2.32.

36. Royal Commission Report, note 6 above, p.4.

37. *Id*., p.24.

38. Pearson Report. vol.1, p.373, recommendation 9.

39. *Id*., p.373, recommendation 11.

40. *Id*., paras.373-381, 448-464.

41. *Id*., p.373, recommendation 10. See also paras.390-392.

42. Motor Accidents (Compensation) Act 1979 (NT), s.39(1).

43. Pearson Report, vol.1, paras. 377-379.

44. *Australian Financial Review,* 5 December 1983, p.12.

45. Pearson Report, vol.1, ch.12 and p.372, recommendation 6.

46. Administration of Justice Act 1982 (UK), s.1 which came into effect on 1 January 1983.

47. See para. 11.30.

48. See paras. 3.84-3.89.

49. J C S Burchett, QC, *Common Law Proceedings in Respect of Personal Injury-Consideration of Procedural Problems* (unpublished Commission document), p.19.

50. Letter from I.M. Dunn, 28 June 1983, p.4.

51. See note 49 above, pp.28-30. See also Law Society of New South Wales, “Transport Injury Compensation Scheme” (April 1984), para.3.6.4.

52. For a discussion of the system see “Compulsory Arbitration of Civil Claims up to $10,000” (1983) 21 *Law Society Journal* 234.

53. See Law Society of New South Wales, note 51 above, paras. 3.6.3-3.6.4.

54. See note 50 above, pp.5-8.

55. M R Chesterman, *Accident Compensation-Proposals to Modify the Common Law* (New South Wales Law Reform Commission-CP 2 1983).

56. See paras.3.17-3.28.

57. Motor Accidents Act 1973 (Vic.).

58. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.).

59. Pearson Report, vol. 1, chs. 11, 18.

60. Submission W28. See also Law Society of New South Wales, note 51 above.

61. Submission W48.

62. Removal of limits on amounts recoverable by passengers and abolition of common law inter spousal immunity rule (see paras.2.7, 2.10 above).

63. Royal Commission on Motor Car Third-Party Compulsory Insurance 1960.

64. *Report to the Chief Secretary on Delays in the Settlement of Third Party Insurance Claims* (1969).

65. *Id.,* para. 13.

66. *Report of Committee to Investigate Compensation of Road Accident Victims Irrespective of Fault* (1972).

67. Motor Accidents Act 1973 (Vic.).

68. *Id.,* s.13(2).

69. *Id.,* s.13(3)(e).

70. Id., s.25.

71. *Id.,* s.30(1). As a result of agreements negotiated with the service providers, the total amount charged is usually paid in practice.

72. *Id*., s.30(1)(g).

73. *Id.,* s.30(2) (a).

74. *Id*., ss.26, 27.

75. *Id*., s.16. The specific exclusion in s.16(1)(a)(ii) for drivers with blood alcohol levels over 0.05 was inserted by the Motor Accidents(Amendment)Act 1981 (Vic.), subject to the following qualification. Section 16(3) says that the Board must make payments if the person excluded by s.16(1)(a)(ii) can show that the level of blood alcohol “did not contribute in any way to the accident”.

76. Section 25(4)(b) of the Motor Accidents Act 1973 (Vic.), is used to justify these payments.

77. *Id*., s.25, as amended by Motor Accidents (Amendment) Act 1979 (Vic.).

78. *Tinkler v. Federal Commissioner of Taxation* (1979) 29 ALR. 663.

79. *Federal Commissioner of Taxation v. Slaven* (1984) 15 ALR 242.

80. *Id*., p.251.

81. *Id*., pp.251-252.

82. *Id*., p.252.

83. *Id*., p.25 3.

84. Motor Accidents Act 1973 (Vic.), part VA, inserted by Motor Accidents (Amendment) Act 1981 (Vic.).

85. Motor Accidents Act 1973 (Vic.), s.57A(1).

86. *Id*., s.57A(2).

87. *Id*., s.61A, inserted by Motor Accidents (Amendment) Act 1981 (Vic.).

88. Motor Accicfents Act 1973 (Vic.), s.61.

89. Figure obtained from Mr. A.E. Scotland, Secretary to the Victorian Motor Accidents Board.

90. Minogue Report, pp.1-2.

91. *Id*., paras.8.31, 9.25.

92. *Id.,* ch.7.

93. *Id.,* paras.8.31, 9.26-9.27.

94. *Id.,* paras.9.23-9.24.

95. *Id.,* para.9.49.

96. *Id.,* paras.9.61-9.63.

97. *Id.,* para.6.22.

98. *Ibid.*

99. *Id*., para.10.18.

100. *Id*., paras.9.10-9.20, 9.38-9.41 and chs.3,11.

101. *Id*., para.8.27: see generally, ch.8.

102. *Id*., para 9.6 1.

103. See para.4.32.

104. Law Institute of Victoria, “Paper on Suggested Amendments to the Motor Accidents Act 1973” (December 1983).

105. *Id*., paras.2.2.7, 2.3.1.

106. *Id*., para.2.2.8.

107. *Id*., paras.2.2.9, 2.5.5.

108. *Id*., para.2.5.2.

109. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), ss.4(1), 14(1) and 30(1).

110. See para.4.27.

111. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), s.14(1).

112. *Id*., s.19 and schedule 2, para.2(1).

113. *Id.,* s.23.

114. *Id.,* schedule 1, part V, paras.2, 2A.

115. *Id.,* schedule 1, part V, para.3.

116. *Id.,* schedule 1, part IV.

117. See para.4.28.

118. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), schedule 1, part II, para.1(1).

119. *Id*., schedule 1, part III.

120. *Id.,* s.24(1) (a).

121. *Id.,* s.24(1) (f).

122. *Id.,* s.24(2).

123. See note 31 above, table 3.

124. *Id.,* table 4.

125. *Id*., table 5.

126. Motor Accidents (Liabilities and Compensation) (Premiums) Order 1981-1982 (Tas.), schedule 1.

127. See note 31 above, revenue statement.

128. *Id*., p.7.

129. *Id.,* p. 5.

130. *Ibid.*

131. *Id*., revenue statement.

132. *Ibid.*

133. Report of the Law Reform Committee of Tasmania, *Recommendations for the Establishment of a No-Fault System of Compensation for Motor Accident Victims* (1972), para.109.

134. See note 64 above, para.6.

135. *Id*., para.12.

136. *Ibid.*

137. Bradley Report, pp.59, 66-67.

138. See the Chief Minister's Speech on tabling the Bradley Report; Northern Territory Parliamentary Debates, 17 May 1979, p.1293.

139. See Appendix A, table A.22, which shows that the Northern Territory rate of traffic deaths of 8.4 per 100 million vehicle kilometres is by far the highest in Australia.

140. Motor Accidents (Compensation) Act 1979 (NT), ss.5(2), 17 and 39(1).

141. Motor Accidents (Compensation) Rates of Benefit Regulations 1984 (NT), reg.3.

142. Motor Accidents (Compensation) Act 1979 (NT), s.6.

143. *Id*., s.13.

144. *Id*., s.11.

145. *Id*., s.13(5).

146. *Id*., s.18(5) and see Motor Accidents (Compensation) Rates of Benefit Regulations 1984 (NT), reg.4.

147. Motor Accidents (Compensation) Act 1979 (NT), s.18(4).

148. Id.. s.19.

149. *Id.,* s.15.

150. *Id.,* s.16.

151. *Id*., ss.22-25 and see Motor Accidents (Compensation) Rates of Benefit Regulations 1984 (NT), regs.5-8.

152. Motor Accidents (Compensation) Act-1979 (NT), s.26 and see Motor Accidents (Compensation) Rates of Benefit Regulations 1984 (NT), reg.9.

153. Motor Accidents (Compensation) Act 1979 (NT), s.7.

154. *Id*., s.8.

155. *Id*., s.10 (a).

156. *Id*., s.9.

157. New Zealand Woodhouse Report, paras.55-63-, Australian Woodhouse Report, vol.1, paras.254-258.

158. New Zealand Woodhouse Report, pp.11-12.

159. *Pearson Report,* vol.1, paras.3, 239 and 274. J.G. Fleming, “The Pearson Report: Its Strategy” (1979) 42 *Modern Law Review* 249, at p.253; D Allen, D Bourn and J Holyoak (eds.), *Accident Compensation after Pearson* (1979), esp. chs.3,6 and 7.

160. New Zealand Woodhouse Report, para.34.

161. *Id*., part 9.

162. *Ibid.*

163. GWR Palmer, Compensation *for Incapacity* (1979) pp.64, 74-76.

164. *Personal Injury-A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (1969), p.5. See also note 163 above, pp.76-78. One of the principal authors of the White Paper was Mr GWR Palmer.

165. *Report of Select Committee on Compensation for Personal Injury in New Zealand* (1970). The Chairman was Mr G F Gair.

166. *Id*., p.30.

167. *Id*., pp.21, 22 and 50.

168. Accident Compensation Bill 1971 (NZ).

169. See note 163 above, pp.97-102.

170. *Id*., pp.104-109.

171. New Zealand Woodhouse Report, para.300.

172. Periodic compensation for loss of earning capacity is available only to earners since it is assessed by a comparison between what the earner would have been earning in his or her pre-accident employment had the accident not happened, and what he or she is now capable of earning: Accident Compensation Act 1982 (NZ), s.60.

173. See note 163 above, p.65.

174. Government Cabinet/Caucus Committee Report, *The New Zealand Accident Compensation Scheme:* A *Review* (1980).

175. *Id.,* p. 3.

176. *Id*., pp.7-9.

177. *Id*., pp.16-18.

178. *Ibid.*

179. *Ibid.*

180. *Id*., pp.13-14.

181. *Id*., pp.14-15.

182. *Id*., pp.9-11.

183. Accident Compensation Act 1982 (NZ), which was assented to on 17 December 1982 and commenced on a April 1983.

184. *Id*., s.78(6).

185. *Id*., s.78.

186. *Id*., s.79.

187. *Id*., part 1.

188. *Id.,* s.92.

189. For example, the Corporation is no longer required to maintain separate statutory funds (Earners', Motor Vehicles and Supplementary) for accident compensation payments. For a summary of other changes, see J L Fahy, *Accident Compensation Coverage* (7th ed. 1983), pp.13-14. In addition to these legislative changes, there have been a number of policy changes in areas such as periodic increases in benefit levels and partial incapacity.

190. See note 163 above, pp.131-142.

191. Australian Woodhouse Report, vol.3, p.l.

192. *Id.,* p. 3.

193. *Id*. Volume 1. contains the general reasoning, recommendations of the Committee mainly in relation to compensation and a draft Bill. Volume 2 contains detailed recommendations in relation to safety and rehabilitation Volume 3, entitled "Compendium" provides, among other things, background details, statistical information and costing material.

194. *Id*., vol.1, part 11.

195. *Id*., para.3.

196. *Id*. This proposal was discussed in detail in paras.389-401. The "media method" caused considerable controversy, but it was a sincere attempt to grapple with what is acknowledged as "the most complicated and

most difficult issue in personal *lady':* see G W R Palmer, note 160 above, p.215: see also pp.214-236, esp. 230-236. See also ch.11 below.

197. The Australian Woodhouse Report attempted to provide death benefits on a basis which took account of the changing status of women in society. See vol.1, paras.357-361. See also ch.51-58 in National Compensation Bill 1974 (Cth).

198. Senate Standing Committee on Constitutional and Legal Affairs, Report on the *Clauses of the National Compensation Bill 1974* (1975), para.1.23.

199. Commonwealth Parliamentary Debates, Senate, 28 October 1975, p.1496.

200. National Rehabilitation and Compensation Bill 1977 (Cth); Commonwealth Parliamentary Debates, House of Representatives, 24 February 1977, p.425.

201. Australian Labor Party, "Law and Justice Policy", launched by Senator G Evans, 23 February 1981, para.9.

202. New South Wales Law Reform Commission Consultative Committee on Motor Vehicle Accident Compensation internal document M, draft advertisement dated 30 October 1972.

203. *Id*., internal document XYZ, summary of proceedings, appendix A, dated 9 February 1973.

204. Report of the interdepartmental Committee, *The Implications for the State of the Woodhouse Report* (1974). pp.1-4.

205. Letter from Mr R M Porter, General Manager, GIO of New South Wales, to Judge Loveday, Commissioner, New South Wales Law Reform Commission dated 14 February 1975.

206. *Ibid.*

207. Submission to the Attorney General from the Under Secretary of Justice, undated.

208. *Id*., appended comments by the Attorney General, dated 10 October 1975.

209. The Hon N K Wran, QC, MP, "Australian Labor Party Policy Statement". 12 April 1976, p.8.

210. Motor Vehicles (Third Party Insurance) Amendment Act 1977, schedule 1. cl.6.

211. Letter from Mr J. Ducker, MLC, Secretary, Labor Council of New South Wiles, to the Hon F J Walker, QC, MP, Attorney General, dated 6 October 1976.

212. The Hon N K Wran. QC, MP, "NSW Elections '78 Policy Speech", p.17.

213. *Id.,* p. 18.

214. Letter from Mr K Beckton, General Manager, GIO, to Ministry of Transport, dated 25 June 1979.

215. *Ibid.*

216. *Compensation for Future Medical and Related Expenses in Personal Injury Cases*. Unpublished Background Paper prepared by the Chairman, p.6.

217. *Pennant Hills Restaurants Pty. Ltd. v. Barrell Insurances Pty. Ltd.* (1981) 145 CLR 625.

218. (1981) 56 ALJR 59.

219. See paras.2.32 and 3.97.

5. Policy Questions

I. INTRODUCTION

5.1 Chapter 1 has explained why this Report is confined to compensation for victims of transport accidents. Chapter 3 identifies the numerous and widely acknowledged deficiencies in the existing common law system as the means of compensating victims of transport accidents. Chapter 4 reviews the range of proposals which have been made, and in some cases implemented, in Australia and overseas to rectify some or all of these deficiencies. This Chapter attempts to identify the objectives of a Transport Accidents Scheme for New South Wales.

A. Losses

5.2 The Pearson Royal Commission in the United Kingdom defined “compensation for personal injury” as

> ... the provision of something to the injured person (or to his dependents if he has been killed) in consequence of the injury or for the purpose of removing or alleviating its ill-effects. What is provided may be money, services, goods or real property. [1]

While this definition refers to “alleviating” the ill-effects of an injury, it provides no clear guidelines as to the means by which the alleviation should be implemented, nor the objectives that should be pursued. Moreover, the ill-effects (or losses) associated with transport accidents are of various kinds. Some are, and some are not precisely measurable in monetary terms.

5.3 The losses sustained by the individual victim or his or her family, can include:

> the cost of medical nursing and other rehabilitative services required to restore, so far as possible, health capacity for work and general well being;
>
> the loss of earning capacity suffered in consequence of the accident;
>
> the physical or mental disability, temporary or permanent, and any consequent impairment of enjoyment of life;
>
> the loss of support, whether of a financial or non-financial kind, sustained by the family of the victim; and
>
> the emotional trauma experienced by accident victims and their families.

From the communities point of view, the losses can include:

> the reduced participation of accident victims in the workforce and in community life generally;
>
> the cost of providing the services required to minimise the disruption to commercial and community life caused by transport accidents; and
>
> the cost of providing services and assistance to accident victims, whether or not as part of a formal compensation “system”.

B. Safety

5.4 The communities first objective must be to reduce the incidence and severity of transport accidents thereby reducing the losses flowing from them. There can be no serious quarrel with the proposition that safety and prevention measures should be made more effective. Indeed this has been officially recognised in New South Wales, most recently through the activities of the joint Standing Committee on Road Safety (the STAYSAFE Committee) and the Governmental responses to the Committee’s proposals. [2] There have also been extensive

publicity campaigns to highlight the need for safer driving and better road conditions. [3] The State Government has indicated its commitment to planning for a safer road system. [4]

5.5 Compensation arrangements may have a bearing on safety and prevention, although there is little evidence as to the relationship between compensation systems and the incidence of accidental death and injury. [5] It is fair to say that measures other than compensation arrangements are likely to have a more direct impact on the incidence and severity of accidents. The criminal law plays a major role, by imposing penalties on (and thereby deterring) dangerous or careless driving of vehicles or other forms of transportation. [6] In New South Wales great emphasis has recently been placed on enforcing criminal sanctions against driving under the influence of alcohol, through the random breath testing program. [7] Others see improved vehicle safety, driver education and better road conditions as having a high priority in achieving a substantial reduction in-the road toll. [8]

5.6 Whatever the best approach or combination of approaches it is clear that compensation arrangements should not jeopardise safety measures and, if possible, should enhance safety. This can be done in a variety of ways. Careful consideration should be given to establishing a structure for funding the Scheme which relates contributions to the risks created, for example, by particular classes of drivers or of vehicles. The Corporation responsible for administering the Scheme should maintain close contact with agencies responsible for promoting safety to monitor the impact of compensation policies on safety and prevention. For example, it will be important to ascertain the significance, if any, of narrow or broad exclusions from the Scheme on road safety. The Corporation should also be a source of funds for research into safety in the area of transport and for the promotion of safety measures, although it should not attempt or supplant the role of more specialised agencies. These matters are explained further in Chapter 17.

C. Rehabilitation

5.7 Despite the emphasis on accident prevention the Australian community accepts that deaths and injuries arising out of the use of motor vehicle transportation are inevitable. Theoretically it might be possible to eliminate all serious transport accidents. This could be done, for example, by imposing and strictly enforcing an absolute speed limit of, say, 10 kilometres per hour and by allocating sufficient resources to ensure that roads and vehicles are as safe as human ingenuity can make them. The reality is that the community values the great social and economic advantages of a swift and comprehensive transportation system to such an extent that it is prepared to accept not merely the risk but the certainty that substantial numbers of people will be killed and injured as a result. In short a judgment has been made that the social and economic costs of making transportation absolutely safe are too great to implement.

5.8 Thus, notwithstanding vigorous safety measures, there will continue to be a substantial number of deaths and injuries arising out of transport accidents. In Appendix A statistical details are provided of deaths and injuries in New South Wales motor vehicle accidents (paragraphs A.46-A.47). The figures show that despite reductions in the toll partly attributable to the introduction of random breath testing, in 1983, 966 people were killed and 33,978 people were injured in motor vehicle accidents in the State. The second objective, then, after the promotion of safety, should be to minimise as far as possible the human suffering and social and economic costs associated with transport accidents. In particular, where a person is injured the maximum effort should be made to rehabilitate him or her rapidly and effectively. The ideal result is, of course, the complete recovery-physically, emotionally, socially and vocationally of that person. But where that objective is not feasible the goal should be to realise the injured person's potential for functional recovery as far as possible.

5.9 The emphasis on rehabilitation was well expressed in the 1974 report by the British group JUSTICE:

> ... the avoidance of accidents is prevention, the rehabilitation of victims is the cure, and compensation can never be more than a palliative. Prevention is notoriously better than cure, but cure is, in its turn, better than any mere palliative. [9]

It is fundamental that the compensation system should attempt to achieve rapid rehabilitation of the victim, both by removing or minimising disincentives to recovery and by actively encouraging disabled persons to participate in effective rehabilitation programs. While this principle would seem to be incontrovertible, the current system is singularly deficient in achieving rapid rehabilitation (paragraphs 3.71-3.77).

5.10 The Scheme proposed in this Report attempts to maximise the chances of early and effective rehabilitation and to eliminate, as far as possible, features that are inimical to this process. The major characteristics of the Scheme which bear on rehabilitation are the following:

entitlement to prompt and secure compensation, on a periodic basis, for loss of earning capacity and to medical hospital and related services;

early access to (and encouragement to use) appropriate and flexible rehabilitation services;

rejection of the principle of once-and-for all assessment[10] and minimisation of adversary procedures within the decision-making process;

provision for the needs of seriously disabled persons, such as home modification, aids and appliances;

establishment of a Corporation responsible for satisfying entitlements to compensation and rehabilitation and for maintaining high quality decision-making; and

maximisation of incentives to rehabilitation such as financial incentives to return to the workforce and assessment of permanent incapacity for those with long-term disabilities.

5.11 All these characteristics are important but the first two are particularly significant. Prompt compensation avoids the need for protracted litigation (or negotiations) to establish entitlements, and provides immediate financial security for the victim, who would otherwise risk substantial financial hardship. It also minimises the dislocation resulting from the accident and reduces the anxiety associated with pending court proceedings that, under the current system may not be resolved for several years. The Scheme is designed to offer the maximum incentive for active and voluntary participation by accident victims in rehabilitation programs especially by increasing the likelihood of early intervention by rehabilitation personnel.

5.12 Chapters 9 and 10 recommend a wide range of rehabilitation and support services for transport accident victims. These services are to be available, as of right, in the same way as monetary compensation for loss of earning capacity. The range of rehabilitation services is designed to provide the disabled accident victim with a choice of programs, reflecting his or her needs, abilities and aspirations. It is also designed to encourage innovation and flexibility in the rehabilitation programs themselves. Clearly there is a limit to the extent to which the Scheme can ensure that effective rehabilitation services are developed. But it can maximise both the opportunities for early intervention and the incentive for accident victims to participate actively in rehabilitation, and thereby ensure that the two systems complement each other.

II. INFLUENCES ON POLICY MAKING

5.13 The remainder of this Chapter considers the policy options available and choices that should be made for the new Scheme. First, however, we discuss three important influences on policy making. These are that:

the inquiry has been created at a State, not national level;

there is an established compensation system for transport accidents, specifically for motor vehicle accidents; and

any new system must be seen as affordable by the community.

A. A State Inquiry

5.14 Unlike the Woodhouse Committee, which was established as a national inquiry we are not reporting to the Commonwealth Government. This has certain advantages. There is no doubt, for example, that the State has the constitutional authority to legislate for a new compensation system in place of the common law negligence action, a step that is by no means clearly within the authority of the Commonwealth Parliament. [11] On the other hand,

recommendations cannot be made for changes in Commonwealth tax or social security arrangements. For example, since income tax is imposed in practice exclusively by the Commonwealth Government it is not realistic to propose that a new scheme be financed by levies on incomes. Similarly, while attempts can be made to minimise the conflict between the objectives of the social security and compensation systems, for example by limiting the opportunities for "double dipping", perfect co-ordination between the two cannot be achieved. Again, it cannot be assumed that Commonwealth financial assistance will be forthcoming to extend compensation arrangements to new areas or to offset additional costs to the State.

B. The Established System

5.15 As has been discussed, there is an established system for compensating victims of motor vehicle accidents. The approach of the common law-for example, its nominal commitment to "full" compensation-clearly influences community expectations as to the proper objectives of a compensation scheme, especially one designed to replace the common law negligence action. This is reflected, for example, in submissions which argued for the Scheme to pursue the objective of full compensation [12] and in the widespread view that compensation should be available for non-economic loss. The point here is not that common law principles are inviolable, nor that they should be preserved in the face of compelling arguments to the contrary. Nonetheless, in formulating recommendations, it is proper to take account of community expectations to the extent they are consistent with the fundamental objectives sought to be achieved.

C. Cost

5.16 If unlimited resources were available to compensate accident victims (or other victims of misfortune), an extremely generous approach to compensation could be easily justified. But resources are limited and this affects judgments as to what is feasible and, indeed, equitable. As one commentator has noted, even courts are not immune from these pressures and use a variety of techniques to trim damages awards. [13] Submissions made a similar point. For example, CSR Ltd. stated that the "ultimate aim" of a compensation system is to provide "total income maintenance for the injured persons". However, the company accepted that

> ... the community as a whole should be willing to accept a slightly lower range of compensation benefits ... if it means all members of the community can participate in all the benefits. [14]

5.17 One consequence of limited resources is that choices have to be made between competing priorities, each of which can be justified in the abstract. For example, financial constraints may make it necessary to choose between compensating people sustaining short-term disability for their pain and suffering, and providing adequate support services and income maintenance for the severely long-term disabled. [15] Similarly, care may have to be exercised in relation to desirable but potentially costly proposals such as providing replacement homemaker services or compensating non-earners for loss of future earning capacity. Although the Transport Accidents Scheme could be financed from existing sources of compensation (such as contributions equivalent to compulsory third party insurance premiums), it is impossible to identify the "correct" level of resources that should be applied to compensate victims. What is regarded as appropriate may vary according to changes in accident rates, economic conditions and community attitudes. For present purposes, however, it is enough to say that recommendations cannot be formulated independently of cost implications. They must take account of the harsh reality that every benefit to an injured person must be paid for by contributions from taxpayers at large or from particular sections of the community. This is, however, very different from suggesting that the Scheme should be formulated by reference to a predetermined cost. This would not be appropriate and has not been done.

III. COMPREHENSIVE ENTITLEMENT

5.18 The Woodhouse Committee, in its report on a national compensation scheme, emphasised the principle of "comprehensive entitlement". [16] This required equal treatment for equal claims, whatever the cause of the incapacity and implied universal coverage for all accident victims (and indeed all victims of disability). Under this principle every Australian suffering incapacity through accidents of any kind (and ultimately through illness) would be compensated in accordance with the same criteria. A State body reporting only on compensation for victims of transport accidents, cannot recommend the implementation of the principle of comprehensive entitlement on a

national basis. However, the principle is valid both in relation to transport accident victims as a discrete category of victims and as an objective to be pursued vigorously by policy makers in Australia. We therefore propose that transport accident victims suffering similar losses (however assessed) should receive similar compensation regardless of whether the victim can prove that somebody else was at fault, or whether he or she was at fault for the accident.

5.19 In suggesting this principle we have been influenced by three major considerations. First, there are what the Woodhouse Committee referred to as the “civilised reasons of humanity”, which dictate that accident victims should not be denied compensation because of the circumstances in which their accidents happened to occur. Secondly, the use of motor vehicles or public transport services creates a risk of death or serious injury which is an unavoidable part of everyday life. This risk, which is faced by virtually every member of the community, is present regardless of the care that each person takes for his or her own safety and for the safety of others. Moreover, as has been noted, a rapid and effective transportation system is an essential element of modern society and provides benefits to (as well as imposing costs on) the entire community. The common law negligence action, by employing fault as the criterion of entitlement to compensation, has the defect of denying compensation to a substantial proportion of transport accident victims. The fault criterion itself, as discussed in Chapter 3, is not a satisfactory basis for determining entitlement to compensation. Thirdly, compensation for motor vehicle accident victims is financed by compulsory third party insurance, which can be seen as a broadly based tax, the cost of which is met directly or indirectly by virtually all members of the community. Unless there are independent valid reasons for retaining the fault system, the funds provided by the community at large should be used for the benefit of all members of the community injured in transport accidents, and not merely of those who are able to prove that the accident was the fault of another person.

5.20 It follows from the principle of comprehensive entitlement that the availability of compensation should not depend on identifying an individual who has breached a specific duty owed to the injured person. If society in general rather than identifiable individuals, can be described as the “cause” of accident-producing activities such as transportation of people and goods, the responsibility for compensating accident victims should fall on the community as a whole. As one commentator has observed, this

> ... can best be understood as a response to the increasing complexity of social action in a modern industrial society. It is a possible interpretation of events in a world where it is no longer plausible to isolate discrete causes and effects of human action [and where] individuals [act] increasingly through other individuals and through the use of machines and other manufactured products. [17]

5.21 Chapter 1 has explained the reasons for concentrating on a Scheme for transport accident victims (paragraphs 1.33-1.46). Clearly the objective of comprehensive entitlement cannot be perfectly realised in the absence of a national compensation scheme. However, the proposed Scheme will be capable of standing on its own and could hasten the advent of a national compensation scheme, whether by Commonwealth action or as the result of joint Commonwealth/State initiatives. The scheme is capable of serving as the model for extension of no-fault compensation arrangements to new areas, such as sporting injuries or injuries sustained by children at school. Such extensions could be made immediately, using the approach in this Report to establish the new arrangements. Alternatively, such extensions could be made after the Scheme has been in operation for some time, and the opportunity has been available to observe it in operation and to ascertain reasonably precisely the cost of extending compensation arrangements. To the extent that the Scheme establishes a standard for compensation it will lead to a rationalisation of existing arrangements and encourage greater uniformity in the treatment of accident victims.

IV. THE ASSESSMENT OF COMPENSATION

A. The Models

5.22 The principle of comprehensive entitlement requires consideration of the means by which compensation for transport accident victims should be assessed. As one submission noted, it is not enough to approach this question by characterising the proposals as “fair and adequate”. [18] Moreover, the question of assessment of compensation is not a problem confined to no-fault schemes. The rules governing the assessment of damages in

common law negligence actions, for example, have changed substantially in recent years and are still in a state of flux, reflecting (partly at least) a reconsideration of the purposes of damages awards. This section considers the approach that should be taken to the assessment of compensation for transport accident victims within the framework of a no-fault scheme.

5.23 Three models can be used as the basis for the assessment of compensation.

> *The welfare model,* under which compensation would be provided to the injured person [19] at a level sufficient to meet his or her needs (however defined and assessed). That person would not necessarily be placed in the position he or she would have enjoyed had the injury not occurred.
>
> *The disability model*, under which compensation would be assessed by reference to the degree of physical impairment suffered by the injured person regardless of the impact of the disability on that person's financial position.
>
> *The restitution model*, under which the injured person receives compensation at a level designed, as far as possible, to restore that person to his or her pre-accident position.

These models are not necessarily self-contained or mutually exclusive. There are many variations on each and most compensation systems (including our proposals) incorporate aspects of more than one model.

B. The Welfare Model

1. Characteristics

5.24 A compensation scheme which adopted the welfare model would provide compensation to injured persons in order to meet needs arising from the injury. The benefits could include income maintenance payments and medical, hospital and rehabilitation services, as well as other assistance such as aids, appliances and home modifications required in cases of severe disability. The compensation would not necessarily be paid in monetary form, but might be provided in kind.

5.25 This approach is described as the "welfare model", partly because it is needs based and partly because it has similarities to the Australian social security system. [20] However, this model need not take only one form. For example, income maintenance payments vary considerably among different categories of social security pensioners and beneficiaries. While most are means tested, some are not. Other variations on the theme are possible. The New South Wales workers' compensation system provides earnings (or award) related payments for short-term incapacity, but needs-based standard payments, which vary according to the number of dependents, for longer-term incapacity. [21] Some commentators have proposed that incapacitated accident victims should receive benefits assessed by reference to a stated percentage of the communities average weekly earnings. [22] Payments would be reduced by the amount the victim earns or is capable of earning, but not by the amount of income or support received from other sources.

2. Advantages

5.26 The welfare model has three major advantages. First, assessing compensation on a needs basis would assist in integrating the compensation system with the social security system and in achieving the objective of comprehensive entitlement on a national scale. If both accident compensation and social security payments were to be assessed in accordance with similar principles, it would be possible to reduce if not eliminate the disparities in treatment of different categories of disabled people. The Australian Council of Social Service summed up the argument by contending that

> [a] scheme based on flat rate or substantially flat rate benefits would integrate appropriately with the present Commonwealth Social Security Scheme. [23]

5.27 Secondly, the welfare model would not be regressive in the same way as the current compensation system for motor vehicle accident victims. At present compulsory third party premiums are collected from all motor vehicle owners, regardless of their capacity to pay, but the largest compensation payments are awarded to

victims who suffer the greatest “losses”, including loss of earning capacity. In the words of the New South Wales Council of Social Service

> ... the most important, and most painful, aspect of schemes wholly or substantially oriented towards compensation is that all other things being equal, a rich accident victim receives higher damages than a poor one, simply by virtue of having higher pre-accident earnings. This inequity is enhanced if, as presently occurs with motor accident compensation, contributions to the fund ... are levied at a flat rate. [24]

A related point is that a welfare model allows resources to be directed to improving the adequacy of payments and services to all eligible persons, rather than to those with the highest pre-accident earning capacity.

5.28 Thirdly, a practical reason for supporting the welfare model particularly where compensation is to be paid on a periodic basis, is that lower benefits may increase the incentive for an injured person to return to the workforce. It is commonly argued that if compensation is assessed by reference to pre-accident earnings for the duration of an incapacity, the injured person, whether consciously or unconsciously, may prolong the incapacity. If payments are needs-based, there will often be a greater gap between the levels of compensation and the remuneration available from paid employment and thus (it is said) a greater incentive to resume or accept remunerative employment.

3. Disadvantages

5.29 Against this must be considered the disadvantages. First, many injured persons will sustain substantial losses, such as the loss of capacity to earn above a basic income, which will not be compensated in full under a welfare model. In these cases the welfare model will fail to restore the injured person to anything like the financial position he or she could have fairly expected to enjoy but for the injury. The effect is that the fortuitous occurrence of an accidental injury will often make the injured person much worse off financially than before the accident.

5.30 Secondly, while the welfare model tends to modify rather than reinforce in equalities, it is arguable that the compensation system should not redress inequalities within the community. If the compensation system is used for this purpose, the effect is that only those well-off people with the misfortune to suffer serious incapacity (and without private insurance) would be reduced to the level of meeting basic needs; other well-off people would not be affected. On this argument, inequalities should be addressed primarily through the taxation and general social welfare systems and not through compensation systems, particularly those covering only specific kinds of accidental injury.

C. The Disability Model

1. Characteristics

5.31 Under the disability model, compensation would be assessed by reference to the degree of physical disability suffered by the victim, independently of the impact of the disability on the injured person’s earning capacity. Thus people with similar disabilities would receive similar compensation, regardless of the financial consequences flowing from those disabilities. Obviously this approach presupposes the availability of a technique to assess physical disability. In practice this could be done by reference to a table specifying a percentage of physical disability for particular impairments (paragraph 11.37).

5.32 Many social security systems and compensation schemes have relied to some extent on the disability approach. The English industrial injuries system, for example, provides disablement pensions for major long-term disability and gratuities (lump sums) for less serious long-term disabilities. The disablement pension or gratuity is not intended to compensate for loss of earning capacity and is payable whether or not any loss of earnings occurs. Additional allowances are paid where income loss occurs and to meet specific needs of injured workers. [25] In Australia, the social security system incorporates the “disability” approach by providing a non-means tested pension f or the permanently blind. [26] The disability approach also forms part of workers’ compensation legislation in most Australian States. In New South Wales, for example, a “table of maims” provides lump sum payments for specified injuries. Such payments are made regardless of the effect of the injury on the workers’ earning capacity, although separate provision is made for compensating lost earning capacity.

5.33 The Australian Woodhouse Committee was attracted to the disability approach as a means of providing compensation for people suffering from permanent partial disability. The Committee recommended that such people should receive a proportion of average weekly earnings, to be calculated by reference to a percentage degree of physical impairment, regardless of the effect of the impairment upon the individuals earning capacity. The sum provided was to compensate for both economic and non-economic loss. By contrast, people suffering total permanent incapacity were to receive 85 per cent of their actual loss of earnings. [27] The Committee's proposal was designed to overcome difficulties which the Committee thought could arise in assessing loss of earning capacity for people suffering permanent partial disability.

2. Advantages

5.34 Two arguments are often made in favour of the disability model. First, the payment of compensation for a physical disability, regardless of the effect of the impairment on earning capacity, may encourage people to return to the workforce. In GWR Palmer's words:

> ... its signal advantage ... was the fact that no one needed to prove economic loss. Future economic loss is notoriously difficult to quantify, and the need to quantify it impedes rehabilitation. People have an incentive not to go back to work because their compensation is dependent upon their not working. [28]

5.35 Secondly, as the Woodhouse Committee argued assessment of the degree of physical disability, while not without difficulty, may be administratively simpler than the assessment of loss of earning capacity. Such an assessment can be performed by doctors who are required to examine only the person's degree of physical impairment, without having to consider the economic and social factors affecting his or her earning capacity. [29]

3. Disadvantages

5.36 The most important disadvantage of the disability approach is that if compensation is assessed solely on the degree of physical impairment, without regard to the effect on earning capacity, inequitable results may follow. As Professor H Luntz has observed:

> A consequence of [the Woodhouse Committee's] method [of compensating permanent partial disability] is... that many people who suffer no loss of income whatsoever will be compensated for their incapacity ... A blue collar worker is justly indignant if he and a white collar worker receive the same benefit for the loss of a leg, but he alone has suffered reduction in his earnings, even though, when the benefit is added to his reduced earnings, he is financially not injured. [30]

5.37 A second disadvantage is that an assessment of physical disability cannot generally be made immediately after the accident has occurred. Even if a procedure for interim assessment were adopted, the initial assessment would usually not be feasible until completion of the acute stage of treatment. If the needs of injured people are to be met during this acute period, there must be some other basis for short term compensation. Furthermore, the administrative advantages of the disability approach are lessened if several assessments have to be made. These problems are minimised if the disability model is used only for permanent disability and as a supplement to other approaches to compensation. [31]

D. The Restitution Model

1. Characteristics

5.38 Under this model, compensation, whether in the form of money or services, is designed to return the injured person, so far as feasible, to his or her pre-accident position. The principle is, of course, exemplified by the common law approach to the assessment of damages (paragraphs 2.29-2.30).

5.39 Other compensation systems incorporate aspects of the restitution model, although they do not necessarily attempt to restore the injured person wholly to his or her pre-accident position. The workers' compensation systems in the Australian States generally adopt the restitution principle in respect of lost earnings for a limited period. In New South Wales, workers' compensation is earnings-related for the first six months but then, in effect reverts to needs based payments. [32] The no-fault motor accident schemes in Victoria, Tasmania and the

Northern Territory provide earnings-related compensation to injured persons although there are various restrictions on the compensation available in each scheme. [33]

5.40 Some social security or national insurance schemes adopt the restitution principle, at least to some extent, for earnings lost by a disabled person. In England, for example, some forms of benefit are funded partly by earnings-related contributions from employers and employees. In the case of both industrial and non-industrial accidents, the system provides a flat-rate weekly sum together with an earnings-related component during the first six months of incapacity. [34] The Social Security Act 1975 (UK) introduced earnings-related additions to retirement pensions and to long-term invalidity pensions. According to Professor P. Atiyah:

> ... [the] introduction and spread of the earning related principle has important, and indeed, perhaps fatal implications for the tort system for it represents a movement in the whole national insurance system towards doing what the tort system is also doing, namely to compensate people for lost earnings at a variable rate. [35]

2. Advantages

5.41 The main argument in favour of the restitution model is that the compensation system should attempt to replace the losses actually sustained by accident victims. Any other model means that the fortuitous occurrence of an injury may leave the injured person substantially worse off than he or she would have been but for the accident.

5.42 Both the New Zealand and Australian Woodhouse Reports strongly supported this argument. [36] In the words of the Australian Report:

> ... the levels of compensation must be realistic for all. Earlier philosophies which were content to provide meagre benefits related merely to need must be set aside. Real compensation demands the provision of income-related benefits for lost income throughout the whole period of incapacity and the opportunity for every incapacitated person to maintain the living standards he or she had earlier achieved by energy and hard work. [37]

This approach was further justified by reference to the financial hardship that earners and their families suffer if their household income is interrupted as the result of incapacity.

5.43 The Woodhouse Reports considered but rejected the view that compensation should be assessed by reference either to the needs or to the extent of the victim's physical disability. The Australian Report, for example, argued that

> ... a system of flat rate benefits would give preference to all those with lesser losses, at the expense of those whose losses were great. The former could recover all their lost earnings while some would receive no more than a small fractional part. Yet others might be obliged to meet the difference for only a limited time, while those with long-term incapacities could be left with the accumulating difference for year after year. [38]

5.44 Secondly, many groups, no doubt influenced by the common law, strenuously argue in favour of retaining the restitution model. For them, the common law becomes the touchstone by reference to which any new scheme must be assessed. For example, the Law Society of New South Wales stated that the restitution principle, as applied by the common law

> ... is a very broad one and enables the award of just compensation in a wide variety of factual situations. Furthermore the common law is a developing system which enables the Courts to modify the system continually so as to reflect changes in society. [39]

Many submissions were critical of the suggestions in the Working Paper that a ceiling should be placed on compensation for loss of earning capacity in order to limit the regressive effects of the Scheme. Most of these implicitly supported the view that the role of the Scheme should be to return the accident victim to his or her pre-accident position so far as possible. [40]

3. Disadvantages

5.45 First it has been argued that the restitution model preserves inequalities in the form of income differentials which can be justified only by reference to differences in the value of productive labour. According to this argument, income differentials should no longer apply as between people who are unable to work productively. In the words of Professor H. Luntz:

> Earnings are a reward for work [and the] amount paid varies according to the value the community places on the work. If a person is prevented from working, there is no *a* prion' reason why he should be paid as if he had worked. [41]

Supporters of this argument contend that it is especially difficult to justify compensation payments to the families of deceased persons by reference to the different earning capacities of the deceased. The deceased's capacity to earn income does not affect the ability of the surviving family members to perform productive work and indeed substantial compensation based on the deceased's earning capacity, may discourage family members from seeking or retaining remunerative employment.

5.46 A second and related argument is that a compensation system which utilises public resources to implement the restitution principle is regressive and therefore inequitable. The present system of compulsory third party insurance involves redistribution from lower income earners to higher income earners, since premiums are collected from motor vehicle owners at a standard rate, regardless of capacity to pay. [42] Professor P Atiyah refers to the tort system as a whole as

> ... the only systematic method of compensation which pays [in effect] earnings-related benefits without earnings-related contributions. [43]

While this comment can fairly be applied to the common law system, a compensation scheme adopting the restitution principle need not necessarily be regressive. In particular, if the funds required for the scheme are based on earnings-related contributions from virtually all potential beneficiaries (which would only be possible in a national scheme) the scheme will not exacerbate existing inequalities, although it is unlikely to ameliorate them.

5.47 Thirdly, the restitution principle may not be easy to apply to a person with little or no earnings at the date of the accident. This category would include:

> people not currently employed and not presently intending to enter the workforce, such as children and homemakers;
>
> school leavers, students and young adults who have not entered the workforce, or who have very low earnings; and
>
> unemployed people actively seeking work. [44]

5.48 Some submissions argued that a compensation scheme which attempts to return the injured person to his or her pre-accident position would make inadequate provision for these groups. The submissions argued that an earnings-related scheme would give insufficient recognition to the economic value of unpaid services provided, for example, by homemakers and voluntary workers. Moreover, it was pointed out that a scheme which relied very heavily if not exclusively on pre-accident earnings as a measure of loss would inevitably fail to compensate for the loss of potential earning capacity suffered by many workers. Thus the Women's Co-ordination Unit expressed their conviction that

> ... there is no objective fairness in tying periodic compensation to pre-accident earnings. While it seems reasonable in the short-term since people usually gear their commitments to their current income, in the long term it becomes clear that a person's earning ability at the time of the accident constitutes a completely arbitrary measure upon which to base compensation ... A woman, for instance, may begin her working life in relatively unskilled work, may become married and leave the workforce for some years to rear children but may return later with professional skills after a period of vocational training. One can see that if she were to

> have an accident and to receive earnings-related compensation at different points in her life, her fortune would vary dramatically-in a way governed more by luck than justice. [45]

This analysis tends to assume that pre-accident earnings must be the major, or perhaps only, measure of loss of earning capacity and also does not address whether the restitution principle can be applied otherwise than by compensating for lost earning capacity. Nonetheless, it raises important issues that are examined later in the Report.

5.49 Fourthly, the restitution principle, if applied to injured people suffering long-term incapacity, might create disincentives to rehabilitation. An incapacitated person who has his or her loss of earnings capacity compensated in full for the duration of the incapacity, may have little incentive to resume paid employment. The common law attempts to overcome this problem by paying compensation in the form of a single lump sum but this creates other serious problems. The payment of full compensation for lost earning capacity on a periodic basis raises questions as to how any anti-rehabilitative effect can be countered. One important counter measure is to provide for assessment of permanent incapacity, thus avoiding the need for the incapacitated person to remain subject to the scrutiny of the compensation authority and allowing that person to resume employment without loss of compensation (paragraphs 8.52-8.60).

5.50 Finally, the restitution model creates significant difficulties in assessing the losses in respect of which compensation is to be paid. There are two major problems. Any assessment of loss which includes a component related to what might have occurred but for the accident, must be speculative to some extent. It is, however, possible to cut down the scope for speculation by avoiding the common law principle that compensation must be assessed once-and-for-all on a lump sum basis. For example, if compensation for lost earning capacity is paid in the form of indexed periodic payments for the duration of the incapacity, the need to predict life expectancy or future rates of inflation is overcome. Nonetheless, it is impossible to be certain what income the claimant would have earned had the accident not occurred.

5.51 In addition, some losses are inherently incapable of precise quantification. The most obvious example is the compensation provided for such intangible items as pain and suffering, loss of enjoyment of life and permanent physical disability. The common law, for example, provides a sum by way of general damages to cover these items, while the workers' compensation system has relied on a table of maims providing specified amounts for particular kinds of physical disabilities. In Australia, the courts have developed conventional figures for the award of general damages, but they tend to vary from State to State and are very different from the standards applied in other common law jurisdictions, such as North America. Similarly, the workers' compensation tables of maims vary from Jurisdiction to jurisdiction. The reality is that, while pain and physical disability undoubtedly can be characterised as a loss, there is no universally acceptable or obvious means of measuring that loss.

E. The Approach

1. Background

5.52 No single model should be adopted exclusively as the basis for assessing compensation for transport accident victims. In formulating the proposals in this Report, we have been influenced by a number of factors.

5.53 First, the arguments in favour of the restitution principle are strongest in relation to loss of earning capacity and other economic losses sustained by the injured person, such as the need to receive medical, hospital and rehabilitation services. The arguments have less force in relation to non-economic losses, such as pain and suffering and loss of enjoyment of life, which are inherently incapable of precise measurement in financial terms. They also have less force in relation to compensation to surviving family members of a deceased accident victim who have suffered no disability themselves. One problem is to find an equitable balance between alleviating misfortune by providing monetary compensation and directing limited resources to those suffering the severest disability.

5.54 Secondly, in the case of compensation for loss of earning capacity, the arguments for the restitution principle are most powerful where a scheme is designed to replace the common law for a particular category of accident victim The argument in favour of the welfare model, especially for long-term incapacity, is stronger if the issue arises in the context of the development of a comprehensive national compensation scheme and especially in those areas where the common law has played a relatively minor role. The integration of the social security

and compensation systems, for example, would be promoted if each were based on a needs principle. This does not imply that, on the welfare model compensation payments should be set at similar levels to current social security income maintenance payments. The standard for compensation could be set substantially above social security payments with the intention of ultimately raising those payments to the compensation standard. The proposals in this Report are, however, confined to transport accident victims and until moves towards a comprehensive scheme develop further, the restitution principle should be given substantial weight.

5.55 Thirdly, the restitution principle should be modified or adapted to ensure that it is consistent with other objectives, including the need to:

tailor benefits to maximise incentives to and opportunities for rehabilitation;

avoid unfairness to injured people who happen to be outside the workforce at the date of the accident (see paragraphs 5.47-5.48);

minimise the inequitable effects of a compensation system funded otherwise by earnings-related contributions; and

(in the case of health care services) integrate the compensation and national health care systems.

5.56 Fourthly, the proposals should emphasise long-term security and income maintenance to accident victims suffering serious permanent disability and incapacity. These victims include, for example, people suffering from paraplegia, quadriplegia or brain damage, who require attendant care and other support. To the extent that choices must be made as to the allocation of limited resources, this emphasis will have to be at the expense of victims of short-term disability and incapacity. In particular, generous compensation for pain and suffering, where the victim recovers from his or her disability within a relatively short period, is not an appropriate use of the community's resources, if the effect is to limit compensation to the more severely disabled.

2. The Restitution Model

5.57 The recommendations in this Report give effect to the restitution model in a number of ways, including the following.

Subject to certain qualifications, the Scheme compensates the victim of a transport accident for loss (or impairment) of earning capacity. This principle should apply both to earners and non-earners and includes, in cases of long-term incapacity, compensation for loss of potential for advancement.

The Scheme provides or meets the cost of medical hospital, rehabilitation and ancillary services required as a result of the disability. In addition, the Scheme compensates severely disabled persons for the non-optional costs flowing from the disability, including those related to personal care, aids and home modifications.

Compensation is provided for the loss of unpaid household services required for the maintenance and preservation of the household of the disabled person. [46]

5.58 There are three major qualifications to the restitution principle as applied to compensation for loss of earning capacity. First, a ceiling is imposed on the compensation payable for such a loss. [47] This approach has been taken largely because a ceiling limits the inequities of the restitution principle in a Scheme in which contributions cannot be based on an earnings-related basis. In addition, higher income earners have a greater capacity to take out insurance to provide coverage for losses above the ceiling. Secondly, compensation for loss of earning capacity is paid, not in full but for a proportion of the loss (which generally speaking, is set at 80 per cent of the loss). This proposal is justified primarily, but not exclusively, by the need to preserve incentives to rehabilitation. Thirdly, for those not defined as earners, compensation for loss of earning capacity is payable only in respect of long-term incapacity (that is, in excess of two years).

5.59 The application of the restitution principle to non-earners presents difficulties, as indeed it does in all compensation systems. It is particularly difficult to estimate likely future earnings for someone who has never

been attached to the workforce or who has been outside the workforce for a substantial period. The Scheme attempts to resolve these difficulties by a number of measures. These include:

> a generous definition of earner, so as to include, for example, many long-term unemployed who have not been in employment for a considerable period before the accident;
>
> compensation for long-term loss of earning capacity (over two years) by non-earners assessed by reference to conventional standards; and
>
> the opportunity for a non-earner suffering long-term loss of earning capacity to apply for assessment of compensation by reference to potential for advancement.

3. The Disability Model

5.60 We do not regard the disability model as an appropriate basis for compensating accident victims for their economic losses. However, some non-economic consequences flow from injuries sustained in accidents. At common law, general damages are awarded to compensate for non-economic losses such as pain and suffering, loss of amenities, and enjoyment of life and loss of expectation of life (paragraphs 2.30, 11.20-11.30). In theory, this approach gives effect to the restitution principle, by granting the claimant a sum of money which, as nearly as possible, restores him or her to the pre-accident position. In practice a damages award can never make good the precise loss suffered by the accident victim. The assessment of damages involves a substantial arbitrary element, since the losses are inherently unquantifiable.

5.61 For reasons explained in more detail in Chapter 11 the Scheme should not attempt to allow for the effect on individual lifestyle of the injury or physical disability, except in so far as it produces economic losses, such as loss of earning capacity. Moreover, as already suggested, scarce resources should not be used to compensate people for pain and suffering or loss of enjoyment of life which is not an element of permanent disability. In other words, the Scheme should not attempt to compensate for short-term pain and suffering or loss of enjoyment of fife. In this respect the Scheme constitutes a major departure from the common law. On the other hand, a person suffering a permanent disability as the result of an accident has sustained a loss, even where there is no economic loss, and compensation is appropriate in such a case. As the New Zealand Woodhouse Committee report said

> ... whether or not such a loss of physical faculty has economic consequences, it is nonetheless a loss to the individual concerned, and in a greater or lesser degree may adversely affect him thereafter. [48]

The disability model of compensation is clearly best suited to the task of compensating for permanent disability and we adopt it for this purpose. The result is that persons sustaining similar permanent disabilities in transport accidents will receive similar compensation for those losses, but compensation for financial losses will be determined by other principles.

4. The Welfare Model

5.62 It is appropriate to include elements of a welfare model of compensation in the Scheme. One important reason for this is that the limitations on resources available for compensation make the application of the restitution principle impracticable and unwarranted in some circumstances. Moreover, there are cases in which the application of the restitution principle may create undesirable disincentives to remunerative employment. These considerations apply to compensation for the death of an earner, particularly where compensation is paid on a periodic basis. The recommendations on death benefits (Chapter 12) broadly adopt a welfare model aimed at meeting the short term problems of adjustment to the changed circumstances immediately following death and periodic compensation to those members of the immediate family who are prevented from exercising their own earning capacity. These benefits apply to surviving children and to spouses with child-care responsibilities or with impaired earning capacity due to poor health, advanced age or the need to care for an aged or infirm family member. Only in limited circumstances is the restitution model used, namely where periodic payments to the surviving spouse of a deceased earner with child-care responsibilities are calculated on the basis of the deceased’s earning capacity for a maximum period of five years after the death. In cases of both injury and death, needs-related criteria also apply to the provision of household services to the accident victim’s family beyond a period of four weeks from the date of incapacity or death.

V. FORM OF COMPENSATION

5.63 The general principles governing the assessment of compensation do not determine the form in which compensation should be provided. Two basic issues arise.

> Should compensation be provided, as under the common law, only by way of monetary awards, or should it be provided, in part, in the form of services?
>
> To the extent that compensation is provided in monetary form should it be paid in a lump sum or on a periodic basis?

A. Money or Services

5.64 The common law limits compensation to monetary awards. Other compensation schemes have tended to take the same approach, although recently statutory schemes have begun to pay greater attention to the provision of rehabilitation services to accident victims. By contrast, the social security and health care systems attempt to meet needs through a variety of programs and services. Commonwealth and State departments, local government authorities and publicly subsidised voluntary agencies all provide services relevant to accident victims. At the Commonwealth level for example, these include health benefit cards entitling eligible invalid pensioners and sickness beneficiaries to optometrical and hearing aid services and subsidised pharmaceuticals; [49] the provision of aids to disabled people; [50] a specialist employment service for disabled people provided by the Commonwealth Employment Service; [51] and rehabilitation services provided through the Commonwealth Rehabilitation Service. [52]

5.65 Because of the traditional emphasis of compensation systems on monetary awards, the community has tended to undervalue the importance of rehabilitation. As the New South Wales Conybeare Report commented:

> ... people in this community have grown up to believe that the appropriate consequence of injury is financial recompense, and have never been encouraged to think beyond that. [53]

Moreover, the services required by disabled people may not be readily available in the free market, or may be available only at excessive cost. Such services may not be

> ... proper subjects for the operation of market forces, either because the social costs of mistaken decisions are too great or because, adopting a paternalistic stance, it is not to be assumed that in such areas individuals always act as rational maximisers of their own welfare. [54]

To the extent that monetary awards are not used for the purposes envisaged, opportunities for improving the injured person's position may be lost, causing the community ultimately to bear additional costs flowing from the injury.

5.66 Those who support monetary compensation rather than provision of services, argue that this maximises individual freedom, by enabling claimants to purchase necessary services on the free market or, if they wish, to forego the services and use the funds for other purposes. Under this approach the way in which

> ... money is to be spent remains a matter of individual liberty and responsibility. Benefits in kind are thus reserved for those who are incapable of exercising that responsibility...[55]

An argument is commonly made that the provision of services in kind requires the injured person to maintain a continuing relationship with the administering authority and possibly reinforces his or her dependence on that authorities goodwill.

5.67 It is clearly important to preserve the independence of disabled people, particularly those with long-term disabilities. Nonetheless, there are circumstances in which compensation should be provided in the form of services required by injured people and their families. Such an approach allows services to be made available as

and when they are required, in a form that matches so far as possible the precise nature of the losses sustained. It also enables the resources and expertise of existing agencies to be utilised so as to provide the services efficiently and in a manner which breaks down distinctions between different categories of accident victims. The provision of services in kind can be undertaken in a manner which preserves choice and the autonomy and dignity of claimants. An example concerning rehabilitation services illustrates the point. If rehabilitation is to be a primary objective of the scheme, it is not enough simply to pay sums of money sufficient to permit the victim, if he or she wishes, to participate in a rehabilitation program. To be effective, rehabilitation should possible after the disability occurs. This requires rehabilitation commence as soon as programs to be integrated with the payment of compensation and for the objective of rehabilitation to be vigorously pursued. Accordingly, the Scheme should ensure that disabled accident victims gain access to rehabilitation services. For this purpose, the Scheme should ensure the provision of such services through programs offered by government, voluntary agencies or the private sector.

5.68 Other kinds of services will be made available to accident victims, preferably through existing agencies. For example, in certain circumstances, household services will be provided to the victim or his or her family, preferably through agencies such as the Home Care Service of New South Wales. Again, it is essential that seriously disabled people receive support services required for personal care and to cope with the disability. These support services will be made available through the Scheme, in a manner intended to preserve the disabled person's freedom of choice, yet ensure that resources are devoted to providing the necessary services.

B. Lump Sums or Periodic Payments

5.69 As has been noted, common law damages take the form of a lump sum which is awarded once-and-for-all. The award is unalterable, even if based on predictions which later prove to be incorrect. Although the common law theoretically accepts the restitution principle as the basis for compensation once-and-for-all assessment in the form of a lump sum involves a high probability, in serious cases, of either under or overcompensation. We have explored elsewhere other disadvantages of the common law approach (paragraph 3.16ff.).

5.70 The question of whether monetary compensation should be paid in a lump sum or on a periodic basis is not confined to a no-fault compensation scheme. The same issue arises even if the common law negligence action were to be retained. It is desirable, whatever the criteria governing eligibility for compensation, that the problems of prediction inherent in a once-and-for-all lump sum award be avoided to the maximum extent practicable. It is also desirable that compensation should be provided in a form which, as nearly as practicable, matches the losses sustained by the injured person and which enables benefits to be provided promptly. Accordingly, compensation for loss of earning capacity should be provided in the form of periodic payments which continue for the duration of the incapacity. In general had the accident not occurred, the injured person would have expected to receive his or her income from personal exertion on a periodic basis, normally in the form of salary or wages. Similarly, medical, hospital and rehabilitation expenses should be met as they are incurred, although it is generally appropriate for these services to be provided in kind.

5.71 The argument in favour of compensation on a periodic basis is strongest where economic losses are involved. We have earlier proposed that the disability model should be used to assess compensation for non-economic loss, the standard being the degree of permanent physical impairment suffered by the victim. On balance, compensation under this head should be provided in the form of a single lump sum. Several factors justify this conclusion:

> the victim will receive separate compensation for financial losses, so that payment of a lump sum for physical disability can be made without placing his or her long term security at risk and without jeopardising the principle that compensation for financial losses should be provided promptly;
>
> a lump sum is widely seen by the community, at least in areas where the common law has operated in the field, as a solace for permanent disability and as a means of giving the disabled person additional flexibility to adjust to his or her condition; and
>
> since the victim's loss cannot be quantified precisely in monetary terms, a lump sum is as appropriate a form of compensation as periodic payments.

5.72 The lump sum should also be a major form of compensation on death where it serves the important function of alleviating the immediate economic and social disruption caused to the family. A lump sum offers a flexible means of adjusting to the future. Additional benefits can be provided in the form of periodic payments, on a modified restitution model in some cases and on a needs basis in others, where the process of adjustment is especially difficult and therefore requires support over an extended period (paragraph 5.62).

VI. ADMINISTRATION AND DECISION-MAKING

5.73 The administrative and decision-making process will be of major importance in determining whether the objectives of the Scheme are realised in practice. Care must be taken, therefore, to state the objectives of this process and to establish systems and procedures designed to achieve those objectives.

A. Administration

5.74 One test of the effectiveness of the administrative process is its “efficiency”. This test is usually employed to emphasise that any systems should keep to a minimum the resources required to process claims. As a general proposition it is difficult to dispute that the administrative expenses of a compensation system should be low in relation to compensation payments. It is clearly desirable that limited community resources should be directed to accident prevention and to compensating and rehabilitating accident victims, rather than being used to meet unnecessary administrative expenses.

5.75 This is not to say that all money spent on administration is wasted. It is important as is explained in more detail in Chapter 15, to balance the objective of administrative efficiency with other objectives that may be of equal or greater significance. Chapter 15 outlines five principles that should guide the Corporation responsible for administering the Scheme. These are:

the principle of entitlement, under which each injured person receives the full benefits to which he or she is entitled and the assistance required to present his or her claim effectively;

the principle of independence, under which the administration of the scheme is independent of the government of the day;

the principle of flexibility, which allows the scheme to perform a range of functions and to respond adequately to a variety of circumstances;

the principle of high quality decision-making, which emphasises the need for well-trained decision-makers, with the authority to determine claims and to undertake appropriate investigation at an early stage; and

the principle of speed in providing compensation, which involves the speediest possible determination of claims consistent with the verification of entitlement.

5.76 With the possible exception of the second, each of these principles is, if implemented, likely to impose greater administrative costs on the Scheme than a more rigid or less sympathetic system. For example, costs will be incurred if efforts are made to ensure that accident victims, including those who are ignorant of their rights, receive their full statutory entitlement. Similarly, it may be more expensive, at least initially, to engage only highly qualified people as primary decision-makers than to regard the initial assessment of claims as a relatively low-level task. In short, it will sometimes be necessary to incur administrative costs in order to achieve objectives that are central to the Scheme. Chapter 15 discusses the way in which the balance between efficiency and the principles governing administration of the Scheme should be struck.

B. Dispute Resolution

5.77 One objective of the decision-making process should be to minimise disputes, preferably by sympathetic and consistent administration of the Scheme. Nonetheless, some disputes are inevitable. Some will concern the claimants initial or continuing eligibility for compensation. Others will relate to the appropriate level of compensation or benefits under the Scheme, bearing in mind that this may vary over the period of incapacity or

disability. Some disputes will turn on the facts and perhaps raise issues of the claimant s credibility. Some will depend largely on a medical assessment of the claimants degree of disability. A smaller proportion will involve interpretation of the governing legislation, or other questions of law. It is fundamental to the Scheme that provision should be made for the fair resolution of disputes. Procedures should be established to protect a claimant against the danger of incorrect or harsh decisions and provide an adequate opportunity to put his or her case before an independent decision-maker.

5.78 Critics of statutory compensation schemes often attack administrative procedures for claims determination arguing that claims should be decided by a court, rather than an administrative body. They stress the impartiality and independence of the courts. They suggest that an administrative system is more susceptible to political control less open to public scrutiny and prone to take a harsh approach to claimants in the interests of conserving resources. The submission of the Law Society of New South Wales referred to “the impossibility of a fair individual assessment of loss within a bureaucratic system”. It went on to contrast such a system with the approach of the common law.

> While the common law system involves bureaucracy in the form of Courts administration, the Police Department and so on, its great strength lies in the independence of the judiciary and its ability to individually assess each case on its merits rather than applying arbitrary rules. In many instances under the Transport Accidents Scheme, its administrators will exercise discretionary power... The Society strongly believes that no government or quasi-government instrumentality should have the unfettered discretionary power to make such far-reaching decisions, particularly when there is no right to legal representation in the initial stages of a claim. [56]

While this analysis underestimates the extent to which common law damages claims are resolved by settlements (rather than by court verdicts), the dangers pointed out by the Law Society warrant careful attention.

5.79 The proposition that the compensation scheme should not confer “unfettered discretionary powers” on the administering authority is clearly correct. The legislation should specify the rights of injured and incapacitated persons as precisely as possible, although it is clearly not feasible to avoid entirely the exercise of discretionary powers. Claimants who are in dispute with the administering authority (the Accident Compensation Corporation) should have ready access to independent appeals tribunals which can respond speedily and informally to the appeal. They should have an opportunity, if they wish, to put their case to a judicial tribunal which should have full power to review the Corporation’s decision.

5.80 We do not share the Law Society’s opinion that it is impossible, within the frame work of a statutory scheme, to establish procedures which adequately protect claimants and curb the danger of administrative excesses. As explained in Chapter 16, the Corporation, as the administering authority, should initially determine compensation claims. Special efforts should be made to ensure that initial adjudication is carried out carefully and sympathetically by well-trained senior staff known as assessing officers. Thereafter there should be a system of review modelled on the administrative appeals system operating under Commonwealth law, specifically applicable to social security appeals. The first appeal should be to an independent Compensation Review Panel-constituted of three members and chaired by a person with legal qualifications. The emphasis at this stage of the appeal process should be on informal speedy adjudication. An appeal should be from the Panel to the Accident Compensation Appeal Tribunal, constituted of a judge, and (usually) two lay members. Ideally the Tribunal should be part of a general administrative appeals tribunal for the State but, in the absence of such a body, should be established as a separate tribunal. Both the Panel and the Tribunal should have power to substitute their view of the case for that of the Corporation and should not be bound by Corporation policy. In other words, the powers of review should extend not only to cases where the Corporation has misinterpreted the legislation or wrongly assessed the facts, but where the Panel or Tribunal considers that a discretion conferred by the legislation should be exercised on a basis different from that adopted by the Corporation. An appeals structure of this kind will add to the cost of administering the Scheme and expose it to the risk of unsympathetic or perhaps unduly technical interpretation. This is the price which must be paid if claimants are to be entitled to challenge adverse decisions before an independent tribunal.

5.81 The right of appeal provides the ultimate safeguard to the individual claimant. This does not mean that the appeal process should constitute the sole or even the major means of external scrutiny of the Corporation’s administrative and policy-making role. There are a number of reasons why appeals are not an especially effective method of reviewing the general performance of the Corporation. A special body, independent of the Corporation,

should be established to monitor the operations of the Scheme and the activities of the Corporation. This body, which should be called the Policy Review Committee, should report to Parliament and should propose such amendments to the legislation and to the practices of the Corporation as are thought desirable.

VII. SUMMARY

5.82 This Chapter has examined the principles that should determine the design of a no-fault transport accidents scheme for New South Wales. Later Chapters discuss the specific recommendations governing the compensation to be provided to transport accident victims and their families. The major principles are outlined as follows:

- comprehensive entitlement for transport accident victims;
- rationalisation of existing compensation arrangements;
- choice of appropriate compensation models for different kinds of losses;
- compensation in a form to match losses;
- administrative efficiency; and
- fair dispute resolution.

Comprehensive Entitlement

5.83 The community should accept responsibility for compensating people injured and the families of people killed in transport accidents. The fault principle is an unsatisfactory basis for determining entitlement to compensation since the effect is to deny compensation to a substantial proportion of accident victims who cannot demonstrate that another person was at fault.

Rationalisation of Existing Arrangements

5.84 Ultimately the community should accept responsibility for compensating the victims of all accidents. The establishment of a no-fault Transport Accidents Scheme should be consistent with that ultimate objective and should constitute a suitable model for extension to other areas of disability and incapacity. However, the Scheme standing alone should be capable of overcoming the major deficiencies which characterise the existing compensation system. The Scheme should maximise the opportunity for rehabilitation of injured people, so that wherever possible they can return to an active and productive life within the community. The Scheme should link the assessment of compensation to the aim of promoting rehabilitation.

Appropriate Compensation Models

5.85 Generally speaking, the Scheme should implement a restitution model in relation to economic loss, by attempting to restore the injured person to his or her pre-accident position. However, the restitution model should be qualified by the need to:

- promote rehabilitation as a paramount objective;
- ensure that the compensation provided does not exceed the limits of the community s resources;
- give priority to the long-term requirements of people sustaining serious and permanent disability and incapacity; and
- minimise inequities flowing from the fact that a State scheme cannot be funded by earnings-related contributions.

5.86 It is sometimes appropriate to assess compensation by reference to the needs of the claimant (the welfare model) in preference to the restitution model. This is true in the case of compensation on death and, except for an initial four week period, the provision of household services to the accident victim's family where these were provided by the accident victim prior to his or her injury or death.

5.87 Compensation should be paid, in addition to other forms of compensation, for permanent disability sustained by a transport accident victim, by reference to the degree of permanent disability. The Scheme should not compensate for pain and suffering or loss of enjoyment of life where these are not elements of permanent disability.

Form of Compensation

5.88 Compensation should generally be provided in a form which matches the losses sustained by accident victims. Thus compensation for loss of earning capacity should be paid on a periodic basis and the medical support and other services required by disabled people should be provided as the need arises. In two specific cases, compensation for death and compensation for permanent disability, a lump sum is appropriate.

Administrative Efficiency

5.89 A Statutory Corporation should administer the Scheme efficiently, in the sense of ensuring that excessive resources are not devoted to administration. However, the emphasis should not be exclusively or even primarily on saving costs. The Scheme should ensure, so far as possible, that transport victims receive their full statutory entitlements and that compensation, whether in the form of money or services, is provided without delay. The Scheme should be independent of Government and should emphasise high quality decision-making.

Fair Dispute Resolution

5.90 The Scheme should safeguard the rights of individual claimants by establishing an independent and accessible appeal system for resolving disputes about entitlement to, and levels of, compensation. This system should allow review of decisions on the merits and include provision for appeal to a judicial tribunal.

FOOTNOTES

1. Pearson Report, vol.1, p.8.

2. See eg. Motor Traffic (Road Safety) Amendment Act, 1982 which implemented the STAYSAFE proposals on Random Breath Testing.

3. See eg. the 1984 campaign by the *Daily Telegraph* entitled "Declare War on 974", and the continuing campaign in the Magazine of the National Road and Motorists' Association, *Open Road.*

4. As evidenced by the establishment of the Joint Standing Committee on Road Safety by the New South Wales Parliament on 30 March 1980.

5. See R Posner, *Economic Analysis of Law* (2nd ed. 1977), pp.153-157; E M Landes, "Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of the Effects of No-Fault Accidents" (1982) 25 *Journal of Law and Economics* 49. There are two major difficulties in constructing studies. One is that no-fault schemes take various forms, with American schemes in particular being very different from the proposals in this Report. A second difficulty is to isolate the compensation system from other variables.

6. See eg. Motor Traffic Act 1909, ss.4, 4A, 4B and 4E, Crimes Act 1900, ss.24, 52A, 53 and 54.

7. See recommendations found in Report of Joint Standing Committee on Road Safety, *Alcohol, Other Drugs and Road Safety* (First Report, 1982), paras.7.5, 7.6. The provisions governing random breath testing came into force and effect as from 17th December 1982: Motor Traffic (Road Safety) Amendment Act,1982, schedule 5.

8. See eg. Submission S39.

9. JUSTICE (British Section of the International Commission of jurists), *No Fault on the Roads* (1974). para.102.

10. Assessment of permanent incapacity is an exception to this principle, but is designed to minimise the anti-rehabilitative effects of repeated assessments of those sustaining long-term incapacity (see paras. 8.52-8.60).

11. Senate Standing Committee on Constitutional and Legal Affairs, *The Clauses of the National Compensation Bill 1974* (1975), appendix C; F Brennan, QC, A Gleeson, QC, and R McGarvie, QC, were all of the opinion that such a step would be outside the constitutional powers of the Commonwealth Parliament.

12. See eg. Submission W28, p.2; W48, pp.14-15.

13. M R Chesterma, *Accident Compensation-Proposals to Modify the Common Law* (New South Wales Law Reform Commission-CP 2, 1983), para.2.1.9. Illustrations are discounting heavily for contingencies or allowing insufficiently for the effects of inflation.

14. Submission S43, p.12. See also Submission S32, p.20.

15. That a choice of this kind is not fanciful is demonstrated by recent events in New South Wales concerning the discount rate in common law negligence actions involving motor vehicles (see para.2.32).

16. Australian Woodhouse Report, vol.1, para.255.

17. R. Gaskins, “Tort Reform in the Welfare State: The New Zealand Accident Compensation Act” (1980) 18 *Osgoode Hall Law Journal* 238, at pp.242-243.

18. Submission W73; Cf. Working Paper, paras.5.2-5.8.

19. Obviously any system has to address the problem of compensation in respect of death. A reference to an injured person includes (unless the context suggests otherwise) the surviving members of the family of a person who has been killed.

20. T H Kewley, *Social Security in Australia 1900-72* (2nd ed. 1973), part IV.

21. Theoretically the Workers’ Compensation Act, 1926, retains an earnings-related base for long-term incapacity. The Act provides weekly compensation to a worker incapacitated for more than six months at a rate not exceeding 90 per cent of his or her average weekly earnings, as defined, subject to a relatively low maximum, currently $139.90: s.9(l)(a). In practice most workers receive the maximum, with additional allowances for dependents.

22. See eg. H Luntz, “The Benefits Payable Under a Statutory Scheme”, paper delivered at the Seminar entitled “Accident Compensation: The Prospects for Reform” (Sydney, August 1983), p. 14. Professor Luntz also proposed payment of earnings-related benefits for a limited period. See also Submission W31, p.2.

23. Submission S70, p.3.

24. Submission S52. p.3. See also Submissions S70, p.3-1, W13, passim; W49, p.2: W1, p.l1 and W31, p.1.

25. For a more detailed description of the English industrial injuries system. see P S Atiyah, *Accidents, Compensation and the Law* (3rd ed. 1980). ch.15. See also A I Ogus and E M Barendt, *The Law of Social Security* (1978), ch-8.

26. Social Security Act 1947 (Cth.), ss.24, 28.

27. Australian Woodhouse Report, vol.1, paras.397-401. Cf. National Rehabilitation and Compensation Bill 1977 (Cth.), ss.33-36; G.W.R. Palmer, *Compensation for Incapacity* (1979), p.232.

28. *Id*., G.W.R. Palmer, p.222.

29. Australian Woodhouse Report, vol.1, para.391.

30. H. Luntz, *Compensation and Rehabilitation* (1975), p.82. The submission of the Compensation Reform Action Group, Submission S62, p.2, echoed this criticism.

31. We note that several submissions supported a disability model, at least in conjunction with other approaches. For example, the Women's Co-ordination Unit suggested that the commission should explore further a needs or disability-based scheme and that some combination of these might be appropriate: Submission W1, p.8ff.

32. See para.2.39.

33. See paras.4.28-4.29, 4.39 and 4.46.

34. See eg. A I Ogus and E M Barendt, note 25 above, pp.26-30, 136, 163 and 303.

35. See P S Atiyah, note 25 above, p.372.

36. Australian Woodhouse Report, vol.1, paras.257, 365: New Zealand Woodhouse Report, paras.261-267.

37. Australian Woodhouse Report, vol.1, para.257.

38. *Id*., para.249.

39. Submission W28, p.2. See also Submission W48, pp.14-15.

40. See Submission W60, p.6. See also Submissions W52. p.14: W2, p.3; S13, p.2; W23 pp.6-7; W34, p.1; W38; and W64. As to earlier Submissions, see generally Submissions S30, p.6; S32, p.20; and S34, p.29.

41. See H. Luntz, note 22 above, p.12. See also P S Atiyah, note 25 above. pp.535-537.

42. Some potential beneficiaries, such as pedestrians and passengers who are not necessarily low income earners) pay no contributions. Some submissions contended that higher income earners were disproportionately unlikely to sustain incapacity in transport accidents, but none offered evidence to support the assertion.

43. See P S Atiyah. note 25 above. p.200.

44. See Working Paper, para.7.2 ff.

45. Submission W31, p.1.

40. The recommendations concerning compensation on death include aspects of the restitution model, but only in respect of a limited class of family members and for a limited period: see para.5.62.

47. This means that there should be a maximum imposed on the weekly earning capacity by reference to which compensation should be assessed. It does not involve the imposition of a limit on the total paid for loss of earning capacity over the period of incapacity.

48. New Zealand Woodhouse Report, para.291.

49. Health Insurance Act 1973 (Cth.), s.23 A: National Health Act 1951 (Cth.), ss.9A.87.

50. The Program of Aids for Disabled People was introduced under the National Health Act 1953 (Cth.), s.9A.

51. Commonwealth Employment Service Act 1978 (Cth.).

52. Social Security Act 1947 (Cth.), part VIII.

53. Workers' Compensation Commission of New South Wales. *Report on the Inquiry into the Feasibility of Establishing a System for the Rehabilitation of Injured Workers in New South Wales* (1970), para.6(15).

54. See A I Ogus and E M Barendt, note 25 above. p.33.

55. *Ibid.*

56. Submission W28, p.16.

6. The Choice: Pure No-Fault or a Dual Scheme

I. INTRODUCTION

A. The Common Law

6.1 Chapter 2 described the common law negligence action which, as modified by statute, provides the basis for compensation for personal injury arising out of motor vehicle and other transport accidents in New South Wales. Many of the defects of the common law action are almost universally recognized (see Chapter 3). The defects include:

- the failure to provide compensation to at least one-third of all transport accident victims, because they are unable to prove fault;
- the problems associated with paying damages in a lump sum, assessed on a once-and-for-all basis;
- the inevitable delays and administrative costs in determining liability and assessing damages; and
- the adverse effects of the common law negligence action on the rehabilitation of transport accident victims.

The compelling case for reform is supported by the vast majority of submissions (paragraph 3.2) and by proposals made both in Australia and overseas for changes to the common law, or for more radical changes to the compensation system. (Chapter 4). The fundamental question is not whether there should be change, but what form change should take.

6.2 The Working Paper proposed the introduction of a " pure" no-fault transport accidents scheme, which would replace the common law negligence action. While the majority of submissions recognised the need for some token of no-fault compensation a number of them advocated a dual scheme which would provide limited no-fault benefits and preserve the common law, along the lines of the scheme operating in Victoria (paragraphs 4.26 to 4.38). Critics of the Working Paper proposals argued that the common law had certain features which could not be incorporated within the framework of any no-fault scheme which took its place. But it is wrong to assume that those features worthy of retention cannot be preserved in a no-fault scheme. There is no reason why a no-fault scheme cannot incorporate the worthwhile features of the common law, while at the same time overcoming its principal defects.

6.3 Chapter 5 demonstrates how the worthwhile features of the common law can be accommodated within a no-fault scheme. These features include:

- compensation for loss of earning capacity and provision for medical hospital and rehabilitation services, generally based on the principle of restitution;
- compensation for non-economic loss (but only where the loss results in permanent disability);
- individual assessment of compensation under the Scheme according to the circumstances of the claimant including, in cases of long-term incapacity, assessment of compensation for loss of potential for advancement;
- independent judicial determination in cases where entitlement to compensation is disputed; and
- administration of the Scheme independent of the government of the day.

B. Proposals for a Dual Scheme

6.4 The major supporters of a dual scheme were the Law Institute of Victoria and the Law Society of New South Wales. The Law Society of New South Wales presented its views in a recent proposal to the New South Wales Government. [1] The proposal contains a no-fault component (Transport Injury Compensation Scheme), providing

for immediate payment of limited compensation to all transport accident victims irrespective of fault. The main features of this no-fault component are as follows.

Medical and other out-of-pocket expenses payable directly to the service providers for a minimum of five years after the accident (to the extent that these are not met by Medicare).

Compensation for economic loss of a minimum of two years to a maximum of 85 per cent of pre-accident earnings subject to an indexed maximum of All Male Weekly Total Earnings for New South Wales (NSWAWE).

Individual assessment of future economic loss for a minimum of two years (up to the same maximum as above) for injured employed.

On the death of the principal breadwinner, payment of 100 per cent of the aggregate of two years NSWAWE.

On the death of the spouse of the principal breadwinner, a variable amount according to the degree of financial support and contribution of the deceased.

Administration and payment of these basic benefits by an independent statutory authority with an emphasis on speedy, non-adversary settlement of claims.

Right of review and appeal to a judge.

6.5 The Law Society has yet to disclose further details of its proposals and a number of matters are left unclear. For example, some benefits are defined in terms of a minimum period of payment Put this way, it would be possible for the benefits to continue indefinitely. If this is intended the Society's proposals would be closer to those of the Commission, although the Scheme proposed in this Report provides a substantially wider range of benefits. It is more likely, however, that for reasons of cost a maximum would be placed on the period for which no-fault compensation would be paid.

6.6 Because of the imprecision of the Society's proposals, it is not possible to cost the ,suggested dual scheme. However, it is clear that t ' he costs of a dual scheme would require limitations to be placed on no-fault benefits, such as a restriction on the period for which compensation is provided. The result is that the scheme would fall to provide adequately for accident victims who suffer long-term disability or incapacity and who cannot prove fault. This is the case with the Victorian scheme on which the Law Society's proposals are based. Proponents of dual schemes in Australia almost invariably assume that restrictions on cost should be borne by the no-fault component, rather than by attempting to minimise the costs of the common law negligence action.

6.7 The dual scheme proposed by the Law Society is an adaptation of the scheme currently operating in Victoria. From the outset of the reference the Victorian scheme has been regarded as an important option, warranting careful investigation. Before the release of the Working Paper, a detailed research study of the history and operation of the scheme was commissioned. [2] In addition, the consulting actuary provided a costing of the present Victorian scheme adapted to New South Wales. [3] On a number of occasions members of the Commission have visited Victoria in order to obtain first-hand knowledge of the operation of the scheme. [4] Most recently, with the cooperation of the Victorian Motor Accidents Board, an examination of the Board's claims statistics over a four-year period was undertaken. [5]

6.8 The Victorian scheme provides the best available basis for comparison with the proposals in this Report. However, whatever model is adopted for the purpose of comparison there is a danger that it will become a "moving target". This is illustrated by the changes to the no-fault component of the dual scheme in Victoria suggested recently by the Law Institute of Victoria. These had been referred to earlier (paragraph 4.38) but the more important include:

extension of the scheme to cover public transport accidents as well as motor vehicle accidents;

an increase in the maximum payment for loss of earning capacity and for the death of a spouse from $20,800 (after tax) to $28,900 (after tax);

a provision enabling an injured person who is not entitled to common law damages to apply to the Motor Accidents Tribunal for compensation for loss of earning capacity in excess of the statutory maximum for a period of up to five years; and

a provision enabling a seriously injured person who is not entitled to common law damages to apply to the Motor Accidents Tribunal for payment of medical, hospital and related expenses, beyond the present maximum of two years. [6]

The Law Institute has offered no costing of these proposals, simply asserting that the overall cost "is unlikely to be substantial". [7]

6.9 Changes have also been proposed to the common law component of a dual scheme. For example, the Law Society of New South Wales has suggested, in addition to the introduction of a limited no-fault scheme, the following changes to common law actions.

In appropriate cases the court should have the power to order continuing payments of medical and similar expenses, as an alternative to having such future expenses paid in the form of a single lump sum.

The court should have the power in appropriate cases of serious injury, such as quadriplegia, to award periodic payments in respect of economic loss, rather than single lump sum payments.

Court delays and the costs of litigation should be reduced by expansion of the new system of arbitration of civil claims.

Current pre-trial procedures should be extended to further reduce delays in the courts. [8]

Similarly, the Law Institute of Victoria suggested that in a common law negligence action the court should have power to order periodic payments where "the plaintiff is destined to remain institutionalised or in hostel-type accommodation". [9] It is not clear whether the professional bodies contemplate that the court's power to order periodic payments should be capable of exercise over the objections of the plaintiff. Both the Law Society and the Law Institute contemplate that entitlement to "full compensation" would still depend on proof of fault. Fault and substantial lump sums would be available only in common law actions (subject to the power of the court to award periodic payments).

6.10 If the Victorian dual model were modified in the way suggested by the Law Institute and if the common law negligence action were also modified to reduce substantially reliance on lump sum compensation the differences between a dual scheme and a pure no-fault system would diminish. For example, expanded no-fault benefits indicate acceptance of the general principle that compensation for economic losses should not generally depend on fault Indeed it would only be the most seriously incapacitated who would be denied substantial compensation for their economic losses, since the less seriously incapacitated would come within the limits imposed by the no-fault component of the dual scheme. Similarly, if periodic compensation became the rule in substantial common law claims, this would indicate more general acceptance of the principle that compensation should not be paid in the form of a lump sum assessed on a once-and-for-all basis. However, even if these developments occurred there would be important differences between a pure no-fault scheme and a dual scheme. In our view the former is to be preferred.

6.11 The reasons for this preference are closely related to the objectives of the compensation system discussed in Chapter 5, although they take into account the practical constraint that the resources available for compensation are not unlimited. The major reasons are that the no-fault scheme:

removes distinction between transport accident victims who can and cannot prove fault, ensuring the objective of comprehensive entitlement for all people injured in transport accidents;

provides restitution for economic loss subject to limited exceptions justifiable on policy grounds, and is especially suitable for meeting the needs of seriously disabled people on a long-term basis;

permits individual assessment of loss;

provides compensation in a form which meets the losses suffered by injured people and which provides maximum security;

permits claimants to obtain independent judicial review of decisions affecting their compensation entitlement;

provides compensation without delay;

actively promotes rehabilitation; and

is more likely to control costs than a dual scheme.

The following section explains these advantages in more detail. In demonstrating the advantages of a pure no-fault scheme over a dual scheme, we have not overlooked the fact that a dual scheme is capable of ameliorating some obvious deficiencies in a system which relies exclusively on the common law, such as the failure to provide any compensation to those who cannot prove fault. At the same time, if there is to be reform, it should address all of the fundamental defects of the existing system, some of which cannot be properly taken care of in an alternative in which the common law remains a major and separate component.

II. A COMPARISON: NO-FAULT AND A DUAL SCHEME

A. Abolition of Fault as a Criterion for Compensation

6.12 Some proponents of a dual scheme justify their support for retention of the common law on philosophical grounds. For the reasons discussed earlier, they argue that it is desirable to maintain a distinction, for compensation purposes, between people who can and cannot prove fault. Others support the fault principle on more pragmatic grounds. These commentators do not, in theory, oppose the provision of compensation assessed on a common law basis to all victims of transport accidents, but they recognise that financial constraints make this impracticable. Because resources are limited they take the view that first priority should be to provide full compensation for injured people who can prove fault. On this view, any remaining funds should be directed towards the provision of limited no-fault benefits.

6.13 Reasons have already been given for rejecting fault as a criterion of compensation. It has been pointed out that the benefits derived from the use of modern transport, together with the inevitability of accidents causing death and serious injury, justify the community's bearing the cost of compensating all transport accident victims (paragraph 5.19). The argument receives further support from the practical difficulties of reliably allocating fault in the circumstances of accidents between fast-moving vehicles; and the high administrative and legal costs involved in linking compensation to proof of fault (see Chapter 3). A no-fault scheme abandons the reliance on such an unsatisfactory criterion. By contrast, retention of the fault principle as part of the dual scheme means that transport accident victims suffering similar disability and incapacity receive differing compensation. Among the most serious cases the differences are very substantial indeed. This is unjust and inefficient.

B. Full Compensation

6.14 No compensation system of which we are aware attempts to provide "full" compensation to all accident victims for both economic and non-economic losses. Cost constraints inevitably require limitations to be imposed on benefits. The question is where those limitations should be imposed.

1. The No-Fault Scheme

6.15 In Chapter 5 it was foreshadowed that compensation for economic loss under the Scheme should be based on the restitution model. The two major qualifications to the restitution principle as applied to economic loss sustained by injured accident victims are:

the ceiling on earnings by reference to which compensation is to be assessed (paragraphs 8.25-8.34); [10] and

the absence of compensation for the first week of incapacity (paragraphs 8.41-8.44).

The first of these proceeds from a deliberate policy choice, based on considerations of equity rather than cost factors. Moreover, the ceiling affects only a very small proportion of incapacitated transport accident victims (paragraph 8.30) and could be raised without substantial additional cost to the Scheme. The second is justified primarily by the need to curtail costs, but is of relatively minor significance to a person suffering continuing incapacity, provided that compensation for loss of earning capacity beyond the first week is paid promptly.

6.16 A major departure from the principle of full compensation, as understood at common law, is that the no-fault scheme compensates for non-economic loss only in the case of permanent disability. The absence of compensation for non-permanent pain and suffering means that some accident victims will receive less compensation than they would have received at common law had they been able to prove fault-Again, this is a deliberate policy choice, the justification for which is fully argued in Chapter 11. One major advantage of limiting compensation for non-economic loss to permanent disability is that substantial resources can be freed in order to extend benefits to a wider class of accident victims and to provide more generously for the most severely disabled and incapacitated. Proposals to restrict damages for non-economic loss are not unique to no-fault schemes, but have been made in relation to the common law itself. By contrast proponents of a dual scheme argue that persons sustaining relatively minor injuries who can prove fault, should continue to receive compensation for pain and suffering, while no-fault compensation for the long-term disabled should continue to be restricted.

6.17 The removal of compensation for short-term non-economic loss permits the Scheme at reasonable overall cost, to provide a wide range of continuing benefits to seriously disabled and incapacitated people. These benefits include periodic compensation for loss of earning capacity; compensation for permanent disability, necessary medical, hospital and rehabilitation services; support services meeting needs for attendant care and household assistance; aids and appliances; modifications to a home and vehicle; and mobility allowances. It is our view that these benefits compare more than favourably with the “full” compensation, in the form of a lump sum once-and-for-all damages award, available to a seriously disabled and incapacitated person able to prove fault.

2. The Dual Model

6.18 The common law negligence action fails to compensate accident victims who cannot prove fault and provides less than full compensation to those whose damages are reduced by reason of contributory negligence. Moreover, in practice the commitment of the common law to the restitution principle is often not realised because claims are settled for less than their theoretical full value and because compensation, assessed once-and-for-all in the form of a lump sum, proves inadequate in cases of long-term disability and incapacity. Proponents of a dual scheme argue that no-fault benefits provided under, say, the Victorian scheme, are sufficient, in combination with the common law, to provide full compensation in all but a small proportion of cases. They suggest that improved no fault benefits, along the lines discussed earlier, would decrease further the proportion of injured people who do not receive full compensation for their economic losses because these losses exceed the maximum for which no-fault benefits are available.

6.19 It is not clear how many motor vehicle accident victims sustain economic losses, particularly, loss of earning capacity, beyond the limits of the no-fault component of the Victorian scheme. It has been suggested that the number of people who have no common law rights and who recover the maximum no-fault compensation for loss of earning capacity (currently $20,800) is less than 100 in any given year. [12] The implication is that the dual scheme covers the economic losses of all but a very few accident victims. Table 6.1 is based on figures supplied by the Victorian Motor Accidents Board and provides information on no-fault compensation for loss of earning capacity under the Victorian scheme.

Table 6.1: Motor Accident Board: Loss of Earning Capacity Claims-Numbers and Percentages

Victoria 1979-1982

Year	1978-79	1979-80	1980-81	1981-82
Loss of earning capacity claims of $20,000 or more 1 (Percentage of loss of earning	272 (5.8)	272 (4.4)	300 (3.5)	267 (3.0)

capacity claims)				
Loss of earning capacity claims (Percentage of total accepted claims)	4,707 (14.7)	6,125 (17.7)	8,597 (20.8)	8,976 (20.2)
TOTAL ACCEPTED CLAIMS 2	**32,004**	**34,534**	**41,294**	**44,455**

1. $20,800 is the maximum payable under the Victorian no-fault scheme for loss of earning capacity. The numbers refer to claims recorded by 4 February 1984 in non-fatal cases.

2. Total accepted claims covers all non-fatal compensation claims accepted by the Board, regardless of the amount of the claim.

Source: Motor Accidents Board of Victoria

6.20 On the assumption that approximately one-third of motor vehicle accident victims are unable to prove fault, Table 6.1 suggests that a relatively small number of those victims suffer a loss of earning capacity over $20,800, and have no common law claim. [13] Nonetheless, the numbers are significant and they are precisely the people suffering the severest disabilities and the greatest losses. Moreover, the figures in the Table may underestimate the numbers of seriously disabled transport accident victims substantially under compensated by the Victorian dual scheme, for the following reasons.

> First, some accident victims may not claim or receive substantial compensation for loss of earning capacity from the Motor Accidents Board, although they would have a claim at common law (if fault could be proved). This is most likely to be the case with victims who were not earners at the time of the accident. [14]
>
> Secondly, some claims would be settled before payments by the Motor Accidents Board had reached the limit of $20,800 and thus would not be recorded in the Table as having resulted in the maximum payment Where these cases are settled at “discount”, for example because of a dispute as to liability or alleged contributory negligence, the plaintiff would be undercompensated.
>
> Thirdly, some cases in which maximum no-fault benefits had been paid would be undercompensated, not because the plaintiff had no common law claim, but because the common law claim is reduced by contributory negligence or settled at a discount.

In addition it is necessary to take account of the tendency of lump sum awards to prove inadequate in cases of long-term incapacity and the limited range of benefits (including the absence of any form of compensation for non-economic loss) in the no-fault component of the Victorian dual scheme.

6.21 Thus the dual scheme falls short of its objective of full compensation in a number of respects. Unlike the pure no-fault scheme the shortcomings adversely affect the most seriously disabled, rather than those with short-term injuries and incapacity.

C. Individual Assessment

6.22 Any scheme which adopts restitution as a major objective must develop methods for assessing the loss suffered by individual claimants. At common law, in the small proportion of cases which are determined by verdict, the plaintiff’s damages are assessed on the basis of his or her circumstances by a court or judicial officer. However, in the vast majority of the cases which are settled between the plaintiff and the insurer, the damages received by the plaintiff reflect the vagaries of the bargaining process, rather than any independent individual assessment by a court. Even where the plaintiff receives a verdict, the defects of the once-and-for-all system of assessing damages in the form of a lump sum often mean that the “Individual assessment” later proves to be inaccurate. Indeed, there are inherent limitations on the process of the individual assessment of losses where the decision-maker is required to predict future events, such as the likely rate of deterioration of a condition, but cannot make adjustments if the prediction turns out to be inaccurate.

6.23 It is often contended that a no-fault scheme does not offer an adequate opportunity for individual assessment of the losses sustained by accident victims. It is, of course, true that the desirability of an individual assessment of losses must be balanced against the need to minimise expenditure on administration and to provide compensation speedily. Nonetheless, a no-fault scheme is quite capable of assessing compensation by reference to the individual circumstances of the injured person, and indeed this must be done to achieve the goal of restitution. The Scheme proposed in this Report provides for individual assessment in relation to such matters as:

- the loss of earning capacity of earners, including power to depart from the standard of pre-accident earnings as the measure of compensation in appropriate cases;
- the loss of potential for advancement of accident victims sustaining long-term incapacity;
- the need for support services and other benefits available to disabled people including modifications to homes and cars, and the provision of aids and appliances; and
- the assessment of degree of permanent disability suffered by an injured person, for the purpose of determining compensation for non-economic loss.

Because those assessments are not made on a once-and-for-all basis, compensation is more likely than common law damages to meet the actual losses suffered by seriously injured people suffering continuing incapacity and/or disability.

6.24 The recommendation made later in this Report for compensation at standard rates to be paid to wholly incapacitated non-earners does not constitute a departure from the principle of individual assessment (paragraph 7.89). The standard compensation is designed to recognise the loss of opportunity to undertake employment, regardless of whether it can be proved that this opportunity would have been utilised. In this respect the Scheme constitutes a considerable advance on the approach of the common law. Moreover, non-earners suffering long-term incapacity have the opportunity under the Scheme to claim compensation for loss of potential for advancement.

D. Form of Compensation

6.25 It is fundamental to a no-fault scheme that compensation should be provided in a form which matches the type of loss and which is best suited to the needs and circumstances of individual claimants. Thus the proposed Scheme

- provides periodic compensation for loss of earning capacity, matching the form in which earnings would have been received had the accident not occurred;
- provides hospital, medical and related services as the need arises preferably through the general health care system or pays expenses as they are incurred;
- provides rehabilitation services to disabled people; and
- makes available a range of services, such as support services for severely disabled people and replacement household services, to meet the immediate and continuing needs of accident victims and their families.

6.26 Under dual schemes, people suffering long-term disability and incapacity must rely on common law damages when no-fault benefits are exhausted. The frequent failure of the lump sum to provide long-term secure income maintenance is examined in Chapter 3, and it is unnecessary to repeat the criticisms of compensation in the form of a lump sum assessed on a once-and-for-all basis. These defects are increasingly being acknowledged by proponents of dual schemes. Both the Law Institute of Victoria and the Law Society of New South Wales for example now recognise the undesirability of once-and-for-all assessment in cases involving long-term disability, and suggest that when such an injured person can prove fault, the court should have power to order periodic payments of medical, hospital and related expenses. [15] While these suggestions have not been developed in detail, they give some support to the approach of a no-fault scheme providing period payments instead of a once-and-for-all lump sum.

6.27 Further support for this approach has begun to emerge in practice through structured settlements, although in New South Wales these have taken a form different from their North American counterparts (paragraph 4.15). A settlement which, for example, provides for payment of all future expenses reasonably attributable to the accident [16] is not very different in concept from benefits available under the Scheme. If implemented on a regular basis, settlements of this kind would require an administrative and decision making structure to supervise the provision of periodic compensation and to resolve disputes. [17] One function of a no-fault scheme is to provide precisely such a structure to deal with a large volume of cases.

6.28 The Scheme proposed in this Report has another advantage. Generally, supporters of a dual scheme contemplate only monetary compensation. For example, the Victorian scheme provides compensation of up to $2,000 for household help and child care. The Law Institute of Victoria has suggested that the Motor Accidents Tribunal should have power to increase this amount, apparently without being bound by any maximum. [18] But payment of money for such ,services is of little assistance if services are not freely available, or are only available at excessive expense in the private market By contrast, the Scheme recognises that money compensation alone may not meet the accident-related needs of the injured person and contemplates rehabilitation, household, and support services being made available in kind.

E. Independent Judicial Review

6.29 Chapter 3 referred to the argument that the common law gives injured people the opportunity to have an independent and impartial judge, rather than an administrative body, to determine liability and assess compensation. As explained in Chapter 5 proponents of a dual scheme often express concern that a scheme replacing the common law would create a bureaucracy, which could not be effectively challenged or subjected to public scrutiny, and which would be more vulnerable than the courts to political control. [19] This position encounters a difficulty since the no-fault component of a dual scheme presumably suffers from the defects with which the proponents are concerned.

6.30 Clearly the Scheme should not confer unfettered discretion on the Corporation responsible for administering it and that the Corporation should be subjected to close public scrutiny. Moreover, claimants should have the right to appeal to an independent judicial tribunal with power to substitute its own judgment on the merits of the claim. Chapter 16 explains in detail the appeal system proposed, which is based on the model operating for administrative appeals under Commonwealth law. The point is that the right to have a claim determined by an independent and impartial judge can be accommodated within a no-fault scheme, although decision-making processes will differ from those used in common law claims and, in particular, will place much less emphasis on adversary procedures.

6.31 Under the Scheme, it would not be possible for the Government of the day to give directions either to the Accident Compensation Corporation or to the tribunals deciding appeals. Each would be independent. It would be possible for the government to “interfere” by legislating to reduce benefits. It is inherent in a democracy that the Government should have this power and no compensation system, including the common law, is immune from it (paragraph 3.95).

F. Delays

6.32 The delays inherent in the common law system were described in Chapter 3. Such delays often cause extreme hardship and anxiety (paragraphs 3.80-3.83) and are strongly anti-rehabilitative(paragraph 3.74). By providing for immediate payment of no-fault benefits, a dual scheme alleviates the hardship and anxiety occasioned by delay, but does not overcome the problem.

> No-fault benefits, especially for loss of earning capacity, may cut out under a dual scheme well before the common law claim has been resolved, whether or not that claim is ultimately successful. [20] This is most likely to be the case for seriously injured accident victims, who may need to wait for a considerable period until the injury stabilises.
>
> The no-fault component of a dual scheme does not, of itself, reduce the time required to resolve the common law claim. Thus the anxiety associated with delay in finalising the claim is not eliminated.

G. Rehabilitation

6.33 A dual scheme has an advantage over the common law because, at least for a period, accident-related losses and expenses are met. Dual schemes may also make some provision for rehabilitation. For example, the Victorian Motor Accidents Board is playing an increasingly active role in this area. [21] Compensation for loss of earning capacity and provision of medical and rehabilitation services may ameliorate some of the more immediate anti-rehabilitative effects of the delay and costs experienced under the common law. However, the retention of once-and-for-all assessment of damages at common law, combined with the limitations on no-fault benefits, means that most of the anti-rehabilitative effects of the common law remain, particularly in the case of the seriously or long-term disabled. The incentive to exaggerate or prolong disability in order to maximise the common law verdict is likely to come in direct conflict with rehabilitation efforts under the no-fault component of the scheme. This is clearly the major deficiency of a dual scheme from the point of view of rehabilitation.

6.34 There has been continuing debate on the rehabilitative effects of once-and-for-all lump sums compared with periodic payments which can be re-assessed from time to time. Supporters of the common law assert the advantages of a once-and-for-all assessment which gives the injured victim “freedom, dignity and independence”. In contrast, periodic payments are attacked as anti-rehabilitative.

> [P]eriodic payments do not make the disabled “self-reliant”, they make them dependent and they lose all motivation to improve their status. [22]

This is seen as likely where periodic payments are linked with the continuing reassessment

> [P]eriodic payments do not allow of any closure, but rather continue the whole accident process indefinitely, reinforcing and maintaining the individual in the sick role that they have to maintain to ensure their income. [23]

6.35 The argument in favour of lump sums is weakened to the extent that proponents of a dual scheme are prepared to accept the principle of periodic compensation in cases of serious disability and incapacity. Moreover periodic compensation can be combined with finality of decision-making through the concept of assessment of permanent incapacity. This concept, the adoption of which is recommended in Chapter 8, allows the incapacitated person to apply for compensation for loss of earning capacity to be assessed permanently thus avoiding further recourse to the Scheme. The assessment can be reopened if the incapacitated person’s condition deteriorates, but not if he or she resumes employment or increases earnings. Such an assessment creates a risk that the claimant ultimately will be “overcompensated” for the incapacity, but this has to be balanced against the possible anti-rehabilitative effects of periodic reassessment of incapacity.

6.36 A system of periodic compensation cannot be considered in isolation from other features of the Scheme. The Corporation is under a duty to ensure that the victim receives effective rehabilitation services promptly. Compensation is to be maintained at a level which preserves incentives to return to work, while those returning to work will be compensated for a greater proportion of the loss sustained (paragraph 8.24). Incentives are also provided to prospective employers to accept partially incapacitated accident victims in employment following rehabilitation. These provisions, along with support services and compensation for the non-optional costs of disability, are designed to ensure financial security and to encourage rehabilitation both in relation to work and independent living. In short, periodic compensation creates novel opportunities for integration of the compensation and rehabilitation systems.

H. Costs

1. Administrative Expenses

6.37 Chapter 3 identified the heavy costs associated with common law negligence actions including the significant proportion of judicial time devoted to common law negligence claims and the high legal and administrative expenses incurred in processing claims. Proponents of the common law usually do not deny that such costs exist, but argue that they can be justified as a proper price to pay for the opportunity to litigate a compensation claim before a judge. [24] The difficulty with this assertion is not that the right of claimants to independent judicial review should be abrogated or limited. The difficulty is that much of the time of lawyers,

insurers, judges and witnesses is spent considering or resolving questions of fault, whether as a criterion of liability or in relation to a claim of contributory negligence.

Additional time is required to assess damages on the basis of evidence (or speculation) as to likely future events, a process which can be minimised, if not avoided, in a scheme providing periodic compensation. Moreover, the adversary process often puts in issue matters that can be resolved quite simply in a system designed to ensure that a claimant receives his or her statutory entitlement to compensation.

6.38 Obviously a no-fault scheme will not eradicate all legal and administrative expenses. A system of appeals must generate costs. Nevertheless, the removal of disputes about fault, the creation of a non-adversary system within the Corporation for determining entitlement to compensation and the provision of compensation on a periodic basis, is likely to lead to significant overall savings.

6.39 The suggestion that administrative costs will be comparatively low tends to be borne out by the experience in other jurisdictions. It should be acknowledged that no identical scheme to the one proposed has been introduced elsewhere and the concept of administrative expenses does not embrace all expenses associated with the Scheme, such as the legal cost of unsuccessful claimants or the cost of the judicial tribunals hearing appeals from decisions of the Corporation. [25] Nonetheless, experience in New Zealand under the no-fault component of the Victorian scheme is useful. For the year ended 31 March 1983, the proportion of administrative costs to benefits paid under the New Zealand scheme was 10.6 per cent. [26] The administrative costs included rehabilitation and safety promotion, neither of which are undertaken by the common law, as well as claims' handling and revenue collection costs. If rehabilitation and safety costs are excluded, administrative expenses as a proportion of claims paid falls to 7.1 per cent, down from 12.5 per cent in 1980-81 and 9.4 per cent in 1981-82. For the year ended 30 June 1982, the administrative costs were 9.1 per cent of benefits paid under the no-fault component of the Victorian scheme; [27] this figure decreased to 8.7 per cent for the year ended 30 June 1983. Administrative expenses of this order compare favourably with the common law where legal and investigative costs are likely to amount to a higher percentage of the compensation. [28]

6.40 One question is whether a dual scheme will produce substantial savings in the cost of common law claims because victims suffering minor injuries are content with their no-fault benefits. It has been suggested, on the basis of returns furnished to the Victorian Government Statistician and Actuary covering incidents reported to authorised insurers, that many trivial claims have been eliminated. [29] Caution must be exercised before relying on these figures since they relate to incidents reported to licensed insurers, whether or not any common law action is commenced. Such incidents may be reported by the prospective plaintiff or defendant, or by the Motor Accidents Board, and are not necessarily an accurate record of the number of common law claims commenced or concluded.

6.41 Nonetheless, it is fair to conclude that there has been some reduction in the number of smaller common law claims in the Victorian dual scheme. Even so, the numbers of such claims are substantial and the vast majority are for relatively small amounts, a major component of which is likely to be damages for pain and suffering. Table 6.2 shows the estimated number of files finalised over a five year period. [30]

Table 6.2: Motor Vehicle Third Party Claims: Finalised Files

Victoria 1979-1983

Year ended 30 June	Number of Finalised Files
1979	9,373
1980	10,819
1981	11,546

1982	11,050
1983	13,479

Source: Victoria State Insurance Office

Information is available on the payments made in the year ended 30 June 1983 in the 7,532 cases in which a common law action was commenced in the Victorian Supreme Court or County Court. This indicates that the amounts recovered are generally comparatively low.

93.2 per cent of awards and settlements in cases are below $50,000;

79 per cent of awards and settlements are below $20,000;

only 2.51 per cent of awards and settlements are above $100,000. [31]

6.42 These figures suggest that a significant number of Victorian motor vehicle accident victims suffering relatively minor injuries are not satisfied with the limited no-fault compensation. Accordingly, they commence common law proceedings to recover additional damages, particularly compensation for non-economic loss which is not available on a no-fault basis. The conclusion is that, while the common law remains a component of the dual scheme the heavy costs incidental to its operation are unlikely to be reduced substantially.

2. Overall Costs

6.43 The introduction of a dual scheme in Victoria has not contained the costs of compensating motor vehicle accident victims in that State. [32] In its most recent report, the Victorian Third Party Insurance Premium Committee recommended substantial increases in premiums in order to keep pace with increasing claim costs. [33] The consulting actuary has estimated that for the Victorian dual scheme to operate in that State on a fully funded basis, an average premium of $246 per vehicle would be required for the accident year ending 30 June 1985. [34] This would require a premium increase of about 82 per cent from the average premium per vehicle for the year ending 30 June 1984 of $141.

6.44 The Victorian scheme is not unique in encountering cost difficulties. However there is a particular reason why a dual scheme could be expected to experience escalating claims. The availability of no-fault benefits may enable some accident victims, who would previously have settled for a small sum in order to overcome immediate financial difficulties, to hold out for a longer period and ultimately receive higher common law damages. It is not, of course, suggested that people should be subjected to financial hardship to ensure that they settle their claims cheaply. Rather, it should be recognised that containment of the costs of the common law negligence action in New South Wales occurs, in part, as a result of the financial pressures on accident victims to settle their claims. If a dual scheme were introduced, these pressures would be reduced if not eliminated with consequences for the costs of the common law component of the scheme.

6.45 The consulting actuary has prepared estimates of the cost of adopting the Victorian scheme in New South Wales (that is introducing a limited no-fault scheme with benefits identical to those offered in Victoria as a supplement to the common law). He estimates that as at June 1984, the pay-as-you-go premium needed for such a scheme would be approximately $255 per vehicle per annum. [35] This compares with the pay-as-you-go levy required for the proposed Transport Accidents Compensation Scheme of approximately $177 per vehicle per annum and the pay-as-you-go premium of $255 per vehicle per annum required for the compulsory third party insurance system. The respective figures on a funded basis are $285, $160 and $235. The purpose of this comparison is not to suggest that cost should be the sole consideration. Rather, it is to point out that the dual scheme, which has a number of disadvantages compared with the proposed Scheme, has the further disadvantage of apparently being substantially more expensive.

6.46 SuggestionsthattheUnitedStatesexperienceindicatesthatno-faultschemesarelikely to prove more costly than dual schemes are misleading. [36] Implicit in such suggestions is the assumption that the word “no-fault” or “true no-fault”, when used in the American context, is a description of a scheme based exclusively on no-fault in which

common law rights have been abolished. In fact no such scheme is in operation in any part of the United States. The word “no-fault” is used in that country to describe schemes in which common law rights are restricted by means of a “threshold” which may be monetary or defined according to the type of injury (the so-called “verbal threshold”. [37] But all such schemes are varieties of the dual scheme because of the retention of common law rights above that threshold. The fact that recent cost analyses [38] suggest that such schemes have proved unexpectedly costly is a reflection more on dual schemes, than on pure no-fault schemes in the sense that we have used the term, and bears out the difficulties facing the Victorian scheme.

III. SUMMARY

6.47 This Chapter has compared a no-fault scheme of the kind proposed in this Report with a dual scheme such as that operating in Victoria. There is a good deal of common ground among the proponents of each kind of scheme. Thus the supporters of a dual scheme accept, implicitly or explicitly, that:

> the vast majority of motor vehicle accident victims should receive full or close to full compensation for their economic losses, regardless of their ability to prove fault; and
>
> lump sums are not necessarily the appropriate form of compensation for accident victims, particularly those sustaining severe disability and incapacity.

The no-fault Scheme proposed in this Report applies the principles that:

> there should be an individual assessment of the loss sustained by a claimant and compensation should be calculated on the basis of that assessment; and
>
> claimants should be entitled, if they are dissatisfied with the initial decision to have their claim determined by an independent judicial tribunal, with power to exercise its own judgment on the merits.

6.48 There are several major differences of principle between the proposed Scheme and a dual scheme.

> The Scheme favours the most severely incapacitated ahead of those suffering less serious consequences of accidental injury. It does this by providing generous compensation to all seriously incapacitated accident victims and by eliminating compensation for short-term non-economic loss.
>
> The dual scheme denies substantial compensation for economic loss by reason of inability to prove fault only to *the most seriously incapacitated.* Those sustaining relatively minor economic losses are largely covered by the no-fault component of the scheme, while victims able to prove fault can also recover damages for short-term pain and suffering. In this way the dual scheme favours the less seriously incapacitated over the more seriously incapacitated.
>
> The no-fault scheme rejects lump sum compensation for future economic loss in favour of periodic compensation, including the provision of services in kind where appropriate. The dual scheme relies exclusively on monetary compensation, and retains (subject to proposed qualification of uncertain scope) lump sums for future economic losses for those who can prove fault
>
> The no-fault Scheme provides opportunities for integration of the compensation and rehabilitation systems that are not available to a dual scheme, partly because it continues to rely heavily on assessment of compensation in the form of a once-and-for-all lump sum damages award.
>
> The no-fault Scheme compensates non-earners sustaining long-term incapacity but no comparable provision is made in a dual scheme.

6.49 Ultimately the policy choice between pure no-fault and a dual scheme rests on whether the concept of fault should be used (as it is in a dual scheme) to compensate short-term incapacity far more generously than long-term incapacity. We are strongly of the view that where resources are limited-as they inevitably are-priority should be accorded to compensating the most seriously incapacitated. The concept of fault is a wholly unsatisfactory

basis for compensating the less seriously incapacitated at the expense of those suffering the greatest losses and experiencing the greatest needs.

FOOTNOTES

1. Law Society of New South Wales, “The Society’s No-Fault Transport Injury Compensation Proposals” (1984) 22 *Law Society Journal* 208.

2. R Graycar, Research Paper on Road Accidents Scheme in Victoria (unpublished Commission document 1982).

3. E S Knight and Co, *Cost Estimates for a Victorian No-Fault Motor Accident Compensation Scheme in New South Wales* (Report to New South Wales Law Reform Commission) dated 30 July 1982, p.37ff.

4. These included discussions with the Victorian Motor Accidents Board and State Insurance Office, as well as attendance at and participation in conferences on the Victorian scheme.

5. Statistical surveys by Motor Accidents Board (Victoria), “Statistics of Major Injury Claims Arising From Accidents” and “Statistics of Non-Fatal Claims Arising From Accidents”: unpublished information Supplied by Motor Accidents Board.

6. Law Institute of Victoria, paper on suggested amendments to the Motor Accidents Act 1973 (December 1983), paras.2.2. 2.3 and 2.5.

7. *Id*., para.4.2.

8. Law Society of New South Wales, “Transport Injury Compensation Scheme” (April 1984), paras.3.6.1-3.6.4.

9. See note 6 above, para.3.2.

10. The limitation on compensation for loss of earning capacity to 80 per cent of the loss is not included as a significant qualification to the restitution principle. One reason is that the 80 per cent figure reflects in part the reduced expenses of a person not attached to the workforce, a factor also taken into account by the common law: *Sharman v. Evans* (1977) 138 CLR 563, at p.577, per Gibbs and Stephen JJ. Another is that the proportion of loss compensated will increase as in the case of a person who returns to work part-time: paras.8.18-8.24.

11. See eg. Pearson Report, paras.382-389 where it was recommended that no damages be recoverable for non-economic loss suffered during the first three months after the date of the injury.

12. D A Miles, “Enhancing the Victorian System of Compensation” (1983) 57 *Law Institute Journal* 1359.

13. The Law Institute of Victoria has claimed that the proportion of such victims who have no common law claims is less than one-third: see note 6 above, para.2.26. We are not aware, however, of any statistical evidence to support these claims. Indeed there is some evidence to the contrary. For example, of claims arising out of accidents occurring in 1978-79 where the claimant received maximum compensation from the Motor Accidents Board of Victoria for loss of earning capacity, only 52.2 per cent had resulted in a completed common law claim by 4 February 1984: information supplied by Motor Accidents Board of Victoria and State Insurance Office of Victoria. Of course some common law claims (despite the passage of approximately five years) would still have been pending at that date but it seems unlikely that the proportion of completed common law claims would rise above two-thirds.

14. Since December 1979 compensation under the Victorian no-fault scheme has been available not merely for loss of earnings but for loss of *earning capacity.* Nonetheless only 4 per cent of claimants classified by the Motor Accidents Board of Victoria as “non-earners” received any compensation for loss of earning capacity under the scheme during the year ended 30 June 1982: information supplied by Motor Accidents Board of Victoria. This suggests that some seriously incapacitated non-earners may not be claiming or receiving substantial compensation for loss of earning capacity from the Board.

15. See note 6 above, para.2.5, Submission W28, p.29: see also note 8 above.

16. See *Archer v. Richards,* 28 June 1984, terms of settlement lodged in Supreme Court of New South Wales, Common Law Division; see para.4.15.

17. The terms of settlement allowed for arbitration by a referee, being a specialist medical practitioner, nominated by the President of the New South Wales branch of the Australian Medical Association, *id*., p.5.

18. See note 6 above, paras.2.5.4-2.5.5.

19. Submission W28, p.16. See also paras 5.78-5.81 above.

20. Letter from I M Dunn, dated 28 June 1983, p.9.

21. Motor Accidents Board, *Ninth Annual Report for Year ended 30 June 1982 Victoria* (1983) pp.5-6.

22. Submission W24, p.9.

23. Submission W69, p.2, see also Submission S94, pp.6-7.

24. J L Sher, QC, “The Case for the Retention of Common Law Rights” (1983) 57 *Law Institute Journal* 1356.

25. It is assumed that the cost of the intermediate appeal tribunals called Compensation Review Panels should be borne directly by the Scheme.

26. Accident Compensation Corporation, *Report of the Accident Compensation Corporation for the Year Ended 31 March 1983* (New Zealand 1983), p.16.

27. See note 20 above; see also E S Knight & Co, *Cost Estimates for Motor Vehicle Accident Compensation,* (Report for the New South Wales Law Reform Commission, April 1983), appendix, P2.

28. See paras.3.89-3.94.

29. Motor Accidents Board, Eighth Annual Report for Year Ended 30 June 1981 (Victoria 1982), p.6: Submission W28, p.25, suggesting that the numbers had decreased by 32 per cent.

30. These include files finalised on which no payment was made, that is, the plaintiffs were unsuccessful or abandoned their claims. It does not include claims handled by an insurer other than the State.

31. These figures were provided by the State Insurance Office and do not cover settlements effected by the RACV General Insurance Pty. Ltd. as agent for the State Insurance Office. No similar information is available on those settlements.

32. State Insurance Office, *Annual Report and Balance Sheet* 81182, p.2. See to the same effect, *Annual Report and Balance Sheet* 82183, p.l.

33. *Twenty-Third Annual Report of the Third Party Insurance Premiums Committee for Year Ended 30 June 1983* (Victoria 1984), appendix 1.

34. Letter from J R Cumpston, E S Knight and Co, 14 August 1984.

35. Actuary’s Report, paras.12.1-12.8. The estimates for the Victorian scheme applied in New South Wales assume that the 5 per cent discount rate and other statutory limitations introduced in New South Wales do not apply. The reason is that these limitations do not apply in Victoria.

36. Such suggestions have been made frequently to us in discussions on the Working Paper.

37. A comprehensive survey of schemes operating in all United States-jurisdictions is contained in: Institute for Civil justice, *Automobile Accident Compensation IV-State Rules* (May, 1984). For an earlier account see J O'Connell, "Operation of No-fault Auto Laws: A Survey of the Surveys" (1977) 56 *Nebraska Law Review* 23.

38. J E Johnson, G B Flanigan and J K Weeks, "An Empirical Investigation of the Costs of Adopting No-fault Insurance Systems: 1971-1980" (1983) 2 *Journal of Insurance Regulation* 168: C C Kelly and B L Webb, "No-Fault: A Review of its Cost" (1983) *Journal of Insurance Regulation* 176.

7. Compensation for Loss of Earning Capacity - I

I. INTRODUCTION

7.1 Chapter 5 has discussed the principle of restitution and its application to compensation for loss of earning capacity. It was suggested there, in general terms, that the Transport Accidents Scheme should provide compensation for:

> loss or impairment of earning capacity sustained by persons injured in transport accidents who have an attachment to the workforce (injured earners); and
>
> loss or impairment of earning capacity sustained by persons injured in transport accidents who do not have such workforce attachment (injured non-earners), provided that the loss or impairment is long-term.

This Chapter puts forward general principles which govern the assessment of compensation for earners and non-earners. Chapter 8 discusses the form and payment of compensation the commencement and termination of benefits and assessment of permanent incapacity.

II. EARNERS

A. General Principles

7.2 The Scheme should provide compensation for loss (or impairment) of earning capacity assessed broadly in accordance with the principle of restitution. Accordingly, **we recommend that earners who are incapacitated as the result of a transport accident should receive compensation in respect of their loss (including impairment) of capacity.** The definition of “earner” should include people who have an attachment to the workforce at the time of the accident (paragraphs 7.6-7.11). The definition should also include both employed and self-employed people.

1. The Yardstick

7.3 A basic question is how the loss should be measured. One approach would be to attempt to assess precisely what the incapacitated person would have earned during each week of incapacity had the accident not occurred. The practicalities of administering a scheme make this approach impossible to apply to every claim. In the case of short-term incapacity, pre-accident earnings provide a reasonably reliable (although not necessarily perfect) indicator of what the incapacitated person would have earned but for the accident. [1] Some account should be taken of specific situations in which the standard of pre-accident earnings is likely to cause difficulties, for example when the injured person is engaged in seasonal employment (paragraphs 7.27-7.32). Moreover, people suffering long-term incapacity (that is, lasting for more than 104 weeks) should be entitled to have their potential for advancement specifically considered in the assessment of compensation (paragraph 7.64ff.). Provided this is done, pre-accident earnings constitutes a reasonable standard for the assessment of compensation and minimises claims processing delays and administrative costs. If, for example, the incapacitated claimant is employed, any information provided in a claim form concerning earnings can usually be readily verified by the employer. Accordingly, **we recommend that in general the earning capacity of an earner should be determined by reference to the amount that fairly and reasonably represents his or her normal weekly earnings at the date of the accident.** This approach is generally adopted by no-fault accident compensation schemes operating in Australia, [2] as well as the New Zealand accident compensation scheme. [3]

2. Measurement of Loss

7.4 The loss or impairment of earning capacity sustained by an incapacitated person is measured by the difference between his or her earning capacity at the date of the accident and his or her post-accident earning capacity. An injured person may be partially incapacitated, for example when he or she can physically manage only part-time work instead of full-time work. In these circumstances the loss is normally the difference between the earning capacity at the date of the accident (generally measured by normal weekly earnings) and post

accident earnings. Special difficulties may arise in assessing the loss of earning capacity of a person fit for certain kinds of work but unable to find employment. This issue is discussed in Part III of this Chapter.

3. Definition of Earner

7.5 The Appendix to this Report indicates that the composition of the Australian labour force has altered considerably over the past few decades. The relevant changes include:

an increase in the rate of unemployment particularly among the younger age groups; [4]

an increased duration of unemployment, which is significantly longer for those aged 35 or over; [5]

an increase in the percentage of part-time workers, which is particularly marked in the case of women; [6] and

an increase in the participation of married women in the labour force. [7]

The fact that a person happens to be unemployed at the date of the accident has never been a reliable indication of the economic consequences of injury to that person. This is even more so in recent times. The Scheme must be responsive to patterns of workforce attachment.

7.6 The Scheme should recognise the diversity of employment patterns within the Australian community. Nonetheless, it is appropriate to distinguish between earners and non-earners in compensating for loss or impairment of earning capacity. The basic distinction is between those who have a recent attachment to the workforce and those who do not. The latter should be compensated only in respect of long-term loss of earning capacity, while the former should be compensated for both short-term and long-term incapacity. The definition of earner should not be so broad as to embrace injured people who would have been unlikely, in the short-term, to undertake remunerative work had the accident not occurred. An overly generous definition might also create undesirable opportunities for injured people to claim compensation at levels substantially higher than the earnings they could have expected to derive had the accident not occurred. Yet the approach should be to recognise the emergence of high and apparently endemic unemployment in Australia.

7.7 The Working Paper suggested that the term “earner” should include a person who, although unemployed at the date of the accident was actively seeking work and had been employed during the previous 26 weeks. The Paper proposed that the Corporation should have a discretion to classify as earners people who had been unemployed for a longer period but were still actively seeking employment. [8] People who were not in employment, but had a firm commitment to enter or re-enter the workforce were entitled to be treated as earners. [9] This approach to the definition of earner was more generous than that taken in any of the limited no-fault motor vehicle accident compensation schemes in Australia. None of these schemes make specific and detailed provision for unemployed people, who generally receive no compensation for loss of earning capacity. [10] The Papers approach also compared favourably with that of the New Zealand Accident Compensation Act 1982, which allows people who were earners up to 13 weeks before the accident to be classified as earners for the purpose of assessment of earnings-related compensation. [11] Despite this, a number of submissions contended that the definition was too narrow and in particular did not take sufficient account of the problems associated with high rates of unemployment. For example, the submission of the New South Wales Society of Labor Lawyers commented on the fact that long-term unemployment was a feature of the job market and suggested that the period selected should reflect the average period of unemployment. [12]

7.8 We accept that the Working Papers approach was not sufficiently responsive to the problems posed by continuing high unemployment. The definition suggested could have a harsh impact on people who have been unemployed for lengthy periods, but are actively seeking work at the date of the accident. The definition of earner should include not only people in employment at the time of or shortly before the accident, but those who were in employment for a significant proportion of the time during a period of up to two years before the accident. **We recommend that a person who is incapacitated as the result of a transport accident should be regarded as an earner if he or she was in full-time or part-time employment (whether as an employed or self-employed person)**

(a) at any time during the eight weeks preceding the date of the accident;

(b) over a period or periods totalling at least 13 weeks during the 52 weeks preceding the date of the accident; or

(c) over a period or periods totalling at least 26 weeks during the 104 weeks preceding the date of the accident.

However, a person who had left the workforce permanently at the date of the accident should not be regarded as an earner.

7.9 This recommendation extends both to employed and self-employed people and also covers people who have regular periods of part-time work. For example, a person who works two days per week in the eight weeks before the accident, or for two days per week over a period of at least 13 weeks during the 52 weeks preceding the accident would be regarded as an earner.

7.10 The periods selected in clauses (b) and (c) of the recommendation are designed to allow most people who have endured relatively lengthy periods of unemployment, yet have not left the workforce permanently, to qualify as earners. The periods take into account the average duration of unemployment in recent times, although this will vary as economic conditions change. The choice of 13 weeks in the 52 week period before the accident should cover a substantial majority of people who, although not in employment at the date of the accident, worked within the previous year. In the year ending 1 February 1983, approximately 94 per cent of those who had worked in the past 12 months had done so for 13 weeks or more. [13] In addition, the recommended definition includes those actually working at the time of or shortly before the accident, even if that employment has been relatively short.

7.11 In February 1984 the average duration of unemployment over all age groups was 41 weeks, while the median duration was 19 weeks. [14] An injured person who has been unemployed for the *average* period, and for an additional period of up to 37 weeks, could satisfy the definition of earner contained in clause (c) of the recommended definition if he or she had worked full-time or part-time for the 26 weeks preceding the onset of unemployment. While any cut-off point must be arbitrary to some extent, the periods incorporated in the recommendation are likely to cover the vast majority of people who could be said to have a substantial workforce attachment. To extend the period further would result in the inclusion of people who have not suffered a genuine short-term loss of earning capacity as a result of the transport accident. Moreover, since assessment of loss of earning capacity becomes increasingly difficult the longer the person has been outside the workforce, extension of the period would increase the administrative burden on the Scheme, although this, of itself, is not a decisive consideration.

7.12 The recommendation in paragraph 7.8 does not cover an accident victim who was not in the workforce for the requisite period within two years of the accident, but had made arrangements to enter the workforce at a future date. Examples include the student or school leaver who has accepted a position but not commenced duties at the time of the accident, the homemaker who has been caring for children for some years but has arranged to return to work with a former employer, and the person who has taken steps to establish himself or herself in business or a profession, for example by purchasing stock or leasing office space. It would be unjust if people who had made firm arrangements to enter or re-enter the workforce were not entitled to compensation for loss of earning capacity, simply because the accident occurred before they had actually commenced work. Hence **we recommend that a person incapacitated in a transport accident should be regarded as an earner if, at the date of the accident he or she had made firm arrangements (whether or not contractually enforceable) with a particular employer to undertake employment or to commence business at a particular time and place.**

7.13 Two points should be noted about this recommendation. First the proposed employment may be as an employee or as a self-employed person. Secondly, the recommendation is not limited by requiring a contractual right to take up employment nor by specifying a period within which employment would have commenced had the accident not occurred. In view of the infinite variety of arrangements that can be made to undertake employment, restrictions of this kind could lead to unfair exclusions. Where an injured person argues that he or she should be treated as an earner because of arrangements to enter or re-enter the workforce, it will be necessary for the Corporation to scrutinise the claim with care. If the employment is said to have been arranged to commence at a

distant date, and the alleged arrangements lack precision the Corporation is likely to conclude that the requirements have not been satisfied.

7.14 The definition of earner proposed so far leaves open the possibility that a person might be excluded even though he or she is very likely to have entered the workforce during the period designated as short-term incapacity (lasting for less than 104 weeks). A typical example would be a student nearing the successful completion of a tertiary course with good employment prospects. Provision should be made for such a case when the incapacity continues for at least six months. **We recommend that a person incapacitated in a transport accident should be regarded as an earner if he or she, having been incapacitated for a period of not less than six months, would, in the opinion of the Corporation, have undertaken employment before the expiration of 104 weeks from the date of the accident.**

7.15 If a person is regarded as an earner because of the previous recommendation or because of firm arrangements to enter the workforce at the date of the accident the Corporation should assess that person's earning capacity, for compensation purposes, as from the date he or she would have taken up employment. A recommendation to this effect is made in paragraph 8.46.

B. Assessment of Earning Capacity: Employees

7.16 This section discusses the assessment of earning capacity for injured people who are employed at the date of the accident or within the preceding two years. The assessment of earning capacity for self-employed people is discussed in the next section.

1. Definition of Earnings

7.17 In addition to a regular salary or wage, employees may receive a variety of allowances including

overtime;

shift loadings;

danger money and dirt money;

site allowances; and

entertainment allowances.

Moreover, not all benefits are provided in monetary form. For example, a farm employee or housekeeper may receive board and lodging, while a person employed in a trade or business may enjoy the use of a car fully maintained by his or her employer.

7.18 In Australia non-wage benefits are enjoyed by a large proportion of employees: in 1979 some 4.3 million employees received non-wage benefits associated with their employment. [15] The definition of earnings should generally be wide enough to include benefits, either in cash or in kind, which the injured person received as a consequence of employment On the other hand, a person who is incapacitated for work is not necessarily thereby deprived of all income. For example, investment income and rental income derived by an employee will normally continue despite the incapacity and should be excluded from the definition of earnings. This can be achieved by defining earnings to include that part of the injured person's income which is derived from personal exertion in his or her capacity as employee.

7.19 Some employees receive allowances designed to meet expenses incurred in the course of work, such as travelling and entertainment allowances. Since a person unable to work because of the injury no longer incurs work-related expenses these allowances should be excluded from the definition of earnings. In some cases an allowance may be made partly to cover work-related expenses, and partly to confer (or have the effect of conferring) a fringe benefit on the employee. An example would include a car allowance which covers both work and private transport costs. To the extent that the allowance concerns work-related expenses, it should be excluded from earnings in assessing compensation for loss of earning capacity.

7.20 Two further limitations should be placed on the definition of earnings for the purpose of assessing compensation. First, earnings should include some, but not all non-cash benefits. Such benefits take a wide variety of forms and in some cases their valuation would present great administrative difficulties. An example of benefits of this kind would be the use of a holiday home or other recreational facilities. Perhaps the most common benefits in kind which are of financial value to employees, are board and lodging and the value of a motor vehicle and its running expenses. The Corporation should be able to value the financial advantages derived by employees from these benefits without undue difficulty and their inclusion in the definition of earnings would lead to a more accurate estimate of the loss suffered by incapacitated employees. It is, however, neither necessary nor feasible for the Scheme to attempt to compensate for other benefits in kind. By way of comparison, the National Rehabilitation and Compensation Bill 1977, included the value of board and lodging, but not the value of a motor vehicle. [16]

7.21 Secondly, superannuation contributions which an employer makes on behalf of an employee to a superannuation fund have not been included. While superannuation is a very significant non-wage benefit for many Australian employees, [17] the inclusion of employer contributions in the definition of earnings could lead to serious difficulties and anomalies.

> Superannuation schemes take a wide variety of forms. Not all provide for an employer contribution throughout the employee's period of employment. Even where they do, ascertaining the amount of the employer contribution and apportioning it over a period of incapacity, which could be relatively short, would be extremely difficult and time consuming.
>
> Many superannuation schemes provide for payment to an employee suffering from an incapacity prior to the retirement date. It is later recommended that the payment of benefits under a superannuation scheme should not reduce the entitlement to compensation for loss of earning capacity. Where an employee is incapacitated and becomes entitled to a disability payment under a superannuation scheme, as well as compensation for loss of earning capacity, it is difficult to justify including, as an element in compensation the employer s contribution to superannuation.
>
> Provision of compensation for loss of earning capacity will often enable an employee to maintain membership of the superannuation scheme (or an equivalent arrangement), especially where the incapacity is short-term.

7.22 **We recommend that the earnings of an employee should include income derived from personal exertion in his or her capacity as an employee. This should include allowances provided by the employer to the employee, which are not provided f or the purpose of meeting expenses associated with employment. Earnings should be limited to benefits in the form of monetary payments except for**

> **(a) the value of living accommodation, board and lodging or food provided by the employer without charge or at a reduced charge; and**
>
> **(b) the value of a car (including running expenses) provided by the employer, to the extent that the car is used by the employee for private purposes.**

2. Assessment of Earnings

Normal Weekly Earnings

7.23 Where an injured employee is in regular employment at the date of the accident and his or her earnings are not subject to fluctuation, the assessment of normal weekly earnings presents little difficulty. In this situation the Corporation would normally rely upon the claimants earnings over the week preceding the accident as the basis for assessing loss of earning capacity. In some cases, however, the earnings over the period immediately preceding the accident may not be a reliable indicator of the loss suffered by the injured person. For example, a person may have worked an unusual amount of overtime during that period or may have missed some time at work (and lost pay) for special reasons. In these circumstances average earnings over a previous two month period may provide a more reliable indicator of the injured person's loss than the past week's earnings. Difficulties may also occur where the injured person although within the definition of an earner, has been in the

workforce only for a relatively short period before the accident. Here, too, it may be necessary for the Corporation to examine the injured person's earnings pattern over a longer period for the purposes of determining his or her "normal" weekly earnings.

7.24 Just as it is necessary for the definition of earner to reflect the tendency of people to move in and out of employment, the process of assessing earnings must reflect variations in earning patterns. This involves conferring power on the Corporation to choose the most appropriate of a number of tests as a guide in assessing normal weekly earnings. **We recommend that in calculating the normal weekly earnings of an employee at the date of the accident, the Corporation should have regard to the employee's earnings before that date, his or her work history and other relevant f actors. In particular, the Corporation should take into account one of the following:**

(a) the earnings of the employee for the week preceding the accident;

(b) the average weekly earnings of the employee during the eight weeks preceding the accident;

(c) the average weekly earnings of the employee during the 52 weeks preceding the accident; or

(d) the average weekly earnings of the employee during the 104 weeks preceding the accident.

Of these, the Corporation should take into account the shortest applicable earnings period unless to do so would cause under-or overcompensation.

7.25 Where the Corporation assesses the normal weekly earnings of an injured person by reference to earnings derived during a period some time before the accident, it will be necessary to adjust the amounts to take account of changes in the value of money in the intervening period.

Employment after the Accident

7.26 The recommendation relating to assessment of normal weekly earnings does not apply where the person has been out of the workforce for more than two years prior to the accident, but is deemed to be an earner because he or she has made firm arrangements to commence employment or because he or she has otherwise shown that employment would have been undertaken after the date of the accident. In these cases it is not possible to assess loss of earning capacity by reference to pre-accident earnings. Hence we recommend that **where a person is regarded as an earner because of events which would have occurred after the date of the accident the Corporation should determine an amount that fairly represents that person's earning capacity as from the date he or she would have taken up employment.** Compensation for loss of earning capacity should be paid from the date when employment would have been commenced (paragraph 8.46).

Adjustment to Normal Weekly Earnings

7.27 The effect of the recommendation in paragraph 7.24 is to enable an injured person's normal weekly earnings to be measured by reference to a period which gives the most accurate assessment of his or her loss or impairment of earning capacity. The recommendation assumes that pre-accident earnings should be the measure of earning capacity. However, reliance on pre-accident earnings to assess loss of earning capacity may be clearly inappropriate because of circumstances that are known at the date of the accident. For example, a claimant who is employed at the date may have made arrangements before the accident to begin a new job, or to change from part-time to full-time work. Similarly, a claimant may be able to demonstrate that he or she was entitled to a salary increment, which would have become payable shortly after the accident.

7.28 Conversely, it may be clear at the date of the accident that the claimant's earnings were about to be reduced, or that the claimant would not have had any earnings over the period of incapacity. For example, a seasonal worker may be injured shortly before his or her seasonal employment was to end. If the seasonal worker did not intend to resume employment until the following season, it would be inappropriate to assess compensation by reference to normal weekly earnings at the date of the accident during the whole period of incapacity. Again if it were known at the date of the accident that the injured person intended to change from full-time to part-time employment for a specified period, that ought to be taken into account in assessing

compensation. Similarly, if a person intended to retire in the period following the accident, this circumstance should be taken into account.

7.29 One way of dealing with this problem would be to confer a general discretion upon the Corporation to depart from the normal method of assessing loss of earning capacity. This approach is taken under the New Zealand legislation which enables the Corporation there to determine an amount which “fairly and reasonable” represents the normal average weekly earnings of the injured person when the usual method of assessment does not produce this result. [18] However, in our view, an unlimited discretion of this-kind would increase the opportunity for disputes and create an unnecessary administrative burden. The legislation should permit departures from the usual approach to assessment only in defined circumstances of the kind referred to earlier.

7.30 **We recommend as follows:**

(1) Where the Corporation is satisfied, by reason of any of the matters referred to in clause (2), that the employee’s normal weekly earnings are significantly more, or significantly less, than the employee’s earning capacity would have been during the period of incapacity but for the accident, it should use a different measure to assess earning capacity.

(2) The relevant matters are:

> **(a) the seasonal nature of the claimant’s employment;**
>
> **(b) firm arrangements made by the claimant at the date of the accident to re-enter or leave the workforce, accept different responsibilities or new or different employment or vary the hours of paid employment; and**
>
> **(c) the employee’s contractual entitlement to significant wage or salary variations (apart from indexation adjustments) arising out of his or her employment at the date of the accident.**

(3) Where the Corporation is so satisfied it should determine the employee’s weekly earning capacity during the period of incapacity (or any relevant part of it), taking account of the relevant matters in clause (2). The amot—nt should be used in assessing compensation for loss of earning capacity in place of normal weekly earnings.

7.31 The Corporation’s power to depart from normal weekly earnings as the basis for assessing loss of earning capacity is restricted to cases where the Corporation is satisfied that the claimants earnings would have been significantly more or less than his or her normal weekly earnings. This provision is designed to discourage adjustments being sought or made in cases where the amount of over-or under-compensation is relatively small. The terms “significantly more” or “significantly less” should be taken as referring to variations of at least 10 per cent. Where a person has firm arrangements to leave the workforce, the result may be that he or she would receive no periodic compensation in respect of the first 104 weeks of incapacity. Such a person would be treated as a non-earner from the time he or she would have ceased employment. The recommendation is not intended to cover anticipated wage rises which result from changes in the value of money, in view of the later recommendation concerning indexation of benefits (paragraph 8.36).

7.32 The recommendation in paragraph 7.30 is confined to cases where it is clear at the time *of the accident* that the claimants earnings would have been increased or reduced had the accident had not occurred. It is not intended to cover the case where a person argues that he or she had a potential earning capacity, which was not being exercised, of had not been fully realized, at the time of the accident. The problem of loss of potential for advancement, which particularly concerns non-earners, young earners, and people who have recently commenced a career, is dealt with in Part IV of this Chapter.

C. Assessment of Earning Capacity: Self-Employed People

1. The Problem

7.33 In principle the assessment of compensation for loss of earning capacity sustained by a self-employed person can be approached on the same basis as the assessment of compensation for loss sustained by

employees. That is, compensation should be based on the difference between the self-employed person's earning capacity at the date of the accident and his or her post-accident earning capacity. There are practical problems in applying this concept to self-employed people. These problems are not confined to no-fault schemes, but al so apply to the common law in its attempts to compensate self-employed people. [19]

7.34 The first problem relates to as certaining pre-accident earnings. Where an employee is incapacitated, it is usually a relatively simple task to ascertain his or her normal weekly earnings, since generally these will be paid in the form of a regular wage or salary. The earnings of a self-employed person usually cannot be assessed simply by reference to receipts over a period of a few weeks, since his or her gross income will not necessarily be received uniformly over the year. More fundamentally, the relevant standard is the net income of the injured person (that is, gross income less expenses). Even if there are no special difficulties in ascertaining net income, the information for the current year may not be available until after the close of the financial year when the accounts of the business or profession are completed. Moreover, self-employed people may experience substantial variations in that income from year to year. A farmer, for example, may experience losses during years of drought, but balance these with high returns during good years. A further complication is that a self-employed person's income for taxation purposes may provide little guidance as to the "true" return from that person's labour or expertise. Sometimes this may be so because of tax evasion, as where the proprietor of a business fails to declare all cash receipts. Sometimes it may be because of lawful tax minimisation techniques. It is common in Australia, for example, for the income derived from a family business to be split more or less equally among family members for taxation purposes even though their contributions are very different. This is a problem which cannot be resolved simply by examining the time spent in the business by each person. The value of a person's contribution to the business may reflect variables other than the time devoted to it.

7.35 If attention is focused on the period after the accident similar problems arise. Just as it may be difficult to ascertain the pre-accident earnings of the injured person, it may be equally difficult to ascertain post-accident earnings. Moreover, the difference between pre-and post-accident earnings may not necessarily be appropriate as a measure of the loss sustained. For example, if a business is being built up, the net income of the proprietor at about the time the accident occurs may be very low. However, the loss of his or her services may prevent the business achieving a high rate of profitability. Again, the loss of services of the proprietor or manager of a business, even for a short period, might effectively destroy that business. This consequence might be avoided if a replacement manager were made available during the period of incapacity.

7.36 These problems have been recognised elsewhere. The Minogue Report on the Victorian no-fault scheme stated that

> [o]ne of the most formidable administrative problems is that of rapid and accurate assessment of loss of income to enable payments to a self-employed person to begin. Considerable delay is frequently experienced because proof of pre-accident income upon which the assessment is to be based is difficult. This is not a problem which is peculiar to the Motor Accidents Board. The administrators of both the New Zealand and Tasmanian schemes report similar difficulties. [20]

In New Zealand, the problems of assessing the earnings of the self-employed have been overcome by a Minimum Relevant Earnings Scheme. [21] Under this scheme a self-employed person chooses a level of coverage which is consistent with his or her taxable income and contributes to the scheme by reference to the level of coverage chosen. A proposal to allow a self-employed person to select the level of his or her coverage is only feasible where the government responsible for the compensation scheme also controls the income tax system, so that contributions from self-employed people can be related to their earnings. Since the Australian States effectively have no control over income tax, which in practice is a Commonwealth responsibility, it is not practicable to recommend such an approach under a State scheme.

2. The Basis for Assessment of Loss

7.37 The Working Paper noted the problem posed by the conflicting objectives of administrative simplicity (including rapid compensation) and accurate assessment of loss. [22] There are three workable approaches to compensating the self-employed. The loss could be assessed by reference to:

> the difference between pre-accident and post-accident earnings (the "earnings approach");

the cost of replacing the services of the incapacitated self-employed person for the whole or part of the period of incapacity (the “replacement services approach”; or

the wage or salary the self-employed person would have earned as an employee performing work similar to that he or she previously performed as a self-employed person (the “equivalent employee approach”).

It should be open to the Corporation to choose the most appropriate of these approaches (or combination of them). The circumstances of self-employed people will vary greatly and no single approach will be satisfactory in all cases.

7.38 **We recommend that the Corporation should have power to assess compensation in respect of the loss of earning capacity sustained by a self-employed person on one or more of the following bases.**

(a) The difference between that person’s earning capacity at the date of the accident (generally measured by normal weekly earnings) and his or her earning capacity (if any) during the period of incapacity.

(b) The cost of providing services to replace that person in his or her business, trade or profession during the period of incapacity.

(c) The earnings that person could have derived as an employee exercising similar skills and responsibilities to those exercised in his or her business, trade or profession.

As explained in paragraph 7.47 the replacement services approach should generally be preferred in cases where the incapacity is likely to continue for no more than 13 weeks.

3. The Earnings Approach

7.39 The earnings approach may be appropriate, for example, where the injured person’s level of income is readily ascertainable and has been reasonably stable over a substantial period. If that person is totally and permanently incapacitated, compensation could be assessed without difficulty by reference to the difference between pre-accident and post-accident earnings. The earnings approach is also often likely to be appropriate as the means of assessing compensation for self-employed people sustaining long-term incapacity.

7.40 If the earnings approach is to be used, it is necessary to define the concept of “earnings”. In accordance with the recommendations made in relation to employees (paragraph 7.22) **we recommend that the earnings of a self-employed person should include income derived by that person for his or her own benefit, as the result of personal exertion. By “income” is meant net income after expenses, but before income tax.** Thus dividends, interest on loans and rent from investment properties would normally not be “earnings”, although they could be so classified if, for example, the injured person’s business was that of share trader or property investor.

7.41 The earnings approach requires the normal weekly earnings of the self-employed person to be assessed. Broadly the same approach can be taken as has been suggested for employees, although it will usually be necessary to take a longer period as the basis for assessment. Moreover, reliance may have to be placed on taxation returns and these will be available only in respect of completed financial years. Where the income of the self-employed person has varied substantially, it may be appropriate to take a period of up to four years before the accident in order to make a fair assessment of his or her normal weekly earnings. **We recommend that in calculating the normal weekly earnings of a self-employed person at the date of the accident, the Corporation should have regard to that person’s earnings before that date, his or her work history and other relevant factors. In particular, the Corporation should take into account the more appropriate of the following:**

(a) the average weekly earnings of the self-employed person during the 52 weeks preceding the accident, or any part of that period; or

(b) the average weekly earnings of the self-employed person during any or all of the f our completed financial years immediately preceding the date of the accident.

7.42 Paragraphs 7.27-7.32 explain that in some circumstances it is necessary to depart from the standard of normal weekly earnings in assessing an injured employee's earning capacity. Broadly the same considerations apply to the self-employed. Accordingly, **we recommend that where the Corporation is satisfied that, by reason of any of the matters below, the self-employed person's normal weekly earnings are significantly more, or significantly less, than that person's earning capacity would have been during the period of incapacity but for the accident, it should use a different measure to assess earning capacity. The relevant matters are:**

> **(a) the seasonal nature of the self-employed person's employment;**
>
> **(b) firm arrangements made by the self-employed person to re-enter or leave the work force, accept new or different employment or vary the hours of employment; and**
>
> **(c) contractual arrangements in force at the date of the accident which would have led to significant variations in earnings.**

Where the Corporation is so satisfied, it should determine the claimant's weekly earning capacity during the period of incapacity (or any part of it) taking account of the matters listed. This should be used, to the extent appropriate, in assessing compensation for loss of earning capacity in place of normal weekly earnings.

7.43 The Working Paper stated a preference for an initial assessment based on the income tax returns of the injured self-employed person with provision for review after a period. In some cases income tax returns will permit a speedy assessment of compensation at least on an interim basis, thus avoiding delays in processing claims. But there should be no requirement that income tax returns be used, as the Corporation may wish to rely on other information in making its initial assessment. If, for example, the replacement services approach is used, the claimant's tax returns may be less important than evidence of the cost of securing a substitute for the claimant. Again, it may be convenient and helpful to claimants, if the Corporation adopts a practice of paying interim compensation at standard rates pending receipt of information required to make a full assessment of claims by self-employed people. Certainly the Corporation should have power to pay compensation on an interim basis without necessarily requiring the production of income tax returns, even though these would normally be needed for the full assessment.

4. The Replacement Services Approach

7.44 One means of preserving an incapacitated self-employed person's income is to continue his or her business or professional practice. This can often be done by engaging the services of another person with the requisite skills to work as a substitute for the incapacitated self-employed person. For example, if a self-employed electrician is incapacitated, the Corporation could pay for the cost of a replacement with equivalent qualifications to carry out the work of the injured contractor. Similarly, if a doctor in general practice is incapacitated for a short period, the most satisfactory form of compensation may be the cost of a qualified locum to carry on the practice.

7.45 The Tasmanian no-fault scheme has selected this method of assessment for its self-employed person's allowance. The scheme pays 80 per cent of "any remuneration gratuity, or reward" paid to a person to carry on a self employed person's business. [23] The injured person must have been working as a self-employed person at the time of the accident and be

> ... disabled from conducting that business as a result of the injury and to ensure that his business is carried on during the period in which he is so disabled arrangements are made for another person for remuneration gratuity, or reward to conduct that business. [24]

The allowance is payable for 104 weeks after the accident where the person is totally incapacitated from carrying out the business he or she was conducting at the time of the accident. [25] Thereafter, it is payable only if the person is wholly disabled from carrying out any employment or occupation for which he or she would otherwise be suited. [26]

7.46 No specific statutory restrictions should be placed on the period for which replacement services can be provided although the approach is more likely to be appropriate in cases of short-term incapacity. **We recommend that, where the replacement services approach is considered appropriate, the Corporation should pay 80 per cent of the remuneration (including incidental costs of employment) provided to a person performing services to replace those of the incapacitated person in his or her business, trade or profession.** The maximum payment of 80 per cent of the cost of remuneration is consistent with the general approach to the proportion of loss of earning capacity that should be compensated (paragraph 8.22). The payment should also be subject to the general ceiling on compensation for loss of earning capacity.

7.47 The replacement services approach is not appropriate in all circumstances. Sometimes a self-employed person, such as a concert pianist or author, has unique skills which simply cannot be supplied by another person. In some professions or businesses it is not feasible to provide replacement services; this would be true, for example, where the profession or business required special skill or relied on personal contacts. However, we think that this approach to compensation will often have many advantages for both the incapacitated person and the Corporation, particularly in the case of short-term incapacity. A preference should be expressed for the replacement services approach in cases where self-employed people suffer short-term incapacity. Accordingly, **we recommend that where a self-employed person is incapacitated for a period which does not or, at the date of the assessment, is not likely to exceed 13 weeks, the Corporation should use the replacement services approach to the assessment of compensation, unless there are good reasons for choosing another approach.**

5. The Equivalent Employee Approach

7.48 The equivalent employee approach requires the Corporation to examine the level of earnings which the self-employed person could fairly be expected to derive as an employee, exercising similar skills and responsibilities to those required in his or her business, trade or profession. This approach may be useful for example, where a person has just commenced a business and his or her earnings are low and would perhaps have been likely to remain low during the period of incapacity. In these circumstances, the earnings approach may yield a low figure for compensation purposes which fails to take account of the fact that the accident victim has been denied the opportunity to build up the business. Moreover, it may not be feasible to provide replacement services, perhaps because the business requires special skills or relies heavily on personal contacts. The fairest approach may be to assess what the incapacitated person could reasonably have expected to earn as an employee and pay compensation accordingly. **We recommend that where the equivalent employee approach is considered appropriate, the Corporation should pay 80 per cent of the wage or salary the incapacitated person could reasonably have expected to earn as an employee performing work similar to that which he or she performed as a self-employed person.**

6. Earnings Both as an Employed and Self-Employed Person

7.49 Some people may derive part of their earnings as an employee and part as a self-employed person. For example, a person may be employed full-time in the Public Service but run a weekend lawn-mowing business, or an elected parliamentarian may continue to practise his or her profession. In such cases, a true assessment of loss of earning capacity requires an examination of both sources of income. For simplicity, some schemes, such as the Tasmanian no-fault scheme, require a person to elect to be treated as either an employed or self-employed person. [27] We do not think such an election should be required, but that the Corporation should make an assessment in each case using the principles already laid down. **We recommend that where a person incapacitated in a transport accident derived earnings within a period of two years preceding the accident, both as an employee and as a self-employed person, the Corporation should assess his or her normal weekly earnings or earning capacity by such means, consistent with earlier recommendations, as are appropriate.**

D. Long-Term Incapacity: The Floor

7.50 An incapacitated earner will be compensated for loss of earning capacity, assessed usually by reference to his or her normal weekly earnings. In some cases the level of compensation will be quite low, for example because the person was working part-time before the accident, or because the period over which normal weekly earnings were assessed included a proportion of time outside the workforce or a period of unemployment. In the short term the compensation may reflect a fairly accurate assessment of his or her loss of earning capacity.

However, in the long term, the incapacitated person may have increased the hours of work or have continued in employment uninterrupted by periods of unemployment until retirement. If nothing else, in the long term, the person will have lost the opportunity of further exercising his or her earning capacity.

7.51 The problem of assessment of compensation for long-term incapacity is approached in two major ways. Part IV of this Chapter deals with the loss of potential for advancement as an element in compensating for loss of earning capacity in the long term. Part V introduces the concept of "notional earning capacity" for non-earners sustaining long-term incapacity. This is a minimum value which should be attributed to a person's earning capacity unless there is evidence of a higher value. This minimum, or floor, should be applied to both earners and non-earners who suffer long-term incapacity. **We therefore recommend that an earner who sustains long-term incapacity as the result of a transport accident should be deemed to have an earning capacity no less than the "notional earning capacity" attributed to non-earners (paragraphs 7.87-7.90). Notional earning capacity for a person who has attained the age of 21 should be set at 50 per cent of AWE (approximately $210 at June 1984). "Long-term incapacity" means incapacity which continues for a period or periods totalling at least 104 weeks.** The effect of this recommendation is that a person who is totally incapacitated should, in respect of the period of incapacity in excess of 104 weeks, be deemed to have sustained a loss of earning equivalent to at least 50 per cent of AWE Compensation would be paid at the rate of 80 per cent of the notional loss-that is, 40 per cent of AWE (approximately $168 at June 1984).

III. POST-ACCIDENT EARNING CAPACITY

A. The Issue

7.52 Compensation for loss of earning capacity will generally be assessed by reference, among other things, to the post-accident earning capacity of the injured person. A physical disability, such as that sustained in a transport accident, may or may not have an effect on the disabled person's earning capacity. The same disability may have a totally different impact on the earning capacity of different people. Indeed the impact of a disability on a particular individual is likely to vary over time, as the individual progresses from the acute stage to recovery. For example two people, such as a labourer and a clerk, earning an identical wage - may each sustain a badly broken leg in a transport accident. During the period of hospitalisation each is totally incapacitated for his or her normal work. During the recovery period, while the leg is in a cast, the labourer remains totally incapacitated for his or her usual work, since a high degree of mobility is required. On the other hand the clerk may be able to resume employment immediately, perhaps on a part-time basis, because his or her work is sedentary.

7.53 Should the broken leg cause a permanent limp, the labourer (assuming he or she has no other skills) is likely to be substantially disadvantaged in the labour market and may be unable to find employment This person may require retraining in order to acquire the skills for a more sedentary occupation. However the clerk with a residual limp may be at no disadvantage in finding a job. If economic circumstances are very difficult even an apparently minor disability may prejudice the clerk's chances of gaining employment. Should the labourer happen to be qualified to work as a clerk, *and should such work be available,* he or she is likely to sustain no post-accident loss of earning capacity.

7.54 It is possible to argue that the only relevant criterion in assessing loss of earning capacity is the victim's physical ability to undertake work of a kind which is generally available in the community. On this view, if a partially disabled labourer is physically capable of working as a clerk, regardless of whether he or she has the experience or skills to do so or whether any such employment is open, that person could be said not to be incapacitated for work. Such an approach would be harsh and unjust to the victim, and quite unacceptable. In determining loss of earning capacity it is essential to consider realistically the impact of the disability on the person concerned, taking into account his or her personal characteristics. These include the person's level of education and training, language skills, work experience, place of residence and capacity to respond to rehabilitation and retraining programs.

7.55 A much more difficult question is how the Scheme should deal with the impact of general economic conditions on people disabled in transport accidents. This question arises because post-accident earning capacity can be affected by factors other than the disability or the personal characteristics of the victim. These include high levels of unemployment particularly among young people; technological development, which reduces the number of certain types of jobs or eliminates them completely, and the changing long-term structure of the economy from one largely based on primary industry and manufacturing to one based on service

industries. [28] For example, a partially disabled accident victim may be physically capable of performing certain work, and have the requisite skills to do so, yet be unable to find employment. The Working Paper pointed out that the question of unemployment looms large as a problem for any contemporary compensation scheme, since chronic unemployment makes it more difficult for disabled people to realise their full earning potential. [29] The question has not previously been regarded as serious because most schemes have operated (or been proposed) in times of relatively full employment. The basic problem is how to distinguish consequences that can fairly be attributed to the transport accident as opposed to those which are attributable to general economic conditions.

7.56 Existing compensation schemes take different approaches to this problem. In New South Wales, the Workers' Compensation Act, 1926 obliges the employer or insurer of a partially incapacitated worker to provide suitable light duties for the worker. If the employer fails to do so, the worker is deemed to be totally incapacitated. [30] There are historical reasons for this approach which is not only designed to protect workers but to promote rehabilitation. [31] Its effect is to require the workers' compensation system to meet the burden of compensating unemployed workers, even where their continuing unemployment cannot be fairly attributed to the disability sustained in the accident, but to prevailing economic conditions. Whatever its merits in the context of workers' compensation this approach should not be applied to a transport accidents scheme. As a matter of principle and in the interests of incentives to rehabilitation, a distinction should be drawn between unemployment attributable to the transport accident and unemployment flowing from general economic conditions.

7.57 The New Zealand scheme has taken a very much less generous approach than the workers' compensation system. The Accident Compensation Act 1982, in effect confers a discretion on the Corporation there to fix the injured post-accident earning capacity where that person is

> not working or earning in paid employment to the extent to which he would be able to do so if the only factor affecting his ability to work or earn in paid employment were his incapacity for work due to the injury. [32]

This allows the Corporation to ignore the effect of economic conditions on job opportunities for partially disabled people. Notwithstanding some recent modifications in the practice of the Corporation, [33] this provision is capable of being applied harshly. The Corporation is able to ignore the real prospects of employment for a partially disabled worker, once a person is certified by a doctor as fit for light duties. The Managing Director of the Corporation states that compensation will be maintained where the injured person is unemployed only if

> ... a finding can be made on the evidence that the real cause of the claimant s inability to obtain work is his disability caused by the accident, and that it is the accident injury which is the only factor affecting his ability to work. [34]

The application of this provision has been rightly criticised in the strongest terms in submissions made to the Commission by a New Zealand lawyer and trade unionist [35] and by the Law Society of New South Wales No-Fault Liability Committee. [36]

B. The Suggested Approach

7.58 The appropriate starting point in assessing post-accident earning capacity for compensation purposes is the income (if any) actually derived by the injured person. **We recommend that in general**

> **(a) where an injured person is employed, whether on a full-time or part-time basis, his or her post-accident earning capacity is equivalent to the earnings derived from that employment; and**
>
> **(b) where an injured person is not employed, his or her post-accident earning capacity is nil.**

7.59 Where however, the Corporation is satisfied that the injured person's reduced earning capacity is fairly attributable to general economic conditions, rather than to the consequences of the transport accident, the general rule should be displaced. It should be open to the Corporation to be satisfied of this only if the injured person is capable of undertaking work of a kind reasonably available, taking into account that person's personal characteristics and circumstances, and that he or she can compete in the relevant labour market at no disadvantage, by reason of the disability, when compared with other people. If, for example, an injured person has sustained a minor residual disability in a transport accident, but the disability in no way affects his or her

capacity for work of a kind that is generally available and for which he or she is qualified, it would usually be fair to conclude that that person's continuing unemployment is due to general economic conditions rather than the disability. The key is whether the disabled person is capable of competing in the labour market at no disadvantage when compared with non-disabled people. If a partially disabled person is prejudiced in seeking employment because of the disability (whether or not the prospective employer has any reasonable grounds for taking the disability into account) it would not be right to relieve the Scheme of the burden of compensating for the loss of earning capacity. If, however, the disabled person is at no disadvantage, it is appropriate that that person's continuing loss of earning capacity be attributed to general economic conditions rather than the disability.

7.60 For these reasons, **we recommend that the general rule should not apply if the Corporation is satisfied**

> **(a) that the person is capable of undertaking employment of a kind for which he or she can reasonably be expected to apply or which is reasonably available taking into account**
>
> > **(i) the nature and extent of the disability caused by the transport accident;**
> >
> > **(ii) his or her age, level of education, training and language skills;**
> >
> > **(iii) his or her work experience;**
> >
> > **(iv) his or her place of residence; and**
> >
> > **(v) other relevant factors; and**
>
> **(b) that the person is capable of competing in the labour market for this kind of employment at no significant disadvantage by reason of the disability when compared with non-disabled members of the community.**

In such a case, the Corporation should determine the post-accident earning capacity of the injured person, taking account of earnings that could be derived from the employment reasonably available to him or her. Some of the "other relevant factors" for this assessment could include limitations on the hours of work arising from necessary child-care responsibilities and disabilities unrelated to the transport accident.

7.61 Under this recommendation, the Corporation must be satisfied of the relevant-facts before departing from the general rules outlined in paragraph 7.58. This is consistent with the role of the Corporation in rehabilitating accident victims. Chapter 9 proposes that the Corporation should be responsible for actively fostering the employment of disabled transport accident victims. The fact that the Corporation (or appeals tribunal) must be satisfied that accident victims are capable of competing in the labour market at no disadvantage should create an incentive for it to create employment opportunities for those victims. Unlike the New Zealand test, the Corporation should not conclude that a person has an earning capacity greater than actual earnings unless it is satisfied

> the person is suited to the work;
>
> the work is generally available; and
>
> the person's disability does not disadvantage him or her in applying for the job.

7.62 The general rule should also be displaced if the Corporation is satisfied that the disabled transport accident victim has unjustifiably failed to exercise or realise all or part of his or her post-accident earning capacity. **We recommend that the general rule should not apply if the Corporation is satisfied that the injured person has, without sufficient reason,**

> **(a) refused an offer of suitable employment;**
>
> **(b) made himself or herself unavailable for vocational training, rehabilitation or assessment of employment prospects;**

(c) failed to take reasonable steps to secure suitable employment; or

(d) given up suitable employment.

If the Corporation is satisfied, it must assess the post-accident earning capacity using all relevant information- Clearly, if the person has unreasonably refused an offer of suitable employment, post-accident earning capacity should be measured by reference to the wages that would have been derived from the refused position. Where the person has failed to take reasonable steps to secure suitable employment, the Corporation would have to examine which jobs would have been available had the person taken such steps. If the person has unreasonably refused to undertake training or rehabilitation, the Corporation would have to assess his or her likely level of earning capacity had the relevant program been completed.

C. Notice

7.63 One of the central themes of the Scheme is the principle of entitlement. This principle leads us to **recommend that, if the Corporation assesses the injured person's post-accident earning capacity at a higher amount than suggested by the general rule, notice of the assessment should be given to that person.** This notice should set out the basis of the assessment and in general should allow a period of grace before the periodic compensation ceases. This would allow the person to prepare to re-enter the workforce, to apply for social security benefits if eligible or to seek review of the Corporation's decision. However, in limited circumstances, it might be appropriate that compensation should cease from the date of the notice being given. This would be the case, for example, if the injured person has unreasonably refused to accept an offer of suitable employment. **We therefore recommend that, unless there are special circumstances, the assessment should not take effect until the expiration of a period of eight weeks. This recommendation should not however, apply when the injured person has wholly recovered from his or her disability.** Chapter 16 discusses the effects of lodging of an appeal, including the continuation of benefits past such a cut-off point.

IV. POTENTIAL FOR ADVANCEMENT

A. Eligibility to Claim

7.64 Any assessment of an incapacitated person's earning capacity, including his or her potential for career advancement, requires speculation as to events that might have occurred but for the accident causing the incapacity. The body undertaking the assessment is required to predict the future career and earnings of an individual whose attachment to the workforce has been interrupted or perhaps ended. This process necessarily entails considerable uncertainty and difficulty. It is impossible to be sure whether the likely career path would have been followed or whether genuine intentions would have been realised. The "vicissitudes of life", to use the expression employed by courts, have to be taken into account. Even if broad predictions about a person's future work patterns are assumed to be correct, the difficulty remains of assessing precisely how much would have been earned during any given future period. These problems of course affect the common law assessment of damages for future economic loss.

7.65 The recommendations thus far provide, to a limited extent, for increases in earning capacity likely to occur after the date of the accident to be taken into account in assessing compensation for loss of earning capacity. There are cases in which events known at the date of the accident make it clear that pre-accident earnings are not a reliable guide to what the injured person could have earned at the date of the incapacity. Paragraph 7.30 for example, proposes that account should be taken of increased earnings that would have resulted from firm arrangements for new or changed employment made by the claimant at the date of the accident. However, the recommendations have not allowed or required the Corporation to consider all likely increases in earning capacity occurring after the date of the accident. These right arise, for example, because of additional training, promotion, seniority, the expansion of a business or professional practice or re-entry into the workforce after a prolonged absence. The question is how far potential for advancement in this sense should be considered in assessing loss of earning capacity.

7.66 The Working Paper suggested that potential for advancement should be considered in relation to specific classes of accident victims, Such as young people and students in training. Those were selected because, generally speaking, their potential for advancement and thus their earning capacity often would be substantially greater than their earnings at or about the time of the accident might have suggested. This approach was

influenced by the need to restrict the opportunity for speculative assessment of loss under the Scheme. Accordingly, it was suggested that the Corporation should consider potential for advancement only in particular classes of cases in which reliance on pre-accident earnings was likely to produce an inadequate assessment of the loss fairly attributable to the accident.

7.67 While some submissions favoured the approach of the Working Paper,[37] others commented on what they saw as the arbitrariness of the proposals and the lack of opportunity for an individual assessment of an incapacitated person's loss of earning capacity taking account of the potential for advancement. [38] The critics, both in submissions and general community discussion often expressed support for retention of the common law negligence action on the ground that it permitted the courts to take account of likely increases in the earning capacity of the injured person had the accident not occurred. The assumption was usually made that a no-fault scheme was inherently incapable of taking into account potential for advancement, because it would be tied to pre-accident earnings as the basis for assessment of compensation.

7.68 The restitution principle suggests that provision should be made in the Scheme for transport accident victims to receive compensation for loss of earning capacity, including the potential for advancement. We accept that this provision should notobe confined to particular classes of incapacitated people (except by reference to the length of incapacity). To do so would be unfair, in that people sustaining the same losses would be treated quite differently and this would lead to serious anomalies among various classes of incapacitated people.

7.69 In reaching this conclusion, careful consideration has been given to the administrative difficulties that arise in individually assessing claims for compensation which require predictions as to future events. It is one thing to provide for specific cases in which events at the date of the accident make it clear that earnings are not a reliable guide to earning capacity. It is another to provide a mechanism to recognise a potential for advancement which might not have been realised for some time after the accident.

7.70 In our view, it is not feasible for compensation for loss of earning capacity to take account of all likely developments after the accident for transport accident victims not suffering long-term incapacity. It is necessary to limit the numbers of people eligible to seek compensation on this basis in order to ensure that the Scheme can cope adequately with the inevitable administrative difficulties of assessing the likely future earnings of individual claimants. This can be done by confining the general entitlement to have loss of earning capacity assessed on the basis of potential for advancement to those incapacitated for a period of at least two years. Limiting the entitlement in this way will permit workable and manageable assessment procedures to be devised bearing in mind that the usual approach to compensation for loss of earning capacity, outlined earlier in this Chapter, is very likely to prove reasonably accurate in cases of short-to medium-term incapacity. Thus, **we recommend that an earner who has sustained long-term incapacity as the result of a transport accident should be eligible to apply for compensation to be assessed on the basis of potential for advancement. Potential for advancement means the earnings the person could have reasonably been expected to earn over the likely period of incapacity had the accident not occurred.**

7.71 An incapacitated transport accident victim applying for compensation for loss of earning capacity on this basis should be required to meet certain conditions before such an application can be considered. **We recommend that an incapacitated earner should be eligible to apply for assessment on the basis of potential for advancement if and only if he or she**

> **(a) has been incapacitated for a period or periods exceeding 104 weeks, but not exceeding 156 weeks;**
>
> **(b) has a disability arising from the transport accident, which is likely to have a continuing effect on his or her earning capacity; and**
>
> **(c) has participated as far as is reasonably practicable in vocational training or rehabilitation programs provided by or through the Corporation.**

7.72 The second and third requirements in this recommendation are self-explanatory. The first requirement is designed to restrict applications for compensation on the basis of potential for advancement to people who have sustained long-term incapacity. The limitation of 156 weeks (or three years) is an attempt to ensure that the

assessment is made within one year after the period marking the onset of long-term incapacity. During the first two years of incapacity the acute phase of medical treatment should be complete and the rehabilitation program either complete or well advanced. There is no advantage to the incapacitated person in delaying the assessment beyond that period. The process requires judgments to be made about what that person would have earned had the accident not occurred. In essence this involves predictions on the basis of circumstances existing at the date of the accident. Evidence of post-accident events may have some relevance, for example, adaptability within a rehabilitation program may demonstrate that the person had the intelligence and flexibility to follow the career path he or she had previously chosen. In general, however, developments more than two years after the onset of incapacity are unlikely to be of assistance in determining the application. Moreover, delays have disadvantages for the incapacitated person. The assessment should operate prospectively only, so that any increase in compensation will apply only from the date of the assessment. Delays may also add to the anxiety experienced by the incapacitated person. Nonetheless, we recognise that there may be exceptional circumstances justifying an extension of the 156 week period. Accordingly, **we recommend that the Corporation should have power, in special circumstances, to accept an application after the expiration of 156 weeks.**

7.73 Compensation on the basis of potential for advancement should be awarded only where the assessment results in compensation significantly greater than that which would otherwise have been awarded. The procedure should not be used to effect minor adjustments; nor should it be invoked as a matter of course by all persons sustaining long-term incapacity. Accordingly, **we recommend that the Corporation should assess compensation on the basis of potential for advancement if and only if compensation so assessed is significantly greater than that which otherwise would be awarded.** We do not think it necessary or feasible to define “significant”, since the award may relate to a very considerable period of incapacity and the circumstances of each case will vary to such an extent that a percentage rule for example, might be difficult to apply. This is an area in which the Corporation and the appeals tribunals will develop working criteria.

B. Assessment of Potential for Advancement

1. The Criteria

7.74 The legislation should specify criteria to be taken into account by the Corporation in assessing the loss of earning capacity on the basis of potential for advancement The relevant criteria include factors personal to the individual, such as his or her training and skills, and factors which require reference to economic circumstances such as the opportunities for new employment or increased involvement in the workforce. **We recommend that in assessing compensation on the basis of potential for advancement, the Corporation should take into account**

> **(a) the person’s age, education, training, skills, abilities and work history at the date of the accident;**
>
> **(b) the likelihood that, had the accident not occurred, the person would have undertaken training or education which would have increased his or her earning capacity;**
>
> **(c) the prospects for promotion or other forms of career, business, or professional advancement, whether in the same or different employment as that undertaken by the person at the date of the accident;**
>
> **(d) the likelihood that, had the accident not occurred, the person would have varied the nature of his or her employment or the extent of his or her involvement in the workforce whether temporarily or permanently; and**
>
> **(e) other factors suggesting that, had the accident not occurred, the person’s earning capacity would have increased or decreased materially whether temporarily or permanently.**

This recommendation is intended to be subject to the recommendation in paragraph 7.76, which limits the factors to be taken into account to those likely to occur within 10 years of the date of the accident.

7.75 The suggested criteria may lead to the conclusion that the applicants earnings in some years would actually be less than his or her earning capacity, as determined by the principles discussed earlier in this Chapter. For example, a young woman who is totally incapacitated in a transport accident may claim to have had firm and

realistic plans to train as a psychologist, which when realised would lead to earnings of at least $500 per week. However, to achieve this objective, it may be clear that she would have had to study full-time for four years, commencing two years after the date of the accident, during which time her income would have been very low. If, at the date of the accident, she was working as a clerk earning $300 per week, she would receive, until assessed on the basis of potential for advancement, compensation by reference to her normal weekly earnings. Any assessment of the potential for advancement would be based on her likely actual earnings during the period of incapacity. In other words, after that assessment she could not choose to have her loss measured by reference to normal weekly earnings for the years of full-time study and then rely on compensation for loss of earning potential for the rest of her earning life. Thus the assessment of potential for advancement would have to embrace the years of low income, although the level of compensation would not be lower than the minimum that should apply in all cases of total incapacity (paragraph 7.51). Similarly, there may be evidence that an applicant would have moved in and out of the workforce over the relevant period had the accident not occurred. This factor would have to be taken into account in assessing potential for advancement even though it would not ordinarily be an element in the assessment of compensation for loss of earning capacity under the Scheme. Again, in making its assessment of potential for advancement the Corporation will have to consider “vicissitudes of life” and give these such weight as may be appropriate.

2. Limits on Speculation

7.76 Assessment of loss of earning capacity on the basis of potential for advancement necessarily involves speculation as to future events. It does not follow, however, that the Corporation should be obliged to speculate about possibilities for the indefinite future. The more distant the period to which a forecast relates, the greater the problems of speculation and the likelihood of disputation and the more arbitrary the result. A balance must be struck between taking into account all factors that bear on the potential for advancement of the incapacitated person perhaps over a lifetime, and avoiding speculation as to remote events. We think this balance should be struck by limiting the period for which the Corporation is obliged to make predictions. **We recommend that, in assessing compensation on the basis of potential advancement, the Corporation should take account of factors or events affecting earning capacity only if they are likely to have an effect or to occur within 10 years of the accident.** For example, if a person is injured while working as a tutor at a university, the Corporation might well accept evidence that he or she would have become a lecturer or senior lecturer during the 10 year period, but would not consider a claim that in 15 or 20 years he or she might have been appointed a professor or dean of a faculty. An apprentice electrician could have potential for advancement assessed on the basis that he or she would have obtained full-time employment as a qualified electrician and would have enjoyed the usual progression as an employee during the decade after the accident. However, it would not be open to the Corporation to assess compensation on the basis that the apprentice might have become a self-employed electrician after many years as an employee. The recommendation in this paragraph has an impact on children who might seek assessment of earning potential (paragraphs 7.92-7.93).

7.77 An assessment of compensation on the basis of potential for advancement should operate prospectively, from the date of the application. The assessment should cover the expected period of incapacity and should take account of variations in the earnings of the applicant during that period. **We recommend that where the Corporation assesses compensation on the basis of potential for advancement, it should specify the incapacitated earner’s likely earnings from the date of the application for**

(a) the remainder of the calendar year in which the application is made; and

(b) each succeeding calendar year for the expected period of incapacity,

and should assess compensation accordingly. This recommendation requires the Corporation to assess the likely earnings progression of the applicant over the expected period of incapacity. Of course this is subject to the restriction that earnings for the period beyond a decade after the accident can be assessed only by reference to developments likely to occur within a decade. Ordinarily, earning capacity for subsequent years would be determined by reference to circumstances assumed to exist in the tenth year of incapacity.

7.78 We have considered whether the Corporation should be required or empowered to reopen the assessment if subsequent circumstances show or seem to show that a prediction relating to the earning capacity of the person was inaccurate. For example, the assessment may have been based on projected demand for the applicants specialised skills as, say a computer programmer. Several years later the demand for these skills might increase

or decrease substantially, suggesting that the initial prediction was inaccurate. Similarly, the assessment may have been based on the assumption that the applicant would remain out of the workforce for several years because of the need to care for a disabled child. If the child dies shortly after the assessment, should the matter be reopened?

7.79 While it is tempting to suggest that the area of speculation should be reduced by taking account of developments after the date of assessment, on balance, such a course is not warranted. The assessment of potential for advancement is necessarily a speculative venture. Subsequent events may appear to shake the foundation of the assessment, but what will not be clear is whether other equally important predictions, which cannot be tested, were accurate. Moreover, if such matters as economic conditions and labour force trends could allow the assessment to be reopened, the opportunities for repeated disputes and determinations would be maximised. We appreciate that the general provisions relating to compensation for loss of earning capacity require continuing assessment of the person's post-accident capacity for work. However, this is a different undertaking from repeated assessments of what a person's earning capacity would have been but for the accident. Accordingly, the assessment of compensation on the basis of potential for advancement should not be susceptible to subsequent review. Of course if the claimant recovers sooner than expected and thus suffers no continuing loss of earning capacity, compensation would no longer be payable. To this extent the assessment based on potential for advancement would be modified. In addition any assessment based on fraud should be capable of being set aside.

V. NON-EARNERS

A. Definition

7.80 The extended definition of "earner" put forward earlier in this Report is designed to take account of the realities of labour force participation and to ensure that many people not in employment at the date of the accident will be treated as earners for the purpose of assessing compensation for loss of earning capacity (paragraphs 7.8-7.15). Nonetheless, there will be many people who do not come within that definition. These include:

- children;
- full-time unpaid homemakers;
- long-term unemployed;
- discouraged jobseekers;
- students; and
- retired people.

These examples do not form distinct groups. For example, a discouraged jobseeker may be a full-time unpaid homemaker because no paid work is available. Similarly, a long-term unemployed person may be seeking new job opportunities through a course of study while an older person may have temporarily retired from the labour force. Thus the class of non-earners covers a diverse range of people, fulfilling different roles and undertaking different activities. **We define a non-earner as a person who sustains incapacity in a transport accident and is not within the definition of earner.** The term does not refer simply to a person who is not participating in the workforce at the date of the accident.

B. Compensation for Loss of Earning Capacity

7.81 Figures from the 1981 Census indicate that even an extended definition of earner would exclude a substantial proportion of the New South Wales population. At the time of the Census, there were 2.76 million people (53.8 per cent of the population) [39] outside the labour force in the State. These figures exclude 133,000 unemployed people [40] and indicate the difficulty of establishing a scheme which assesses compensation for loss of earning capacity solely or primarily by reference to pre-accident earnings.

7.82 The Working Paper canvassed the question of whether non-earners should be compensated for what was described as “loss of economic capacity”. This phrase was used to mean the loss or impairment of the non-earner s ability to undertake paid work (whether or not that ability would have been utilised) or to provide unpaid services for their families or other people. The Paper pointed out that the circumstances of non-earners, in relation to future paid employment vary considerably. Some may have a settled expectation of entering or re-entering the workforce within a specified period, others may intend to do so, but face uncertainty as to whether employment opportunities will be available. In some cases, as with a Young child, it is clear that the person will not enter the paid workforce for many years. Certain people, such as a full-time homemaker who wishes to continue in that role or a person who has taken early retirement, may have a firm intention never to take up or resume paid employment.

7.83 It is not difficult to cater for non-earners who at the date of the accident were about to enter or re-enter the workforce (paragraph 7.12). Where, however, the accident victim’s entry or re-entry into the paid workforce is more distant or uncertain, different issues arise. There is no recent past or imminent future income to use as a measure for loss of earning capacity and indeed in some cases there will be a settled expectation that the person would never have undertaken or resumed employment. The question is whether the Scheme should provide periodic compensation for loss or impairment of economic capacity analogous to that provided to earners for loss or impairment of earning capacity, and, if so, on what basis.

7.84 The Working Paper put forward two principal arguments in favour of compensating non-earners in respect of “loss of economic capacity”. [41] One was that many non-earners perform indispensable functions that have substantial economic value, even though they are unpaid for the services they provide. This argument has been acknowledged by the recognition that support services should be available where the incapacitated person performed substantial household services before the accident (paragraphs 10.3-10.4). Moreover this principle also applies to earners who provide household services and so does not of itself justify the payment of periodic compensation to non-earners some of whom would not be providing these services in any event.

7.85 The second argument was that

> even though a non-earner has no immediate prospect or intention of undertaking paid employment, a physical disability may deprive that person of the opportunity, later in life, to enter or re-enter the workforce. [42]

It was pointed out that this argument applied particularly strongly to children who could ordinarily be expected to seek employment after completing their education. Consequently, incapacity inflicted by accidental injury would deprive the child of the opportunity to pursue a career and gain employment, although the child’s success would depend in part upon prevailing economic conditions, particularly employment opportunities. The argument was also applied to homemakers. It is a very common pattern in Australia for women to resume careers or undertake retraining after a period of child-rearing. This is reflected in labour force statistics which show that more married women, aged between 20 and 34 and with dependent children, are outside the labour force than in it, but the pattern is reversed after the age of 35. [43] The average labour force participation rate for married women in Australia over the year February 1982 to February 1983, was 52.2 per cent. [44] Again, the circumstances of full-time homemakers may change for other reasons. A spouse may die, become unemployed or leave the relationship. A firm intention to remain outside the workforce may give way to economic necessity. In short, long-term physical disability may deny the homemaker the opportunity of seeking further employment, whether from choice or necessity.

7.86 The Working Paper suggested that this argument could be given effect by adopting the “lost opportunity” principle of compensation, under which compensation would be paid to non-earners to replace the income they could have been expected to earn but for the injuries sustained in the transport accident. [45] However, if the lost opportunity principle is applied, it should be applied to all non-earners sustaining long-term incapacity and not merely (as was suggested in the Working Paper) to selected categories of non-earners such as children or young people about to enter the workforce. All non-earners, in the long term, have the potential to enter or re-enter the paid workforce and any attempt to distinguish among the various categories, by regarding some as more” deserving” is bound to produce arbitary and unjustifiable results. [46] **Thus we recommend that non-earners who sustain long-term incapacity as the result of a transport accident should receive compensation in respect of their loss of earning capacity. Long-term incapacity means incapacity which continues for a**

period or periods totalling at least 104 weeks. Compensation should be available only for the period of incapacity in excess of 104 weeks. We explain later why compensation should be limited to cases of long-term incapacity and why the period of 104 weeks has been chosen to mark the distinction between short-term and long-term incapacity.

C. Assessment of Compensation

1. Notional Earning Capacity

7.87 The next question is how compensation for loss of earning capacity of non-earners should be assessed, bearing in mind that it will usually not be possible to use pre-accident earnings as a guide. Some non-earners, such as children or young students, have never been in employment. Others have had training and work experience but have been out of the workforce for a long period and have lost the skills or competitiveness for their previous employment. Similarly, the non-earner's skills may be redundant because of advances in technology or changes in the structure of industry.

7.88 As with earners, there should be an opportunity for non-earners suffering long term incapacity to apply for compensation to be assessed on the basis of what we have described as potential for advancement (paragraphs 7.64-7.79). This will require an individual examination of the injured person's circumstances and prospects to determine what he or she would have earned had the incapacity not occurred. However, this does not go far enough in meeting the circumstances of non-earners. Some incapacitated non-earners may not be able to show that they would have undertaken or resumed employment at a particular time and thus be unable to show a specific loss for which compensation should be paid. Yet they have been denied the opportunity of seeking remunerative employment even if it is not clear when advantage would have been taken of that opportunity. Even a person who, at the date of the accident, had resolved never to re-enter the workforce has been denied the opportunity of seeking employment should his or her circumstances change. The statistics in labour force participation show that many people experience a pattern of moving in and out of the workforce over their working lives and that to assume their intentions at a particular date will remain fixed is often unrealistic. Thus to link compensation for loss of earning capacity to the claimant s ability to prove that he or she would have entered or re-entered the workforce is too narrow a basis for dealing fairly with incapacitated non-earners.

7.89 The most satisfactory approach is to adopt a standard figure as the means of determining earning capacity of a non-earner. This standard, which can be described as the non-earner's "notional earning capacity", should be used to assess compensation for loss of earning capacity unless the non-earner can rely on an assessment based on potential for advancement. This solution is similar to that adopted by the Australian Woodhouse Committee, which, in 1974, proposed a minimum flat rate of $50 per week, which was to be the "notional earning" attributed to non-earners. [47] Thus **we recommend that in general, compensation for a non-earner's long-term loss of earning capacity should be ascertained by reference to that person's "notional earning capacity". The notional earning capacity of a non-earner who has attained the age of 21 should be set at 50 per cent of AWE (approximately $210 at June 1984). Where the non-earner has not attained the age of 21, his or her earning capacity should be set as follows:**

Age 16-17: 30 per cent of AWE

Age 18-20: 40 per cent of AWE

This approach is consistent with the proposal for a minimum earning capacity to be attributed to earners sustaining long-term incapacity. The intention is that the approach to the compensation of earners and non-earners in the long term should, in practice, be based on similar principles.

7.90 The choice of the level of notional earning capacity must, to some extent, be arbitrary. On the assumption that, in the case of total incapacity, compensation would be paid at the rate of 80 per cent of notional earning capacity, a figure of 50 per cent of AWE for non-earners over the age of 21 produces periodic compensation for loss of earning capacity approximately equivalent to the minimum adult weekly wage for New South Wales. [48] It would, of course, be open to the community to devote more resources to compensating incapacitated non-earners and thus increase the figure chosen to represent notional earning capacity.

2. Potential for Advancement

7.91 Many, perhaps most, non-earners who have sustained long-term incapacity will be unable to demonstrate a loss of earning capacity greater than that which would follow from the notional earning capacity attributed to them under earlier recommendations. However, some will be able to show that their loss was significantly higher. For example, a woman who has temporarily left the labour force to care for children may be incapacitated in a transport accident. She may be able to show that she intended to resume work when the children reached school age, and that her skills and work experience make it highly likely that her earnings would have been substantially greater than her notional earning capacity. Non-earners should be able to seek compensation on the basis of potential for advancement in the same way, as earners. **Accordingly, we recommend that a non-earner who has sustained long-term incapacity should be eligible to apply for compensation for loss of earning capacity on the basis of potential for advancement. Such an application should attract as nearly as possible, the same principles as those governing a similar application by an earner** (paragraphs 7.70-7.77).

7.92 Attention should be drawn to an earlier recommendation 'Which is especially relevant to a particular group of non-earners, namely incapacitated children. Paragraph 7.76 proposed that, in assessing compensation on the basis of potential for advancement, account should be taken only of factors likely to occur within 10 years of the date of the accident. This limits the scope of such an assessment for older children and eliminates it for younger children.

7.93 Careful consideration has been given to whether young children who are incapacitated in transport accidents should be permitted to apply for compensation on the basis of potential for advancement. This is a matter of considerable difficulty, since predictions as to the future earning capacity of children are even more unreliable than those for adults. Courts deciding common law negligence actions acknowledge the speculative character of such an undertaking [49] and may reach widely divergent results in similar cases. In practice, a great deal depends on such matters as the perceived quality of the child's home environment and his or her educational opportunities and personal attributes. These criteria can apply unfairly to children from less well-off homes and to children whose talents had not developed at the date of the accident. There is much to be said for not permitting children under a certain age, say 15, to apply for compensation on the basis of potential for advancement on the ground that such an assessment is simply too speculative and unfair to children with no record of employment or vocational training. The emphasis of the Scheme, in relation to severely disabled children, should be on maximum rehabilitation and vocational training, taking advantage of the greater adaptability of younger people. The recommendation to which we have referred will preclude most claims by younger children but will allow consideration to be given to the occasional case in which it can be confidently said that a child would have earned substantially more than his or her notional earning capacity within 10 years of the accident.

3. Post-Accident Earning Capacity

7.94 In assessing compensation for a non-earner's earning capacity it will be necessary to take into account his or her post-accident earning capacity. It might be thought that this will present difficulties in some cases because of the absence of a recent work history and because the incapacitated non-earner may not have intended to resume or take up remunerative employment. However, these difficulties may arise with incapacitated earners, particularly in view of the broad definition of earner we have adopted. Accordingly **we recommend that in assessing the post-accident earning capacity of non-earners the same approach should be taken as with earners** (paragraphs 7.58-7.63). This means that the starting point will be the earnings actually derived by the injured person from post-accident employment. If the person is not employed during the relevant period, his or her post-accident earning capacity would be nil. If, however, the Corporation is satisfied that the person's earning capacity is greater than his or her actual earnings, by reason of the factors referred to in the earlier recommendations, it can assess post-accident earning capacity on another basis. If, for example, the injured person is capable of undertaking employment that is reasonably available and can compete in the relevant labour market at no significant disadvantage as a result of his or her disability, the Corporation could regard that person as capable of earning the wage or salary that would be derived from that employment. Clearly a non-earner, like an earner, will be provided with assistance in relation to rehabilitation and vocational retraining. If a non-earner decides that he or she does not wish to train for or seek employment, this will be a relevant factor for the Corporation to take into account in determining the loss of earning capacity, if any, that has been sustained.

D. Short-Term Incapacity

7.95 The majority of transport accident victims suffer minor injuries and are incapacitated for ordinary daily activities only for a short period. Even in the case of pedestrians, pedal-cyclists and motor-cyclists, who are most likely to suffer serious injuries, a substantial majority are no longer restricted in their normal activities three months after the accident. [50] There is no reason to believe that the experience of transport accident victims who are non-earners is any different from that of earners. An important question is whether non-earners should be compensated for loss of earning capacity sustained during a period of relatively short-term incapacity.

7.96 There are sound reasons why non-earners should not be compensated for loss of earning capacity in respect of relatively short-term incapacity, although other forms of compensation should be provided including compensation for reduced capacity to perform substantial household services (paragraphs 10.3-10.4). The Working Paper noted that the

> ... major argument against compensating non-earners is that such persons have suffered no demonstrable loss of earnings or earning capacity, since they had no substantial earnings immediately before the accident and no settled expectation of receiving future earnings, whatever their long-term aspirations might have been Thus, if the rationale of a scheme based on lost earning capacity is the need to compensate individuals for losses actually sustained, it can be argued that there is no sound basis for paying periodic compensation to people who cannot show that they have lost earnings as a direct result of their injury. [51]

This argument, as has been seer cannot fairly be applied to non-earners sustaining long-term incapacity. However, the argument has force in relation to short term incapacity and gathers further force from the extended definition of earner, which includes people with firm arrangements to enter or re-enter the workforce. The expanded definition makes it likely that a non-earner about to exercise his or her potential to undertake remunerative employment would be classified as an earner, and compensation for loss of earning capacity would be assessed accordingly. A further safeguard is provided by the recommendation in paragraph 7.14, relating to non-earners incapacitated for more than six months, who would have joined the workforce within two years of the date of the accident.

7.97 A further difficulty is that of assessing the value to a non-earner suffering short-term incapacity, of the lost opportunity to exercise earning capacity. If notional earning capacity were to be applied in such cases there is a danger not only of overcompensation, but of creating incentives to prolong a period of incapacity to take advantage of compensation for loss of earning capacity. This danger is increased where the Scheme provides, as is later recommended, for compensation in respect of the injured person's loss of capacity to provide household services. [52] This form of compensation is of special significance to some categories of non-earners. For these reasons **we recommend that non-earners who are incapacitated as the result of a transport accident for a period of less than 104 weeks should be entitled to all benefits under the Scheme other than compensation for loss of earning capacity.**

7.98 The period of 104 weeks has been chosen as marking, the distinction between short-term and long-term incapacity. This is not necessarily the most appropriate period and, if anything, we may have erred on the side of caution in selecting a period which permits only the most seriously incapacitated non-earners to claim compensation for loss of earning capacity. It may be that experience with the Scheme will suggest that the period can be shortened without creating substantial administrative difficulties or undesirable disincentives to rehabilitation.

VI. SUMMARY

7.99 This Chapter has dealt with the general principles governing compensation for loss or impairment of earning capacity sustained by people injured in transport accidents. Compensation will be based on the difference between the injured person's earning capacity at the time of the accident and his or her post-accident earning capacity. The Chapter examines earners and non-earners separately, although many principles are common to each group.

Earners

The concept of an “earner” is defined very broadly. The term is not confined to those who are employed or self-employed at the date of the accident. It includes those who have worked for a significant period during the two years before the accident and those who had firm arrangements at the date of the accident to take up employment. This approach takes account of high rates of unemployment and patterns of attachment to the workforce.

The earning capacity of an employee should be generally measured by weekly earnings at the time of the accident, although account can be taken of the employee’s earnings over a substantial period before the accident. Account should also be taken of special factors such as seasonal employment, which would have affected post-accident earnings.

Compensation for a self-employed person should be assessed by reference to lost earnings, the cost of replacement services or the earnings that could have been derived from alternative employment, depending on the circumstances.

An earner sustaining long term total incapacity should be deemed to have a notional earning capacity equivalent to 50 per cent of AWE ($210 in June 1984).

The test of post-accident earning capacity should take account of the employment reasonably available to the injured person in view of his or her training, skills and experience. A person should not be considered to have a capacity greater than actual earnings unless he or she is capable of competing for employment of a kind for which he or she is suited and can do so at no disadvantage by reason of the disability.

An earner sustaining long-term incapacity (greater than 104 weeks) should be eligible to apply for assessment of compensation on the basis of potential for advancement This would allow such matters as likely promotions or improved prospects to be taken into account in assessing loss of earning capacity.

Non-Earners

A non-earner is a person who does not come within the definition of earner and includes children and full-time homemakers not recently in the workforce. Because of the broad definition of earner the term does not simply refer to people not employed at the date of the accident.

A non-earner sustaining long-term incapacity should be entitled to compensation for loss of earning capacity. For this purpose a wholly incapacitated non-earner should be deemed to have a “notional earning capacity” of 50 per cent of AWE ($210 in June 1984).

A non-earner sustaining long-term incapacity should be eligible to apply for assessment on the basis of potential for advancement.

A non-earner sustaining short-term incapacity (less than 104 weeks) should not be entitled to compensation for loss of earning capacity but will receive other benefits under the Scheme.

FOOTNOTES

1. One Adelaide Survey, indicated that most transport accidents victims suffer minor injuries and return to work within a relatively short period: see Appendix A, tables A.34, A.35.

2. See Motor Accident Act 1973 (Vic.), s.25; Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), schedule 1, part V, paras.2,5: and Motor Accidents (Compensation) Act 1979 (NT), s.13.

5. Accident Compensation Act 1982 (NZ). s.5

4. Appendix A, para.A.18.

5. *Id*., para.A.19.

6. *Id*., para.A.20.

7. *Id*., paira.A.23.

8. Working Paper, paras.6.13-6.14.

9. *Id*., para 6.15. The Working Paper also suggested that special provision should be made to compensate Students and school leavers for loss of earning capacity, *id*., para.6.18.

10. However, the Victorian and Tasmanian motor vehicle accidents schemes recognise the principle that non-earners should be compensated in respect of loss of economic capacity. See Motor Accidents Act 1973 (Vic.), s.30(1)(g) and Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), schedule 1, part V, para.3.

11. The Corporation also has a discretion to deem a person to be an earner when the period since the last employment is longer than 13 weeks: Accident Compensation Act 1982 (NZ), s.69. There are also special provisions relating to compensation for people below the age of 16, students, and people who have recently acquired qualifications or undergone training or who have recently begun a career. See Accident Compensation Act 1982 (NZ), s.63, which provides for loss of potential earning capacity.

12. Submission W53, p.12. See also submissions W59, p.5; W81, p.2-, and W15, p.3.

13. Australian Bureau of Statistics, *Labour Force Experience, Australia, during the year ending February 1983,* Cat. No.6206.0, table 12.

14. Australian Bureau of Statistics, *The Labour Force Australia, February 1984,* Cat No.6203.0, p.31, table 34.

15. See Appendix A. para.A.40. Not all the non-wage benefits referred to in para.7.17 above were included in this survey.

16. National Rehabilitation and Compensation Bill 1977 (Cth.), cl.24.

17. Appendix A, para.A.40.

18. Accident Compensation Act 1982 (N.Z). s.5 3 (1).

19. See H. Luntz, *Assessment of Damages* (2nd ed. 1983), paras.5.5.01-5.5.13.

20. Minogue Report, para.9.10.

21. Accident Compensation Corporation, *Compensation for the Self-employed* (New Zealand, 1983). pp.9-10.

22. Working Paper, para.6.5.

23. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), schedule 1, part V, para.2A(3).

24. *Id*., para.2A(1)(b).

25. *Id*., para.2A(1) (a).

26. *Id*., para.2A(2)(b).

27. *Id*., para.1(3).

28. B. Jones, *Sleepers, Wake!* (1982), pp.1-8,

29. Working Paper, para.5.36.

30. Workers' Compensation Act 1926, s.11(2).

31. See eg. C P Mills, *Modification of the Workers' Compensation System* (unpublished Commission document, 1983), pp.21-22.

32. Accident Compensation Act 1982 (NZ), s.59(2) (b).

33. In July 1981 the corporation issued new guidelines for the reassessment of weekly compensation in cases of partial incapacity. See final appendix to Submission W9. For discussion of previous practice, see other appendices to Submission W9.

34. J L Fahy, *Accident Compensation Coverage* (7th ed. 1983), pp.45-46; see also pp.44-47 generally.

35. Submission W9.

36. Submission W76, pp.38-44.

39. Appendix A, para.A-10.

40. For more recent figures on unemployment, see id., para.A.13.

41. Working Paper, paras 7.9-7.10.

42. *Id*., para.7.10.

43. Australian Bureau of Statistics, Labour *Force Status and other Characteristics of Families-Australia, June* 1981, Cat No.6224.0, p.11, table 5.

44. Appendix A, para.A-23.

45. Working Paper, paras.7.19-7.21.

46. It is appropriate however, to make distinctions on the basis of the age of the injured person, since this is relevant to workforce attachment.

47. The Woodhouse Committee's reasons for relying on a normal earning for non-earners were not identical to the reasons we have been given.

48. The minimum adult weekly wage in New South Wales in June 1984 was $158.60. Actual weekly compensation would be equivalent to 40 per cent of AWE or $168 in June 1984. We recognise that precisely the same justification cannot be used to pay only 80 per cent of a non-earner's notional earning capacity as is used to justify paying 80 per cent of an earner's loss of earning capacity. However, it is convenient to apply the same principle in arriving at the level of actual compensation.

49. See eg. *Davis v. Kudrins,* 5 June 1975, Supreme Court of New South Wales. Court of Appeal, transcript of judgment at p.4, per Reynolds J A. See also *Denning v. Morris,* 11 August 1978, Supreme Court of New South Wales, Court of Appeal, transcript of judgment at pp.3-4, where Hutley J A made similar observations.

50. Appendix A, Table A.35.

51. Working Paper, para.7.5.

52. See paras.10.3-10.4.

8. Compensation for Loss of Earning Capacity - II

8.1 This Chapter deals with:

the form and payment of compensation for loss of earning capacity;

the commencement and termination of benefits; and

assessment of permanent incapacity.

I. THE FORM AND PAYMENT OF COMPENSATION

A. Periodic Payments

8.2 Chapter 3 discussed the criticisms of the common law principle which requires compensation for future loss to be provided in the form of a lump sum assessed on a once-and-for-all basis. In the context of compensation for economic loss, including compensation for loss of earning capacity or potential earning capacity, the force of these criticisms is overwhelming. It is noteworthy that even supporters of the common law negligence action concede that the present system of once-and-for-all assessment requires change. Some of the advantages of a system of periodic payments are outlined below.

Avoidance of delay: Compensation can be provided promptly after an application is lodged, since it is unnecessary to wait for the victim's injuries to stabilise. This relieves the accident victim and his or her family from financial hardship during the critical period following the accident. The financial security provided by rapid compensation encourages the accident victim to undertake rehabilitation and increases the likelihood that rehabilitation will prove effective.

Avoidance of under and over-compensation: Periodic payments can be tailored to the changing circumstances of the accident victim. Thus, for example, an injured person whose condition deteriorates some years after the accident will be entitled to compensation for loss of any earning capacity attributable to the accident. This overcomes the problem of accurately estimating the future economic losses of an injured person, and prevents the under and overcompensation which is an inherent part of the common law system.

Investment: A system of periodic payments relieves the injured person of the responsibility and worry of managing the lump sum to provide for his or her long-term needs arising out of the accident. Participants in the Lump Sum Survey and the Traffic Accident Study referred to the anxiety which they experienced in having to manage their lump sums. [1]

Double compensation: Periodic payments minimise the risk of the community paying "double compensation when lump sum awards are exhausted or diminished and the injured person has to resort to the social security system for support.

Compensation which meets loss: Periodic payments provide compensation in a form which matches the actual losses suffered by the accident victim since the injured person would, if the accident had not occurred, receive wages or salary on a periodic basis rather than in the form of a lump sum.

8.3 For these reasons **we recommend that compensation for loss of earning capacity, whether to earners or non-earners, should be paid on a periodic basis, preferably fortnightly in arrears.** The selection of a fortnight as the relevant period for payment is designed to meet the needs of the injured person promptly, but to avoid the increased administrative costs which would follow from the adoption of a shorter period. The social security system provides for fortnightly payment. Payments should be made in arrears rather than in advance, to avoid the overcompensation which would inevitably occur if an injured person returned to work before termination of the period for which payment was made. Allowing for the five day waiting period (paragraphs 8.41-8.44) an injured person should normally receive his or her first payment approximately two weeks after the accident. We intend that the first payment should be made at the end of the first week for which the person is entitled to receive compensation rather than at the end of the second week.

B. Redemptions

8.4 A further question which arises is whether the Transport Accidents Scheme should permit the redemption of periodic, earnings-related compensation payable for loss of earning capacity. If redemption is permitted, an injured person who exercises the option to redeem would receive a sum representing the capitalised value of the periodic payments he or she would otherwise receive. Assuming that the redemption operated in a similar way to those made under the workers' compensation system, he or she would be unable to receive any further payments for loss of earning capacity, even if his or her condition deteriorated. The Working Paper discussed three possible approaches to this issue. [2] These were:

> a complete prohibition of redemptions;
>
> provision for redemption by agreement between the injured person and the compensation authority, without imposing any statutory restrictions; and
>
> provision for redemptions to be made by agreement between the injured person and the compensation authority in limited circumstances specified by statute (these could include the additional requirement of approval by an independent body).

8.5 Apart from the workers' compensation system no-fault compensation schemes have generally taken the third approach restricting the availability of redemptions to limited situations. This approach is consistent with the criticisms of providing compensation for loss of earning capacity in the form of a lump sum assessed on a once-and-for-all basis. For example, under the New Zealand Accident Compensation Act 1982, redemptions are permitted only in "very exceptional circumstances", [3] and in practice very few redemptions are allowed in that country. The National Rehabilitation and Compensation Bill 1977 (Cth.), allowed redemptions in a broader, although still limited, range of circumstances. Specifically the Bill provided for redemptions where:

> (a) the beneficiarys incapacity was not likely to become total incapacity;
>
> (b) the beneficiary intended to use the lump sum in a manner particularly advantageous to the beneficiary; and
>
> (c) in all the circumstances of the case benefits should be paid by way of a lump sum payment. [4]

8.6 The New South Wales Workers' Compensation Act, 1926, permits redemption of claims for periodic compensation. The liability of the employer or insurer to make weekly payments

> ... may, with the consent of the worker, be redeemed... by the payment of a lump sum, determined by the Commission, having regard to any dispute as to liability to pay compensation under this Act, and the injury, age and occupation of the worker at the time of the occurrence of the injury, as well as to his diminished ability to compete in an open labour market. [5]

The practice relating to redemptions in New South Wales has changed markedly in recent years, with seriously injured workers increasingly receiving lump sum compensation rather than periodic payments. During the period 1972-73 to 1981-82 the amounts paid by licensed insurers in the form of redemptions (adjusted to 1981 values) increased from $13.1 million to $95.5 million. To put the matter another way, 7.3 per cent of payments of licensed insurers in 1972-73 were by way of redemptions but this had increased to 23.7 per cent in 1981-82. [6]

8.7 Redemptions have flourished in New South Wales for a variety of reasons. For example, by redeeming a claim in a serious case an insurer removes a potential long term liability from the books and gains certain other advantages by access to the Insurers' Contribution Fund.[7] The worker has the apparent advantage of a tax-free lump sum (although generally modest in size) and knows that he or she can later transfer to the social security system for income maintenance, or resume paid employment without incurring a financial penalty. The advantages from the worker s point of view may be increased where he or she is deemed to be totally incapacitated because of the employees failure to provide "light duties", and the worker considers that he or she is likely to find other employment in the future.

8.8 While redemptions seem to offer advantages to workers and insurers, the advantages to the community are by no means as obvious. Redemptions transfer some of the cost of compensating injured workers to the social security system. This may produce savings for insurers and employers, but not for the general body of taxpayers. More importantly, redemptions often leave injured workers in an extremely vulnerable financial situation. The Lump Sum Survey, for example, showed that six years after redeeming their entitlement, approximately 60 per cent of respondents had incomes of less than $150 per week or were reliant on some form of social security. [8]

8.9 We have discussed at length the reasons for providing compensation for loss of earning capacity on a periodic basis and for medical, hospital and rehabilitation services to be provided as and when required. If redemptions were quite freely available (with or without the consent of an independent body), it is likely that a significant proportion of victims would choose to take an immediate lump sum. The evidence from our surveys and the experience of the workers' compensation system suggest that this choice will often be made against the long-term interests of the individual. [9] Moreover, redemptions in serious cases (assuming they cannot be reopened) raise virtually all the problems of speculative assessment of loss, arbitrary calculations and anti-rehabilitative effects of the current common law system.

8.10 One approach is to require the consent of an independent tribunal to redemption. But this imposes an impossible burden on a tribunal, which is faced with the task of predicting whether the injured person will manage his or her affairs successfully. In some cases the prediction will be right, in many it will be wrong. In short, the available evidence does not support the view that a consent requirement will avoid the obvious problems associated with redemptions. Accordingly, **we recommend that, in general, redemption of periodic compensation for loss of earning capacity or other losses should not be permitted.**

8.11 Some submissions suggested that the payment of a lump sum could help accident victims to rehabilitate themselves. Professor R Jones, for example, argued that seriously injured accident victims should be able to redeem.

> Such redemption would then allow a person who in the eyes of the Board is unemployable but who, with the motivation that is so frequently seen with human endeavour, will find some remunerative employment. [10]

In some cases the payment of a lump sum, for example, to assist the accident victim to establish a small business, may be in his or her interests. But he or she should not be obliged to sacrifice long-term financial security in return for receiving this lump sum. It is more appropriate for the Corporation to have power to provide loans, where this will assist in the rehabilitation of an accident victim. This issue is discussed further in Chapters 9 and 10. In addition the Scheme accepts that lump sum compensation may be appropriate for some purposes in particular in relation to compensation for permanent physical disability.

8.12 One exception to the general principle can be justified. When, for example, a person Suffers a small continuing loss of earning capacity, perhaps a few dollars per week, the cost of paying periodic compensation indefinitely may place a substantial burden on the Scheme, yet redemption would pose little threat to the long-term well-being of the injured person. In these circumstances, the Corporation should have a discretion, with the consent of the injured person, to commute the entitlement to periodic compensation The Corporation should redeem only where the physical condition of the injured person is stable. However, to protect a person who redeems his or her entitlement and whose physical condition, and therefore his or her earning capacity, subsequently deteriorates, there should be power to reopen the redemption in such circumstances. Thus **we recommend that the Corporation should have power, with the consent of the injured person, to redeem its liability to pay periodic compensation for loss of earning capacity to an injured person when the amounts involved are so low that the cost of providing compensation unnecessarily burdens the administration of the scheme. Where such a redemption takes place and subsequently the injured person's capacity for work is significantly reduced, (whether through a deterioration in physical condition or otherwise) the Corporation should be required, on application, to resume appropriate periodic compensation, making allowances for the lump sum already paid.** This recommendation is consistent with the approach adopted in the Northern Territory legislation. [11]

C. Gross Earnings

8.13 The Working Paper suggested that compensation for loss of earning capacity should be calculated by reference to the gross (before tax) earnings of the incapacitated person, rather than his or her net (after tax) earnings. This approach was different from that taken under the Victorian motor accidents scheme, which calculates compensation for loss of earning capacity by reference to net earnings, on the assumption that payments will be free from tax in the hands of the accident victim. [12] In *Slaven v. Federal Commissioner of Taxation,* [13] the Supreme Court of Victoria held that this assumption was correct Justice O'Bryan held that payments for loss of earning capacity were provided as compensation for the loss of a capital asset, and consequently were not taxable as income. This decision and reasoning were confirmed on appeal to the Full Court of the Federal Court. [14]

8.14 By contrast, in Tasmania, under the Motor Accidents (Liabilities and Compensation) Act 1973, disability allowances paid to injured earners are calculated by reference to gross weekly earnings. Since 1 January 1983, the Motor Accidents Insurance Board has been authorised to make tax instalment deductions from the weekly compensation payments. [15]

8.15 There have been few submissions criticising the proposal that compensation should be assessed by reference to gross pre-accident earnings. However, it has been criticised on the ground that it involves Commonwealth taxation of revenue which is provided through State sources of funding. [16] While the Working Paper proposal has this result, it has several advantages compared with the Victorian approach, and these are referred to in the following paragraph A more satisfactory solution to the Commonwealth-State problem would be achieved by negotiations between the State and the Commonwealth. The negotiations would need to take into account a number of financial consequences of the introduction of a transport accidents scheme in New South Wales. As discussed in Chapter 17, these include:

> savings to the Commonwealth social security system, which will no longer bear the cost of providing invalid pensions and sickness benefits to transport accident victims;
>
> medical, hospital, rehabilitation and other services that otherwise would have to be met by the Commonwealth; and
>
> Commonwealth revenue derived from taxation of earnings related benefits.

Matters of this kind can only be satisfactorily resolved on a government-to-government level and we later recommend that the State enter into negotiations with the Commonwealth to secure a contribution to the Scheme. [17]

8.16 There are three main reasons for not departing from the view that payments should be calculated by reference to gross earnings.

> First, and most important, the earnings received by the incapacitated person before the accident and those which would have been received had the accident not occurred, are subject to income tax. In principle the compensation should take the same form as the income it is intended to replace. This is the approach taken in relation to New South Wales workers' compensation weekly payments. [18]
>
> Secondly, there is no guarantee that compensation for loss of earning capacity paid under the New South Wales Transport Accidents Scheme would be covered by the principle in *Slaven v. Federal Commissioner of Taxation.* The decision in that case turned upon particular features of the Victorian scheme. Even if the decision in *Slaven v. Federal Commissioner of Taxation* were applicable to compensation under the New South Wales scheme, the Commonwealth Income Tax Assessment Act 1936 could still be amended to make compensation for loss of earning capacity taxable. If payments were made on a net basis, and taxed by the Commonwealth, accident victims would not receive adequate compensation for their loss of earning capacity.
>
> Thirdly, the problems of integrating the policies of the Commonwealth and the States in areas of compensation taxation and welfare should be overcome by negotiations designed to achieve coordination rather than actions designed simply to limit the expense incurred by one Government.

8.17 **Accordingly we recommend that compensation for loss of earning capacity should be assessed by reference to the gross earnings of the incapacitated person.** The concept of notional earning capacity, which has been applied to non-earners, should also be treated as referring to notional gross earning capacity. We would therefore expect that periodic payments for loss of earning capacity of non-earners would, like those of earners, be taxable. We recognise, however, that it is impossible to be certain about the status of payments under the Scheme, since the administration and interpretation of the Income Tax Assessment Act is a matter for Commonwealth authorities and the courts. In particular, there may be uncertainty about the status of compensation for non-earners. This has a notional element in it and this possibly could be characterised as compensation for loss of earning capacity rather than replacement of lost earnings even though paid on a periodic basis. Clearly anomalies among different classes of claimants must be avoided. If the assumption proves inaccurate remedial action will be required, for example by adjusting the level of benefits.

D. Proportion of Loss Compensated

8.18 In the Working Paper, [19] we suggested that compensation for loss of earning capacity should be paid in respect of 80 per cent of the total loss sustained. There were two main reasons for this conclusion.

> Earners have certain work-related expenses (such as, the cost of travelling to and from work) not incurred by people unable to work. Thus, Compensation covering the total loss of earnings would make some incapacitated people financially better off than when they were working. It is a recognised principle of the common law that damages for loss of earning capacity do not include expenses saved as the result of the person no longer working.
>
> Although an injured person's incentive to work may be affected by a wide variety of factors, the payment of compensation covering the total loss of earnings may, at least in some cases, discourage injured people from attempting to rehabilitate themselves and return to work.

The suggestion that compensation be provided in respect of 80 per cent of the loss was designed to give general effect to the principle of restitution, while at the same time providing an incentive for a return to the workforce.

8.19 Several other compensation schemes adopt a similar approach. The Australian Woodhouse Report favoured compensation for lost earning capacity at the rate of 85 per cent of actual lost earnings. [20] The New Zealand national compensation scheme and the Tasmanian no-fault motor accidents scheme apply a rate of 80 per cent. [21] By contrast, the New South Wales workers' compensation system compensates for 100 per cent of the award rate of pay lost but only for the first six months, though this may not represent full loss of earnings since the injured person's earnings may have exceeded the award rate. [22] The Victorian no-fault motor vehicle accidents scheme also provides 100 per cent of after-tax earnings, but this is subject to a relatively low maximum. [23]

8.20 The submissions received on this proposal were divided. Some argued that the common law provides full compensation for loss of earning capacity, and criticised the suggestion that only 80 per cent of the loss should be compensated. [24] These submissions did not take into account the deduction generally made for contingencies or so-called vicissitudes of life, and the effect of the discount rate which both operate in practice to reduce common law damages for loss of earning capacity below the theoretical level of "full" compensation. Nor did they consider the further reduction which frequently occurs in the high proportion of cases settled out of court.

8.21 Other submissions took the view that provision of less than full compensation would ensure that injured people out of the workforce were not better off financially than when they were working, and would provide an incentive to return to the workforce. For example, the Government Insurance Office submission commented that "the principle that the benefit should be less than the weekly wage rate... will assist rehabilitation in appropriate cases". [25]

8.22 We remain of the view that the Scheme should not provide compensation for the total loss of earning capacity suffered by the incapacitated person. Accordingly, we **recommend that a person who is totally incapacitated for work as a result of a transport accident should receive compensation at the rate of 80 per cent of the loss of earning capacity sustained.** [26] The same principle should apply to compensation paid to non-earners in respect of loss of earning capacity, although the standard of earning capacity in the ordinary

case is simply a notional figure. Thus, in a case of total incapacity compensation should be paid at the rate of 80 per cent of the notional earning capacity.

8.23 If compensation is paid at the rate of 80 per cent of the loss of earning capacity there is a limited financial incentive for an incapacitated person to return to work, whether on a full-time or part-time basis. Of course there are many other factors that will influence the decision to resume employment, including the effectiveness of rehabilitation programs, the requirements of the Scheme and the desire of injured people themselves to continue their careers. Chapter 9 deals in detail with the rehabilitation program and with incentives to prospective employers and disabled people to create or take advantage of employment opportunities. Nonetheless there is room for an additional incentive whereby incapacitated people returning to the workforce are compensated for a higher proportion of their residual loss of earning capacity than 80 per cent. This would not only provide a financial incentive to resume (or take up) employment, but would also recognise the fact that someone who is in employment for a significant part of the working week incurs greater expenses than someone who remains, albeit involuntarily, out of the workforce. It is important to recognise that the resumption of employment, even on a part-time basis, may be the critical factor in rehabilitation.

8.24 Accordingly, **we recommend that the Corporation should develop a program under which a person incapacitated in a transport accident, who resumes employment for a substantial part of the working week, should receive compensation for a proportion of the loss of earning capacity sustained higher than 80 percent.** We suggest(without recommending) that the program could take the following form.

Where a person incapacitated in a transport accident resumes employment but has suffered a loss of earning capacity, the proportion of the loss compensated should be:

> where he or she is employed for 11-15 hours per week-85 per cent of the loss;
>
> where he or she is employed for 16-20 hours per week-90 per cent of the loss;
>
> where he or she is employed for 21-25 hours per week-95 per cent of the loss; and
>
> where he or she is employed for more than 25 hours per week-100 per cent of the loss.

E. The Ceiling

8.25 The decision to compensate both earners and non-earners for their loss of earning capacity raises the question of whether any limit should be placed on the amount of compensation payable. Chapter 5 referred to two competing objectives:

> the provision of full compensation for loss of earning capacity to the vast majority of transport accident victims; and
>
> the avoidance of the inequitable effects of the present compulsory third party insurance system, which is funded by flat-rate third party premiums, but pays earnings-related benefits.

It was pointed out there that the inequitable effects of the present system could be overcome by the introduction of a transport accidents scheme funded by earnings-related contributions (for example, a tax on income) but that in the short term this was unlikely to occur.

8.26 The Working Paper suggested a ceiling on earnings by reference to which compensation would be payable of 125 per cent of average weekly earnings. At that stage average weekly earnings were defined by reference to an index covering weekly total earnings for all New South Wales employees. This would produce a figure of $525 per week in June 1984.

8.27 Some submissions argued that there should be no limit on compensation payable. For example, the New South Wales Branch of the Australian Medical Association Submission made the following comment.

> The Commission's proposed imposition of the limit on the level of compensation payable for economic loss, ie. 125 per cent of average weekly earnings by New South Wales employees, is grossly unfair to those of the

> community who earn more than the average weekly wage... Some comment must be made, if only because the Branch's members generally earn more than average weekly earnings and would be greatly disadvantaged as accident victims compensated by the proposed scheme ... A significant proportion of the community earn more than the average weekly wage and, for them, if they are injured, appropriate living standards will not be maintained, mortgages and other out goings will not be met and there will develop a major complication in the emotional well being and potential for rehabilitation of such an injured party. [27]

Another group of submissions, which criticised earnings-related compensation and supported a welfare or disability-based scheme, implicitly supported the imposition of a ceiling on compensation for loss of earning capacity if, contrary to their view, an earnings-related approach was adopted. [28] Other submissions took the middle ground, accepting a ceiling but arguing that it should be higher. For example, the Motor Cycle Council of New South Wales argued in favour of a higher ceiling which would ensure "that very few people would suffer hardships as a result of their incapacity to earn their previous income". [29]

8.28 We have maintained the view that, if the Scheme is to be funded otherwise than by earnings-related contributions, the inequity should be minimised by imposing a ceiling on compensation for loss of earning capacity. However, the ceiling suggested in the Working Paper is, in our view, too low. Several unions consulted after the release of the Working Paper commented that the ceiling which we proposed was not high enough to cover the earnings of many of their members. In part, this was a consequence of the average weekly earnings index selected in the Working Paper. The index selected, that of weekly total earnings for all New South Wales employees, includes both female and part-time earners. Since the earnings level of both groups is considerably lower than that of full-time adult male employees, [30] it does not reflect the average weekly earnings of that latter group. A more appropriate index would be average weekly earnings for adult male full-time employees in Australia. The figure for Australia was selected in preference to that for New South Wales, because an Australia wide index allows benefits to be integrated nationally should the opportunity arise. Despite considerable changes in the composition of the labour force, adult male full-time workers are still in the majority. [31] In addition, families supported by a single male breadwinner are slightly more common than families with both partners working, and in families with two earners, the earnings of the male are generally higher than those of the female. The index selected should reflect the workforce experience of Australian families.

8.29 In addition to selecting a different index, we propose that the ceiling should be increased to 150 per cent of average weekly earnings, as defined in paragraph 8.26 ($630 at June 1984). Accordingly, **we recommend that there should be a limit on the compensation payable to earners in respect of loss of earning capacity. The maximum earning capacity by reference to which compensation should be assessed should be 150 per cent of AW E.** Since it has already been recommended (paragraph 8.22) that compensation should normally be paid at the rate of 80 per cent of lost earning capacity, the maximum compensation actually payable will be 120 per cent of AWE.

8.30 The ceiling of 150 per cent of AWE should be high enough to cover the vast majority of earners. Table A.15 in Appendix A indicates that only 6.2 per cent of New South Wales male full-time employees have earnings above this ceiling. An even smaller percentage-4 percent-of all employees (including female full-time and all part-time employees) receive earnings above the ceiling. This information relates only to employees. Since the earnings of the self-employed are consistently lower than those of the employed, these figures are likely to overstate the proportion of all earners who will be above the ceiling.

Top-Up Insurance

8.31 A further argument for imposing a ceiling on the loss of earning capacity in respect of which compensation is payable is that it is open to higher income earners who wish to cover themselves against loss of earnings in excess of the ceiling to take out private insurance. We had a number of discussions with insurance bodies relating to the cost of such additional cover on the private market. While earners can at present purchase lump sum disability insurance cover for a relatively low premium, the insurers were reluctant to provide estimates on the cost of indexed periodic payments for loss of earning capacity covering the shortfall between the proposed ceiling and the actual loss of earning capacity. If such insurance does not become available on the private market, it should, if possible, be offered by the Corporation. Although there may be difficulties in devising a suitable insurance program, the Corporation should be better placed than private insurers to offer coverage, since administration of the insurance program can be linked to the no-fault scheme itself and take advantage of

the experience of that Scheme. **We recommend that the Corporation should investigate the practicability of providing top-up insurance for people with an earning capacity in excess of the maximum in respect of which compensation is payable.** The top-up insurance could be offered in the form of indexed periodic payments for loss of earning capacity or, if this is not practicable, as a lump sum. If such insurance is offered by the Corporation, arrangements could be made for a person to accept the offer and pay the premium at the same time as his or her motor vehicle is registered. If this is inappropriate, for example, because the person does not own a motor vehicle, consideration should be given to making such insurance available to anyone who wishes to take it up.

Partial Loss of Income by High Earners

8;32 A particular problem arises in the assessment of compensation for partial loss of earning capacity if earnings-related compensation is subject to a ceiling. The question is whether an injured person who suffers a partial loss of earning capacity, but whose post-accident earnings are above the limit, should be able to claim under the Scheme. There are two approaches. The first is to compensate the injured person by reference to the actual loss of earning capacity, subject only to the overall limit on the amount of compensation payable. Thus, if a person's earning capacity is reduced from 300 per cent to 200 percent of AWE, that person would receive compensation for 80 per cent of the loss regardless of the fact that his or her residual earning capacity is above the maximum by reference to which compensation can be assessed (150 per cent of AWE). The second approach is to compensate the injured person for loss of earning capacity only when his or her earnings after the accident are reduced.

F. Indexation of Compensation

8.35 Several submissions expressed concern that compensation provided under the Scheme should maintain its real value, that is, not be eroded by inflation. Reference was made particularly to the failure of the New Zealand scheme to provide for automatic indexation of benefits and thus its failures to ensure maintenance of the real value of those benefits. [32] The Gair Report in New Zealand recognised clearly that the maintenance of the real value of benefits is of central importance both to the success and acceptability of a new statutory scheme of no-fault compensation.

> [I]f the public is to have confidence in new compensation schemes ... all doubts should be removed as to the danger of benefits being eroded by changing money values. [33]

We strongly endorse this view. It is fundamental to the Transport Accidents Scheme that the legislation provides for automatic indexation of monetary benefits.

8.36 Legislative provision for automatic indexation has another advantage. Any scheme, including the common law, is not immune from political interference, should Governments decide, for example, that benefits must be reduced in order to save costs. Thus automatic indexation cannot guarantee that the Scheme will not have to reduce the benefits. However, if the policy of automatic indexation is incorporated into the legislation, with benefits being framed by reference to the standard of average earnings, real reductions in benefits will require amendments to the governing legislation. The need for amending legislation will make it more difficult for reductions in benefits to occur without preliminary debate in the community and the opportunity to assess whether the proposals are consistent with the below the maximum of 150 per cent of AWE. On this approach the injured person in the example would receive no compensation since his or her earning capacity would remain above the maximum despite the accident.

8.33 There are arguments in favour of each approach. It can be argued that the first favours partially incapacitated earners over those whose earning capacity is totally destroyed. A high income earner whose earning capacity has been destroyed will receive compensation in respect of a maximum earning capacity of 150 per cent of AWE. By contrast, a partially incapacitated person whose post-accident earning capacity is greater than the limit will receive compensation for 80 per cent of the loss of earning capacity, even though the combination of continued earnings and compensation may give him or her an income far in excess of the maximum compensation payable under the Scheme. On the other hand, the difference between the position of the totally and partially incapacitated high income earner derives from the latter's residual earning capacity. The

partially incapacitated person has still suffered a loss of earning capacity and arguably should not be denied compensation simply to equalise his or her position with that of the person suffering total incapacity.

8.34 On balance we prefer the second argument, as giving fuller effect to the restitution principle. Thus **we recommend that where a person suffers a partial loss of earning capacity, irrespective of the amount of the person's residual earning capacity, he or she should be compensated for the loss sustained, subject to the overall limit on compensation payable in respect of loss of earning capacity** (paragraph 8.29).

Objectives of the Scheme. For these reasons **we recommend that the legislation should embody the principle of automatic indexation. Accordingly, periodic compensation for loss of earning capacity should be indexed and adjusted at six monthly intervals by reference to changes in AWE. In assessing the extent of loss of earning capacity the Corporation should make appropriate adjustments to pre-accident earnings or other standards used in the assessment to take account of movements in AWE.**

8.37 An indexation model based on average weekly earnings has been adopted in preference, for example, to the consumer price index, because the benefits provided are earnings-related rather than linked directly to the cost of living. Adjustment on a six-monthly basis is, in our view, sufficiently frequent and administratively less cumbersome than quarterly adjustments. It should be noted that the New South Wales workers' compensation system also provides for automatic adjustment of periodic payments and some lump sums in line with a specified index of average weekly earnings. [34]

G. Assignability of Benefits

8.38 Compensation for loss of earning capacity, and other entitlements to continuing benefits under the Scheme, are intended to be personal to the disabled or incapacitated person. **We recommend that compensation for loss of earning capacity and other benefits under the Scheme should not be capable of assignment by the person entitled to the compensation or other benefits.** This is not intended to exclude the special arrangements for transport accident victims requiring protective measures, such as the appointment of a trustee to manage compensation payments for young children or people suffering mental disability. Nor does it exclude payment by the Corporation directly to the dependent spouse and children of a permanently unconscious victim (paragraph 11.56)

II. COMMENCEMENT AND TERMINATION OF BENEFITS

A. Commencement of Benefits

8.39 Under New South Wales law, children must attend school until the age of 15 years, [35] although in special circumstances they may be able to leave earlier. [36] In October 1983 less than 4 per cent of the Australian civilian population aged 15 years was in full-time employment The proportion increased to 15 per cent among 16 year olds and steadily rose to about 58 per cent by the age of 19 [37] and 65 per cent by the age of 24 years. [38] The labour force participation rates are, of course, higher because of the inclusion of people in part-time work and those who are unemployed. [39] Under Commonwealth legislation only people aged 16 years or more are eligible for unemployment benefits. [40]

8.40 **In accordance with policies in other areas we recommend that compensation for loss of earning capacity should not commence until the injured person has attained the age of 16 unless, at the date of the accident, the person was under that age but was in fun-time employment.**

B. Waiting Periods

1. The First Five Days

8.41 As shown in the Adelaide Traffic Accident Survey, discussed in Appendix A, [41] a relatively large number of transport accidents involve either no resulting injury or only minor injuries. Fifty-six per cent of people recorded in the Survey suffered some injury, but of these some 60 per cent were only minor injuries. [42] This is consistent with New South Wales Traffic Accident Research Unit data which shows that of all people reported by police as injured in traffic accidents in 1983, only 28 per cent were injured seriously enough to be admitted to hospital. [43] It

is therefore likely that a relatively large proportion of transport accident victims suffer only very short-term incapacity. Again the Adelaide Traffic Accident Survey is consistent with this conclusion. [44]

8.42 The difficulties of compensating the large volume of victims sustaining minor injuries has been repeatedly stressed. The Australian Woodhouse Committee, for example, observed that

> ... if compensation were to begin as from the day an incapacity first commenced, very large numbers of minor or short-term... injuries would press down upon the fund and its administrative processes ... There would be criticism too that personal initiatives to overcome the small troubles had been taken away. Of equal importance, there would be a heavy added financial burden put upon a scheme designed to concern itself with more pressing claims. [45]

These reasons led us to suggest, in the Working Paper, that there should be a one week waiting period before benefits are payable under the Scheme. The Paper noted that the workers' compensation system pays compensation during the first week of disability, but pointed out that arguably this could be justified on the ground that it provides an incentive to employers to improve safety standards. [46] This argument does not apply to transport accidents as there is no identifiable group creating the risk of such accidents in the same way as employers can be said to create the risk of work-related injuries. A waiting period of one week, which applies in the Tasmanian and Northern Territory schemes, [47] creates a relatively small burden for injured earners, most of whom will be covered by sick pay for the first few days of incapacity. [48]

8.43 Some submissions criticised the proposal for a waiting period, referring especially to the fact that the common law which was being replaced compensated for the whole period of incapacity. [49] While common law damages, if awarded in full, cover lost earnings including those in respect of the first few days incapacity, the indisputable reality is that the waiting period for damages under the common law can usually be measured in months or years rather than days. It is true that a no-fault scheme supplementing the common law could cover loss of earnings from the first day of incapacity, although this would increase costs significantly. We adhere to the view that a departure from the restitution principle is warranted for the first week (or five working days) of incapacity. Under any compensation scheme resources are limited and priority should be given to those sustaining long-term incapacity rather than those suffering minor injury. **Thus we recommend that compensation for the earner's loss of earning capacity should not be paid in respect of the first five working days from the date of the accident or the first incapacity caused by the accident (whichever period expires later).**

8.44 The period of five working days, rather than a week as in New Zealand, [50] has been chosen because this will apply more uniformly, without regard to the fortuitous occurrence, for example, of public holidays. **We recommend, however, that the waiting period should apply only once in respect of an incapacity arising from a transport accident.** For example, a person who is injured in a transport accident may return to work after five working days of incapacity. Subsequently the injury may prevent that person from working for another period. In such a case the injured person should be entitled to compensation for loss of earning capacity from the first day of the subsequent incapacity. The recommendation does not affect the entitlement of a transport accident victim eligible to claim workers' compensation for the first five days of incapacity (paragraph 14.94).

2. "Earners" Not in Workforce

8.45 The definition of earner put forward earlier includes transport accident victims who were not working at the time of the accident or perhaps for a considerable period before that a longer waiting period for compensation for loss of earning capacity should apply to such people. The major reason is to reduce the incentive for a person who is not in the workforce to maximise incapacity in order to claim relatively generous monetary compensation during a period when he or she is unlikely to have been employed in any event. We think the risks are much less significant in relation to incapacity which continues for at least four weeks. Accordingly, **we recommend that where a person, although classified as an earner, has not been in employment at any time during the eight weeks preceding the accident, compensation for the earner's loss of earning capacity should not be paid in respect of the first four weeks from the date of the accident or from the date of the first incapacity caused by the accident (whichever expires later).** People in this category should not be required to wait a further five working days to receive compensation.

8.46 Some transport accident victims will be deemed to be earners solely because, at the date of the accident, they had firm arrangements to enter the workforce (paragraph 7.12).In these cases **we recommend that compensation for loss of earning capacity should commence from the date on which that person, but for the accident, would have commenced employment.** This should be subject to a further waiting period of five working days, but not to the four week period referred to in the previous paragraph.

C. Termination of Benefits

1. General

8.47 **Compensation for loss of earning capacity should cease on:**

the termination of the incapacity; or

the death of the incapacitated person.

2. Age Limits

8.48 The Working Paper proposed that entitlement to compensation for loss of earning capacity should generally cease at age 65. [51] It was correctly put in submissions that some people over this age continue to work. [52] In October 1983, about 1 per cent of the Australian civil labour force was aged 65 or over. [53] The workforce participation rate of people 65 or over (including full-time, part-time and unemployed people) was 5.2 per cent. [54] Fifty-seven per cent of those who were employed were still employed full-time in this age group. [55] We have modified the proposals to take account of these facts. **Subject to the following recommendations, we recommend that compensation for loss of earning capacity should continue until the incapacitated person attains the age of 65.** This applies to benefits for loss of earning capacity for both earners and non-earners. However, subject to the recommendation in paragraph 8.50, **where the incapacitated person is an earner and has attained the age of 61 but not 70 when the incapacity commences, compensation for loss of earning capacity should continue for a period of four years from the commencement of the incapacity, provided that compensation should not continue beyond the age of 72. Where the incapacitated person is an earner and has attained the age of 70 when the incapacity commences, compensation should continue for a period of two years from the commencement of the incapacity.**

8.49 We appreciate that the age limit of 65 (subject to extension in certain cases) for both men and women is different from the age qualification for the age pension which is 60 in the case of women and 65 for men. There is an argument that entitlement to compensation should cease at the time when the accident victim becomes eligible for the pension. However, it is not appropriate to distinguish between males and females in relation to their entitlement under the Scheme. As equality in career opportunities and the workplace comes closer to realisation the differences in entitlement in other areas are likely to diminish. Of course compensation for loss of earning capacity will be subject to the same means test for social security purposes as other income and this will presumably reduce or eliminate the entitlement to an age pension or other benefit.

8.50 In the case of people working at the age of 65 or over, further questions arise about imminent retirement. For example, a 67 year old earner may be injured in a transport accident on the way home from his or her retirement party. Is it fair, in these circumstances, to continue earnings-related periodic compensation for a further four years? We think that it is not and **we recommend that where an earner who has attained the age of 61 is injured, compensation for loss of earning capacity should not be paid or continue beyond the age of 65 or beyond the age at which he or she would have left the workforce permanently had the accident not occurred (whichever is later).**

8.51 There are, of course, many people who have permanently retired before the age of 65. Under the recommendations, these people would still receive compensation for loss of earning capacity in the same manner as other non-earners. For example, a man aged 58 who has retired from his job would be entitled, after two years of total incapacity, to compensation at the minimum level applicable to all totally incapacitated adults (that is, actual payments of 40 per cent of AWE). It would, of course, have been possible to exclude these people from compensation for loss of earning capacity on the basis that they had no intention of exercising this power. However, the view has been taken that this intention is irrelevant in the case of long-term incapacity because the

person has lost the capacity to choose whether to exercise his or her latent earning capacity. Accordingly to provide otherwise for people who have retired from the workforce on account of age would discriminate unfairly against older people.

III. ASSESSMENT OF PERMANENT INCAPACITY

8.52 Considerable attention has been paid to submissions which evaluated the proposals in the Working Paper in terms of the goal of rehabilitation. One important feature which received both praise and criticism was the proposal for periodic compensation for loss of earning capacity. Many submissions accepted the view that periodic payments provided future security more effectively than a single, once-and-for-all assessed lump sum. [56] However, others made the criticism that the scheme of payments proposed in the Working Paper raised the spectre of repeated assessments and reassessments for the full period of incapacity. [57] This was alleged to have adverse effects on rehabilitation because incapacitated people would be fearful of returning to work in case they forfeited their right to compensation. There was also the practical problem of supervening events which might cause disagreement between the injured person and the Corporation about the continuing cause of incapacity. These submissions saw one of the major benefits of the existing system as being its finalisation of the assessment process, [58] even though that might not occur for some years after the accident.

8.53 There is great force in the argument that a person suffering long-term incapacity should be able to terminate his or her relationship with the Corporation as far as compensation for loss of earning capacity is concerned. However, periodic compensation does not necessarily require the incapacitated person to maintain a continuing relationship with the Corporation and to be subjected to continuous supervision and repeated assessments. The benefits of periodic compensation can be combined with the advantages of terminating the relationship through a system of assessment of permanent incapacity. This would involve the Corporation making an assessment of the permanent loss of earning capacity sustained by an injured person and paying compensation accordingly. The compensation would not be subject to review even if the injured person subsequently derived higher earnings from employment, although the assessment could be reviewed in favour of the injured person if, for example, his or her condition deteriorated.

8.54 In a recent paper the former Chairman of the British Columbia Workers' Compensation Board, Professor T G Ison, suggested that assessment of permanent incapacity, which he describes as a "fixed pension system", has great advantages over a system which pays compensation by reference to "actual loss of earnings". [59] The advantages of a fixed pension include the following:

> it creates the maximum incentive for rehabilitation, since the injured person can return to work without losing his or her entitlement to compensation for loss of earning capacity;
>
> it overcomes genuine fear of work which some incapacitated people may entertain because they are apprehensive that if they accept a job and are unable to cope, their entitlement to compensation may be prejudiced;
>
> it is the most consistent with civil liberties in that the incapacitated person
>
>> ... can go where he likes, he can migrate if he wishes, he can do what he likes and adopt the lifestyle of his choice without fear of control or criticism from the [Corporation] [60] ; and
>
> administrative costs are minimised and the system avoids the need to make ongoing determinations of the cause of incapacity.

Professor Ison acknowledges that a fixed pension system will produce overcompensation if the incapacitated person later unexpectedly returns to work. However, he argues that this is likely to occur infrequently in practice and in any event is a price well worth paying because of the advantages to be gained in relieving the incapacitated person of dependence on the administering authority.

8.55 The New Zealand Accident Compensation Act 1982 adopts the concept of assessment of permanent incapacity. Section 60(1) provides that:

> where an earner who suffers personal injury by accident does not completely recover from his incapacity due to the accident, as soon as the Corporation considers that (so far as the consequences of the injury are concerned) his medical condition is stabilised and all practicable steps have been taken towards his retraining and rehabilitation, the Corporation shall review his case and make an assessment.

The assessment is to specify, in percentage terms, the permanent loss or diminution of the earner's capacity to earn. This is done by comparing the amount the claimant would have been earning in his or her pre-accident employment at the date of the assessment and the amount he or she is now capable of earning. The percentage loss is applied to the claimant s "relevant earnings", and compensation is paid at the rate of 80 per cent of the loss so calculated. [61] Earnings related compensation payable in accordance with the section is not to be reduced by reason of any subsequent increase in the earning capacity of the claimant. [62] However, if at any time after the assessment the claimants earning capacity has deteriorated as a result of the injury, the Corporation may increase the amount of compensation payable. [63]

8.56 The arguments of Professor Ison lead to the conclusion that the Scheme should provide for assessment of permanent incapacity. The New Zealand Act, with some variations, can provide the model for the suggested approach. However, the Corporation should not be under a duty to make an assessment of permanent incapacity as soon as the pre-conditions have been satisfied. Several reasons support this view. First, the test proposed for post-accident earning capacity is different from the test applied in New Zealand and may make the task of assessing permanent incapacity somewhat more difficult than in New Zealand. Secondly, it will be necessary for the Corporation to develop procedures to ensure that applications for assessment of compensation on the basis of potential for advancement are taken into account in assessing permanent incapacity. This may be difficult to accomplish if the Corporation is under a duty to assess for permanent incapacity at the earliest opportunity. Thirdly, it would be wise in the early stages of the Scheme to observe the workings of this procedure, with a view to determining whether it is feasible and desirable to impose a duty on the Corporation to make an assessment of permanent incapacity in all cases of apparently stable long-term incapacity. Fourthly, care must be taken to ensure that the prospect of an assessment of permanent incapacity does not cause some accident victims to prolong their incapacity to take advantage of the procedure.

8.57 The Corporation's power to make such an assessment should be exercisable only with the consent of the incapacitated person although it should be open to the Corporation to initiate the process. An incapacitated person may, for example, prefer that the assessment of permanent incapacity await the outcome of an assessment of compensation on the basis of potential for advancement. Again, the person may be content to have his or her post-accident earning capacity assessed from time to time and compensation adjusted accordingly. In these circumstances, the incapacitated person should not be required to participate in an assessment of permanent incapacity. However, this view might well be reconsidered after some experience with the Scheme.

8.58 **We recommend that where a person has sustained a permanent disability in a transport accident and**

> **(a) his or her medical condition has stabilised;**
>
> **(b) all practicable steps have been taken towards his or her rehabilitation;**
>
> **(c) he or she has suffered a loss of earning capacity which is likely to continue indefinitely; and**
>
> **(d) the extent of the loss is unlikely to vary substantially, taking into account reasonably foreseeable changes in economic conditions and employment opportunities,**

the Corporation should have power, with the consent or at the request of that person, to make an assessment of his or her permanent loss of earning capacity. Such an assessment should be made in accordance with earlier recommendations and should take account of any assessment of compensation on the basis of potential for advancement. Clause (d) of the recommendation is designed to take account of the test of post-accident earning capacity embodied in earlier recommendations, which in turn requires reference to be made to labour market conditions.

8.59 Once an assessment of permanent incapacity is made it should not be reduced if the incapacitated person's earning capacity subsequently increases. As was noted (paragraph 8.54), this is the price that has to be paid for achieving finality and permitting incapacitated people to be free of continuing obligations to the Corporation in relation to compensation for loss of earning capacity. Thus **we recommend that, subject to the recommendation in the next paragraph, an assessment of permanent incapacity should be final and not liable to variation.** This would mean that compensation pursuant to the assessment would not be reduced by reason of any subsequent increase in the earning capacity of the person concerned. Nor would the compensation be reduced if it is later ascertained that the person's incapacity at the time of permanent assessment was not as great as had been assumed. Of course, on general principles an assessment could be set aside if it were procured by the fraud of the claimant.

8.60 While the assessment should not be reduced by reason of a subsequent increase in the disabled person's earning capacity, the Corporation should be required to make a fresh assessment if that person's earning capacity is substantially reduced because of a subsequent deterioration in his or her physical condition. However, we would go further than the New Zealand legislation and require a reassessment when the disabled person's earning capacity is substantially reduced because of a loss of or change in employment. It should be necessary for the disabled person to show that the reduction in earning capacity arises out of the disability, it would not be enough, for example, if the disabled person voluntarily resigned from employment or if the change of employment was unrelated to the disability sustained in the transport accident. Accordingly, **we recommend that if, at any time after an assessment of permanent incapacity has been made, the earning capacity of the disabled person is significantly reduced by reason of**

(a) a deterioration in that person's physical condition; or

(b) a loss of or change in employment,

and the continuing reduction in earning capacity arises out of the disability caused by the transport accident, the Corporation should set aside the assessment. The Corporation should have power to make a fresh assessment of permanent incapacity if the conditions required for such an assessment are satisfied. Alternatively, continuing compensation for loss of earning capacity would be assessed in accordance with the general principles stated in this Chapter.

IV. SUMMARY

Form and Payment of Compensation

8.61 Compensation for loss or impairment of earning capacity should be paid on a periodic basis (fortnightly in arrears). In general, a claimant should not be permitted to redeem his or her entitlement in return for payment of a lump sum. This compensation should be paid at the rate of 80 per cent of the loss or impairment of earning capacity, calculated by reference to gross (pre-tax) earnings. As an incentive to resumption of employment, this percentage should be increased where the incapacitated person resumes employment for a substantial part of the working week.

8.62 The maximum earning capacity by reference to which compensation is to be assessed should be 150 per cent of AWE ($630 in June 1984). Thus the maximum compensation payable should be 120 per cent of AWE ($504 in June 1984). Monetary compensation under the Scheme should be indexed and adjusted at six-monthly intervals by reference to changes in AWE.

Commencement and Termination of Benefits

8.63 Compensation for loss or impairment of earning capacity should not be paid in respect of the first five working days of incapacity. Compensation should thereafter continue for the duration of the incapacity or until the incapacitated person attains the age of 65. However, there should be special arrangements for earners over the age of 61 to allow compensation to continue, in appropriate circumstances, beyond the age of 65.

Assessment of Permanent Incapacity

8.64 The Corporation should have power, provided certain conditions are satisfied and it has the consent of the injured person, to make an assessment of his or her permanent loss of earning capacity. Such an assessment should be final and not liable to variation, except where the incapacitated person's earning capacity is later significantly reduced. In this case a fresh assessment can be made.

FOOTNOTES

1. Lump Sum Survey, pp.171-175. Traffic Accident Case Study, paras.6.15-6.17.

2. Working Paper, para.6.31.

3. Accident Compensation Act 1982 (NZ), s.71(1). No redemption is to be made if the injured person is thereafter likely to become reliant on social security; see s.71(2).

4. National Rehabilitation and Compensation Bill 1977 (Cth), cl.43(2).

5. Section 15(1). See also s.15 (1A), (1B). The liability to compensate for medical and related expenses may also be redeemed, as may the liability to pay a specified sum under the table of claims: s.16.

6. Derived from information supplied by the Workers' Compensation Commission of New South Wales.

7. Workers' Compensation Act 1926, part IIIA.

8. Lump Sum Survey, p.80, table 42. The table shows that 60.2 percent of workers receiving between $20,000 and $10,000 and 61.9 percent of workers receiving $40,000 or more were "vulnerable". For the definition of vulnerability, see p.73.

9. *Id*., p.87, table 44. This table shows the numbers of people currently satisfied with their lump sum awards in relation to the numbers who were satisfied at the time of the award. Of workers who received $40,000 or more and had been satisfied at the time of the award 69.2 per cent were currently dissatisfied. A striking 77.8 per cent of motor vehicle victims who received $100,000 or more and had been satisfied at the time of the award were currently dissatisfied.

10. Submission W23, pp.11-12.

11. Motor Accidents (Compensation) Act 1979 (NT), s.15.

12. Prior to 1979 in Victoria, s,25 of the Motor Accidents Act 1973, provided for compensation robe provided in respect of "loss of income". In *Tinkler v. Federal Commissioner of Taxation* (1979) 29 ALR 663, it was held that payments made under s.25 were taxable income. As a result of the decision, s.25 was amended to provide that payments are to be made for "deprivation or impairment of earning capacity". In determining compensation for loss of earning capacity, the Board is required to take into account "the loss of earnings which that person has incurred and the likely loss of future earnings which that person will incur".

13. (1983) 14 ATR 431.

14. *Federal Commissioner of Taxation v. Slaven* (1984) 15 ATR 242.

15. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), schedule 1, Part V, paras.4, 5. Letter from the General Manager of the Motor Accidents Insurance Board, dated 24 November 1983.

16. Submission W28, para.2.3.2.

17. See para. 17.57.

18. Income Tax Assessment Act 1936 (Cth.), s.221A(1)(f).

19. Working Paper, paras. 5.22-5.25.

20. Australian Woodhouse Report, Vol.1, paras.374(c). 529(3).

21. Accident Compensation Act 1982 (NZ), s.59: Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), schedule 1, Part V, para.2(4).

22. Workers' Compensation Act 1926, s.9(1) (a).

23. Motor Accidents Act 1973 (Vic.), s.25(1).

24. Submissions W52, pp.3, 8; W28, p.3.

25. Submission W17. p.2. See also Submission W28, p.29 arguing in favour of compensation for 85 per cent of the loss: Submission S46, pp.3, 5 which suggested that, particularly in the context of workers' compensation, the injured person should not be better off than if he were not injured"; and Submission S34, p.34.

26. The selection of 80 per cent also takes into account estimates of the costs of working made for the purposes of the poverty line. For example, the poverty line estimate of the University of Melbourne's Institute of Applied Economic and Social Research for a single person who is not working is some 20 per cent lower than that for a person who is working. ($98.30 as against $121.20 in May 1984).

27. Submission W60, p.6. See also Submissions W13, p.3: W23, p.6.

28. See eg. Submissions W1, p.1; W49.

29. Submission W59, p.4. See also Submission W34, p.3.

30. Appendix A, Table A.17.

31. Australian Bureau of Statistics, *The Labour Force Australia October 1983,* Cat. No.6203,0, p.1 3, table 4.

32. Submission W9, pp.8-9.

33. Gair Report para.118.

34. Workers' Compensation Act, 1926, s.9A. The index used is that of the weighted average minimum weekly rate payable for all industry groups to adult males for a full week's work, excluding overtime. Workers' compensation payments are indexed every six months.

35. Public Instruction (Amendment) Act, 1916. ss.2A, 4, s.4 has been incorporated into s.55 of the Community Welfare Act, 1982, which section has yet to be proclaimed.

36. Public Instruction (Amendment) Act 1916, s.6, s.6 his been incorporated into s.56 of the Community Welfare Act 1982, which section has yet to be proclaimed.

37. See note 31 above, p.15, table 7.

38. *Id.,* p.15, table 8.

39. *Id*., p.15, table 7. In the 15 year age group, 13 per cent of the Population work part-time and 8 per cent are classified as unemployed. However, in both these groups about three-quarters still attending school. The inclusion of these groups with the full-time employed gives an overall labour force participation rate among 15 year olds of 25 per cent.

40. Social Security Act 1947 (Cth.), s.107(1)(a).

41. Seventy-seven per cent of all people recorded in the Survey, either suffered no injury or minor injuries. See Appendix A, Table A.34.

42. *Ibid.*

41. Traffic Authority of New South Wales, *Road Traffic Crashes in New South Wales, Statistical Statement Year ended December 31st 1983,* p.19.

44. Appendix A, table A.35.

45. Australian Woodhouse Report, vol.1, para.377(a).

46. Working Paper, para.6.39.

47. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), schedule 1, part V, para.4(1), Motor Accidents (Compensation) Act 1979 (NT), s.11. Cf. Motor Accidents Act 1973 (Vic.). s.17, which imposes a monetary threshold but no waiting period.

48. See Industrial Arbitration Act, 1940, s.88C(2).

49. See eg. Submission W28, p.14.

50. Accident Compensation Act 1982 (NZ), s.57.

51. Working Paper, para.6.41. There was provision to pay earnings-related compensation for one year after the date of injury when a person injured was aged 64 or more.

52. See eg. Submissions W7;, W87; and W52, p.11.

53. See note 31 above, p. 17, table 11.

54. *Ibid.*

55. *Id.,* p.18, table 13.

56. See eg. Submissions S47, pp.3. 5; S49. p.1; and W85, p.4,

57. See eg. Submissions S94, pp.6-71-W75, p.6: and W69, p.2.

58. See eg. Submission W69, p.2.

59. T G Ison, “Workers’ Compensation-The Canidian Experience”, paper delivered at the conference entitled “Workers’ Compensation-New Directions”, South Australian Ministry of Labour (Adelaide, May 1984); pp.4-8.

60. *Id.,* p.5.

61. Accident Compensation Act 1982 (NZ), s.60(1),(2).

62. *Id*., s.60(5).

63. *Id.,* s.60(4).

9. Rehabilitation

I. INTRODUCTION

9.1 In the Working Paper, rehabilitation was recognised as an essential objective of an accident compensation scheme. [1] This Chapter examines the evolution of the concept of rehabilitation as a right and discusses in detail the areas of rehabilitation that should form an integral part of a transport accident scheme. The recommendations are the product of a program of research and consultation including a survey of existing rehabilitation facilities [2] in New South Wales and discussions with disabled people. [3]

9.2 According to the World Health Organisation, rehabilitation is the

> ... combined and coordinated use of medical, social, educational and vocational measures for training or retraining the individual to the highest possible level of functional ability. [4]

An American commentator stresses a similar goal by defining rehabilitation as

> ... an individualised process in which the disabled person, professionals, and others, through comprehensive, coordinated and integrated services, seek to minimize the disability and its handicapping effects, and to facilitate the realization of the maximum potential of the handicapped individual. [5]

This was echoed in the submission from the Rehabilitation Staff at the Royal South Sydney Hospital which described rehabilitation as

> [t]he process of restoring a disabled person to the maximum level of function of which he/she is capable and wishes to achieve. [6]

9.3 Chapter 5 referred to the fact that, despite efforts to promote road safety there were still 966 deaths and almost 34,000 injuries reported in road accidents in New South Wales in 1983 (paragraph 1.34). While improved car design, road conditions and driving techniques could reduce these numbers considerably, it is impossible in a highly motorised society to avoid accidental death and injury altogether. Where death or injury does occur, the first priority of any compensation scheme should be the reduction of the resulting human suffering and economic cost. The optimum result is the complete functional recovery of injured people or, if this is not possible, the maximisation of their functional ability. This requires prompt referral to, or intervention by skilled workers, [7] who may be doctors, occupational therapists, physiotherapists, social workers, psychologists or a number of other professionals. Each injured person's needs will be different. Some will need only short-term medical treatment while others will need a complex program of rehabilitation demanding continuity of effort by a variety of many service providers.

9.4 Rehabilitation does not end when the injured person's physical and social readjustment has been taken as far as skilled attention can. Where complete functional recovery cannot be achieved, the quality of long-term care available to the permanently disabled is .itself a continuation of the rehabilitation process. The better the long-term care, the less chance there is that the initial achievements will be lost or impaired. Effective rehabilitation means a long-term commitment to minimising the consequences of disability by providing mechanical aids and other forms of support and assistance designed to allow the disabled person to lead an independent life. Regrettably, there will always be some accident victims who cannot live independently in the community because their disabilities are too severe. The provision of long-term support with particular regard to the permanently disabled is taken up in Chapter 10. The main concern of this Chapter is the initial stage of rehabilitation aimed at averting permanent incapacity or minimising its extent.

9.5 It is also necessary for the community to have a firm commitment to rehabilitation and to the right of disabled people to participate in rehabilitation programs. Once the initial rehabilitation process is complete, the injured person requires continuing support and encouragement from family, friends, the workplace and the community generally, in order to achieve the goal of maximum independence. A widespread community commitment to

rehabilitation also increases the chances that disabled people and their families will perceive it is in their best interests to participate actively in rehabilitation programs.

II. EMERGENCE OF REHABILITATION

A. Australia

9.6 The concept of rehabilitation is relatively new and its importance has not always been recognised. A submission from Dr. N. Wing, a rehabilitation pioneer in New South Wales, noted that

> [t]he philosophy of Rehabilitation grew from very meagre beginnings in the Armed Forces in the USA and Great Britain, and was very reluctantly accepted by the medical profession and by Governments. [9]

Since rehabilitation is a relatively novel concept it is helpful to trace briefly the emergence and development of rehabilitation services in Australia.

1. Charities

9.7 Rehabilitation services in Australia developed in a fragmented and uncoordinated fashion through charitable organisations, government agencies and hospital facilities. The first such services were provided by private charities.

As in other countries, voluntary organisations have played a pioneering role in the development of rehabilitation services for the civilian disabled in Australia. The first handicapped groups to receive attention were the blind, the deaf and the dumb, and organisations to assist people with these disabilities have been in existence for a long time. During the 1920s several voluntary bodies were established to meet the needs of disabled children. [10]

A large number of private organisations continue to operate and provide services for disabled people, including transport accident victims. Some are managed by disabled people as self-help organisations, such as the Australian Quadriplegic Association and Handicapped Persons' Alliance of New South Wales. Others are conducted by able-bodied people, or by a combination of able-bodied and disabled people such as the Paraplegic and Quadriplegic Association of New South Wales. They subsidise the purchase of equipment, conduct accommodation centres, [11] provide sheltered employment [12] and act as lobby groups to protect their members interests. [13] Their sources of funding include government grants, charges to clients, charitable donations and sales of items from sheltered workshops.

2. The Commonwealth Government

9.8 The first Government involvement in the development of rehabilitation services was through the Commonwealth Repatriation Department. The Department was established in 1917 to provide medical treatment to incapacitated ex-servicemen whose disabilities were connected with war service. [14] This rehabilitation service continued and was expanded following World War II. In 1952 a special vocational training scheme was established specifically for disabled ex-service people, called the Disabled Members and Widows' Training Scheme. [15]

9.9 The provision of rehabilitation services by the Government to civilian disabled people did not commence until 1941. [16] Amendments to the Invalid and old-age Pensions Act 1941 led to the establishment of vocational training programs for invalid pensioners. [17] Following the end of World War II, an interim scheme for disabled ex-service people, whose disabilities were not due to war service, was established. It included facilities for physiotherapy, occupational therapy, vocational and pre-vocational training and was conducted by the Department of Social Security. In 1948, the Commonwealth Rehabilitation Service was established following the report of a special government committee which recommended a rehabilitation program for physically handicapped people. [18]

9.10 There are now two comprehensive vocational rehabilitation centres operated by the Commonwealth Rehabilitation Service in New South Wales. These are Mount Wilga Rehabilitation Centre at Hornsby which began as a day centre in 1953, and the Queen Elizabeth II Rehabilitation Centre at Camperdown, a more modern

development which opened in 1977. The Commonwealth has also established rehabilitation facilities to assist in the transition to work: the Granville Work Preparation Centre commenced in 1974 and the Artarmon Work Adjustment Centre in 1975. As facilities have expanded so have the eligibility criteria. The services are provided free to social security recipients and certain young people. They are available to other disabled people at reasonable charges, which vary according to their capacity to pay. People with compensation claims are likewise eligible, but are expected to pay for the services from their compensation. [19] The concentration on vocational rehabilitation has been relaxed and the service now provides non-vocational rehabilitation designed to promote independent living. There are also limited Commonwealth rehabilitation coordination facilities in other centres including Newcastle and larger country centres. [20]

3. The State Hospital System

9.11 The development of rehabilitation facilities within hospitals in New South Wales has been more fragmented. [21] A specialist rehabilitation unit was established at the Royal South Sydney Hospital in 1956 and the Spinal Injuries Units at Royal North Shore and Prince Henry Hospital commenced in 1958 and 1963 respectively. The high quality work done by these units has been invaluable, both in individual cases and in developing a body of expertise for the acute care and the rehabilitation of seriously injured people. Until recently the development of facilities was not coordinated on a state-wide basis, although coordination now takes place through the State's Department of Health and its regional offices. Demand for services still appears to exceed supply, but one submission claimed that this shortage was not insurmountable if existing resources were directed towards the establishment of additional rehabilitation units.

The nucleus of a staff for a Rehabilitation Department exists in most hospitals throughout the State, namely Occupational Therapists, Physiotherapists, Social Workers, Speech Pathologists. The only essential team members missing from some institutions are Psychologists and Specialists in Rehabilitation Medicine. [22]

4. The Workers' Compensation System

9.12 The need for rehabilitation of injured workers was formally recognised in the original Workers' Compensation Act, 1926 which contained a specific section authorising expenditure on rehabilitation. [23] Notwithstanding this provision, it was not until 1969 that any expenditure on rehabilitation was incurred under the Act.

9.13 In 1968, Judge Conybeare of the Workers' Compensation Commission was asked to undertake an inquiry on behalf of the Government of New South Wales into the feasibility of establishing a system for the rehabilitation of injured workers. His report, presented in 1970, recommended far-reaching changes to the Workers' Compensation Act, including continuation of earnings-related compensation past the 26 week period, a clear obligation in the Act to 'de for rehabilitation expenses, an obligation on the workers to participate in any provided rehabilitation which was offered and, significantly, the abolition of the worker's right to proceed at common law. [24] Only the recommendations relating to the creation of a rehabilitation section within the Workers' Compensation Commission and the establishment of a right to recover rehabilitation expenses were implemented.

9.14 The Rehabilitation Department was established in 1974 but in its early years the numbers of people referred for rehabilitation were quite small. [25] Following the 1980 amendments requiring the referral of injured workers whose incapacity continues for at least 12 weeks, [26] the referral rate increased dramatically to approximately 350 cases per month. [27] While the extra demands had been anticipated by the Commission a commensurate increase. [28] An in staff did not eventuate, although the Commission continues to press its case. An acknowledgement of the cost effectiveness of rehabilitation is evidenced in the emergence of private rehabilitation consultants and rehabilitation sections in insurance companies active in the workers' compensation industry. [29]

5. The Australian Woodhouse Committee

9.15 The Australian Woodhouse Report dedicated most of one volume to a scheme for rehabilitation, and emphasised the interaction between safety, rehabilitation and compensation.

> It is self-evident that the problem of incapacity ... demands an attack on three fronts. The most important is obviously prevention. Next in importance is the obligation to rehabilitate the injured and the sick. Finally, there is the need to provide economic assistance in the form of compensation for their losses. The priorities need to be emphasised and particularly is it necessary to ensure that the objective of compensation does not bear down upon the far more important need for the restoration of health and physical well-being. [30]

9.16 The Report stated that rehabilitation services should be:

> universally available;
>
> easily accessible; entirely flexible;
>
> comprehensive;
>
> continuous; and
>
> complete. [31]

Detailed recommendations for an Australia-wide coordinated and integrated program of rehabilitation were made. These included the establishment of a central coordinating Rehabilitation Division in the proposed Commonwealth Department of Social Welfare Policy and Planning, with a widespread regional administration to operate the following facilities in each region.

> Medical rehabilitation units and a limited number of specialist medical rehabilitation units.
>
> Mobile rehabilitation clinic teams.
>
> General rehabilitation centres.
>
> Sheltered workshops and day activity centres.
>
> Accommodation and domiciliary services for handicapped persons.
>
> Special facilities for the pre-school training associated with the special education of handicapped children, and for their accommodation. [32]

Little action has been taken on these proposals.

6. The Victorian No-Fault System

9.17 Althoughtherewasnomentionofrehabilitationinitstermsofreference,theMinogue Report [33] stressed the need for suitable rehabilitation services. [34] The Report recommended:

> the establishment of a small Rehabilitation Section in the Motor Accidents Board to undertake research into the rehabilitative needs of motor accident victims and the best methods of meeting those needs;
>
> the appointment of rehabilitation liaison officers to assist accident victims;
>
> the provision of financial assistance to existing evaluation teams; and the
>
> establishment of a Chair of Rehabilitation Medicine. [35]

The Report was also critical of the continuation of the fault-based common law system because of its adverse effects upon rehabilitation. [36]

9.18 The Victorian Motor Accidents Board has since become active in the field of rehabilitation. In 1981, a provision was inserted in the Motor Accidents Act 1973 stating that

> [I]t shall be the duty of the Board to design and promote, so far as possible, a programme designed to secure the early and effective medical and vocational rehabilitation of persons injured as a result of accidents to whom or on behalf of whom the Board is or may become liable to make any payment under this Act. [37]

A fund has been established to meet the expenses of rehabilitation [38] and the Board has undertaken specific initiatives to improve accident trauma services and to foster rehabilitation centres. [39]

B. New Zealand

9.19 The New Zealand Accident Compensation Act has contained provisions dealing with rehabilitation from the beginning, but there has been criticism of the lack of progress in the field. In a submission to the Commission, a New Zealand lawyer and trade union official, Mr. J R Wilson said:

> [t]he promise of an enlightened system of rehabilitation has not been fulfilled ... The Act specifically requires the Corporation to “promote a well coordinated and vigorous programme for the medical and vocational rehabilitation of injured persons”. The 1982 Act also requires the Corporation to “place great stress upon rehabilitation”. However, claimants do not have any statutory right to rehabilitation assistance and the Corporation has, in the past, both in policy and practice, failed to meet the statutory directive. [40]

While he acknowledges that the Corporation has publicly committed itself to greater efforts in this area,[41] he criticises the lack of professionally trained rehabilitation officers, inadequate services for vocational rehabilitation and the absence of a job placement service for rehabilitees. [42]

9.20 The Accident Compensation Act 1982 (NZ) states its objectives regarding the rehabilitation of accident victims as follows.

> (a) Their restoration as speedily as possible to the fullest physical, mental and social fitness of which they are capable, having regard to their incapacity;
>
> (b) Where applicable, their restoration to the fullest vocational and economic usefulness of which they are capable; and
>
> (c) Where applicable, their reinstatement or placement in employment.[43]

The scope for the provision of rehabilitation services by the Corporation is wide. The Corporation is given functions relating to cooperation and consultation with existing services, the promotion and provision of services, the fostering of new services, and the sponsoring of relevant projects. [44] It is also given detailed responsibilities in relation to the rehabilitation of injured individuals. These include:

> providing financial assistance for training; [45]
>
> financing home modifications; [46]
>
> providing aids and appliances; [47] and
>
> financing the purchase and/or modification of a motor vehicle.[48]

The Corporation has power to undertake research into rehabilitation [49] or to fund or otherwise encourage the development of training or education facilities to assist in its rehabilitation service function. [50] This includes, for example, providing funds to encourage the training of more doctors in rehabilitation medicine.

9.21 A review of rehabilitation services in New Zealand, which pre-dated the 1982 Act, considered the role of the Accident Compensation Corporation in that field. [51] Some of the problems identified by the review included:

> the emphasis on rehabilitation of earners as against non-earners; [52]

> problems of overlap between the Corporation's officers and other service providers; [53] and
>
> the reluctance of the Corporation to meet certain patient requirements because hospitals were responsible for patient needs, while the Corporation was responsible for rehabilitation aids. [54]

The last problem flowed from divided responsibilities whereby hospital costs were not borne by the Accident Compensation Corporation, but by the general health care system. The review observed that delays had occurred prior to the decentralisation of services but that "the speed of response is now satisfactory". [55] On balance, the review found that criticisms of the Corporation had been "more than offset by entirely favourable comments made quite gratuitously". [56]

C. International Developments

9.22 For many years the International Labour Organisation has expressed a commitment to the rehabilitation of disabled workers. [57] Following the United Nations Declaration on the Rights of Mentally Retarded Persons in 1971, the United Nations-Declaration on the Rights of Disabled Persons was passed by the General Assembly on 9 December 1975. [58] The Declaration recognises the right of disabled people to rehabilitation services to enable them to develop their capabilities and skills and their right to economic and social security. The importance of the Declaration was stressed in submissions [59] and we recognise that it contains goals for which the community should aim.

9.23 During the International Year of Disabled Persons, sponsored by the United Nations in 1981, both employer and employee groups affirmed their support for the participation of disabled workers in the workforce. The Disabled Workers' Charter was approved at the 1981 Australian Council of Trade Unions Congress. The Confederation of Australian Industry also adopted a charter for disabled people in that year. The National Labour Consultative Council, which was established in 1977, has issued guidelines for employers on the training and employment of disabled people. [60]

D. Anti-Discrimination Legislation

9.24 The New South Wales Government has recognised the importance of guaranteeing equality of opportunity to disabled persons. The New South Wales Anti-Discrimination Act, 1977, was amended in 1981 to prohibit discrimination on the ground of physical impairment. [61] While there are certain exemptions, the Act purports to cover discrimination ill work, [62] education, [63] provision of goods and services, [64] and accommodation. [65] There has also been a considerable amount of public attention focussed on the problems faced by disabled people in the community through various reports and inquiries. [66]

III. ROLE OF THE ACCIDENT COMPENSATION CORPORATION

A. The Right to Rehabilitation

9.25 The central importance of rehabilitation to the Transport Accidents Scheme is based on the principle that disabled people should have, in the words of the United Nations Declaration on the Rights of Disabled Persons

> ... the right to medical, psychological and functional treatment including prosthetic and or thetic (sic) appliances, to medical and social rehabilitation education vocational training and rehabilitation aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the process of their social integration or reintegration. [67]

and that

> [d]isabled persons are entitled to the measures designed to enable them to become as self-reliant as possible. [68]

In view of its fundamental importance, **we recommend that transport accident victims be granted a right by legislation to rehabilitation** to enable them to recover or maximise their functional capabilities and become as self-reliant as possible.

B. Ensuring the Provision of Rehabilitation Services

9.26 There are already organisations, private and public which provide services of the nature required to give effect to the transport accident victim's right to rehabilitation Attempts to establish new agencies would risk duplicating existing services and further fragment the provision of rehabilitation and allied services in this State. It would therefore be more efficient and economical for the Accident Compensation Corporation to coordinate the provision of services to transport victims through existing agencies. This view was supported in 1983 by the then Minister for Health Mr L J Brereton, MP, in commenting on the Working Paper.

> [T]he establishment by the Accident Corporation of a completely autonomous and separate Medical Rehabilitation Service would be unwarranted and uneconomic. New South Wales already has an established system of Rehabilitation Services provided through the Public Hospital System with additional programmes offered by the two Centres at Mount Wilga and Camperdown, administered by the Department of Social Security, and from some resources within the private sector. Admittedly, there are shortfalls in certain areas and, as the Working Paper correctly identifies, greater co-ordination could be achieved between those services which do exist. These problems can be overcome and I would suggest the appropriate policy option for the Law Reform Commission to endorse would be integration with existing services. Expansion of service to meet increasing need can be achieved by cooperative effort, with the role of the Accident Compensation Corporation being defined primarily as a funding source. [69]

9.27 In general the Corporation should utilise existing public facilities in both health care and other fields, appropriate financial arrangments being made with the service providers. The next Chapter considers whether the Corporation should provide monetary compensation directly to the disabled person, or whether compensation should be provided in the form of services. As explained there, we prefer the latter in order to ensure that the disabled person receives the assistance required, although efforts should be made in such areas as attendant care to maximise the choices available to the disabled person. Accordingly, **we recommend that wherever practicable, the Corporation coordinate and administer the provision of rehabilitation services through existing agencies rather than establish its own services.**

9.28 This approach means that it will be necessary for the Corporation to maintain close liaison with all service providers in the field of rehabilitation. There must be careful assessment of the needs to be met and of the best means of meeting those needs, within the framework of the legislation and the policy guidelines developed by the Corporation. Negotiations with existing service providers and selection of appropriate sources of assistance should be a high priority following the establishment of the Accident Compensation Corporation. It will be necessary for the Corporation to ascertain, at an early stage, areas where services require expansion to provide for transport accident victims and, if necessary, to provide additional funds to enable the expansion to occur. In view of its statutory obligations, administrative procedures will be required to ensure that funds are directed specifically towards providing for the needs of disabled transport accident victims.

9.29 Many existing agencies which provide for the rehabilitation of the disabled and supply support services are overburdened. [70] To some extent, the availability of extra funds may allow these services to be extended. In this way, the Corporation would be able to utilise the expertise of existing organisations. Since many of them are community-based, it would also enable services to be provided on a decentralised basis. Where there is already a critical shortage of facilities, such as in the area of vocational rehabilitation centres, the Corporation could work with existing agencies to build new centres or extend existing ones to cope with the extra demands generated by the Transport Accidents Scheme.

9.30 Where public rehabilitation services are not available or are too costly the Corporation should have power to make arrangements with other organisations providing such services. Interest has been shown in this area by the private sector. One submission identifies the rehabilitation services provided by such hospitals relevant to the needs of transport accident victims [71]. Private services may well be able to fill the need for rehabilitation services in locations not served by public facilities or in cases where existing facilities simply cannot meet the demand.

9.31 Where services are not available in the public or private sector, the Corporation may need to become a service provider. There will also be other areas in which the Corporation should have power to act in the long-term interests of transport accident victims. For example, where a seriously disabled person is unable to obtain a housing loan from conventional sources, the Corporation should have the power to provide financial assistance or act as guarantor for a loan. Similar questions arise in relation to loans for other rehabilitation purposes. **We recommend that the Corporation should have broad powers to ensure the provision of rehabilitation services and other support services, including the power**

(a) to make financial and other arrangements with both government and private service providers to provide rehabilitation or support services to transport accident victims;

(b) to monitor contracted service providers to ensure satisfactory standards of service; and

(c) to provide, where necessary, services or assistance directly to transport accident victims.

C. A Rehabilitation Section

9.32 To encourage the prompt and effective utilisation of existing rehabilitation services and to foster the development of new ones, **we recommend that the Corporation create a Rehabilitation Section to administer its rehabilitation functions.** Its responsibilities should include:

establishing and coordinating procedures for early referral of cases;

monitoring of service providers to maintain adequate standards and prompt service provision;

ensuring effective communication between claimants, their families, the Corporation and service providers through liaison officers, rehabilitation counsellors and, where necessary, interpreters; and

developing, with claimants and appropriate rehabilitation personnel, individually tailored rehabilitation programs and supervising these programs.

Many of these functions would rest with rehabilitation counsellors employed by the Corporation. Such officers would not themselves conduct rehabilitation a function which should rest with doctors, physiotherapists, occupational therapists, vocational trainers, family counsellors, psychologists and many others. It should be the duty of the rehabilitation counsellors to monitor the progress of the person through the program and to act as a central inquiry point for the person and his or her family.

9.33 Chapter 15 refers to the desirability of employing liaison personnel in hospitals (paragraph 15.16). This is one means of ensuring prompt referral of transport accident victims to the Corporation. These people would not only advise transport accident victims of their entitlements under the Scheme, but would also be the first point of contact with the Corporation. Liaison personnel could alert rehabilitation counsellors to individuals who may be in need of special attention.

9.34 In addition, the Corporation will have to develop its own referral procedures. Sometimes accident victims, their families or medical practitioners will make direct approaches to the Corporation in relation to rehabilitation. However, special procedures will be required to identify potentially long-term incapacitated transport accident victims as early as possible. The work of hospital liaison officers and hospital visits by rehabilitation counsellors in cases of serious injury will assist in this process of identification. However, it is equally important to devise effective means of locating accident victims not admitted to hospital who suffer less traumatic but still incapacitating injuries. To this end the Rehabilitation Section may need to develop a list of types of injuries which should be referred to rehabilitation counsellors when an application for compensation is lodged. In addition, cases should be referred to a rehabilitation counsellor where the incapacity continues or is likely to continue for longer than 8 weeks. Accordingly, the initial medical certificate to the Corporation should indicate whether or not the incapacity is likely to continue beyond the 8 weeks period.

IV. MEDICAL AND FUNCTIONAL REHABILITATION

A. The Aim

9.35 When a person is injured in a transport accident, the first sources of assistance will probably be a hospital doctor or other medical personnel such as nurses or ambulance officers. While the first priority must be the acute care of the injured person treatment is also directed towards the goal of rehabilitation from the very beginning. Medical rehabilitation has been defined as a continuous process which ideally starting from the onset of sickness or injury, comprises measures:

> to prevent undue loss of mental and physical function during illness;
>
> to assist convalescent patients to recover full function and to resume their normal way of life without undue delay; [and]
>
> to help those for whom permanent disability is unavoidable to regain the maximum possible physical and mental function and to adapt to their residual disability. [72]

9.36 The rehabilitation process should begin as soon as possible after the injury and so far as practicable, should be integrated into other aspects of medical care. This point was emphasised by Dr. N. Wing in her submission.

> Rehabilitation is an ongoing process that should be introduced in the earliest hours after an accident and proceed gradually as the patient progresses from stage to stage of convalescence, until he is restored to the greatest degree of usefulness possible. [73]

Where integration does not occur, or is substantially delayed, the chances of successful rehabilitation decrease considerably. For example, a recent New South Wales study of people suffering from lower back pain conducted over a 10 year period stated that

> ... all sub-groups had much better outcomes if admitted within one week and very poor outcomes (range 12 to 28% ‘fit’) if admitted more than 12 weeks after injury. [74]

Another recent study, the findings of which were consistent with the foregoing study, concluded that

> rehabilitation is the process of restoring function. And this can only be achieved by early assessment of function. This assessment must look not only at the musculo-skeletal function which is directly affected, but we must also look closely at the person with the injury and how that person functions psychologically, socially and in his work.[75]

The immediate attention of both the patient and treating medical professionals to the goal of rehabilitation is very important even at the acute treatment stage, to maximise the patient s chances of successful recovery. **We therefore recommend that the Corporation should be under a duty to provide rehabilitation services as soon as possible after the occurrence of the injury in a transport accident.** Some ways of ensuring prompt access were discussed in paragraphs 9.32-9.34

9.37 The approach to medical and functional rehabilitation which appears to offer the greatest benefits to disabled persons is that of a skilled interdisciplinary “team” who jointly assess the needs and abilities of the injured person and who work systematically towards rehabilitation. The composition and function of one such team was outlined in one submission.

> Royal South Sydney Hospital’s Rehabilitation Centre is staffed by Rehabilitation Medicine Specialists, Occupational Therapists, Physiotherapists, Psychologists, a Rehabilitation Engineer, Social Workers and a Speech Pathologist. A team such as this has the capacity to treat patients along the full spectrum, from the ward to resettlement in the community, which includes the home, former employment and leisure pursuits. 76

Such teams function successfully at other hospitals with rehabilitation units in New South Wales. The emphasis varies from teams in which the medical specialist conducts the program with advice from other rehabilitation professionals to those in which other personnel play a substantially greater role. Wherever practicable multi-disciplinary teams of rehabilitation professionals should assess the abilities and needs of disabled transport accident victims and work jointly towards the goal of rapid rehabilitation.

9.38 The Corporation should also take account of the needs of family members of accident victims. While they are not likely to require physical rehabilitation they may have other important needs. For example, the family of a seriously disabled person will often require counselling to help them to adjust to their new roles. If a person is killed, family members may need special counselling even if they have not suffered nervous shock and are not therefore compensable victims. [77] Similarly, a person who believes the death or injury arising from the transport accident is his or her fault, may require counselling. just as the physical trauma requires prompt attention, so too, does the emotional and mental trauma of these transport accident "casualties".

9.39 Consistent with the view that the Corporation should be under a duty to provide such services, **we recommend that the Corporation should be responsible for meeting the costs of rehabilitation services required for transport accident victims, subject to the general arrangements made with regard to hospital and medical costs.** Where rehabilitation services provided as part of hospital treatment, the Corporation should bear the cost only to the extent that it is liable for hospital costs generally. If the recommendations in Chapter 13 are accepted, for example, part of the cost may be met by the Commonwealth.[78] What is most important is that the accident victim be relieved of any concern about meeting the cost.

> Rehabilitation ... requires a positive approach in which the accident victim immediately begins to concentrate on the problem of recovering his health freed to the maximum possible extent from worry over problems such as meeting his expenses and supporting his dependants. [79]

9.40 Where transport accident victims require rehabilitation treatment it may be necessary for them to incur travelling expenses or even accommodation expenses in some cases. To a large extent-the decentralisation of services and the development of mobile rehabilitation teams will minimise the need for claimants to travel long distances (see paragraphs 9.49-9.50). However, **we recommend that the Corporation should pay necessary travelling and accommodation expenses incurred by a claimant in obtaining rehabilitation treatment.**

B. Problems Requiring Attention

9.41 If the objective of maximising opportunities for medical rehabilitation is to be realised, a number of difficulties must be considered. First, medical training has paid relatively little attention to rehabilitation. The second matter, which is probably a result of the first, is that there is a shortage of rehabilitation specialists and rehabilitation teams in New South Wales. Thirdly, rehabilitation medical facilities are concentrated in the urban centres of New South Wales. If the Corporation is to ensure access to rehabilitation facilities from the outset, these problems must be addressed even though their effects are not confined to transport accident Victims.

1. Medical Training

9.42 The 1970 Conybeare Report into Rehabilitation and Workers' Compensation noted that witnesses

> ... deplored the scant attention given to rehabilitation in the training of many generations of New South Wales doctors... Generations of medical graduates have gone into practice with no real exposure to the ideas and techniques of rehabilitation; the result of this is reflected, according to most of the witnesses before me, in a striking lack of awareness, on the part of many doctors, of what rehabilitation is and what it can achieve. [80]

While the position has since improved, the heavy concentration on acute care in medical training at the expense of rehabilitative care has continued. In 1979, the Chairman of the National Advisory Council for the Handicapped, Mr C L D Meares, QC, said

> [c]ontinuing major accent on acute health care is disturbing indeed and costs are mounting out of all proportion to real need. Not enough attention is specifically paid to prevention and restorative care... Medical Schools continue to concentrate on acute 'scientific' care and very little emphasis is given to rehabilitation and long-term care. [81]

9.43 The establishment in 1980, of the Australian College of Rehabilitation Medicine [82] indicates a growing recognition within the medical profession that rehabilitation is an important facet of medicine. There are now rehabilitation components in the Family Medicine Program, which trains doctors for general practice. [83] The development of rehabilitation training facilities should be fostered and encouraged by the Accident Compensation

Corporation, although it cannot bear the primary responsibility for this task. **We recommend that the Corporation should have powers to encourage and sponsor the development of rehabilitation training programs for medical practitioners and other health care professionals.** This is perhaps more important for the disabled person than the present shortage of specialist rehabilitation doctors and teams. If medical and health personnel generally were more aware of the objectives of rehabilitation, the shortage of specialists referred to in the next paragraph would be less significant.

2. Shortage of Rehabilitation Specialists

9.44 One result of the communities lack of concern with rehabilitation is the shortage of doctors specialising in rehabilitation medicine. The Australian College of Rehabilitation Medicine estimates that the number of specialists should be at least doubled to meet present needs, and that needs are increasing. One reason given for the shortage is that rehabilitation medicine, like geriatrics, does not have a significant private practice base. [84] Other reasons given include the reluctance of established medical schools to recognise rehabilitation medicine as a speciality [85] and the lack of medical rehabilitation training centres. [86]

9.45 The need for recognition and development of a rehabilitation speciality has been debated by the medical profession for some time. [87] Some doctors see this as a necessary step towards the integration of rehabilitation into hospital and medical treatment. Others see it as a step towards separation of the processes of treatment and rehabilitation. [88] We think that two approaches should be fostered. Infusion of the principles of rehabilitation into all medical training is imperative. In addition, specialist doctors and rehabilitation teams are required to assist disabled people with special needs or problems. For example, even where all treatment is geared towards rehabilitation the need for special programs for victims of spinal injury or brain damage would remain.

9.46 A number of ways have been suggested to meet the need for more specialists and to imbue the training of medical personnel with the aims of rehabilitation. These include:

the establishment of Chairs of Rehabilitation Medicine at universities; [89]

the creation of more centres of excellence for research into rehabilitation; [90] and

the development of undergraduate courses with a substantial rehabilitation content. [91]

There is an obvious need also for the organised dissemination of information about rehabilitation facilities and techniques to practitioners and medical personnel who have already completed their training. Nurses, doctors and other personnel should have the opportunity, through conferences, or refresher courses and other means, to be informed of developments in this area.

9.47 While many of these problems cannot be directly solved by the Accident Compensation Corporation, there is a role for such a body in this area. For example, the New Zealand Accident Compensation Corporation sponsored the establishment of a Chair of Rehabilitation Medicine at Massey University. The Minogue Report in Victoria also recommended that funds be provided for a Chair of Rehabilitation Medicine. [92] Other possibilities include establishing Postgraduate Research Grants or Awards to enable research work to be done and specialists to be trained in the treatment of transport accident victims. One submission suggested that medical practitioners should be subsidised while undergoing training in rehabilitation medicine to encourage them to participate in such programs. [93] **We therefore recommend that the Accident Compensation Corporation should have the power to support training and research in rehabilitation and to make grants to institutions and individuals f or these purposes. The Corporation should also have power to support dissemination of information concerning rehabilitation to health professionals, other groups and members of the community.**

9.48 The shortage of other rehabilitation personnel, such as physiotherapists, rehabilitation counsellors and occupational therapists, which was mentioned in the Australian Woodhouse Report, [94] is now less acute. The Woodhouse Report saw this staff shortage as a critical problem for the implementation of its proposals. While the position has improved, the vision in that Report of a decentralised, coordinated national scheme of rehabilitation for all disabled people is far from a reality. [95]

3. Centralised Services

9.49 The third obstacle to achieving the goal of adequate medical and functional rehabilitation facilities is that the vast majority of rehabilitation teams and facilities operate in Sydney or the other large urban centres of New South Wales. In the case of specialised facilities dealing with specific catastrophic injury this may be inevitable. It may also be necessary in the case of large specialist rehabilitation complexes, such as the Department of Social Security's Queen Elizabeth II facility. This was recognised in the Australian Woodhouse Report.

> Specialist medical rehabilitation units would necessarily be few in number, and they would need to be located, with rare exception in the capital cities and in association with one or more of the major teaching hospitals. They would provide a full range of sophisticated equipment and facilities and offer advanced medical and paramedical treatment required for special post-acute management and long-term medical rehabilitation assistance in the case of particular types of severe disability. A specialist "unit" for quadriplegics and paraplegics is an example. [96]

9.50 Nonetheless, effective rehabilitation of people injured in transport accidents may well be inhibited if they are taken away from their families and communities. While there are limits to the process, the continued development of rehabilitation services in country and suburban hospitals and regional centres should be encouraged by the Corporation. It should also evaluate the feasibility of using mobile rehabilitation teams in remote parts of the State. Similar proposals have been advanced by the Commonwealth Department of Health.

> Mobile rehabilitation teams are needed to provide services especially in towns where no rehabilitation unit exists. A vocational counsellor should be included in the team. Apart from giving advice, assessment and treatment these teams could be used to improve the knowledge of rehabilitation concepts of health personnel in metropolitan fringe and/or non-metropolitan areas. [97]

Accordingly, **we recommend that, so far as practicable, the goal of decentralisation of rehabilitation facilities should be pursued by the Corporation.**

V. MEDICAL EQUIPMENT AND MECHANICAL AIDS

9.51 Aids to rehabilitation may be equally important during the initial stages of a program and in the longer term. Medical equipment, pharmaceutical supplies and mechanical appliances, all of which are essential to an effective rehabilitation program, are the "non-optional" costs of disability. It is obviously important to the rehabilitative process that such aids be readily available to transport accident victims and that the cost of providing them be met by the Corporation.

A. Medical Equipment and Pharmaceutical Supplies

9.52 Some people injured in transport accidents require prosthetic devices such as artificial members (limbs and organs), eyes and teeth, orthotic equipment such as splints, calipers or built-up shoes; or other equipment such as hearing aids, glasses or surgical braces. Others may require pharmaceutical supplies such as bladder and bowel care items, and materials such as sheepskin rugs to prevent pressure sores. The cost of providing equipment of this kind to a quadriplegic was estimated to be in the vicinity of $2,000 per year in 1983. [98] Some of the case study participants had found these expenses prohibitive, particularly where they were not eligible for pensioner fringe benefits because they or their spouses worked. [99] **We recommend that the Corporation should bear the cost of necessary pharmaceutical supplies, and necessary prosthetic, orthotic or other corrective medical equipment, the need for which arises from disability suffered in a transport accident.**

B. Aids and Appliances

9.53 In addition to medical or pharmaceutical supplies a person disabled in a transport accident may require aids or appliances to live independently. For example, a paraplegic may require a wheelchair, while a person with limited hand function may require special equipment to do everyday chores. A person with limited mobility may need a hoist or a special chair. One submission noted the importance of such aids for disabled people, and said that they should be prescribed by an occupational therapist who has the skills to assess and restore function. The submission stressed that aids often require special design to meet the individual's disability and only a few can

be mass produced. [100] The cost of aids varies considerably. **We recommend that the Corporation should also bear the cost of providing necessary aids and appliances and of altering existing equipment used by disabled transport accident victims.**

9.54 One issue frequently mentioned in discussions with disabled people's groups was the short period for which some aids were required. Some said that by the time the aid had arrived the person's condition had improved so that it was no longer required. Alternately, they were provided with extra aids which were not required. Another problem was faced by those who were trying to find the right aid. Often the aid had to be used fora time before its usefulness (or uselessness) became obvious. Rather than providing aids and wheelchairs, some disabled people suggested that a "borrowing poor, of aids should be established. A borrowing pool of aids and wheelchairs known as "Westhelp" operates already among groups of parents of disabled children. [101] These arrangements allow disabled people to try out the aids which professional staff or others recommend and select the most appropriate. They also allow disabled people to borrow items required only for a short term and return them when they are no longer needed. The suggestion has great merit. **We recommend that the Accident Compensation Corporation should establish borrowing pools of equipment which can be used by disabled transport accident victims.** We acknowledge that some aids and appliances, and almost all prosthetic and orthotic equipment, require individual tailoring and are, therefore, inappropriate to such a proposal.

9.55 The frequency with which equipment will require replacement will depend largely on subjective factors. For example, a person who uses his or her wheelchair to lead a very active fife may require replacement items more frequently than someone who chooses not to or is unable to do so. We therefore do not favour the imposition of time limits upon the transport accident victim's right to replacement aids or equipment. Instead, **we recommend that the Corporation should provide replacement aids and equipment as often as is necessary and reasonable.** However, this is another area in which the Corporation could develop guidelines to assist in making decisions in individual cases.

C. Research

9.56 There is a continuing need for research into the best ways of meeting the physical needs of disabled people. For example, one submission emphasised the importance of rehabilitation engineering, in relation to such matters as the design of aids, prosthetics, orthotics, communication devices and environmental control systems. [102] An Expert Committee in Rehabilitation Engineering was established in 1979 to exchange ideas and information and coordinate research on the needs of the disabled. This committee has recommended that one centre of excellence in research be established in each capital city. [103] There are other examples of research of special interest to disabled people. **We recommend that the Corporation should have power to make grants for research into the needs of transport accident victims. It should also have power to establish and develop research facilities in coordination with agencies already working in this field.**

VI. WORKFORCE REHABILITATION

9.57 One aim of rehabilitation is to foster economic independence. This has obvious advantagesforthedisabledpersonandfortheScheme,whichwillberelievedoftheobligation to make continuing payments for loss of earning capacity. Resources directed toward this aim also have the potential for increasing the disabled person's satisfaction with life and opportunities to participate in community activities.

A. Training and Retraining

9.58 A person injured in a transport accident may require training or retraining to enable him or her to enter or re-enter the paid workforce. This may also be true of the financially dependent spouse of a person who is killed in a transport accident. [104] It is clearly desirable that the Corporation offer the opportunity for retraining, where the person is likely to benefit from the course and to be better equipped to resume or commence remunerative employment. It will be necessary for the Corporation to develop guidelines in order to identify the persons likely to benefit from training and the kind of program appropriate for each individual. The matters that would need to be taken into account include the person's:

- medical condition;

educational and vocational history;

hobbies, interests and special attributes;

family responsibilities;

future employment prospects; and

likely period of employment, including proximity to retirement.

In addition, reports of rehabilitation assessment teams, vocational assessors and others will be important. These criteria are similar to those which operate under the New Zealand accident compensation scheme. [105]

9.59 **We recommend that the Corporation should make available vocational training programs for people disabled in transport accidents and for the dependent spouses of people killed in such accidents. The Corporation should meet the costs of such programs and should formulate guidelines for admission designed to maximise the opportunities for successful vocational training.** The term "spouse" includes de facto partner (paragraph 12.21). In accordance with general recommendations, the Corporation should use existing services, such as those operated by the Commonwealth Employment Services, the Commonwealth Rehabilitation Service or other agencies, wherever feasible.

B. Alterations to Workplace

9.60 Sometimes an employer is willing to employ a disabled person but finds it difficult to do so because of physical limitations in the workplace. For example, access to the building may be by a staircase or the equipment in the workplace may require modification if it is to be used by a disabled person. The Commonwealth Rehabilitation Service and the Commonwealth Department of Employment and Industrial Relations provide financial assistance for workplace modifications. [106] These alterations may include devices such as special headsets for telephones, different chairs, stools or desks, modified work benches or work access. Publicising these possibilities and efforts by both employers and workers to ensure that workplaces are accessible to all people will probably enhance the employment prospects of disabled people generally. **We recommend that the Corporation should provide reasonable work place modifications, where an employer employs or continues to employ a disabled transport accident victim and where the modifications are necessary to enable the disabled transport accident victim to work in or gain access to the workplace.** The Corporation should have power to negotiate financial arrangements with Commonwealth Departments which provide such services. Should these negotiations not prove successful, the Corporation should make alternative arrangements to provide necessary workplace alterations. There are some workplace modifications which may benefit the employer and other workers or customers as well as the disabled transport accident victim. Where this is so, it may be reasonable for the Corporation to seek contribution from the employer. **We recommend that, in deciding what workplace modifications are reasonable, the Corporation should have regard to:**

(a) the cost of the modifications;

(b) the benefit of the modifications to the employer and other workers or customers and contribution to the cost by the employer; and

(c) the likely duration of employment of the disabled transport accident victim.

9.61 An obvious difficulty with this proposal is that the Corporation's investment may be nullified if the disabled worker leaves the employment voluntarily or is dismissed. While the Corporation could not prevent such an event occurring, it may be able to minimise the consequences. For example, if the workplace modifications are fairly substantial the Corporation could negotiate an agreement under which the employer would reimburse a proportion of the costs if the disabled transport accident victim were dismissed within a set period. The Corporation could also waive this provision if the dismissal were justified and another disabled transport accident victim were employed in the dismissed person's place. It should be open to the Corporation to provide workplace modifications on a second or subsequent occasion for a disabled worker, if there is good reason to do so. A worker may change 'obs for compelling reasons, such as family circumstances or because the previous work

environment was harmful to his or her health. The formulation in paragraph 9.60 allows the Corporation to make a judgment that a second or subsequent set of modifications is warranted.

C. Liability to Pay Workers' Compensation

9.62 A potential employer of a partially disabled transport accident victim may be adversely influenced by the fear a liability may arise to pay workers' compensation should the victim aggravate the disability at work or sustain a second, unrelated injury which may have more severe consequences because of the pre-existing disability. The general principle is that where a worker has a pre-existing disability and death or incapacity follows a work-related accident

> ... then the incapacity is regarded as resulting from the injury, although in fact it results from the injury taken together with the other circumstances. [107] The Workers' Compensation Act, 1926, states in general terms that
>
> [w]here the death or incapacity of a worker results from more than one injury, liability to pay compensation under this Act shall be apportioned in such manner as the Commission determines. [108]

However, this section is generally believed to be limited in its application to disputes between insurers and employers in relation to consecutive work injuries. [109]

9.63 In Chapter 14 we recommend that if the subsequent disability or incapacity is reasonably attributable to the disability sustained in the transport accident, the Transport Accidents Scheme should be liable to pay compensation for the subsequent disability or incapacity (paragraph 14.39). This recommendation should provide considerable protection for potential employers, since a partially disabled worker who suffers a work-related injury to which his or her pre-existing disability contributes will be covered by the Transport Accidents Scheme rather than the workers' compensation system. If, for example, a worker has restricted mobility because of a knee injury sustained in a transport accident and the work-related injury is the result of impaired mobility, the burden of compensation will not fall on the employer or workers' compensation insurer.

9.64 Nonetheless, some potential employers may be concerned that disabled workers in some way may be more prone to work injuries unrelated to the pre-existing disability. Even if this fear is without foundation, it may act as a barrier in practice to the re-employment of disabled transport accident victims. [110] The problem may be overcome by improved incentives to re-employ under the workers' compensation system which we understand are currently under consideration. However, the Corporation should be in a position to offer incentives itself and therefore **we recommend that the Corporation should have power, for a specified period, to contribute to the cost of workers' compensation insurance incurred by the employer who has provided or continued employment for a person disabled in a transport accident.** In the case of self-insurers, a notional premium could be calculated to achieve the same purpose. However, the Corporation should cooperate with other agencies involved in workers' compensation in order to devise other methods to encourage re-employment and thereby enhance rehabilitation. This may prove to be a useful means of encouraging employers to accept disabled workers who might otherwise simply continue to receive compensation under the Scheme for loss of earning capacity. An indemnity of this kind might be especially appropriate for the first six or twelve months of employment to provide protection to the employer during the period when the worker might be considered most vulnerable to work injuries.

D. Placement Programs

9.65 It is critical to a successful vocational rehabilitation program that the Accident Compensation Corporation play an active role in placing disabled transport accident victims in employment. Not only is this socially desirable, but the Corporation will also have a financial incentive to restore accident victims to employment as soon as possible. Among other things, the test proposed for post-accident earning capacity requires the Corporation to be satisfied that a disabled person is at no disadvantage in competing in the labour market for employment of which he or she is capable. The clearest means of being satisfied of this fact is, of course, to secure employment for the disabled person, thus establishing his or her post-accident earning capacity beyond doubt.

9.66 The Commonwealth Employment Service currently employs placement officers concerned with disabled people [111] and a similar service is conducted by the Public Service Board of New South Wales. There is obvious virtue in the Corporation working in cooperation with agencies which conduct placement programs for disabled people, although this should not preclude the Corporation taking its own initiatives and developing its own programs. In particular, the Corporation should ensure that potential employers are aware of advantages under the Scheme, such as financial assistance for workplace modifications and indemnity against liability for workers' compensation. **We recommend that the Corporation should promote the placement of disabled transport accident victims in employment.**

9.67 If placement programs are to be effective, it may be necessary to offer further inducements to employers to engage disabled transport victims. Some inducements, such as taxation incentives for companies which employ a minimum number or proportion of disabled people in their workforce, may be appropriate as general government policies applicable to all disabled people. However, there are others which the Corporation could adopt specifically. One example is the approach of the Commonwealth Employment Service, which pays subsidies to an employer to train and employ a disabled persons. The subsidies are payable for a period of at least 20 weeks, depending upon the period of training required, and the amount paid may vary during the training period, commencing at a relatively high level and reducing halfway through the approved training period. [112] The employer is paid the subsidy and the worker receives wages in the normal way. A similar scheme would be very useful in relation to transport accident victims, conducted either by the Corporation itself, or by the Corporation in conjunction with other agencies. Accordingly, **we recommend that the Corporation should have power to develop schemes providing financial incentives for specified periods to employers who engage or maintain disabled transport accident victims in employment.**

E. Return to Work and Compensation Entitlement

9.68 Disabled people have many reasons for wishing to resume employment even if they are receiving compensation for loss of earning capacity. These include job satisfaction self-esteem, a desire for advancement and companionship with workmates. Nonetheless, where a person receives earnings-related compensation, albeit at a level less than 100 per cent of the loss, financial incentives to resume employment are not as great, generally speaking, as in schemes where compensation is paid on a less generous needs basis. A number of measures have been suggested to encourage resumption of employment. In Chapter 8 we recommended that the proportion of loss of earning capacity compensated should be increased beyond 80 per cent as the disabled person increases his or her involvement in the workforce (paragraph 8.24). The provisions relating to assessment of post-accident earning capacity are designed to ensure that a disabled person cannot simply decline to take advantage of employment opportunities that are reasonably open (paragraph 7.62). The proposals for assessment of permanent incapacity address the problem of incentives for the long-term disabled (paragraphs 8.52-8.60). The thrust of this Chapter is to maximise the opportunities for vocational rehabilitation of disabled transport accident victims.

9.69 Another potential barrier to vocational rehabilitation requiring attention is that a resumption of employment may itself prejudice entitlement to compensation if the attempt to resume employment proves to be unsuccessful. The disabled person may be uncertain for example, as to whether he or she can cope with the proposed employment, but would be willing to try, if compensation rights were not prejudiced in the attempt. In these circumstances, the Corporation should have power to allow a period of grace during which the disabled could cease employment and resume compensation for loss of earning capacity without having to make a fresh application This does not mean that the Corporation would be precluded from demonstrating on the usual criteria that the person's incapacity for work has ceased. However, it does mean that a good faith effort to enter the workforce should not necessarily be considered as proof of capacity for work and that such an effort could be undertaken in the knowledge that lack of success will not prejudice a resumption of compensation for loss of earning capacity. **We recommend that the Corporation should have power to approve the entry into or resumption of employment by a disabled transport accident victim on the basis that, if the employment does not continue beyond a specified period, that person should be entitled to compensation for loss of earning capacity without making afresh application.** The length of the trial period will vary. In cases of severe or fluctuating disability, it may extend over a number of years.

F. Business Loans

9.70 A number of submissions contended that lump sums were useful to establish a person in her or his own business. For example, the Law Society of New South Wales stated that

> [a] lump sum gives people an opportunity to re-establish themselves in an income earning activity which is within their physical limitations. [113]

9.71 The Accident Compensation Corporation should encourage a disabled transport accident victim who desires to become economically independent by establishing a business. However, lump sum compensation for loss of earning capacity is not the best way of achieving this. Should the business fail, [114] the person would be left with no recourse but social security. Even then it is likely that social security will not be payable for the period of capitalisation of compensation. [115]

9.72 In general if a person wishes to establish a business he or she must use his or her own capital or borrow from a lending institution. Where a person uses his or her own capital wise financial planning is necessary to avoid loss. If finance is sought, the applicant must prepare detailed proposals which shed light on the prospects of the venture. The person must demonstrate that the venture has a reasonable chance of success before a lending institution will support it. In many cases where a disabled person has the skills and motivation required for business success, a lending institution will be prepared to provide funds in accordance with its usual criteria. In these circumstances the most constructive role for the Corporation to play may be to provide independent advice to the disabled person and to assist in planning the venture and in preparing applications for finance. **We recommend that the Corporation should provide financial counselling if requested by any person who is entitled to or has received compensation under the Scheme.** [116] Such advice may be particularly important in relation to investment of the lump sum paid for permanent disability, but may be helpful on other matters such as proposed business initiatives.

9.73 It may also be appropriate for the Corporation to provide more tangible assistance to a person wishing to establish a business. Such assistance may be necessary to promote vocational rehabilitation and is likely to prove cost effective. **We recommend that the Corporation's power in relation to a person incapacitated in a transport accident should include:**

> **(a) continuing compensation for loss of earning capacity for a specified period during which the person commences and conducts a business. venture;**
>
> **(b) guaranteeing loans made to that person for business purposes; and**
>
> **(c) making loans, in such terms as are appropriate, to enable that person to commence or continue a business.**

These powers will need to be exercised cautiously. However, the process of rehabilitation requires a wide variety of powers to permit flexible responses to the circumstances of disabled people.

VII. SOCIAL REHABILITATION

9.74 When a person suffers a serious injury, a very important part of the rehabilitation process may be re-learning activities which were previously undertaken almost automatically. These include dressing, grooming, bathing, cooking, eating, drinking, writing, speaking and many other every day skills. It may also include sexual counselling for the person and his or her partner. Even where the disability is less catastrophic the person may need to develop a new lifestyle to minimise continuing pain, or to lessen the chance of aggravation or deterioration. Where a person is unable to work, he or she will need alternative interests that ordinarily would be regarded as leisure activities. The family of the disabled person will also need to make adjustments, both emotional and otherwise, to their changed circumstances. The importance of social rehabilitation, in many cases, places it earlier in the rehabilitation process than vocational rehabilitation, although the two often interact.

9.75 To some extent the lump sum compensation for permanent disability (Chapter 11) recognises the difficulties of these adjustments and acknowledges that, even with as many services as possible to assist the person to live independently, there are intangible and immeasurable losses, which he or she may feel acutely. However, effective training for independent living can substantially offset the intangible losses. This training should aim to

educate the disabled person to minimise the handicaps flowing from his or her disability. For example, if a person has a lower back injury, the function of an independent living training program would be to show how the person can perform activities without aggravating the condition and how other parts of the body or aids and equipment can be used to minimise handicap and discomfort.

9.76 Rehabilitation programs should include leisure counselling, particularly when the disabled person is unable to undertake any kind of remunerative employment. One submission noted the importance of this kind of rehabilitation to disabled people.

> Sporting and other recreational facilities for severely disabled persons should become the focus of concern for a rehabilitation division to maximise the potential of all disabled persons. [117]

Thus **we recommend that the rehabilitation programs for people disabled in transport accidents should include training for independent living, social rehabilitation and leisure counselling.**

VIII. SUMMARY

9.77 Although of comparatively recent concern in compensation schemes, rehabilitation was given a high priority in the Australian Woodhouse Report and increasingly has become acknowledged as an essential component of accident compensation. Prompt and effective rehabilitation reduces both unnecessary suffering and the ultimate cost of compensation by restoring the accident victims functional capacity to the maximum possible extent. Transport accident victims should therefore have a right to rehabilitation and the Corporation should be actively involved in ensuring that the necessary rehabilitation services are provided. This can be achieved by utilising existing facilities in both the public and private sectors. But where these are inadequate or unsatisfactory, the corporation should have power to provide services directly. A special Rehabilitation Section within the corporation is proposed to encourage the prompt and effective utilisation of existing rehabilitation services and to foster the development of new ones. The Section would employ rehabilitation counsellors to identify transport accident victims in need of rehabilitation and to provide them with advice and assistance.

9.78 In fulfilling its duty to provide prompt and effective medical and functional rehabilitation, the Corporation should:

> bear all costs associated with the provision of rehabilitation services;
>
> meet the costs of travel and accommodation necessarily incurred in obtaining treatment;
>
> encourage the development of training programs for rehabilitation professionals; and
>
> provide mechanical equipment, pharmaceutical supplies and mechanical aids.

9.79 In addition to functional and medical rehabilitation, the Corporation should also play an active role in the vocational and social rehabilitation of transport accident victims. Vocational rehabilitation includes not only training programs but also payment for alterations to the workplace and active involvement in job placement programs. In addition the Corporation should take measures to minimise the financial risk to employers of engaging disabled transport accident victims. Another form of vocational rehabilitation which the Corporation may undertake is assistance in establishing a business. Social rehabilitation involves not only retraining for everyday activities and learning to cope with the disability but also counselling in human relationships and leisure activities.

FOOTNOTES

1. Working Paper, para. 11.42.

2. See J. Dewdney and I. Inwin, *The Aftermath-Caring for Accident Victims in New South Wales* (Unpublished Commission document, 1983).

3. We have been assisted greatly through criticism and suggestions from disabled people, medical practitioners and rehabilitation personnel. In addition, we have met with various groups Such as the Australian Quadriplegic Association, and the New South Wales Council of Social Service, which organised a seminar attended by both able-bodied and disabled community members. We received submissions from the organisations representing disabled people and disabled individuals, (see eg. submissions W15, W44, W74, W83 and W85), as well as conducting Our internal Case Study program. For further information on these matters see paras 1.7-1.12, 1.18-1.32.

4. World Health Organization Expert Committee on Medical Rehabilitation, *Second Report* (Geneva 1969).

5. J Henle, *Rehabilitation of Auto Accident Victims* (US Department of Transportation, Automobile Insurance and Compensation Study, 1970), p.4.

6. Submission W42, p.2.

7. For a study which confirms the importance of early referral, see D Hewson, J Halcrow and C Brown, *Compensable Back Injuries-Characterisation of a Ten-year Rehabilitation Centre Caseload* (Royal South Sydney Rehabilitation Centre 1982), pp.82-83. See also Submission W24, p.11.

8. *Report of the Rehabilitation Review* Committee (New Zealand 1982), para.50.

9. Submission W24, p.3.

10. T H Kewley, *Social Security in Australia 1900-1972* (2nd ed. 1973), p.326.

11. See note 2 above, paras.7.9-7.10. These paragraphs summarise some of the organisations which have developed Such centres in co-operation with the New South Wales Housing Commission. There are also, of Course. private hostels and hospitals which serve this purpose.

12. See eg. Paraplegic and Quadriplegic Association of New South Wales.

13. Many groups undertake this function, but there are umbrella organisations Such as the Australian Council for Rehabilitation of disabled.

14. F Rowe, “Rehabilitation in Australia” (1958) 78 *International Labour Review* 461, at p.464.

15. *Ibid.*

16. See note 10 above, pp.326-327.

17. Invalid and Old-age Pensions Act 1941 (Cth), s.6.

18. Social Services Consolidation Act (No.2) 1948 (Cth.), s.20.

19. Social Security Act 1947 (Cth.), s.135R.

20. See note 2 above, para. 10.2.1.2.

21. See note 14 above, at p.463.

22. Submission W42, p.2.

23. Workers’ Compensation Act 1926, s.52. See also, Official Farewell by Bench and Bar to His Honour Judge Perdriau, first Chairman of the Workers’ Compensation Commission of New South Wales, (1950) 24 WCR 93, at p.102, per Perdriau J.

24. Conybeare Report, pp.117-129, esp. at p.122.

25. *Forty-ninth Annual Report of The Workers' Compensation Commission of New South Wales and Statement of Accounts for the Year ended 30th June* 1975, p.31.

26. Workers' Compensation Act 1926, s.52A.

27. *Fifty-fifth Annual Report of The Workers' Compensation Commission of New South Wales for the Year ended 30th June 1981,* p.38.

28. Workers' Compensation Commission of New South Wales, Rehabilitation Department, *Submission to the Attorney General on Costs of the Workers' Compensation System* (June 1983), p.3.

29. See eg. International Rehabilitation Associates and Industrial Rehabilitation Service.

30. Australian Woodhouse Report, vol.1, para.8.

31. *Id*., vol.2, para.34.

32. *Id*., para.4(4).

33. See paras.4.36-4.37.

34. Minogue Report, 7.01-7.02.

35. *Id*., para.7.24.

36. *Id*., paras.7.29-7.31.

37. Section 57A(l).

38. Motor Accidents Act 1973 (Vic.), s.61A.

39. Ninth *Annual Report of the Motor Accidents Board, Year ended 30 June* 1982 (Victoria 1983), paras.6-7.

40. Submission W9, p.7. Mr. Wilson is the Industrial Secretary of the National Union of Railway men.

41. *Id*., p.7.

42. *Id*., pp.7-8.

43. Accident Compensation Act 1982 (N.Z.), s.36(2).

44. *Id*., s.37(l).

45. *Id.,* s.37(3)(d)(i), (ii) and (iii).

46. *Id.,* s.37(3) (e).

47. *Id.,* s.37(3) (0.

48. *Id.,* s.37(3) (g).

49. *Id.,* s.37(5).

50. *Id.,* s.37(3) (d) (iv).

51. See note 8 above, para. 183.

52. *Ibid.*

53. *Id*., paras.184, 191.

54. *Id*., para.190.

55. *Id*., para.188.

56. *Id*., para.193.

57. See eg. International Labour Organisation, *Recommendations Concerning Vocational Rehabilitation of the Disabled* (Geneva 1955), rec.99.

58. This was passed at the 2433rd plenary meeting.

59. See eg. Submission W24, p.6 ff.

60. National Labour Consultative Council, *Disabled People: Working for a Better Future* (1982).

61. Anti-Discrimination Act, 1977, part IVA. The area of employment gives rise to the largest proportion of complaints of discrimination on the ground of physical impairment. Of the 91 complaints received in 1981-82, 79 per cent related to discrimination in employment. The-corresponding figure for 1982-83 was 72 per cent of 47 complaints: *Anti-Discrimination Board* Annual *Report year ended 30 June 1983,* p.85.

62. Anti-Discrimination Act, 1977, ss.49 B-491.

63. *Id*., s.49J.

64. *Id*., s.49 K.

65. *Id*., s.49 L

66. See eg. Commission of Inquiry into Poverty, Social Medical Aspects of Poverty Series, *The Social Relationship between Poverty and Disability in* Australia, Research Report by S Treloar, ACROD (1977); Parliament of Tasmania, *Report of the Tasmanian Board of Inquiry into the Needs of the Handicapped* (1980); South Australian Committee on Rights of Persons with Handicaps, *The Law and Persons with Handicaps* (1978), esp. vol.1; New South Wales Anti-Discrimination Board, Discrimination *and Physical Handicap* (1979); National Women's Advisory Council, *So Much Left Undone* (1983).

67. Declaration on the Rights of Disabled Persons passed at 2433rd plenary meeting of the General Assembly of the United Nations, 9 December 1975, cl.6.

68. *Id.,* cl.5.

69. Correspondence from the Minister for Health to the Attorney General, dated 9 December 1983 and forwarded to this Commission for attention. See also. Submission W42, p.2.

70. See eg. Council of Social Service of New South Wales, Cold Comfort (1983).

71. Submission W86.

72. Commonwealth Department of Health, *Rehabilitation in Health Services* (1979), para.2.6.

73. Submission W24, pp. 10-11.

74. See D Hewson, J Halcrow and C Brown. note 7 above, p.59. The importance of early referral to rehabilitation and of integration of rehabilitation principles is also stressed in the Conybeare Report, para.6(1).

75. Dr A Ganora, *Survey of Patients 1-150 Consecutive Referrals Presenting with Back Pain to the Illawarra Rehabilitation Centre,* paper presented at the Illawarra Rehabilitation Centre Insurance Symposium (June 1983), pp.8-9.

76. Submission W42, p.5.

77. D Hart and D Linklater, *Psychological and Social Losses from Road Traffic Crashes* (Traffic Accident Research Unit, Research Report 2/81, 1981).

78. See paras.13.63-13.72

79. Minogue Report, para. 7.07.

80. Conybeare Report, para.6(6).

81. See note 72 above, p. ix; see also, Commission of Inquiry into Poverty, *Third Main Report, Social Medical Aspects of Poverty in Australia* (1976), p.68.

82. The College was inaugurated on 23 February 1980.

83. See note 72 above, para.7.8.

84. *Id*., para.6.6.

85. *Id*., p.xiv.

86. *Id*., p.xv and para.6.4.

87. For discussion see Commission of Inquiry into Poverty, note 81 above, p.69.

88. Dr B M Ford, “Medical Rehabilitation”(1974) 2 *Medical Journal of Australia* 177.

89. See note 72 above, p.xiv.

90. Australian Woodhouse Report, vol.2, paras.215-216. See also note 72 above, pp. xv-xvi.

91. Australian Woodhouse Report. vol.2, paras.210-214.

92. Minogue Report, para.7.24.

93. Submission W24, p.13.

94. Australian Woodhouse Report, vol.2, paras.221-225. See also paras.226-230 on other problems for the paramedical and medical support personnel.

95. See eg. note 72 above, para.7.6.

96. Australian Woodhouse Report, vol.2, para.92.

97. See note 72 above, para.7.4. See also Australian Woodhouse Report, vol.2, paras.93-95.

98. This figure is an estimate provided by the Australian Quadriplegic Association.

99. See eg. Case Study Booklet para.3.20, CS 142.

100. Submission W24, p.22.

101. See note 2 above, para.5.4.2.2(b).

102. Submission W42, pp.20-21.

103. See note 2 above, para.5.4.1.1.1 (c).

104. The concept of work force rehabilitation for the spouses of deceased earners is not a new concept. The Repatriation Act 1920 (Cth.), made provision for war widows in this regard, while in 1958 the scope of the Commonwealth Rehabilitation Service was widened to include widows' pensions: see note 10 above, pp.330-331.

105. New Zealand Accident Compensation Corporation, *Rehabilitation Manual,* para.5.5.

106. See note 2 above, para. 10.4.

107. *Ward v. Corrimal-Balgounie Collieries Ltd.* (1938) 61 CLR 120, at pp.129-130, per Latham C J, see also C J Mills, *Workers' Compensation (New South Wales)* (2nd ed. 1979). para.174.

108. Section 7A.

109. No case has attempted to use this section to apportion between work and non-work injuries. For a leading case on the interpretation of s.7A, see *National Employers' Mutual General Insurance Association Ltd.* v. *Calver* [1983] 3 NSWLR 107.

110. This may be so notwithstanding Part IVA of the Anti-Discrimination Act 1977: see para. 9.24 above.

111. The Disadvantaged Persons Officer's responsibilities include other disadvantaged people in addition to disabled individuals.

112. See Commonwealth Employment Service. Help *To Break Down The Barriers-Employ A Disabled Person,* leaflet 4-3-220 (April 1983).

113. Submission W28, para.2.2.2.

114. See eg. lump sum survey, vol.1, p.145, Case No.46.

115. Social Security Act 1947 (Cth), s.115B.

116. See eg. Submission W85, p.3.

117. Submission S93. p.7.

10. Support Services and Independent Living

I. INTRODUCTION

10.1 The accident-related needs of a person disabled in a transport accident may extend beyond the need for income replacement, medical care and early rehabilitation services. In the short-term, particularly in the case of a non-earner, the most urgent additional need is likely to be for the provision of household services to replace those previously provided by the injured person, either for himself or herself or for other household and family members. This need may continue in the longer term, as where the disabled person requires these replacement services to remain outside an institution, and to live independently within the community. This Chapter deals with this form of support service as well as attendant care, emergency family support and other services or assistance required by severely disabled people, such as home modifications and mobility allowances. The provision of these services is central to the alms of adequate compensation for the most seriously disabled accident victims, as well as being necessary to minimise family dislocation in the short-term.

II. HOUSEHOLD SERVICES

A. Introduction

10.2 People usually provide unpaid services for the benefit of themselves and other members of the household. If these services were not provided some at least would have to be purchased on the open market. If a person injured in a transport accident is no longer able to perform these services, the household suffers a loss. This was one aspect of the recently abolished action for loss of consortium, [1] whereby a husband could sue, among other things, for his wife's loss of ability to provide household services. [2] These losses occur in cases of both short- and long-term disability.

B. Scope of Household Services

10.3 A large range of unpaid services may be the subject of loss, depending on the previous activities of the person. These could include ironing, washing, cooking, child-care, mowing lawns, performing routine household maintenance such as changing tap washers and mending fuses, and innumerable other chores. They could also include activities such as building extensions to a house on weekends, making clothes for the family, servicing the family car and constructing furniture for the house. To provide replacement services for all these services or activities would create great difficulties of assessment and impose substantial costs on the scheme. For instance, the New Zealand accident compensation scheme originally included a provision which allowed a member of a household to receive compensation "for any quantifiable loss of services" [3] suffered by that member, because of the death or injury of another member of the household. A decision of the New Zealand Court of Appeal in 1980 interpreted this section to cover a claim by a widow for the cost of home renovations which her deceased husband would have carried out had he not been killed in an accident. [4] This section was changed in the 1982 Act to restrict its meaning to any quantifiable loss of services of "a domestic or household nature" [5] which were previously provided by the injured or deceased person on a regular basis. Section 80 also allows the injured person to recover compensation

> ... for actual and reasonable expenses and proved losses necessarily and directly resulting from the injury or death [6]

provided that it is not one of the excluded expenses, such as property damage, [7] loss of opportunity to make a profit [8] or an expense which is similar to others recoverable under other sections of the Act. [9] The Corporation's Claims Manual excludes expenses caused by the inability to complete the building of a person's home but states that

> ... the cost of closing in an area temporarily may be a valid claim as there is a distinction between essential preservation and asset improvement. [10]

10.4 Compensable services should be those necessary for the maintenance and preservation of the household, but not those in the nature of hobbies, crafts or special improvement projects. Maintaining and preserving the household extends to keeping the physical environment tidy by cleaning, and caring for the occupants through washing, cooking and child-care. We acknowledge that the distinction we have drawn is difficult to justify on a restitution model of compensation. All household services have an economic value in the sense that they avoid the need to purchase services in the marketplace. But it is not feasible to attempt to replace all services previously rendered to the household by the disabled person. Household services should not necessarily be provided at a level sufficient to maintain the household at its pre-accident standard. For example, in the household of a meticulous homemaker, sometaskswillbeundertakenfarmorefrequentlyorintensivelythanisrequired for its maintenance and preservation. Similarly, replacement child-care services can hardly be expected to replace fully the services performed by a parent. Again we do not think it appropriate that such services should be provided where a disabled household member previously performed only occasional or minor household tasks, such as washing up dishes after the evening meal or removing the garbage. In these circumstances, it is reasonable to expect the household to use its own resources to fill the gap, without causing hardship to other family members. Accordingly, we recommend that a person:

(a) who suffers a disability (whether temporary or permanent) as the result of a transport accident;

(b) who, before the accident, performed substantial household services for himself or herself and/or his or her household family members; and

(c) whose capacity to perform household services has been significantly impaired by reason of the disability;

should be entitled to replacement household services, to the extent necessary for the maintenance and preservation of the household of which he or she is a member. This formulation would permit replacement household services to be provided to a person living alone who previously performed all necessary tasks himself or herself.

10.5 It is now necessary to consider the criteria that should determine the extent to which services are necessary for the maintenance and preservation of the household. The circumstances will clearly vary substantially among different households. For example, if an injured person has young children and is the primary care-provider within the family, the need for replacement household services, including child-care and other services, may be quite large. By contrast, a young person living with his or her parents and a number of siblings may have contributed much less to the household. Moreover, it may be reasonable to expect other household members to accept extra responsibilities during the period of disability without significant interference with their daily activities. In assessing the need for household services a number of factors should be taken into account by the Corporation. **We recommend that in assessing the extent to which household services are necessary for the maintenance and preservation of the household the Corporation should have regard to:**

(a) the household services provided by the disabled person before the accident and the extent to which he or she can provide such services after the accident;

(b) the number of household family members, their ages and need for household services;

(c) the household services that other household family members or other family members could reasonably be expected to provide after the accident; and

(d) any special factors affecting the need of the disabled person and other household family members for household services.

In determining what is reasonable for the other household or family members to provide after the accident, the Corporation should take into account:

(a) the household services provided by the other household family members or other family members before the accident;

(b) the need to avoid substantial disruption to the employment or daily lives of household family members; and

(c) other relevant circumstances. [11]

This recommendation specifically contemplates that the Corporation should take into account the contributions that other household family members or family members outside the household can reasonably be expected to make by providing services. While they should not be required to endure substantial disruption to their lives, it will often be feasible for them to fill, at least in part, the gap temporarily left by the disabled person without undue interruption to their way of life.

10.6 The criteria specified in paragraph 10.5 do not refer to the financial position of the household: that is, the ability of members to purchase the services required to maintain and preserve the household. In the short-term it is more important to ensure that emergency needs are met rapidly, than to attempt to assess the financial position of each household claiming assistance. It is frequently difficult to arrange services of this kind immediately after a traumatic event such as an injury or death in a transport accident, regardless of the household's financial resources. However, in the case of longer-term disability, we think it right to take into account the household's financial resources and ability to pay for any services they may require. A period of four weeks following the occurrence of an accident in which a service provider is disabled, would seem to be a reasonable period in which to allow a household to receive replacement household services, without account being taken of their financial resources. Thereafter these resources should be considered, including other forms of compensation provided to disabled persons or other household members under the Scheme. One consequence is that, for longer- term disability, non- earners (who would not be entitled to compensation for loss of earning capacity for 104 weeks) would be more likely to receive substantial compensation in the form of household services than earners previously in full-time employment who are being compensated for loss of earning capacity. The non-earner would have been more likely to provide extensive homemaker services before the disability, particularly if he or she was caring for children, and household services will be that person s main source of continuing compensation for a period of 104 weeks. **We therefore recommend that in assessing the extent to which household services are to be provided after the expiration of four weeks from the date of the accident, the Corporation should have regard to the following additional criteria:**

(a) the compensation and other benefits provided to the disabled person or other household family members arising out of the transport accident;

(b) the earnings and other income of the spouse of the disabled person (being a member of the household); and

(c) the resources, financial or otherwise, available to household family members to meet the need for household services.

In practice, this would probably mean that the vast majority of people would no longer be eligible for the provision of household services after a two year period. This is because at that point, incapacitated non-earners would commence receiving periodic compensation for loss of earning capacity. There would, of course, be a small minority of cases, where the need for such services was substantial and the resources to meet the need inadequate. In such cases, provision would continue while the need continued. The term "spouse" in the above recommendation includes de facto partner. (For more detailed explanation see paragraph 12.21).

C. Provision of Services

10.7 The Corporation should ensure that replacement household services are:

provided promptly; and

available for as long as is reasonably necessary, in accordance with the criteria discussed earlier.

This requires an efficient decentralised method of service provision. In New South Wales, the Home Care Service of New South Wales provides home services throughout the State. The Service has recently been brought under

the jurisdiction of the Department of Youth and Community Services pursuant to the Community Welfare Act, 1982. [12] Its operations fit well within the framework of the Transport Accidents Scheme.

> The Home Care Service aims to provide a flexible range of non- medical services to enable people to function in their own homes. These include:
>
> Household Tasks: washing, ironing, shopping, cleaning, cooking.
>
> Personal Care: feeding, bathing, dressing, grooming, assisting with mobility.
>
> Relief Care: is generally combined with at least some of the above tasks and may also involve assistance with exercise and therapy programmes.
>
> Family Worker is a more extensive involvement with the family, assisting with the development of skills such as household management and child care.
>
> Handyman Service: includes basic maintenance and household repairs and essential garden maintenance.
>
> Live-in Housekeepers are available for a maximum of eight weeks.

It is the aim of the Service that all of the above types of assistance should be available from all Branches. Due to financial restrictions, however, this is not currently the case. [13]

Resources could be made available by the Corporation to enable the Service to provide assistance to accident victims who are entitled to benefits of this kind. If the Home Care Service cannot meet the need, the Corporation will need to rely on commercial agencies or engage staff, either on a casual or permanent basis. **We recommend that, in general, replacement of household services should be provided through existing government or private agencies, but the cost should be met by the Scheme.**

10.8 In some circumstances, it may be appropriate for a member of the family or household to provide the services to which the disabled person is entitled under the Scheme. A member of the household, for example, may have the time required to do so and it may be both acceptable to the disabled person and convenient for the Corporation to enter into an appropriate arrangement with the household member. Remuneration would generally be equivalent to that payable to other service providers (although not necessarily at the level charged by those operating in the private sector). A household member may be willing to forego remunerative employment or other activities outside the home in order to undertake duties as a service provider, yet it may be quite unreasonable to expect him or her to perform those duties without reward. But the Corporation should not be compelled to engage a member of the household. **We recommend that the Corporation should have power when requested and where it considers it appropriate to do so, to engage a member of the disabled person's household or family to provide replacement household services.**

10.9 The Home Care Service of New South Wales has developed expertise in assessing an individual's or household's need for household services. I n many cases, it may be appropriate for the Home Care Service to carry out the assessment of need on behalf of the Corporation, using its own knowledge and the Corporation's guidelines. This would, of course, be subject to the Corporation's approval of assessments in individual cases. In practice it will be necessary to provide household services immediately after the minimum preliminary assessment so that the services are made available when the need is most acute. The Corporation's rehabilitation officers and the social work staff in hospitals should be able to advise families of their rights in this regard. The Corporation should also publicise the entitlements so that transport accident victims and their families are aware of the benefits during the period of most acute distress and dislocation following an accident.

D. Possible Limits

10.10 Consideration was given to whether the provision of household services should be subject to monetary or hourly limits. We have decided against this approach because the recommended criteria impose reasonable limits on the services that can be claimed and on the cost of providing these services. Nonetheless we are conscious that this is a novel area of compensation and that we may not have anticipated all difficulties that may

arise in practice. Accordingly, the Corporation and the Policy Review Committee (Chapter 15) should monitor the extent to which household services are claimed and the cost of meeting claims. If necessary, proposals for change to the legislation can be formulated in the light of the early experience with the Scheme.

III. ATTENDANT CARE

A. Introduction

10.11 Disabled people should, if they wish, be able to live in the community rather than in an institution. In addition to assistance with housework, seriously disabled people need assistance with personal care, such as dressing, bathing, eating and mobility. The Handicapped Persons Survey 1981 showed that while a relatively large proportion of handicapped people living in households were handicapped in relation to self-care (38.9 percent), [14] only just over 1 per cent had assistance to dress, wash or feed themselves [15] and another 0.5 per cent had an unmet need in that area. [16] The percentage of handicapped people living in institutions who were handicapped in relation to self-care predictably was much higher (83.6 per cent) [17] and the vast majority of these people were severely handicapped in relation to self-care. [18] To enable a disabled person to live in his or her own home, attendant care services are often required.

10.12 The Australian Council for Rehabilitation of Disabled has stated that the basic objective of attendant care is to provide disabled people with the opportunity to achieve the maximum independence, personal fulfilment and community participation in their lives by:

> making it possible for them to employ an attendant to assist them with essential personal care needs in their own home, group homes etc.;
>
> relieving strain on their family (including spouses, parents, siblings, aunts and uncles) who are traditionally expected to assume the role of attendant in addition to their other roles and responsibilities;
>
> avoiding unnecessary admission to hospital or other forms of institution; and
>
> maintaining good quality long-term care for the disabled person who does not wish to live within an institutional setting and has no medical need to do so. [19]

These ends are clearly desirable in themselves and are often cost effective in the sense that they encourage rehabilitation and avoid the costs of institutional care. While the costs of attendant care (although not generally requiring special skills) are significant, especially over a lifetime, the proportion of disabled transport accident victims requiring such care is small. Thus the provision of attendant care services should be an important feature of any compensation scheme.

10.13 The right to attendant care is consistent with the aim of rehabilitation and restitution through the process of normalisation.

> The case for the introduction of an attendant care allowance is based on the strongly held belief that severely physically disabled adults have as much right as other adults in the community to take responsibility for the management and direction of their own lives. However, at the present time, in most cases, this is not possible. Their physical dependence on another person for assistance with personal care needs is translated into social dependence and they are forced through lack of alternatives to accept the role of dependent patient either in an institution or within the family setting. [20]

Moreover, the provision of attendant care services is by no means a novel concept- either as a service for the disabled or as an aspect of compensation Attendant care programs operate in other countries,[21] and a pilot attendant care program has been undertaken by the Commonwealth Government in conjunction with the Home Care Service of New South Wales for severely disabled people in the Sydney metropolitan area.[22] Very severely disabled veterans are also entitled to receive an attendant allowance for service-related disabilities. The common law awards damages for the costs of paid attendant care,[23] and also the notional costs of such care where it is

provided gratuitously by relatives or friends of the disabled person (paragraphs 10.23-10.24). The New Zealand Accident Compensation Act 1982 specifically provides for the Corporation there to pay for attendant care

> ... where the incapacity is so grave that the person is incapable of caring for himself and requires, as a matter of necessity, constant personal attention. [24]

10.14 **We recommend that a person who:**

> **(a) suffers a disability (whether temporary or permanent) as the result of a transport accident; and**
>
> **(b) is thereby unable to provide adequately for his or her personal care;**
>
> **should be entitled to receive attendant care services from the Corporation. "Attendant care services" means the services (other than medical or nursing care) required to provide for the essential regular personal care of the disabled person.**

B. Assessment of Need

10.15 The assessment of need for attendant care in individual cases involves a number of factors and the assessment is likely to vary over the period of the disability. One estimate puts the average requirement for attendant care of a seriously disabled person at about four hours a day, seven days a week. [25] Of course, there may be exceptional cases which require longer periods of attendant care. Examples include a seriously disabled person who is unable to be left unattended in case he or she chokes, or a bedridden person who is unable to move at all and requires turning to avoid bedsores. In some cases the intensive attention required may leave no alternative but for the person to live in an institution. The evaluation of these matters will often best be made by the rehabilitation team responsible for the care of the disabled person, although their views should not necessarily be decisive. Another relevant factor, which should be used by the Corporation in developing policy guidelines, would clearly be standards developed by governments in Australia for the purposes of welfare programs or other schemes. The need for attendant care is not confined to those disabled people who are housebound. It is quite common for the permanently disabled to rejoin the workforce and it is consistent with the objectives of rehabilitation to encourage them to do so. But such people, especially the seriously disabled, may still need substantial attendant care. In one example from our case studies, Mr P who had become quadriplegic as the result of a car accident, was employed full-time as a telephonist, but still relied on his wife for attendant care. [26]

10.16 **We recommend that in assessing the need for attendant care services the Corporation should have regard to:**

> **(a) the nature of the person's disability and its effect on that person's ability to provide for his or her personal care;**
>
> **(b) the medical and nursing services received by the disabled person, to the extent they provide for his or her personal care;**
>
> **(c) the wishes of the disabled person, specifically his or her desire to five outside an institutional environment, to the extent that it is reasonable to attempt to meet these wishes;**
>
> **(d) the extent to which attendant services are required to enable the disabled person to undertake or continue employment;**
>
> **(e) any assessment made by a rehabilitation assessment team at the request of the Corporation; and**
>
> **(f) the standards developed or applied by governments or public agencies in Australia in determining the needs of disabled people for attendant care services.**

A distinction should be drawn between the attendant care needs of a disabled person and his or her need for medical and nursing services and replacement household services. However, the availability of medical and

nursing services (which involve specialist skills) may have a considerable bearing on the need for attendant care. 27

10.17 As with house hold services it will sometimes be feasible for necessary attendant care services to be provided by another member of the family or household without undue inconvenience to that person. For example, if the disabled person has difficulty combing his or her hair because of a limitation in shoulder movement, but has no other difficulties in relation to performing personal care tasks, it would be reasonable to expect another household member to assist with this task. **We recommend that the Corporation should take into account the attendant care services that other household family members could reasonably be expected to provide to the disabled person. In determining what is reasonable the Corporation should take into account:**

(a) attendant care services (if any) provided by the other household family members before the accident;

(b) the need to avoid substantial disruption to the employment or daily lives of those household family members; and

(c) other relevant circumstances.

10.18 In the short term a disabled person's need for attendant care services will vary as his or her medical condition or ability to do various activities improves through rehabilitation. However, once the condition has stabilised and maximum rehabilitation is achieved the review of the assessment of need should be minimised to avoid undue interference in the person's life. It should take place no more than once a year, unless there are exceptional circumstances or the disabled person seeks review more frequently.

C. Provision of Services

10.19 Attendant care services could be provided in one of two ways:

an attendant allowance; or

the provision of an attendant to perform the services.

The main advantage of providing an allowance is that the disabled person will have greater freedom in choosing her or his attendant and in dispensing with the services of someone who turns out to be unsatisfactory. The main advantage of service provision is that the disabled person is guaranteed the necessary high quality care. In addition, the Corporation avoids the risk of paying out money for attendant care, only to find that it has not been used for the purpose. The major disadvantage is that the disabled person does not have the same freedom of choice as with an allowance.

10.20 To a large extent, it is possible to accommodate these conflicting objectives. The Corporation, either through a body such as Home Care or by its own arrangements could employ providers of attendant care on a casual basis. The disabled client could interview a pool of attendants and choose the person who seems most appropriate for his or her personal needs. The attendants would be directly answerable to the client and, if their performance was unsatisfactory, the client could terminate their services. In this event a temporary relief person should be available to assist the person until a more appropriate person could be found. This proposal should minimise the adverse effects of the service provision model from the point of view of the disabled person, without introducing the disadvantages of the allowance model.

10.21 It will also be necessary for the Corporation to offer relief or emergency services and perhaps weekend services. Special holiday arrangements may be required on occasions when a disabled person or family members need a break. To deal with these and other situations, guidelines should be established by the Corporation concerning the criteria governing the provision of attendant care. A committee comprised of disabled consumers and service providers should be created to monitor the adequacy and quality of services and to report to the Corporation and to the Policy Review Committee.

10.22 In accordance with the approach we have explained (paragraph 10.7) **we recommend that, in general, attendant care services should be provided through existing government or private agencies, but that the cost should be met by the Scheme.** If however, these agencies are unable to meet the needs of disabled transport accident victims, the Corporation should engage its own personnel or enter agreements with private agencies. This should only be done, however, if services such as the Home Care Service of New South Wales are unable to fulfil the Corporation's obligations, taking account of the resources to be provided by the Corporation.

D. Family Members

10.23 It is common for attendant care services to be provided to disabled people by family members or friends without financial reward. The common law has recently been in a state of flux concerning the award of damages in respect of gratuitous services of this kind. Initially the courts declined to award damages for these services, [28] but a different view was taken in a series of English decisions in the 1970s. [29] The issue came before the High Court of Australia in the landmark case of *Griffiths v. Kerkemeyer*. [30] In this case, a young quadriplegic person was provided with nursing and other services by his fiancee and family and this situation appeared likely to continue indefinitely. The court held that the right to compensation was based on the need for these services, whether they were paid for or had been provided gratuitously. The size of the loss was to be measured by reference to the market value of the services rendered to the plaintiff. This measure of loss was to apply regardless of whether services were actually provided to the plaintiff or whether he or she paid the service provider. Chief Justice Gibbs noted that the matter should

> ... be viewed in two stages. First, is it reasonably necessary to provide the services, and would it be reasonably necessary to do so at a cost? If so, the fulfilment of the need is likely to be productive of financial loss. Next is the character of the benefit which the plaintiff receives by the gratuitous provision of the services such that it ought to be brought into account in relief of the wrongdoer? If not, the damages are recoverable. [31]

10.24 The decision in Griffiths v. Kerkemeyer led to a substantial increase in damages awards in serious cases, with consequent financial implications for the compulsory third-party insurance system. According to the submission of the GIO, an analysis of some large awards showed that the "gratuitous services" element amounted to about 30 per cent of the awards. [32] The courts, in tacit acknowledgement of the financial consequences of *Griffiths v. Kerkemeyer,* have limited the scope of the decision. For example, damages have not been awarded where the services are such as would normally be provided by family members to each other. [33] The courts have also tended to apply more stringently the overriding qualification that the services in respect of which the claim is made should be reasonably necessary. [34] The most recent limitations in New South Wales have been legislative. The Motor Vehicles (Third Party Insurance) Amendment Act, 1984, imposes limits on the compensation payable in respect of gratuitous attendant care or domestic services provided to a plaintiff, [35] up to a maximum of a specified index of average weekly earnings.

10.25 While family members often make an invaluable contribution in providing attendant care services, it is important to recognise that fulfilling the dual roles of attendant and family member can create tensions and difficulties for both the attendant and the disabled person.

> At best it is difficult to differentiate between the roles of lover and attendant, if they are embodied in the same person. Both the disabled person and the partner may expect more than if a separate paid attendant does the physical care. Dealing with emotions like anger can be confusing - it is risky to express anger to the other, when he/she will have to provide intimate aid in a moment When is he/she a partner and when an attendant? [36]

There is therefore much to be said for the view that family members should not bear the primary responsibility, whether on a paid or unpaid basis, for providing attendant care services, other than performing relatively minor tasks. When the option of a paid attendant is available, the disabled person and family members may well choose the paid attendant in order to minimise the strain caused to family members and to provide the disabled person with a sense of independence.

10.26 Despite the potential difficulties, both family members and the disabled person may prefer the services to be provided by a family member in some circumstances. We think that this option should be available, although the Corporation should not be bound to accept such a solution simply because a request is made. **We recommend that the Corporation should have power when requested and where it is appropriate to do so, to engage a member of the disabled person's family to provide attendant care services.** The person so engaged should be entitled to the equivalent payment provided to non- family providers of attendant care, for the number of hours assessed as necessary. The money would be paid directly to the service provider.

IV. EMERGENCY FAMILY SUPPORT

10.27 When a person is injured in a transport accident, it may be necessary for that person's uninjured spouse, parent or child to attend to the injured person's needs at home or in hospital. For example, a husband may be required to attend hospital when his wife is in a critical medical condition or a parent may be required to be with a severely injured child who is in hospital or at home. In these circumstances, the attendant may incur expense, such as travel or accommodation costs, or losses in the form of earnings or reduced ability to perform household tasks. The common law has taken an ambivalent attitude to these matters, generally denying a direct remedy to the spouse or parent, although sometimes including in the general damages of the injured person a component reflecting the expenses or financial losses sustained by the relatives. [37] Some compensation schemes recognise the need for emergency family support to minimise the financial difficulties which often arise in the immediate aftermath of an accident. In New Zealand, for example, emergency support is available where a person is absent from work because his or her performance of attendant or household duties is necessary as a result of the other household member's personal injury by accident. The New Zealand Accident Compensation Corporation will pay up to one week's wages, with a discretion in special circumstances to extend the payments for three more weeks, if it is not possible to make any alternative arrangements. [38]

10.28 The Scheme should provide assistance of this kind, although caution should be exercised in extending benefits in such a novel area. Initially, two categories of emergency family support should be available. First, where the parent, spouse (including de facto partner - see 12.21) or child of an injured person loses income because of the need to attend that person in hospital or at home, the Scheme should compensate for the loss. The compensation should be the same as that which would have been provided had the parent, spouse or child been incapacitated by injury. Thus, no compensation would be payable for the first weeks loss of earnings and the usual ceiling on compensation would apply. The compensation should be payable for a maximum of four weeks, principally because it is designed to ease the immediate emergency created by the accident. Accordingly, **we recommend that where it is necessary for the spouse, parent or child of a person injured in a transport accident to attend that person continuously, whether in hospital or elsewhere, the Corporation should compensate the spouse, parent or child for the loss of earnings caused by his or her attendance. Compensation should be paid as if the spouse, parent or child had been incapacitated by an injury sustained in a transport accident but should be payable for a maximum period of four weeks.**

10.29 The Corporation should also meet the costs of travel and accommodation within Australia necessarily incurred by a parent, spouse or child of an injured person in providing care or support for that person during the period of four weeks from the date of the accident. If, for example, the parent of a seriously injured child lives in the country and has to travel to a Sydney hospital or has to travel interstate to provide comfort for the child during the period immediately after the accident, the Scheme should meet the travel costs. The Corporation should have power in exceptional cases to extend the period during which travel and accommodation expenses are available, when the continuous presence of the relative is required for the recovery or well-being of the injured person. Therefore, **we recommend that the Corporation should reimburse expenses necessarily incurred in respect of travel and accommodation within Australia by the spouse, parent or child of a person injured in a transport accident, for the purpose of providing care and attention to that person. The Corporation should meet expenses incurred during a period of four weeks from the date of the accident, but should have power in exceptional cases to extend that period where the continuous presence of the spouse, parent or child is necessary for the recovery or well-being of the injured person.**

10.30 There is a strong case for extending emergency family support to a person who is prevented from providing household services to the family because of the need to care for or attend the injured person. In

principle, there is little reason to differentiate between a loss in the form of reduced earnings and in the form of a reduced capacity to perform household services. However, we are venturing into a new field and caution should be exercised. If the experience with replacement household services (paragraphs 10.2-10.10) suggests that the benefit can readily be extended to people required to care for transport accident victims, we think the extension should be made.

V. ACCOMMODATION

A. Introduction

10.31 The need for a place to live is universal. In New South Wales, expectations of home ownership are high and there is a clear preference for free-standing houses rather than high rise accommodation. This is confirmed by the 1981 Census data, which showed that approximately 75 per cent of households in private dwellings in New South Wales occupied free-standing houses, [39] while a further 20 per cent lived in either semi-detached houses, terrace houses, or other medium density forms of housing. [40] Of all households in private dwellings, 67 per cent were either purchasing the dwelling or already owned it. [41]

10.32 The aspirations of disabled people are not very different from those of the general population. This is supported in some of our submissions. One man who had been rendered quadriplegic in a motor vehicle accident in 1975 and received a common law settlement some seven years later said:

> The thing that has made the biggest difference in my life would be the fact that I am living in my own home. I put 10% deposit down and my wife and I are paying it off in monthly instalments. Possibly, for the recipients of no-fault compensation, a certain figure could be awarded, enough to put a deposit on a house, and a sum could be paid periodically, enough to pay off same house and pay the bills. [42]

In a survey conducted for the Law Society of New South Wales of members of the Paraplegic and Quadriplegic Association of New South Wales, the question was asked: “Would you rather live in a nursing home or in your own home?” [43] Ninety-five per cent of respondents preferred their own home, while only I per cent favoured a nursing home. [44]

10.33 A disabled person does have additional needs in relation to accommodation For example, a person who is confined to a wheelchair may need ramps to gain entry to his or her house, or widened doorways to move around in the house. Specific rooms, such as toilets, may need to be enlarged to allow wheelchair access. Bathrooms may need rails to allow the person to lift himself or herself. If the person lives in a two-storey dwelling, he or she may require special access to the other floor, in order to avoid the need to move to more suitable accommodation. A disabled person may need to have a specially designed kitchen or extra accommodation may be required for a live-in attendant care provider. Air-conditioning is normally required by a person who has become quadriplegic.

10.34 While this Report is limited to people disabled in transport accidents, the issue of accommodation raises many questions which apply to all disabled people. There is now a growing commitment to the principles of equal opportunity for the disabled and “normalisation”. These principles dictate that the Scheme should allow the disabled person, wherever possible, the same opportunity to live in his or her own home in the community as is available to the non-disabled person.

10.35 The range of options include:

- one-family homes;
- boarding houses;
- group homes;
- hostels;

nursing homes; and

hospitals. [45]

The choice open to a disabled person will depend on factors such as:

the person's degree of disability;

the need for and availability of support services;

the cost of the preferred options; and

the family situation of the disabled person.

10.36 The number of people disabled in transport accidents who may require assistance in finding or purchasing adequate accommodation in anyone year is not clear. However, from a survey of handicapped persons conducted by the Australian Bureau of Statistics in 1981, some 90.9 per cent of all handicapped people in New South Wales were living in private households while the remaining 9.1 per cent were resident in institutions. [46] The vast majority of handicapped people living in institutions were severely disabled but even among the severely handicapped, only 19.1 per cent lived in institutions. [47] Some 66,800 handicapped people (or 16 per cent of all handicapped people in New South Wales) suffered a primary disabling condition caused by an accident. [48] Of these, 2,900 (4.3 per cent) lived in institutions, [49] with over one-fifth (22.1 per cent) of those injured in road accidents. Thirty-seven per cent of those handicapped victims who lived in households in New South Wales were injured in road accidents. [50] Even though it would be difficult to assess the precise extent of the need for accommodation or home modifications for transport accident victims, these figures indicate that the need certainly exists.

B. Home Ownership

10.37 Given the high level of home ownership in Australia, it is reasonable to assume that most disabled transport accident victims would prefer to own their own homes. Certainly our surveys indicate that it is a very common practice for accident victims to use their lump sum compensation for the purchase of a home, if one is not already owned. Some submissions stressed the need for accident victims to receive compensation in the form of a lump sum sufficiently large to enable victims to purchase their own homes. [51] In the next Chapter we make recommendations for compensation for permanent physical disability which would provide many seriously disabled transport victims with a sufficiently large sum to enable them to purchase a dwelling of average price in, say, the metropolitan area. However, depending on the degree of disability and the cost of the accommodation sought, the amount may not always be adequate to purchase a house outright. In such situations the question arises whether the Corporation should provide funds, in addition to other forms of compensation specifically to enable an accident victim to purchase a house if he or she does not already own one.

10.38 It is relevant that under the common law, damages are not generally awarded for the purchase of a home but only for modifications required by reason of the plaintiff s disability. [52] In practice, however, the plaintiff often uses part of the award to purchase a house. This is by no means inappropriate, even if no component of the damages award is designed specifically to permit acquisition of a home. Part of the award usually represents compensation for loss of earning capacity. Since the plaintiff s future earnings would presumably have been used to finance the purchase of a home, allocation of part of the damages award for the same purpose enables the plaintiff to do what he or she could have done had the accident not occurred.

10.39 In principle, a disabled person should have the same opportunities to acquire a home as those available to an able-bodied person. The capacity to purchase a house is related to the intending purchases s earnings and resources, and his or her housing needs. On our proposals, a person disabled in a transport accident would be compensated for accommodation needs attributable to the disability, such as home modifications. In addition, compensation would be paid for loss of earning capacity including, in cases of long-term disability, loss of potential earning capacity. The result, even leaving aside any lump sum paid in respect of permanent physical disability, is that the disabled person should have a similar financial capacity to purchase a home as he or she would have had if the accident had not occurred. There is no reason, for example, why periodic compensation for

loss of earning capacity cannot be used to pay off a mortgage loan. If the disabled person is a low income earner the same opportunities would be available for government subsidies or access to public housing as for other people in low incomes. In practice the lump sum payable for permanent disability will assist materially in the purchase of a home, should the disabled person choose to allocate the sum in this way.

10.40 We recognise that there may be some accident victims who, despite compensation for permanent disability and separate compensation for the non-optional costs flowing from the disability, find that their periodic compensation for loss of earning capacity is insufficient to sustain mortgage payments required to purchase a home and to maintain that home. This is unlikely to be a frequent occurrence, but could be the case where a non-earner or low income earner has sustained only a moderate disability (for which modest lump sum compensation is payable), but has no residual earning capacity. In these circumstances we do not think that the Corporation should make financial grants to enable the transport accident victim to purchase a home. However, **we recommend that the Corporation should have power to make loans to disabled transport accident victims who have or would have difficulty borrowing money from conventional sources, for the purpose of financing the purchase of a home.** Loans of this kind could be made for extended periods and at rates comparable to those charged by public authorities financing home purchases by low income earners. Sometimes the most appropriate solution to the problem of accommodation might be the provision of public housing, whether on the basis of purchase or rental. While transport accident victims should not be entitled to priority over other applicants for public housing, **we recommend that the Corporation should have power to negotiate arrangements with the Housing Commission of New South Wales and other public authorities for the provision of housing to disabled transport accident victims.**

C. Home Modifications

10.41 Common law damages, in the case of serious disability, include the estimated or actual cost of modifications to the residence of the plaintiff. [53] This generally includes the building of ramps and widening of doorways, the redesigning of bathrooms and living areas, as well as changes to household items such as door knobs, tap handles and the like. [54] In some cases damages may be awarded in respect of more substantial modifications, such as air-conditioning of living areas. Damages are not necessarily confined to modifications to a home owned by the plaintiff. The cost of modifications to a home owned by a third party may sometimes be included in the damages. [55]

10.42 A person who enters a Commonwealth Rehabilitation Service program, but who cannot claim common law damages, may be supplied with certain home modifications or aids. These include:

the provision of or the widening of doorways to provide access;

the provision of access ramps;

the relocation of toilets, baths, showers; and the installation of suitable weight-bearing handrails, grips and grab rails;

adjustable toilet seats, bath seats etc.;

lever taps;

shower hose;

thermostatic control units for water supply;

modifications to working area in the kitchen, laundry, etc.;

dressing aids;

pneumatic hoists; [and]

alterations to the height of electrical switches, power points etc. [56]

The scope of home modifications allowed by the Service does not envisage large capital works or funds for home acquisition. [57] For example, a disabled person may require wider doorways, different washing and toilet facilities and new access arrangements. If the person makes these modifications to an existing home, the service will usually meet the cost in full. However, if the person decides to build a new extension incorporating these design features, the Service is likely to meet the same alteration costs, but no more.

10.43 In the New Zealand accident compensation scheme, detailed guidelines relating to home modifications have been devised. The Rehabilitation Manual sets out the principles which cover housing alterations. [58]

> The Corporation will provide housing alterations which are necessary and reasonable, subject to relevant criteria. These include the persons disability, and consequent limitations, the wishes of the person in relation to location, the inconvenience to other household members, the intended period of residence, any structural or location problems, the extent and cost of the modifications, especially in relation to the value of the house, any alternatives available and also any other compensation payable. [59]

The Corporation allows both major and minor modifications to premises owned by or rented to the disabled person; but in the latter case, only where the lessee has a long-term lease and the lessor consents to the modification

10.44 The provision of necessary home modifications is critical if the aims of the Transport Accidents Scheme regarding long-term disabled transport accident victims are to be realised. Accordingly, **we recommend that a person who has suffered long-term physical disability, of a kind which severely impairs his or her mobility or ability to live independently within a home or residence, should be entitled to the reasonable cost of necessary modifications to his or her home or residence. In determining whether modifications are necessary the Corporation should take into account whether they are required to enable the disabled person to:**

> **(a) gain access to;**
>
> **(b) enjoy reasonable freedom of movement within; or**
>
> **(c) live independently within the home or residence.**

In some cases, the difficulties of providing suitable modifications may lead the Corporation to suggest that the disabled transport accident victim should move to another home. Where this occurs, the Corporation should assist not only with the acquisition and modification of the new accommodation but also with the costs of relocation.

10.45 Disabled people, like able-bodied people, are likely to change their place of residence from time to time, for domestic and other reasons. Care should be taken not to expend substantial amounts on home modifications only to find that the disabled person moves to new accommodation within a short period. In general, **we recommend that the cost of modifications should be met only in relation to a home or residence in which the disabled person intends to live for a substantial period.** For example, where a disabled person is renting premises on a short-term lease, it would seem inappropriate to spend significant amounts of money on modifications, even if the approval of the landlord were forthcoming. Such people should be encouraged either to purchase premises or to enter a long-term lease. In the second case, a landlord may be more willing to allow the modifications to take place if the Corporation guaranteed performance of the tenant's obligations under the lease. The Corporation should have such a power. While it is important that a disabled person intend to live for a substantial period in premises to be modified, this does not mean that the Corporation should meet the cost of modifications only to premises owned or rented by the disabled person. For example, if a young child is seriously disabled in a transport accident, it is obviously appropriate that the parents' home should be modified to meet the needs of the child. Thus, **we recommend that it should not be a condition of the Corporation meeting the cost of modifications that the disabled person is the owner or tenant of the premises.**

10.46 The powers and responsibilities of the Corporation must take account of the likelihood that disabled people, particularly if they are relatively young at the time of the accident may wish to change their accommodation on one or more occasions. We do not think it feasible to do other than **recommend that the**

Corporation should have power, in special circumstances, to meet the reasonable cost of necessary modifications to the home or residence of a disabled person on a second or subsequent occasion and to express the view that this power should be exercised sympathetically. The range of possible circumstances is so great that detailed rules cannot be laid down in legislation, although the Corporation's published guidelines will need to address the issue. Circumstances that would be relevant to a determination include:

> the need to move to another area for work or other rehabilitation purposes;
>
> the need or desire to leave a parental home to become more independent;
>
> the alteration of domestic circumstances brought about by marriage breakdown death increasing family size or some other event; and
>
> a change in the person's physical condition.

10.47 In some cases, a disabled person or his or her family may wish to carry out alterations that are more extensive than strictly necessary, having regard to the victim's disability. Alternatively, the person may wish to make alterations which while necessary, add substantially to the capital value of the house. The New Zealand Accident Corporation uses various methods of financing home alterations some of which are relevant to these kinds of cases. Minor modifications are usually financed by outright grants; major alterations (costing in excess of $5,000) are secured by registered mortgage. The balance due under the mortgage is generally reduced by equal annual sums for the term of the mortgage, without the disabled person being required to pay instalments. However, where the house is sold, the mortgage balance may become payable from the proceeds of the sale, although the Corporation has power to write off the debt. In some circumstances the Corporation contributes to the cost of alterations, rather than meeting them in full.

> There may be occasions where the alterations proposed by injured persons or their families exceed what the Corporation considers to be necessary (eg. alterations, or renovations which may be *desirable* but not essential for the injured person's well-being). In these circumstances it maybe appropriate to make a contribution towards the total cost equal to the amount the Corporation would have paid for the necessary alterations. Rehabilitation officers should recognise this and be flexible in their approach. [60]

10.48 The Corporation should contribute only that proportion of the cost of desired alterations which are necessary to overcome problems associated with the disability. **We recommend that, where the Corporation meets the cost of necessary modifications which add substantially to the value of the home or residence (whether or not owned by the disabled person), it should have power to impose a condition requiring repayment of the increase in the value on the sale of the premises or on the death of the disabled person. The Corporation should also have power to waive any such requirement.** The Corporation might exercise the power of waiver, for example, where the disabled person uses the increased capital value, arising from the first modifications, to pay for another modified house, thereby avoiding at least some of the cost of a second set of modifications. In such a case, the Corporation may also agree to pay the additional cost of any further necessary modifications.

10.49 The Corporation should use existing home modification services wherever possible. This could be through the Commonwealth Rehabilitation Service, the State Housing Commission or through other agencies, private or public, capable of supplying the appropriate services. The Corporation, in conjunction with the disabled person and his or her family, should arrange for the necessary work to be undertaken However, in some cases (including those outlined in paragraphs 10.47-10.48), direct grants will be appropriate.

D. Institutional Accommodation

10.50 The disabled person's choice of accommodation may be limited in practice by the degree of his or her disability and consequent need for support services. For many disabled people, the unavailability or high cost of support services, such as attendant, domiciliary or nursing care, prevents them living in a household and forces them into institutions. We have provided for support services to allow disabled transport accident victims to live as independently as possible within the community. Nonetheless, there will be a continuing need for institutional care for the most seriously disabled. This need will arise because some disabled people will not be able to live independently in the community while others will prefer the controlled environment of an institution **We**

recommend that the Corporation should meet the reasonable [61] costs of a disabled person who is required, by reason of his or her disability, to live in an institution.

10.51 This recommendation raises a specific problem in that the cost of institutional accommodation ordinarily includes a component for board and lodging. Since a severely disabled person living in an institution almost invariably will be entitled to compensation for loss of earning capacity, there may be double compensation in respect of that person's need for food and accommodation. The common law has faced the same question. In the High Court decision of *Sharman v. Evans,* the following rule was stated:

> Both principle and authority ... establish that where, as here, there is, included in the award of damages for future nursing and medical care the plaintiff s entire cost of future board and lodging, there will be "overcompensation" if damages for loss of earning capacity are awarded in full without regard for the fact that the plaintiff is already to receive as compensation the cost of her future board and lodging, a cost which but for her injuries she would otherwise have to meet out of future earnings ... it would better accord with principle if the savings in board and lodging could be isolated from, and excluded from the damages to be awarded in respect of hospital expenses. [62]

We consider that the common law's response to this problem is appropriate.

10.52 The Transport Accidents Scheme will have the advantage that the institutional cost component will increase appropriately with rising costs, because the payments are made periodically Rather than deducting an amount from the periodic earnings-related compensation payable to an individual, **we recommend that the Corporation should prescribe a modest amount to represent the costs of the "board and lodging" element of institutional accommodation. This sum should be deducted from the amounts paid to the institution in respect of care and accommodation, and the disabled person should pay an equivalent amount to the institution from his or her compensation for loss of earning capacity.** Special arrangements may be required in some cases to reduce the prescribed amount, because compensation for loss of earning capacity is relatively low. Guidelines will need to be developed by the Corporation on this issue and these will need to take account of arrangements in force from time to time in the health care system generally.

10.53 **We also recommend that the Corporation should have power to establish hostels for seriously disabled people and to contribute to the cost of new hostels.** This would help meet the needs of the most seriously disabled transport accident victims for accommodation of this kind. Such hostels could operate as halfway houses, to ease the transition for disabled transport accident victims who wish to return to their own accommodation, or as long-term accommodation for those in need of relatively intensive care or supervision.

VI. MOBILITY

A. Introduction

10.54 Submissions and comments to us stressed the importance of mobility to disabled people. For example, a submission from a disabled person explained that mobility is essential for independence and stated the priorities as:

> (a) a car for optimal independence; and
>
> (b) wheelchairs-two(2)-one manual wheelchair for everyday use and one motorised wheelchair for long distances. [63]

This section examines ways in which the Scheme could minimise the effects of limited mobility on people disabled in transport accidents.

10.55 The Handicapped Persons Survey conducted by the Australian Bureau of Statistics, showed that more people suffered handicap in relation to mobility than many other area. This was so whether the person lived in an

institution or in a household. [64] A person was defined as being severely handicapped in the area of mobility if he or she had

> ... difficulties in using public transport, moving around a person's own home, moving around unfamiliar places, walking 200 metres, walking up and down stairs; [65]

and required help or supervision to perform one or more of the activities, or could not perform one or more of the activities. Using this definition, 35.6 per cent of all handicapped people were severely handicapped in the area of mobility. [66] Of people handicapped for five years or more who live in households, (a total of 1,114,400 people), 18.3 per cent or 203,400 were prevented by their condition from using public transport. [67] Over one-third (37.3 per cent) of handicapped people in New South Wales, who lived in households, experienced difficulties in using public transport. [68] Table 10.1 sets out the main difficulties of handicapped people who experienced problems in using public transport.

Table 10.0: Handicapped People[(a)]: Difficulties in Using Public Transport

New South Wales 1981

Main Difficulty	**Number of People**	**%**
Getting to stops/transport	28,500	7.8
Getting into carriages or vehicles	70,200	19.2
Crowds or poor ventilation	8,000	2.2
Other [(b)]	30,200	8.2
TOTAL WITH DIFFICULTIES	**136,900**	**37.3**
TOTAL WITH NO DIFFICULTIES	**229,800**	**62.7**

(a) Handicapped people aged five years or more who live in households in New South Wales. This excludes all handicapped people living in institutions or those living in households who are less than five years of age.

(b) Includes lack of privacy or personal facilities and other difficulties.

Source: Australian Bureau of Statistics, *Handicapped Persons Australia* 1981, Cat No.4343.0, table 7.13.

In New South Wales only 11.3 per cent [69] of handicapped people aged five years or over and living in institutions reported no difficulties with using public transport. Two-fifths (42.1 per cent) of institutional handicapped people were either paraplegic, quadriplegic, in wheelchairs or were confined to their rooms or wards and could be assumed to have had difficulty using public transport. [70] Some of the effects of limited mobility on users of public transport could be minimised by greater awareness among planners and designers of public transport systems of the problems of disabled people. Even so, some disabled people will always experience grave difficulties.

10.56 The most common method of transport used in Australia is the private car. [71] Disabled people, unable to use public transport, may have a special need for a motor vehicle, although of course some will be too disabled to drive a car. Of all handicapped people between the ages of 17 and 64 years living in institutions, 84.9 per cent are unable to drive because of their disability. [72] By contrast, 21.5 per cent of those living in households are unable to drive. [73] A disabled person, who is unable to drive or to use public transport, must rely on taxi services or lifts from friends. The alternative is simply to remain housebound.

B. Vehicle Modifications

10.57 A disabled person who wishes to drive a car may find that it requires modifications, such as a hand accelerator, automatic transmission or room for wheelchairs. The Handicapped Persons Survey showed that some 49,300 handicapped people in Australia had their cars modified, while another 16,000 who had cars in their household, said that their vehicles required modifications. Table 10.2 indicates the types of modifications which may be necessary.

Table 10.2: Handicapped People - Type of Vehicle Modifications

Australia 1981

Type of Modification	Number of People
Hand accelerator or brake control	4,200
Automatic transmission	25,700
Power window, steering or mirrors	5,100
Room for wheelchair/station wagon	3,100
Other modifications	21,000
TOTAL OF MODIFIED VEHICLES (a)	**49,300**

(a) This total is less than the sum of all components, because some vehicles have more than one modification.

Source: Australian Bureau of Statistics, *Handicapped Persons Australia* 1981, Cat No. 4343.0, table 7.8.

10.58 A disabled person who agrees to participate in a rehabilitation program may obtain vehicle modifications through the Commonwealth Rehabilitation Service. Benefits under the scheme are limited, particularly if the person cannot undertake employment. [74] The Service may allow hand controls to be fitted to a motor vehicle if

> ... the rehabilitee is about to enter employment or is undertaking an approved course of training; or in non-vocational cases, the use of the vehicle is considered essential to the rehabilitee's achieving and maintaining his or her rehabilitation objective. [75]

Common law damages generally include the costs of modifying a vehicle, in so far as the modifications are attributable to the disability, but not the cost of purchasing a vehicle. [76] The argument is that, since most people at some stage purchase or maintain cars, damages should not include the cost of acquiring a vehicle.

10.59 Under the New Zealand Accident Compensation Act 1982, the Corporation has the obligation of

> [a]dapting or assisting with t ' he adaptation or purchasing or assisting with the purchase of a motor vehicle where, in the opinion of the Corporation, the adaptation or purchase will assist the rehabilitation of an incapacitated person or will improve his earning capacity. [77]

Adaptations which may be carried out include hand controls, seating modifications, hydraulically operated mechanisms to replace or assist with hand- operated controls in the vehicle, hoists and equipment carriers and extending the head room of a van. [78] If there is no suitable car, assistance may be provided to purchase one. Grants or loans may be made in certain circumstances, for example, where the parent of an injured child requires a car or modified car. If the disabled person cannot drive, seating modifications can be made to a car driven by someone else. Assistance may be available at a later stage for the modification of the next vehicle. An important

benefit is a contribution towards the cost of automatic transmission Only one payment for a change to automatic transmission is allowed, presumably because the resale capital value of an automatic vehicle is higher than that of the equivalent manual vehicle. The Scheme provides no continuing periodic payments for running costs or to those who cannot use a motor car and have to use taxi cabs.

10.60 **We recommend that the Corporation should meet the cost of necessary modifications to a vehicle owned or regularly used by the disabled person or a member of his or her family.** This recommendation is intended to cover not only the case where the disabled person is capable of driving a modified vehicle, but also where he or she cannot drive but requires modifications to, say, the family car in order to use it as a passenger. In assessing the modifications required in a particular case the Corporation should have regard to:

the disability of the person and its effect on his or her capacity to drive or use the vehicle;

the person's need for the use of a motor vehicle to undertake employment or carry out daily activities; and

the cost of the proposed modifications.

The benefit should be available on more than one occasion, since cars have a limited life span. The Corporation will need to develop guidelines to cover successive applications for vehicle modifications.

10.61 In general we do not think that the Corporation should purchase motor vehicles for disabled claimants. Periodic compensation for loss of earning capacity, together with other benefits under the Scheme, should allow most disabled transport accident victims to purchase vehicles in much the same way as if the accident had not occurred. Nevertheless, it is necessary to take account of the fact that some accident victims will receive relatively low periodic compensation yet have a compelling and continuing need for a motor vehicle. To cover this kind of situation **we recommend that the Corporation should have power to contribute to the cost of purchasing a motor vehicle where such a contribution is required to avoid financial hardship to the disabled person. The Corporation should have power to impose a condition requiring repayment of such contribution on the resale of the motor vehicle or on the death of the disabled person, provided that such repayment should not exceed the price obtained on resale or value on death.** In addition, the Corporation should have power to make loans for the purpose of financing the purchase of a motor vehicle.

C. Mobility Allowance

10.62 A seriously disabled person's loss of mobility produces extra travel costs. For example, instead of using public or private transport or walking to town, a seriously disabled person may have to drive into town and pay for a car parking space. Similarly, instead of walking to the local shops or relying on public transport occasionally, such a person may be wholly dependent on motor vehicle transportation. One form of assistance to disabled people who cannot use public transport is a mobility allowance designed to meet additional costs of transport arising from the disability.

10.63 The extra costs of limited mobility are currently recognised to a limited extent by the Commonwealth Government. The Department of Social Security pays a mobility allowance of $10 per week to a disabled person aged 16 years or more, whose physical or mental impairment is such as to make travel on public transport difficult or impossible. The person must be engaged in work or vocational training for at least 20 hours per week and must not have had a sales tax exemption for purchase of a motor vehicle for two years. [79] Notwithstanding the restrictions upon these benefits, they recognise the continuing need for assistance in transportation where a person's mobility is impaired. Severely disabled veterans are also entitled to a Recreation and Transport Allowance to meet these extra costs. Similarly, at a State level, the Urban Transit Authority administers a subsidised taxi service, which enables disabled people who cannot use public transport to obtain transportation in specially modified taxi cabs at half the normal fare.

10.64 It is appropriate that the Scheme should provide a mobility allowance to severely disabled people to meet some of the unavoidable additional expenses of travel attributable to their disability. **We recommend that the Corporation pay a mobility allowance, equivalent to 5 per cent of AWE ($21 per week in June 1984), to people unable to use public transport unassisted because of a disability arising out of a transport accident and who incur expenses in travelling by reason of their disability. The allowance should not be payable in respect of disability during the six months following the accident, unless the circumstances**

are exceptional. We impose this restriction because we see the allowance as being designed to assist those with long-term, (although not necessarily permanent) disabilities, rather than temporary disabilities. However, the allowance should be paid in addition to meeting the cost of necessary vehicle modification, since this is not the only additional expense incurred by a severely disabled person in remaining mobile.

VII. SUMMARY

Household Services

10.65 Where a transport accident victim can no longer perform household services because of his or her disability, the Scheme should provide replacement services to the extent necessary for the maintenance and preservation of the household. The emphasis should be on meeting the immediate needs of the family during the period following the accident. After the first four weeks, account should be taken of the family's financial resources, including compensation and benefits received by the disabled person and other household family members. Household services should in general be provided through existing agencies, such as the Home Care Service of New South Wales.

Attendant Care and Emergency Support

10.66 A transport accident victim unable to provide adequately for his, or her personal care should be entitled to receive attendant care services. As with household services, account should be taken of the attendant care which other family members could be reasonably expected to provide. The services should be provided by the Corporation through existing government or private agencies and, where appropriate, by engaging members of the disabled person's family. Emergency family support should be available to reimburse family members for losses incurred in attending to the transport accident victim in hospital or at home during the first four weeks after the accident. In exceptional cases, compensation for travel and accommodation may be extended beyond the four week period.

Accommodation

10.67 A person disabled in a transport accident should enjoy the same opportunities of living in a private home as those available to an able-bodied person. The Corporation should have power to make home loans to disabled transport accident victims who have difficulty borrowing from conventional sources and to negotiate arrangements with the Housing Commission of New South Wales and other public authorities for the provision of housing. Specific provision is made for the payment of the reasonable cost of home modifications both in the case of those wishing to acquire a home and to assist those who wish to remain where they were living at the time of the accident. The Corporation should have power to meet the costs of modification on second or subsequent occasions. Where modifications, made at the Corporation's expense, add substantially to the value of the home or residence, the Corporation should be entitled, as a general rule, to require repayment of the increase in value on the sale of the premises or on the death of the disabled person.

Institutional Care

10.68 Even with generous provision of support services, including assistance with accommodation, the most seriously disabled will not be able to live independently. Where institutionalised care is necessary, the reasonable costs of such care should be met by the Corporation, subject to some modest reduction for the "board and lodging" component. The Corporation should also have power to establish hostels for the seriously disabled.

Mobility

10.69 In order to increase mobility outside the place of residence of a transport accident victim, vehicle modification costs should be met by the Corporation. In special cases, the Corporation should have the power to contribute to the cost of purchasing a motor vehicle. Where a disabled transport accident victim cannot use public transport unassisted, a mobility allowance of 5 per cent of AWE should be paid after the first six months of disability.

FOOTNOTES

1. The husband's right of action was removed by the Law Reform (Marital Consortium) Act, 1984.

2. For a discussion of this area of law, see H. Luntz, *Assessment of Damages* (2nd ed. 1983), paras.4.1.10, 10.1.05-10.1.06.

3. Accident Compensation Act 1972 (NZ), s.121(2) (a).

4. *Accident Compensation Commission v. Kivi* [1980] 2 NZLR 385.

5. Accident Compensation Act 1982 (NZ), s.80(2) (a).

6. *Id*., s.80(1).

7. *Id*., s.80(1) (a).

8. *Id*., s.80(1)(d).

9. *Id*., s.80(1)(h).

10. New Zealand Accident Compensation Corporation, *Claims Manual 198-3,* part II, section 2.4. 1.

11. Corresponding recommendations for household services on death are made in Chapter 12.

12. See Community Welfare Act, 1982, part V, which came into operation on 1 February 1984.

13. Home Care Service of New South Wales, *The What, Where and Why of the Home Care Senice of New South Wales* (1983), p.9.

14. Australian Bureau of Statistics, *Handicapped Persons Australia* 1981, Cat. No.4343.0, p.4. table 1.2. This table shows that 448,300 people living in households were disabled in relation to self-care.

15. *Id*., figure derived from a calculation using numbers from table 4.22 on p.59, with total number of handicapped people living in households from p.4, table 1.2,

16. *Id*., p.63, table 4.28.

17. *Id.,* p.4, table 1.2.

18. *Ibid.*

19. Australian Council for Rehabilitation of Disabled, A *Discussion Paper* on A *National Attendant Care Allowance* (1980), para.1.3.

20. *Id*., para.7. I.

21. *Id*., ch.3, which outlines schemes operating in the United Kingdom and parts of the United States of America.

22. See J Dewdney and I. Irwin, *The Aftermath-Caring for Accident Victims in New South Wales* (unpublished Commission document, 1983), para.8.3: D. Percy, "Attendant Care Pilot Study: An Update" (1984) *Quad Wrangle* 19.

23. See eg. *Moriarty v. McCarthy* [1978] 2 All ER 213, at p.219; *O'Brien v. McKean* [1970] Qd R166. At p.191.

24. See s.80(3); J L Fahy, *Accident Compensation Coverage* (7th ed. 1983), pp.64-65.

25. See note 19 above, p.19.

26. Case Study Booklet, para.4.8. C.S.83.

27. See Submission W29.

28. See note 2 above, para.4.6.02.

29. See eg. *Cunningham v. Harrison* [1973] QB 942; *Donnelly v. Joyce* [1974] QB 454, *Taylor v. Bristol Omnibus Co. Ltd*. [1975] 2 All ER 1107.

30. (1977) 139 C.LR 161, See also *Hodges v. Frost* (1984) 53 ALR 373.

31. *Griffiths v. Kerkemeyer* (1977) 139 CLR 161, at pp.168-169, per Gibbs J.

32. Submission S9, p.2.

33. *Johnson v. Kelemic,* (1979) Fam L Cas. 78,487: *Bloomfield v. Brambrick,* 17 August 1979, Supreme Court of New South Wales. Court of Appeal, see esp. transcript of judgment at p. 1588, per Glass J.A.

34. *Kovac v. Kovac* [1982] 1 NSWLR 656, at p.669, per Samuels J A, at p.678, per Mahoney J A.

35. See now Motor Vehicles (Third Party Insurance) Act 1942, s.35C.

36. M. Hacker, “Juggling two relationships is tedious” (1983) 6 *Quad Wrangle 23.*

37. This was the course recommended by the High Court of Australia in *Wilson v. McLeay* (1961) 106 CLR 523.

38. New Zealand Accident Compensation Corporation, *Rehabilitation Manual,* ch.5, para.5.7.3. I.

39. Australian Bureau of Statistics, *1981 Census of Population and Housing - Census Statement 4* (October 1982), sheet 7, table 25.

40. *Ibid.*

41 *Id*., table 30.

42. Submission W66, p.2.

43. Consensus Research Pty. Ltd., *A Survey of Attitudes among Paraplegics and Quadriplegics to Some Aspects of Compensation* (September 1983), conducted for the Law Society of New South Wales, and annexed to their Submission W28, p.13, question 5.

44. *Id*., table 5.

45. For a full examination of available facilities in New South Wales, see note 22 above, paras.7.1-7.7.

46. See note 14 above, p.9, table 1.4.

47. *Ibid.* Of handicapped people in institutions in New South Wales, 92.9 percent were severely handicapped, approximately 4 per cent were moderately handicapped and 3 per cent were mildly handicapped.

48. *Id*., p.29, table 2.15.

49. *Ibid.*

50. Data from special computer runs done by the Australian Bureau of Statistics for the New South Wales Law Reform Commission.

51. See eg. Submissions W24, W45 and W66.

52. See eg. *Moriarty v. McCarthy* [1978] 2 All ER 213, at pp.219-220.

53. For general discussion, see note 2 above, para.4.1.07. Sometimes home purchase or modification claims are rejected as being unreasonable and too costly: see eg. *Cannuli v. Di Matteo.* 21 August 1979, Supreme Court of New South Wales, Court of Appeal, transcript of judgment at p.1619, per Hutley J A, where a claim for $75,000 for purchase of a house in Sydney was refused. Sometimes claims for home purchase or modifications are rejected as being too costly, in relation to the alternative of institutional care, once home care and support services are taken into account: see eg. *Siems v. Haylock,* 7 June 1984, Supreme Court of New South Wales, Master Greenwood, transcript of judgment at pp.34-41. especially pp.38-40.

54. See eg. *Frankcom v. Woods,* 1 October 1980, Supreme Court of New South Wales, Court of Appeal, in which $70,000 was awarded to provide “such additional facilities over and above the cost of an appropriate house without those facilities”. Additional features which were considered to increase the capital value of the house included garbage, air-conditioning and a swimming pool. While, on the facts of the case, it was not considered necessary because the plaintiff was anticipated to have 40 years use from the house and alterations. the Court said that the plaintiff is required to bring to account any capital gain which accrued from the alterations in assessing the defendants liability to pay damages: transcript of judgment at p.2087, per Glass J A.

55. See eg. *Preston v. Mercantile Mutual Insurance Co. Ltd.* [1971] SASR 221. This decision followed the judgment of the High Court of Australia in *Wilson v. McLeay* (1961) 106 CLR 523, which had criticised earlier decisions in which expenses incurred by third parties, such as parents, are held not to be recoverable. Instead both the High Court of Australia and the Supreme Court of South Australia said that they were to be taken into account in the award of general damages.

56. Commonwealth Department of Social Services, *Commonwealth Rehabilitation Service Manual of Instructions,* s.5/E/13(a).

57. *Id*., s.5/E/13(c).

58. See note 38 above, Rehabilitation Guideline No. 1.

59. *Id*., para.5.1.2.2.

60. *Id*., para.5.1.4.3.

61. For what is regarded as reasonable in such circumstances, see paras. 1 3.71-13.72

62. *Sharman v. Evans* (1977) 138 C.L.R 568, at p.576, per Gibbs and Stephen J J.

63. Submission W66, p.1.

64. See note 14 above, p.2., also table 1.1.

65. *Id.,* p.xvi.

66. *Id.,* p.4. table 1.2.

67. *Id.,* p.102.

68 *Id..* p.105. table 7.13.

69. *Id.,* p.108, table 7.19.

70 . *Ibid.,* see also p.107.

71. *Id*., p.99. In the 1976 Census of Housing and Population, 84.3 per cent of dwellings had one or more vehicles on Census night.

72. *Id.,* p.100. table 7.5.

73. *Ibid.*

74. See note 56 above, s.5/3/8(b).

75. *Id*., s.5/3/8(a)(1).

76. *Jackson v. Jackson* [1970] 2 NSWR 454, at p.460; *Cull v. Judd* [1980] WAR 161, at pp.170-171; *Moriarty v. McCarthy* [1978] 2 All ER 213, at p,220.

77. Accident Compensation Act 1982 (NZ), s.37(3) (g).

78. See generally, note 58 above, Rehabilitation Guideline No.2.

79. Social Security Act 1947 (Cth.), part VIIB, ss.133RA - 133RE.

11. Compensation for Permanent Disability

I. INTRODUCTION

11.1 A person sustaining a permanent disability has suffered a loss, over and above continuing loss of earning capacity or other economic loss. This view was encapsulated in the New Zealand Woodhouse Report:

> Whether or not such a loss of physical faculty has economic consequences, it is nonetheless a loss to the individual concerned, and in a greater or a lesser degree may adversely affect him thereafter. [1]

The same approach is reflected, although in varying forms, by existing systems of compensation including the common law and workers' compensation (paragraphs 11.21-11.35). The case studies illustrate the kinds of difficulties which may be experienced in everyday living by people who have suffered serious disabilities. [2] Ordinary activities such as dressing, eating or housework may take very much longer for disabled people and may require an attendants assistance or outside replacement household help. Seriously disabled people may be dependent upon others to complete routine chores like shopping, or even to go on an outing. Many activities that able-bodied people take for granted are beyond the reach of disabled people, either because their disabilities make the activities impossible or because the community falls to provide the necessary facilities to allow participation in them. Disabled people also have to contend with continuing discomfort and, sometimes, persistent pain.

11.2 The principal objective of rehabilitation is to minimise the degree of permanent impairment and consequent disability suffered by accident victims. To this end the recommendations in Chapters 9 and 10 are designed to maximise a seriously disabled person's chances of living in the community and resuming as normal a life as possible. Yet even the most effective rehabilitation program cannot prevent some accident victims Sustaining permanent disabilities. No doubt some of the difficulties experienced by disabled people could be ameliorated by better community planning, but at present their disabilities create serious and continuing problems for them. Submissions which considered this question favoured some compensation for disability, in *addition* to compensation for loss of earning capacity. [3] One of the main reasons given was

> ... the belief that no-one should suffer the humiliation or indignity of a loss of function without compensation whether or not this loss of function interferes with ability to work or perform socially necessary functions. [4]

11.3 The Pearson Royal Commission in the United Kingdom gave three reasons for paying compensation for non-economic losses. The Commission argued that such compensation:

> serves as a palliative or solace to the victim;
>
> allows the victim to purchase alternative sources of satisfaction to those which he or she has lost; and
>
> helps to meet the hidden costs of the disability. [5]

These reasons apply to the permanent disabilities sustained by transport accident victims although the Scheme has made separate provision for compensating the "hidden costs" of disability such as reduced mobility. [6]

11.4 Some argue that the compensation system should be concerned with economic losses and, since the non-economic aspects of disability cannot be translated into financial terms, compensation for those losses should not be paid. [7] However, the fact that a given disability has no intrinsic economic value does not mean that the loss is unimportant or incapable of being accommodated within a compensation system. The restricted ability to lead a normal life, resulting from permanent impairment of mind or body, should be reflected in monetary compensation regardless of whether the person has also suffered a loss of earning capacity.

11.5 For these reasons, the Scheme should provide compensation for permanent disability in addition to compensation for loss or impairment of earning capacity and for other economic losses. Accordingly, **we recommend that a person who suffers a permanent physical or mental disability as the result of a**

transport accident should receive compensation for that disability. Compensation of this kind could be paid in a variety of forms. For reasons given later (paragraphs 11.41-11.42), **we recommend that the compensation for permanent disability should be paid in a lump sum, the amount of which should be related directly to the degree of disability.** This lump sum should be paid in addition to all other forms of compensation. That is, a permanently disabled person could be entitled not only to a lump sum, but also to periodic compensation for loss of earning capacity, additional amounts for home and vehicle modification, a mobility allowance, attendant care, replacement household services and medical, hospital, nursing, rehabilitation and like services.

11.6 Given our recommendation that a lump sum payment should be made for permanent disability, the remainder of this Chapter discusses:

> the standard which should be employed to assess compensation for permanent disability;
>
> other possible bases for assessment of non-economic loss and the reasons for rejecting these; and
>
> the means by which the general proposals should be implemented.

II. THE CONCEPT OF PERMANENT DISABILITY

11.7 Compensation for the non-economic consequences of an accident can be assessed on one or more of a number of bases. The reasons for preferring the permanent disability approach are discussed in more detail later, but can be summarised as follows.

> Given that choices must be made in allocating limited resources, compensation for non-economic loss should be directed to those suffering long-term rather than short-term disabilities.
>
> Compensation should be assessed in a manner consistent with the objectives of rehabilitation. Other approaches, particularly compensation for pain and suffering, detract from those objectives.
>
> Criteria for measuring the extent of permanent disability can be applied uniformly and with a minimum of disputation.

A. The Meaning of Permanent Disability

11.8 The terms “impairment” and “disability’ are defined in the Glossary. As indicated there, a permanent impairment is a medical condition that includes

> ... any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved, which abnormality or loss the physician considers stable or non progressive at the time of assessment. [8]

A long-term disability is

> ... the measurable long-term/permanent functional limitation or loss resulting from an impairment whether mental or physical. [9]

Thus disability is the cumulative effect of impairments.

11.9 The most satisfactory approach to the assessment of permanent disability is the so called “Whole Person Approach”, which measures

> ... the nature and extent of the patient s... injury as it affects his personal efficiency in one or more of the activities of daily living. These activities are self-care, communication normal living postures, ambulation, elevation travelling, and non specialised hand activities. [10]

The Whole Person Approach was originally implemented in the American Medical Association’s *Guides to the Evaluation of Permanent Impairment,* which was adopted by the Australian Woodhouse Report as the basis for

compensating permanent partial disability. [11] The *Guides* has now been adapted and updated in Australia by the Commonwealth Department of Veterans' Affairs. [12] The Australian adaptation was intended:

to abbreviate the format of the American *Guides*;

to enhance its acceptability as a working manual among medical assessors;

to enhance its ease of use by those not fully experienced with the use of the *Guides;* and

to update various sections to bring them into line with modern clinical practice and assessments. [13]

11.10 The Australian adaptation is still in draft form and undergoing trials. It has not been accepted for general use within the Department. Furthermore it is possible that, even if accepted by the Department, the adapted *Guides* will be capable of further refinement and improvement with experience. We envisage that the Corporation would coordinate with the Policy Review Committee (paragraphs 15.59-15.61) in maintaining a continuing review of the *Guides* and would seek expert medical opinion on ways of improving particular aspects found to be unsatisfactory. Subject to the need for continuing **review, we recommend that the degree of permanent disability should be 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.**

B. The Scope of Permanent Disability

11.11 The Whole Person Approach is comprehensive in the range of impairments covered. For example, it includes:

loss of limb or limb function;

loss of organ or organ function;

loss of organ control;

loss of sexual and reproductive capacity;

loss of mental capacity;

disfigurement;

loss of sensation and senses; and

pain.

11.12 "Pain" is measured in terms of its effect on bodily or mental function. According to the Australian adaptation of the American Guides (appendix 14), the assessment of pain is based consideration of:

peripheral spinal or cranial nerve involvement;

interference with activities of daily living;

therapy needs - nature, frequency and efficacy;

psycho-physiological reactions; and

pathological tissue reactions.

Acute pain, unconnected with bodily function, *such as* that associated with identifiable medical conditions like neuralgia or sciatica, is also included.

11.13 A number of individual characteristics, such as the age of the disabled person, maybe relevant in assessing the degree of disability attributable to the injury. For example, in appendix 1 of the Australian Guides, which provides assessment of impairments of the cardiovascular system, different levels of activity and energy expenditure are allocated different levels of impairment depending upon age. In other words, allowance is made for the fact that age itself can be expected to affect activity and energy levels. Thus the impairment level for an 18 year old is higher than that for a 70 year old, because the 18 year old has more to lose. Similarly, age is relevant to both sexual and reproductive capacity. Male sexual or reproductive function according to the Australian *Guides* is at its highest level in men below 40 years of age, decreasing between 40 and 65 years of age and failing to its lowest level in those over 65 years. [14] In women, the impairment varies between pre- and post-menopausal age groups. [15] In addition to age and sex, other individual characteristics are taken into account. For example, the degree of impairment assigned to an injured upper limb depends on whether it is dominant or not. The amputation of an index finger produces a disability assessment of 15 per cent if it is from the dominant hand and 10 per cent if it is from the non-preferred hand. [16]

11.14 The Guides also addresses the problem of assessing permanent disability where there is more than one impairment. This may be the case where the one injury produces several impairments, such as the case in which acute facial scarring results in limited face movement, reduced sensation continuing pain and psychological trauma. Alternatively, the one accident may cause multiple injuries, such as the case in which the victim sustains a permanent limp in one leg, limitation of movement in his or her dominant hand and limited vision in one eye. The *Guides* rely on a Combined Values Table to give a total assessment of the level of permanent disability, [17] as the process involves more than simply adding together the individual percentages attributable to each impairment. For example, in the case of an 18 year old male paraplegic who cannot stand, and who has no bladder or bowel control or sexual function, the combined values in the Table below [18] produce a permanent disability assessment of 93 per cent.

Individual Impairment Values[19]	**Per cent**
Cannot stand	65
No Bladder control	60
No Bowel control	25
No Sexual function	30
Total Permanent Disability	**93**

11.15 A system of this kind combines the virtues of individualised assessment with the advantages of objective standards of impairment. To illustrate this, if a person suffers sciatic back pain, appendix 11 of the Australian adaptation makes allowances for impairment of the whole person for between 0 and 30 per cent for loss of function from loss of strength, as well as an additional 0 to 10 per cent purely for loss of function arising from pain, discomfort or loss of sensation. The total degree of permanent disability from an impairment of the sciatic nerve may therefore range from 0 to 40 per cent depending upon the loss of function caused by pain and by loss of strength.

11.16 It is important that compensation for permanent disability, like all forms of compensation under the Scheme, should be paid as promptly as possible. Against this must be weighed the need to allow conditions to stabilise and to take account of the effects of rehabilitation on the impairment. Moreover, in some cases there may be uncertainty as to whether an impairment is permanent. Balancing these considerations, **we recommend that in general, the degree of permanent disability should be assessed 12 months after the date of accident. However, the Corporation should have power to assess the degree of disability at an earlier time where it is satisfied that the disability is stable and permanent.** This is designed to allow prompt payment of compensation where rehabilitation efforts are not likely to diminish the impairment, but are concentrated on minimising the consequences of the impairment, such as where a limb has been amputated.

11.17 It may be clear from the date of accident that there is going to be a residual disability which will remain regardless of medical treatment and rehabilitation efforts and that the extent of the residual disability may not be known for some time. To allow prompt payment in these cases, **we recommend that the Corporation should have power to make interim payments, where a disability is permanent but the extent of the disability cannot finally be assessed.**

11.18 A disabled person's condition may deteriorate unexpectedly after compensation for permanent disability has been assessed. The case study program reported a case in which an accident victim received compensation on the basis that he was paraplegic and could continue to work. His condition subsequently deteriorated unexpectedly and he lost the use of one of his arms. He faced the prospect, if the deterioration continued, of becoming quadriplegic. [20] Because a common law verdict or settlement is reached on a once-and-for-all basis, the case could not be reopened. It is important to avoid this situation. **We recommend that where compensation has been assessed in respect of permanent disability but the person's degree of permanent disability subsequently increases, the Corporation should increase the compensation to take account of the increased degree of disability.** This means that a speedy assessment will not disadvantage the claimant because, if the condition later deteriorates, he or she can apply for an increase in the award.

III. COMPARISONS WITH EXISTING COMPENSATION SYSTEMS

11.19 The recommendation that compensation should be paid according to the claimant's degree of permanent disability departs significantly from the approach taken by other compensation systems, notably the common law. This section reviews other approaches and explains our reasons for not adopting them.

A. The Common Law

11.20 Earlier Chapters have referred to the principles upon which damages are assessed at common law for non-economic loss. [21] Such damages include compensation for:

pain and suffering;

loss of amenities and enjoyment of life; and

loss of expectation of life.

Each of these is now examined in turn.

1. Pain and Suffering

11.21 Compensation for pain and suffering at common law is not clearly defined. It certainly includes the conscious experience of pain and extends to distress with the injury and anxiety about its consequences. The uncertainty surrounding its definition is reflected in widely differing judicial attitudes about the appropriate amount of compensation in a given case. [22] There is also considerable doubt surrounding community attitudes to the importance of compensation under this head, compared for example, with compensation for immobility and social isolation. [23] There is also some evidence that people receiving payment in settlement of claims do not even realise that a component for pain and suffering was included. [24] Damages for pain and suffering are not restricted to people suffering permanent disability. Compensation can be recovered for short-term pain and suffering, which has often ceased well before compensation is assessed. This aspect has not escaped judicial criticism.

> It may be that giving damages for physical pain that is wholly past, not continuing and not expected to recur, is simply an anomaly, for there can be no solace for past pain. [25]

11.22 An assessment procedure which concentrates specifically on the degree of the claimant's pain and suffering, rather than on the extent of permanent disability has potentially adverse effects upon rehabilitation. This is particularly so where the size of the award depends upon the subjective level of suffering experienced by the claimant. This aspect of the common law has also attracted judicial comment In the words of Lord Pearce.

> It would be lamentable if the trial of a personal injury claim put a premium on protestations of misery and if a long face was the only safe passport to a large award. [26]

Some submissions stressed that the common law's approach to assessing compensation for non-economic loss provided a "reward for complaint". This reward has an anti-rehabilitative effect, discouraging strenuous efforts to overcome a disability as rapidly as possible.

> One of the stupidities of the present system is the way that the complainer is encouraged to complain and continue, because the more he does the more he is financially rewarded; whereas the well motivated person who may suffer some quite serious injury, but who puts up with the pain and really works at getting himself mobile again... gets little reward out of the present system. [27]

Limiting compensation to cases of permanent disability, as we recommend, minimises the risk of "reward for complaint", yet recognises the impact of pain on the most seriously injured victims of transport accidents.

11.23 A further argument against compensating short-term pain and suffering is that scarce resources available to compensate accident victims are directed to less seriously rather than more seriously injured people. Table 11.1 provides information on the proportion of motor vehicle accident common law verdicts attributable to non-economic loss.

11.24 The prospect of even small amounts of compensation for pain and suffering leads to substantial disputation, frequent appeals and the retention of adversary attitudes derived from common law proceedings. This has been the experience in New Zealand (paragraph 11.40). In combination, the conflict and delays aggravate the anti-rehabilitative effects of compensation for pain and suffering and impose substantial administrative costs on the system. Obviously, a system of compensation for permanent disability will not avoid all disputes or appeals. However, the decision-making process should be substantially swifter and less contentious than an assessment of the monetary value of temporary pain and suffering.

2. Loss of Amenities and Enjoyment of Life

11.25 In awarding damages for loss of amenities, the common law in theory evaluates the effect of an injury on the individuals life. Since continual pain is likely to affect enjoyment of fife, there is inevitably some overlap between the two heads of damage. Like pain and suffering, loss of amenities and enjoyment of life suffers from lack of definition and widely differing judicial attitudes. Damages under this head are meant to reflect the effect of the injury on the pre-accident lifestyle of the particular person and how he or she has reacted to the injury. Two people suffering identical disability may react differently. Indeed, severely disabled people may adjust more readily to their circumstances than those suffering only moderate impairments.

> The cripple by the fireside reading or talking with friends may achieve happiness as great as that which, but for the accident, he would have achieved playing golf in the fresh air of the links ... Some less robust persons, on the other hand, are prepared to attribute a great loss of happiness to a quite trivial event. [29]

Table 11.1: Motor Accident Common Law Verdicts: Component for Non-Economic Loss

New South Wales July- December 1982

Verdict Range	Number of Verdicts	Aggregate of Verdicts $,000	Non-Economic Loss Component Aggregate $,000	% Paid for Non-Economic Loss
District Court				

Below $10,000	90	492	378	76
$10,000 and above	106	3,298	1,406	43
Supreme Court				
Below $50,000	32	581	383	66
$50,000-$149,000	37	3,476	1,376	40
$150,000 and above	53	6,682	2,040	31

Source: Information supplied by the GIO.

The Table suggests that the more seriously disabled receive proportionately less for pain and suffering (and loss of enjoyment of life) than the less seriously disabled. This does not merely reflect the greater economic losses sustained by the more seriously disabled but also demonstrates the fact that relatively large amounts can be obtained in respect of short-term injuries. Trivial claims involving very little economic loss may also attract sizeable settlements because of their "nuisance" value. [28] The result is that a substantial, although not precisely quantifiable, proportion of common law verdicts and settlements is used to compensate the less seriously disabled for their non-economic losses.

11.26 The varying impact of severe disability on individuals was demonstrated in the case study program. On any view, seriously disabled people had suffered a loss compared with their pre-accident position. However, their response to the new situation differed according to many factors, including their personality, resources and the assistance available in rehabilitation and retraining programs. Some severely physically disabled people appeared to have adjusted remarkably well to their disability and pursued a wide range of interests notwithstanding their need for constant attention. Less severely disabled people may find the restrictions on their movement and capacity to carry out daily tasks so great that their capacity to "enjoy life" is more deeply affected.

11.27 It is one thing to acknowledge that the reactions of victims sustaining similar disabilities may differ significantly. It is, however, another to suggest that compensation should be assessed taking account of the subjective impact of the disability on the individual's enjoyment of life. To do so not only makes the process of assessment more complex and uncertain but creates an incentive for the victim to maximise the impact of the disability and a disincentive to participate fully in rehabilitation programs. A further reason for preferring disability as the standard, rather than enjoyment of life, is that the activities a person pursues vary over time. The fact that the person, at the time of the accident, gained pleasure or enjoyment from a specific activity which he or she can no longer pursue, is not as important as the reduced opportunity in the future to pursue a range of activities.

11.28 Compensation for permanent disability, assessed in accordance with earlier recommendations, takes account of factors affecting quality of life. For example, a person whose physical capacity is reduced from an athletic to a sedentary level would be compensated for the impairment. [30] Similarly, a person unable to perform daily activities Would be assessed as more severely disabled than someone who can carry out these activities. [31] For these reasons, we take the view that compensation for permanent disability incorporates many aspects of loss of amenities and enjoyment of life, without incorporating the disadvantages of that concept.

11.29 Furthermore, compensation for permanent disability is not intended to be the only means of compensating for loss of amenities and enjoyment of life. The fact that identical disabilities can mean different things to different people is partly taken into account in the payment of periodic benefits for loss of earning capacity. For example, a professional pianist who loses two fingers will suffer a greater loss of earning capacity (and thus will receive higher compensation) than the person whose employment is unaffected by the disability. Other recommendations in this Report are designed to minimise the loss of amenities or enjoyment of life suffered by accident victims, or to provide them with more appropriate forms of compensation. For example, a loss of mobility is to be

compensated (in part) by the payment of a mobility allowance, while services such as leisure counselling, are to be provided in order to improve a seriously disabled victim's quality of life.

3. Loss of Expectation of Life

11.30 Compensation for permanent disability does not include compensation for loss of expectation of life. Even as a head of damage at common law, the role of loss of expectation of fife has been minor and much criticised. In practice, a small conventional sum is awarded under this head, in recognition of the impossibility of estimating in money terms the value of a part of life that may be lost. The sum currently awarded is in the order of $2,000 to $3,000. The Pearson Royal Commission criticised this head of damage and recommended its abolition. [32]

> In our view, damages for loss of expectation of life have an air of unreality. It is not possible to assess how happy the victim might have been if he had lived out his days. Still less is it possible to evaluate such a loss. These difficulties have led the courts to fix damages for loss of expectation of life at a level which means they are usually of no practical significance. [33]

We agree with the reasoning of the Commission. It is relevant to add that a person whose injuries are sufficiently serious to curtail life expectancy significantly is likely to suffer a substantial permanent disability for which compensation would be payable.

4. Once-and-For-All Assessment

11.31 The principle of once-and-for-all assessment applies to the assessment of damages in a common law negligence action, including damages awarded for non-economic loss. [34] This principle, which is distinct from the award of damages in a lump sum, encourages the plaintiff to maintain his or her symptoms over the very considerable period that often elapses before a final settlement of his or her claim. The counterproductive effect on rehabilitation of such delay was discussed in Chapter 3. [35] Compensation for permanent disability under the Scheme will generally be paid within twelve months of the accident, or sooner if the disability is stable and permanent (paragraphs 11.16-11.17) and provision has also been made for reassessment where there is subsequent deterioration (paragraph 11.18). Thus, the adverse features of once-and-for-all assessment are avoided. Early assessment allows the accident victim to receive the lump sum, as well as being able to participate in social, medical or vocational rehabilitation without the fear that his or her efforts will mean a reduction in compensation.

5. Why Not the Common Law Approach?

11.32 The preceding discussion outlines the main reasons for rejecting the common law's approach to compensation for non-economic loss. These may be summarised as follows:

> the disproportionate amount of resources paid for short-term pain and suffering;
>
> the anti-rehabilitative consequences of assessing non-economic loss in accordance with the common law rules;
>
> the potentially damaging delays in a once-and-for-all assessment; and
>
> the apparently high incidence of disputes arising from the use of these heads of damage.

We discussed in Chapter 4 reports which had recommended limitation or abolition of the common law's approach (paragraphs 4.18-4.20).

11.33 There are, however, aspects of the common law's approach which are included in compensation for permanent disability. These include:

> individual assessment of permanent disability (including disability caused by pain);

the use of the concept of impairment of the whole person, which contains many elements compensated for by the common law as loss of enjoyment of life; and

compensation for permanent disfigurement.

11.34 One consequence of compensating only for permanent disability is that those who suffer short-term pain and suffering, with no long-lasting effects will not receive compensation for this “loss”. They will, of course, be eligible for all other forms of compensation, such as periodic compensation for loss of earning capacity. However, even if it were decided that. compensation for the non-economic aspects of short-term disability was desirable, we would not favour the use of the current common law method of assessment because of the shortcomings previously discussed. Nor is the approach we propose suitable to cases of short-term disability, since it depends on assessment of permanent disability. Thus if compensation for short-term disability were to be provided, a new base would need to be developed which avoided the adverse effects of the common law and which ensured that those who suffered permanent disabilities are adequately compensated. It would then be a question of whether sufficient extra funds should be made available through increased contributions to pay this form of compensation. Priority should be accorded to providing other benefits, discussed in this Report, including compensation for permanent disability, before resources are allocated to compensate short-term pain and suffering.

B. The New South Wales Workers’ Compensation System

11.35 Section 16 of the Workers’ Compensation Act, 1926, provides for lump sum compensation in respect of certain physical disabilities sustained as the result of work- related accidents or diseases, some of which are presented in a “table of maims”. However, the coverage of the section is not comprehensive. Among other things, it omits some serious disabilities such as loss of control of bladder or bowels, [36] back injuries (except so far as they cause loss of function in limbs) and impairment of mental capacity. The section provides compensation for loss of a sexual organ, but not for loss of function of an intact organ. [37] These omissions, and the fact that the table appears to have developed without any consistent philosophical basis for the various levels of compensation for specified impairments, make it far less satisfactory for the purposes of the Scheme than the approach we have adopted. Tables of the kind found in the Workers’ Compensation Act are sometimes described as “amputation” tables because of their concentration on these sorts of injuries at the expense of less dramatic but equally disabling conditions.

C. The New Zealand Accident Compensation Act 1982

11.36 The New Zealand Act provides for two forms of compensation for non-economic loss. Under section 78 of the Act up to $NZ 17,000 is payable for permanent loss or impairment of bodily function, while section 79 provides for up to $NZ 10,000 for loss of enjoyment of life and pain and suffering.

1. Compensation for Permanent Impairment

11.37 The New Zealand Act contains a schedule [38] which lists the percentages of the maximum sum which is to be paid for various impairments. Some of the items in the schedule include the following.

Injury	Percentage
Loss of the pulp of an index finger	4
Total loss of an index finger	14
Shortening of leg by between 37.5 and 50 mm	15
Total loss of vision in one eye (normal vision in the other eye)	30

Total loss of all fingers, thumb intact	63
Total loss of a hand or lower part of an arm	70
Total loss of both legs by above-knee or below-knee amputation	100

These percentages are applied to the $NZ 17,000 lump sum, but deductions can be made for pre-existing conditions. Where there are several impairments the total percentage of compensation payable is simply assessed by adding the values of the impairments together. This tends to mean that many assessments arrive at the maximum because the sum of impairment exceeds 100 per cent. Where the impairment is not listed in the schedule, the Accident Compensation Corporation is given a discretion to decide the appropriate amount of compensation

> ... in the light of the medical and other evidence available to it and having regard to the severity of the loss or impairment and the contents of the schedule. [39]

11.38 The New Zealand table is far more detailed than that adopted in the New South Wales Workers' Compensation Act. It has the advantage that no disability or impairment is excluded simply because it is not mentioned in the schedule. It is fairly straightforward to use, although complications can arise in relation to the assessment of impairment where there are multiple injuries. In practice, the Corporation relies on medical certificates in making assessments, but is ultimately responsible for determining the appropriate level of compensation. An important defect is that the percentages allocated do not refect any consistent view as to the nature of the impairment to be compensated, presumably because it was based on the New Zealand Workers' Compensation schedule. The upper limit on compensation for permanent impairment is low, even having regard to different money values and purchasing power, and the availability of compensation for pain and suffering.

11.39 While the New Zealand schedule has some advantages, notably its simplicity, we prefer the more detailed and consistent. Whole Person Approach outlined earlier. Such an approach assesses the degree of disability in accordance with a coherent philosophy, and avoids the criticism that percentages have been arbitrarily assigned for different impairments.

2. Compensation for Pain and Suffering

11.40 The provision allowing compensation for loss of enjoyment of life and pain and suffering [40] has been trenchantly criticised by the New Zealand Accident Compensation Corporation:

> In practice, the Corporation has found that a disproportionate amount of administration, expense and time, and a disproportionate amount of total compensation, is being applied towards compensating for pain, mental suffering and loss of amenities or enjoyment of life. These particular items of compensation have become the focus of claimants' attention almost largely to the exclusion of other forms of entitlement under the Act. This also had an effect of unduly concentrating on relatively minor injuries or losses. [41]

The provision has also given rise to much disputation producing a high proportion of all appeals made under the Act. [42] These reasons add weight to the case made earlier for not providing compensation for pain and suffering. It should be noted that the repeal of this provision has been suggested by an inquiry in New Zealand but, partly because of the inadequacy of the compensation for permanent impairment, the suggestion has not been accepted. [43]

IV. DETAILED PROPOSALS

A. The Form of Compensation

11.41 In general we have recommended that compensation should be paid on a periodic basis and other benefits provided as and when the need arises or an expense is incurred. It is arguable that compensation for permanent disability should also be paid on a periodic basis. For example, a periodic sum, related to a maximum weekly sum for permanent and total disability, could be paid whether or not the person was receiving compensation for

loss of earning capacity or earning an income. Such a proposal would have the advantage that it would continue for the length of time the person endures a permanent disability (usually his or her actual life span) and perhaps would be less likely to be dissipated than a lump sum.

11.42 Nonetheless, we have concluded that compensation for permanent disability should be paid in the form of a lump sum (although not necessarily on a once-and-for-all basis). Other forms of compensation under the Scheme will cover the economic losses sustained by the accident victim and should provide him or her with financial security. A lump sum for permanent disability can give the disabled person the freedom to purchase alternative forms of satisfaction without risking loss of money required for accident-related expenses or for replacement of earning capacity. In particular, the lump sum may be used to assist the disabled person to adjust to a new lifestyle. The money could be applied, for example, towards the purchase of a home or used to pay off a mortgage, although other compensation is available for necessary home modifications, and periodic compensation for loss of earning capacity could be used (as are weekly earnings) to meet mortgage commitments. Alternatively, the disabled person may choose to use the lump sum for leisure pursuits, investment, the establishment of a small business or other purposes that he or she thinks appropriate. A further factor, although not decisive, is that other compensation systems, including the common law and workers' compensation, provide lump sums for non-economic loss. This form of compensation has become an accepted means of redressing the non-economic consequences of a permanent disability on a person's life. In our view, payment of a lump sum for permanent disability and (generally speaking) periodic compensation for economic losses, strikes an appropriate balance between providing long-term security and affording the disabled person some economic freedom to enable him or her to adjust more readily to the new circumstances.

B. The Amount of Compensation

11.43 There is no self-evident basis for determining the amount of compensation that should be provided for permanent disability. The loss sustained by the victim cannot readily be translated into monetary terms and to some extent the selection of a maximum figure is a matter on which community expectations might be important. The Working Paper tentatively suggested a maximum of three times average annual earnings. On the index used in that Paper, the maximum would have been approximately $53,300 in June 1984. This compares with common law awards for non-economic loss in cases of total and permanent disability in the range of $150,000 to $190,000. Many commentators thought the maximum proposed in the Working Paper was too low, although perceptions may have been influenced by the misconception that the lump sum would be required to pay for home modifications, aids and other requirements for which specific provision is in fact made under the Scheme.

11.44 It is necessary to balance the need to acknowledge in monetary terms the significance of the loss sustained by the severely disabled accident victim and the fact that resources are not unlimited. A further factor is that compensation for permanent disability is additional to other forms of compensation which, in the case of seriously disabled people, are very extensive. They include compensation for loss of earning capacity, mobility allowances, provision for home or vehicle modifications, coverage of medical, hospital, nursing and ancillary care services, attendant care provision and the possibility of the provision of replacement household services. Taking these matters into account we think that the appropriate maximum compensation for permanent disability should be four times average annual earnings. Accordingly, **we recommend that the maximum compensation for permanent disability should be 208 times the value of AWE at the date of payment (approximately $87,360 in June 1984).** This recommendation is subject to reduction of the maximum on the ground of the age of the victim (see paragraph 11.49).

C. Thresholds

1. A Minimum Level of Disability

11.45 While a substantial number of transport accident victims suffer permanent disabilities, a large number of those disabilities are minor.

> Many of the permanent effects left behind by injury after convalescence... have no more than a nuisance effect upon earning capacity or upon normal living. They may involve a degree of discomfort: but the man is well able to accommodate himself to the situation and he suffers no repercussions of any practical significance. [44]

A decision must be made whether to compensate all those disabilities, or whether to impose a threshold level of disability, below which no lump sum will be payable. The New Zealand Accident Compensation Corporation provides figures which relate to all compensable accidents (not only transport accidents) resulting in permanent disability.

Permanent Disability Range	Percentage of Claims	Cumulative Percentage
Less than 5%	30	30
5-9	23	53
10-14	18	71
15-34	23	94
35-54	3	97
55-74	2	99
75-100	1	100

Since transport accidents are more likely than many other accidents to produce more serious disabilities, the percentage of minor permanent disabilities may be fewer than suggested in this table. Nonetheless, if no threshold is imposed, the multitude of small claims would add considerably to compensation costs and to the costs of administration. This could divert limited resources away from those with serious disabilities to those with minor, albeit permanent disabilities.

11.46 A number of Inquiries have recommended a threshold to overcome this problem. The Australian Woodhouse Report recommended a 10 per cent threshold because

> ... reasonable people with any sort of pride in themselves neither want nor accept, and certainly should not be offered, easy handouts for every small problem. [45]

This was subject to a discretion to include people below this threshold in “unusual and special cases”, where it is necessary to avoid injustice. [46] The Quigley Report in New Zealand recommended the establishment of a threshold of 15 per cent because

> ... it appears that at this level no loss normally occurs which is likely to affect seriously the earning capacity of the injured person. [47]

There was also to be a limited discretion in the Commission (now the Corporation) to waive the threshold in order to avoid any serious anomalies. The actual threshold now provided is 5 per cent, but no discretion to waive this has been included in the legislation. [48]

11.47 Having regard to these matters, **we recommend that where the assessed degree of permanent disability is 4 per cent or less, no compensation for permanent disability should be payable.** This means that a lump sum will be payable once the degree of permanent disability reaches 5 per cent. The degree of disability should be assessed in percentage terms as a whole number, with no assessments involving fractions of a percentage point.

2. Total Disability

11.48 **We recommend that a person who reaches an assessed level of permanent disability of 90 per cent should be entitled to the maximum level of compensation for permanent disability.**

D. Variations Because of Age

11.49 The Working Paper was criticised in discussions on the ground that the maximum compensation for permanent disability did not take account of the age of the victim and, therefore, the period for which he or she would be likely to endure the disability. As has been noted (paragraph 11.13), assessment of permanent disability takes age into account in measuring the extent of impairment which can reasonably be attributed to the injury, but this is a quite separate consideration from the length of time over which the disability must be endured. The problem could, of course, be overcome by paying compensation for disability on a periodic basis. However, we prefer to accommodate the criticism by reducing the maximum compensation as the victim's age increases beyond 25. This will not relate compensation to the precise life span of the victim, but will afford recognition to the fact that, in general the older the victim the less the period for which the disability will be endured. **We therefore recommend that in assessing compensation for permanent disability adjustment should be made to take account of the person's age. The adjustment should take the following form.**

Age of Victim at Date of Accident	Percentage of Assessed Compensation Payable
0-25 years	100 per cent
26-64 years	99-61 per cent (reducing on a uniform sliding scale of 1 per cent per year of age)
65 years and above	60 per cent

There should be no further reduction in the maximum payable beyond the age of 65. While an older person may not have a long life expectancy the effect of an impairment may be even more devastating than for a younger person because of the difficulty of adjusting to that impairment.

11.50 Table 11.2 illustrates the impact of the age variation on six disabled people, aged 20 to 70, each with a 50 per cent disability.

Table 11.2: Compensation for Permanent Disability: Age Variations Under Transport Accidents Scheme Recommendations

New South Wales June 1984

Age	Percentage Entitlement	Compensation Payable at 50% Disability $
20	100	43,680
30	95	41,496
40	85	37,128
50	75	32,760

60	65	28,392
70	60	26,208

E. The Deceased or Unconscious Victim

1. The Deceased Victim

11.51 Compensation for permanent disability is designed to provide some solace for a permanently disabled transport accident victim and to recognise in a tangible way the level of his or her loss. Where the victim dies soon after the accident, before compensation has been assessed, no compensation for permanent disability should be paid. In these circumstances the spouse and children of the victim will be entitled to death benefits, including lump sum compensation. **We recommend that no compensation for permanent disability should be paid where the disabled person dies before assessment of the disability or payment of the sum due.**

11.52 A transport accident victim may receive compensation for permanent disability and die shortly thereafter. In these circumstances, the surviving spouse and children ordinarily will be entitled to claim death benefits. Consideration has been given to adjusting the death benefits to take account of the compensation for permanent disability already paid, but this course of action was rejected. Such an adjustment might penalise the surviving family members, who would not necessarily have benefited from the lump sum payment

2. The Unconscious Victim

11.53 Considerable difficulties are created by the case of a person who is permanently unconscious or otherwise totally unaware of his or her disability. On the one hand, the person clearly is permanently disabled, usually totally. On the other, the lack of awareness makes it very difficult to justify compensation to provide alternative sources of pleasure or solace. This question has caused difficulties in existing systems of compensation.

11.54 Under the common law in Australia a permanently unconscious plaintiff who has no feelings of pain, discomfort or loss of enjoyment, receives only minimal damages for non-economic loss. It was decided by a majority of the High Court in *Skelton v. Collins* [49] that his or her subjective awareness of the loss was the central question.

> I am unable myself to understand how monetary compensation for the deprivation of the ability to live out life with faculties of mind and body impaired can be based upon an evaluation of a thing lost. It must surely be based upon solace for a condition created not upon payment for something taken away. [50]
>
> ... Consolation presupposes consciousness and some capacity of intellectual appreciation If money were given to the plaintiff he could never know that he had it He could not use it or dispose of it... He is not, like Samson Agonistes, aware and able to bemoan his fate “to live a life half dead, a living death”. His existence is in very truth a living death. [51]

The courts in England have taken a different view, regarding the objectively observable loss as more important. [52]

11.55 The Northern Territory’s no-fault motor vehicle scheme provides compensation for specified impairments. [53] Where a victim is unconscious and likely to remain a full-time patient in a hospital or institution, the dependent spouse may apply to have the injured person deemed to be dead. This operates from the date of determination, so that if the victim has previously recovered compensation for his or her permanent disability, there is no apparent reason why the dependent spouse cannot then apply for lump sum death compensation for himself or herself and periodic benefits for any children on the basis of the deemed death of the injured person. The interaction between these provisions appears to acknowledge, first the objective loss of the unconscious person and secondly, the death-like loss to his or her dependents, so far as support and companionship are concerned.

11.56 While the “deemed death” approach provides a means of directing compensation to dependents of an unconscious accident victim, there is something distasteful in attributing death to anyone who is still alive. But if

death benefits are not to be made available to dependents in such cases, there is still good reason for providing benefits to them as they may not only be deprived of support but are also placed under very great stress. This is especially likely in the case of spouse and children. **We recommend that where a person is permanently unconscious, or otherwise totally and permanently unaware of his or her disability, compensation for permanent disability should only be payable where that person has a dependent spouse and/or children.** The compensation should be paid to a trustee, who should have power to apply it to the support of the spouse and children, having regard, where relevant, to the possibility that the disabled person will recover from unconsiousness or develop awareness. The same approach should be taken in relation to compensation for the unconscious persons loss of earning capacity As in other parts of the Report, “spouse” includes de facto partner (paragraph 12.21).

F. Duty to Mitigate

11.57 **We recommend that in assessing the degree of permanent disability, the Corporation should have regard to any unreasonable refusal by an injured person to participate in a rehabilitation program or to undergo medical treatment where these may have reduced the degree of permanent disability.** The approach to this problem recently taken by the courts in common law actions provides a useful guide to what amounts to reasonable refusal. For example, refusal to undergo surgery has been held reasonable where motivated by a genuine fear caused by deep-rooted cultural prejudice [54] or prolonged hospitalisation. [55]

G. Assessment

11.58 Because assessment of degree of permanent disability is based upon medical evaluation of impairments, the role of assessing doctors will be central. The Corporation will base its assessments upon the reports of these doctors having regard, where appropriate, to information supplied by the person’s rehabilitation team. Appeal procedures for compensation for permanent disability will be the same as for other forms of compensation and are discussed in Chapter 16.

V. SUMMARY

11.59 The Scheme should provide compensation for permanent disability sustained by transport accident victims. This should be in addition to compensation for loss or impairment of earning capacity and other forms of compensation under the Scheme, including provision for home modification and attendant care. Compensation for non-economic loss of this kind serves as a solace to the permanently disabled victim and provides him or her with a means of adjusting to the disability.

11.60 Compensation for non-economic loss should be limited to cases of permanent disability and should not be available, for example, to those suffering only short-term pain and suffering. The reasons for this decision are that:

- compensation for non-economic loss should be directed to those suffering permanent rather than short-term disabilities;
- compensation should be assessed in a manner consistent with promoting rehabilitation. Other approaches, particularly compensating pain and suffering, detract from this objective; and
- the criteria for measuring the extent of permanent disability can be applied uniformly and with a minimum of disputation.

11.61 The degree of permanent disability should be 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. In general the degree of permanent disability should be assessed 12 months after the date of the accident, but a reassessment should be possible if the degree of disability subsequently increases.

11.62 Compensation for permanent disability should be paid in the form of a lump sum. This exception to the general rule of periodic compensation can be justified on the ground that the disabled person’s economic losses

will be covered and a lump sum will give him or her freedom to purchase alternative forms of satisfaction without risk to long-term security. The maximum compensation for permanent disability should be 208 times the value of AWE at the date of payment (approximately $87,360 in June 1984). However, the maximum should be adjusted to take account of the accident victim's age. Thus a totally disabled person aged 25 would receive 100 per cent of the maximum; a person aged 45 would receive 80 per cent of the maximum and a person aged 65 would receive 60 per cent of the maximum. Where a claimant is permanently unconscious, compensation for permanent disability should only be paid where the claimant has a dependent spouse and/or children. In such cases, payment should be made to a trustee with power to apply it to the support of the spouse and children.

FOOTNOTES

1. New Zealand Woodhouse Report, para.291.

2. See generally, Case Study Booklet and Traffic Accident Study.

3. See eg. Submissions S34, p.35; S32, p.21; S42, p.2; S60, p.2; and S79, p.2.

4. Submission S60, p.2. This part of Submission S60 was approved in Submissions S73, p.1; S62, p.1.

5. Pearson Report, vol.1, paras.360-362.

6. See chapter 10.

7. See eg. Submission W2, pp.3-4.

8. American Medical Association. *Guides to the Evaluation of Permanent Impairment* (1971), p.iii.

9. Australian Council for Rehabilitation of Disabled and the International Year of Disabled Persons National Committee of Non-Government Organisations, Discussion Paper, *Income Security Policies for Mentally and Physically Disabled People in Australia* (1981), para-2.3.

10. See note 8 above, p.iii.

11. Australian Woodhouse Report, vol.1, para.400.

12. In a pilot program by medical assessors of the Department, the Australian adaptation worked well. We have been advised by the Department of Veterans' Affairs that further trials will be held in late 1985.

13. This applies particularly to the sections dealing with the cardiovascular, respiratory, ophthalmological, haemotopoietic, ear, nose and throat and urinary systems. Information supplied by Dr. D. Donnelly, retired medical officer. Department of Veterans' Affairs.

14. Australian adaptation of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, appendix 4, tables 8-11.

15. *Id*., tables 13-15.

16. *Id*., appendix 10, table 1.

17. The American *Guides* (see note 8 above) uses the term "impairment of the whole man" for any total value, while the Australian adaptation (see note 14 above) uses the term Departmental Medical Assessment Value (DMA). For our purposes, both these terms are equivalent to our term "the degree of permanent disability".

18. See note 14 above, appendix 15.

19. *Id*., appendix 12, table 2.

20. See Case Study Booklet. para. 4.17, LS.S.3.

21. See paras.2.30, 3.68-3.70.

22. H. Luntz, *Assessment of Damages* (2nd ed. 1983), para. 3.2.04, H D Sperling, “Compensation for Pain”, a paper delivered to the Australian Pain Society, Annual Scientific Meeting (Sydney, February 1984).

23. P S Atiyah, *Accidents, Compensation and the Law* (3rd ed. 1980). at p.221.

24. O’Connell and R. Simon, “Payment for Pain and Suffering: Who Wants What, When and Why?” [1972] *University of Illinois Law Forum* 1.

25. *Skelton v. Collins* (1965) 115 CLR 94, at p.132, per Windeyer J; see also *Fairbairn v. Cummins* [1961] ALR 205, at p.206.

26. *H. West & Son Ltd. v. Shephard* [1964] AC 326, at pp.368-369.

27. Submission S17, p.3.

28. Although Table 11.1 is concerned only with verdicts, it is likely that the same pattern is reflected in settlements.

29. *H. West & Son Ltd. v. Shephard* [1964] AC 326, at p.368, per Lord Pearce.

30. See eg. note 14 above, appendix 1, tables 1, 2.

31. *Id*., appendix 2, table 3.

32. Pearson Report, vol.l. para.372.

33. *Id*., para.371.

34. See paras.2.29-2.30, 3.40-3.70.

35. Paras.3.71-3.77.

36. This has been the subject of criticism in some submissions: see eg. Submission W91.

37. Workers’ Compensation Act 1926, s.16(1B)(a2).

38. Accident Compensation Act 1982 (NZ), first schedule.

39. *Id*., s.78(3), (4).

40. *Id*., s.79(1).

41. Submission S61, p.32.

42. Information supplied bv the New Zealand Accident Compensation Corporation.

43. In the 1980 Quigley Report, the abolition of this section was recommended, but political opposition to this proposal was strong: Quigley Report, pp.16-18. See also Submission S61, pp.32-33.

44. Australian Wodhouse Report, vol.1, para.389(a).

45. *Id*., paras.389(a), 401(b).

46. *Id*., para.401(b).

47. Quigley Report, p.18.

48. Accident Compensation Act 1982 (NZ), s.78(6).

49. (1965) 115 CLR 94.

50. *Id*., at p.130, per Windeyer J.

51. *Id*., at p.133, per Windeyer J.

52. See eg. *H. West & Son Ltd. v. Shephard* [1964] AC 326.

53. Para.4.45.

54. *Fazlic v. Milingimbi Community Inc*. (1982) 38 ALR 424.

55. *Vecera v. Dickinson*, 28 May 1982, Supreme Court of New South Wales, Court of Appeal.

12. Compensation of Death

I. INTRODUCTION

A. The Need for Death Benefits

12.1 We continue to support the view, expressed in the Working Paper, [1] that there are strong reasons for providing compensation to the family and dependents of people killed in transport accidents. All existing compensation systems provide some compensation for loss caused by death. However the form and amount of such compensation and eligibility criteria vary from system to system. The reasons for providing compensation on death include:

the financial need, particularly in the short term, created by the loss of material support provided by the deceased;

the dislocation to the family unit caused by the death, often requiring financial outlay to readjust to a changed social and economic situation; and

the need to provide for the immediate costs of death such as funeral and related expenses.

B. Other Compensation Systems

1. Common Law

12.2 Most compensation benefits available to the surviving family members of a deceased transport accident victim are the result of statutory intervention. At common law, no damages are payable purely as compensation for the death of another. [2] This problem was initially solved by Lord Campbell's Act 1846 (Eng), the model for later acts including the Compensation to Relatives Act, 1897. [3] This Act permits close relatives of the deceased person to claim damages for loss resulting from the death, [4] but it makes no detailed provision except with regard to set-offs, [5] concerning assessment. This has left the courts the task of developing rules which govern the assessment of damages. They have done this by providing, as in other cases, a once-and-for-all lump sum. Periodic compensation is not available.

12.3 To illustrate the approach of the common law courts to such assessment and the principles which are applied, we briefly outline what is probably the most typical claim under the legislation-one involving the death of the family breadwinner. In such a case, damages are calculated on the basis of the portion of the deceased s earning capacity which would have been devoted to the material support of the family. This involves the courts in the uncertainties of prediction associated with a calculation of lost earning capacity. In addition, it involves predictions not relevant to an injured party's claim, for example a widow's prospect of remarriage [6] and the stability of a marriage at the time of the death of one spouse. [7] Where the homemaker has been killed, damages are based on the value of household services rendered by the deceased. [8] The Act expressly provides for recovery of reasonable funeral or cremation expenses and the cost of erecting a tombstone. [9]

12.4 There is separate statutory provision for some survivors to bring an action for the nervous shock which they suffered as a result of the death of a close relative. [10] In such cases statute has largely replaced the common law, although there may still be isolated cases and situations where the statute is silent but the common law provides a remedy. [11]

2. Workers' Compensation

12.5 Section 8 of the Workers' Compensation Act, 1926, provides for benefits where death results from a work injury. Current benefits (August 1984), which include a lump sum of $54,750 and weekly payment of $27.40 for each child up to 16 years of age, are payable only to those who were wholly dependent on the worker for support. The benefits are indexed. Where a spouse survives the benefits are payable to the spouse unless otherwise ordered by the Workers' Compensation Commission. [12] Where the worker leaves no person wholly

dependent on him or her for support, payment of whole or part of the lump sum may be determined by the Commission for the benefit of partially dependent survivors. [13] Up to $15,350 is payable to members of the family of a minor who, while leaving no dependents, contributed a major proportion of his or her income to the maintenance of the family home. [14] In addition where there were no dependents, reasonable burial and cremation expenses up to a maximum of $300 are payable. [15]

3. No-Fault Schemes

12.6 Under the New Zealand scheme, earnings-related compensation is payable to spouses, children and other dependents of a deceased accident victim up to the maximum amount allowable for total loss of earning capacity of the deceased, had the deceased remained alive.[16] If the surviving spouse remarries, earnings-related compensation ceases subject to payment of a lump sum equivalent to two years' entitlement.[17] There is also provision for payment of reasonable funeral expenses and a lump sum of up to NZ $4,000 to a surviving spouse and NZ $2,000 to each surviving child (up to a maximum of NZ $6,000)[18]. Under the no-fault component of the Victorian scheme, a lump sum is payable to a dependent spouse and children,[19] as well as burial and cremation costs. An amount for household help and child care up to a maximum of $2,000 may be paid where the deceased had previously provided such services. Death benefits under the Tasmanian no-fault provisions also include a lump sum to dependents, and funeral benefits, [21] as well as a dependant's weekly allowance for a period of up to 104 weeks from the date of death. [22] Lump sums to surviving spouses are provided for under the Northern Territory scheme, [23] together with periodic payments to surviving dependent children [24] and parents, [25] and funeral benefits. [26]

12.7 These statutory provisions have a number of common features.

All provide for a lump sum payment of varying amounts to eligible claimants.

Eligibility is based on either

(a) a family relationship with the deceased, and/or

(b) dependence on the deceased for support

All meet the immediate costs of death such as funeral and related expenses.

Not all statutory provisions, however, allow for periodic payments to survivors. In some cases where these are available, they are limited to a fixed period after the death or to a fixed amount.

12.8 The availability of death benefits in all existing compensation schemes reinforces the view that they should be provided in the proposed Scheme. [27] Therefore, **we recommend that compensation in respect of death should be provided to the spouse, children and other dependent f amily members of people killed in transport accidents, provided that the death is caused by or arises out of a transport accident.**

C. Form of Compensation-Working Paper Proposals Reconsidered

12.9 The Working Paper argued that compensation should be provided by way of a lump sum to all adults who qualified for benefits, with periodic payments being made available only to dependent children. [28] We have reconsidered this position, although the reasons given for favouring a lump sum payment to survivors remain valid. In particular, compensation should be directed towards the immediate needs of survivors, to be used as a financial buffer and so allow them to readjust their lives. A fixed lump sum payment gives to survivors a high degree of short-term flexibility and because of this it is still central to the recommendations.

12.10 No compensation scheme should allow limited resources to support able-bodied survivors for substantial periods of time. The Scheme should accept that it is desirable for a survivor, after a period of adjustment, to make efforts to become self-supporting. Dependence on another person is an option which is open during that person's lifetime, but should not be available indefinitely through the compensation system after the person's death. In this respect the position of an incapacitated person and a surviving dependent of a person who has

been killed are quite different. The former requires support during the period of incapacity and cannot earn income because of the incapacity. The latter, unless there is a continuing impediment to employment, can be expected to attempt to support himself or herself. A different approach to compensation is thus required in such a case.

12.11 The Working Paper proposals were criticised in submissions for restricting benefits to a single lump sum (apart from periodic compensation for children of the deceased), thus failing to take account of the individual circumstances of different families. There is great force in this criticism, particularly in the case of a surviving spouse with child-care responsibilities. There are strong reasons why such a person should be place in a special category in determining entitlement to compensation on the death of his or her partner. To do so recognises the likelihood that the spouse's earning capacity will be affected, at least for a period, by the child-care responsibilities. It also recognises the likelihood that, where the deceased was an earner, the surviving spouse will experience difficulties in adjusting readily to the loss of financial support and in achieving financial and social independence. In particular, a surviving spouse as a sole parent with child-care responsibilities may face serious difficulties (if out of work at the time of death) in re-entering the workforce, or in increasing workforce participation to cover the costs of child care.

12.12 Submissions also pointed out that compensation arrangements should distinguish between those with special needs, who cannot reasonably be expected to support themselves, and those who face no barrier to supporting themselves. It was suggested, for example, that a distinction should be drawn between an elderly widow in poor health and a young widow in good health with no child-care responsibilities. [29] The case for the younger widow being expected to support herself after a relatively short period of adjustment is strong, while the other person clearly may not have that option open.

12.13 Special needs which exist at the date of death may be alleviated (or exacerbates by subsequent events unconnected with receipt of compensation. For example, a survivor unable to exercise his or her earning capacity because of ill-health may recover sooner than expected, or remarriage may replace the loss of support caused by the death. Factors of this kind cannot accurately be predicted in proceedings for a once-and-for-all lump sum award, for reasons similar to those which apply to the assessment of damages for personal injury.

12.14 The approach we suggest is that periodic compensation in addition to the lump sum already referred to, should be available to two categories of surviving spouse who have been deprived of financial support.

> First, a surviving spouse with child-care responsibilities should be entitled to periodic compensation on the death of an earner. For a limited period (normally five years) the compensation should be related to the earnings of the deceased and should be paid regardless of the survivors earnings or earning capacity. After that time periodic compensation should continue only if the spouse with child-care responsibilities has special needs and cannot support himself or herself above a specified level. Periodic compensation to a spouse with child-care responsibilities should not continue beyond the time the youngest child reaches 16. Such compensation should also end on remarriage.
>
> Secondly, a spouse without child-care responsibilities, but who is prevented by circumstances from becoming self-supporting, should be entitled to compensation for a limited period (again normally five years). The compensation should not exceed that which is required to bring the spouse's earnings to a specified minimum level. During the period of compensation some survivors will be able to adjust to the new situation, for example by retraining or by altering their domestic circumstances. Some will not adjust. However, a point is reached where responsibility for continuing support should fall to the social security system.

12.15 The social and economic factors suggested as relevant in determining whether a person cannot fairly be expected to be self-supporting do not include general economic conditions which might make returning to the workforce more difficult. As stated in chapter 7 in considering the relevance of general economic conditions to the disabled transport accident victim (paragraph 7.59), unemployment is a community problem and one which should be the responsibility of the social welfare system. Only where a survivor has particular social disabilities can the payment of periodic compensation be justified.

12.16 The needs of the surviving spouse may exist whether the deceased spouse provided financial support or other material support such as household services. However, where household services were provided by the

deceased we propose, subject to appropriate criteria, substitute support services to the family dependent on the deceased rather than monetary payments (paragraphs 12.54-12.57).

D. Eligible Claimants

12.17 In order to be eligible for death benefits a person should be able to show a close relationship with the deceased and to demonstrate that the death had a disruptive effect on that person's life. In general terms, this is most likely when two circumstances combine:

material dependence; and

family membership.

We therefore propose that eligibility should depend on the existence in fact of both elements.

1. Material Dependence

12.18 Eligibility for benefits on death should require some degree of dependence on the deceased for material support, whether in the form of contribution from earnings where the deceased was an earner, [30] or household services where the deceased was a non-earner. A person is entitled to be treated as a dependent even if he or she was only partly dependent on or interdependent with, the deceased. This may occur where others contributed with the deceased towards the dependant's support or the dependent contributed together with the deceased to his or her own support. It is intended in this way to cover the wide range of domestic situations which exist in the community. A deceased may have:

contributed as an earner to the household along with other family members, for example a spouse who was also an earner;

supported two families, because of separation or divorce;

lived in a blended family supporting children of his or her partner or some other person; or

provided financial support to relatives who may or may not have lived within the household.

Generally dependence should have to be proved by the person seeking to claim benefits, except in the case of children (paragraph 12.26). Accordingly, **we recommend that a dependent should be defined as a person who, at the date of the accident resulting in the deceased's death, was dependent upon, or interdependent with, the deceased.**

12.19 Although partial dependence or interdependence is sufficient to establish eligibility, it must be material. There must have been support of a significant and continuing kind provided by the deceased to the dependent. It would not be sufficient if a parent, living apart from a child after separation or dissolution of marriage, merely saw the child occasionally or provided gifts from time to time. There must be financial support or continuing material support in some other form.

2. Family Membership

12.20 It is consistent with existing compensation schemes [31] and with the recommendation of the Australian Woodhouse Committee [32] that only members of the deceased's family should be entitled to benefits available on death. [33] Such benefits should be concentrated in particular on the surviving spouse and/or children, although some consideration should be given to other close family members, such as parents, who were dependent oil the deceased in the required sense. The three classes of eligible dependents should be:

spouse;

child;

and other family member.

Each class requires more precise definition.

Spouse

12.21 The term spouse most obviously refers to a party to a legal marriage. However, the de facto relationship has become widely recognised as a basis for benefits in existing compensation schemes. [34] We therefore propose that “spouse” should include de facto partner and that a “de facto” partner should be defined in terms equivalent to those adopted in the De Facto Relationships Bill 1984. [35] For the reasons given in our Report on *De Facto Relationships*, [36] on which the Bill is based, it is not necessary to require that the de facto relationship should have existed for a minimum period of time prior to the death, as long as the parties were living together as husband and wife on a bona fide domestic basis. Therefore, for purposes of entitlement to death benefits, **we recommend that “spouse” should include a de facto partner of the deceased who was living with the deceased at the date of death. A de facto relationship is one between a man and a woman who, although not legally married to each other, live together as husband and wife on a bona fide domestic basis.**

12.22 In most cases, a de facto relationship will have been established between unmarried people. However there will be some cases where the deceased was a partner to a de facto relationship although still legally married to another person at the date of death Under the Compensation to Relatives (De Facto Relationships) Amendment Bill, 1984 (cognate to the De Facto Relationships Bill: see paragraph 12.21), both the legal spouse and de facto partner will be entitled to benefits under the Compensation to Relatives Act, 1897. We propose that the same approach should be taken for the purposes of the Scheme, provided that both survivors can prove dependence or interdependence. It follows that the benefits otherwise payable to the surviving spouse would be shared in proportion appropriate to the respective degree of dependence of each “spouse” on the deceased. For the purposes of this Chapter, any further reference to “spouse” should be understood to include, where applicable, both legal spouse and de facto partner, where those relationships existed simultaneously at the date of death.

12.23 The benefits for which the surviving spouse will be eligible include:

a lump sum (the proportion depending on whether there are dependent children or other dependent family members);

where the spouse has child-care responsibilities, periodic compensation for loss of support, regardless of the spouse’s own earnings, for a period of up to five years, followed by further limited compensation for loss of support where there are special needs;

where the spouse has no child-care responsibilities but:

(a) is in poor health;

(b) is over the age of 50 and lacks relevant work skills; or

(c) is caring for an aged or infirm relative;

limited compensation for loss of support for up to five years; and support services, to the extent previously provided by the deceased, usually for a period of two years.

Child

12.24 Consistent with both the Compensation to Relatives Act [37] and the Workers’ Compensation Act, [38] "child” should be defined to include a child to whom the deceased stood in *loco parentis,* that is, to whom the deceased was in fact a parent. **We recommend that “child” should be defined to include a child in relation to whom the deceased stood** *in loco parentis.*

12.25 The child should be eligible to benefits as a child up to 16 years of age, and from 16 to 21 years of age if the child remains a full-time student or is physically or mentally handicapped. If a child is 16 or over, or, in the case of a full-time student or handicapped child, 21 or over, that child is treated as another "member of the family" for purposes of eligibility to death benefits. The same consequence would apply if the child is married or in a de facto relationship. The choice of 21 as the ultimate cut-off is different from the age limit of 25 applied for certain purposes under the Tertiary Education Assistance Scheme [39] and to family allowances under the Social Security Act 1947 (Cth.). [40] However, 21 is the age limit used for corresponding purposes (death benefits) under the Workers' Compensation Act. [41] It is also sufficient to permit the child to complete secondary school and to make substantial progress towards, and in many cases complete, tertiary education. **We recommend that for the purpose of a child's eligibility to benefits on the death of a parent, "child" should mean a child who has not attained the age of 16 years or, where the child is a full-time student or physically or mentally handicapped, 21 years, at the date of the death of the parent. The term should not, however, include a child who is married or living in a de facto relationship.**

12.26 In the case of children it should not be necessary to prove dependence where the child was a member of the deceased's household at the date of death. If, however, the child was not living with the deceased at the date of death the general rule requiring proof of dependence should apply. Therefore, **we recommend that where the child who is eligible as a child was a member of the deceased's household at the date of death dependence of that child on the deceased should be conclusively presumed.**

12.27 The benefits for which surviving children will be eligible include:

a share of the lump sum;

periodic payments at a fixed rate; and

the benefit of support services, where these were previously supplied by the deceased.

Other Family Member

12.28 Where members of the deceased's family (other than the spouse and children) were dependent on the deceased at the date of the accident causing death, the Scheme provides:

a share of the lump sum up to one-third of the maximum amount, where spouse and/or children also survive; or

a share of the lump sum to be determined by the Corporation, where neither spouse nor children survive.

For this purpose "member of the family" should be defined in terms equivalent to those in the Compensation to Relatives Act [42] and Workers' Compensation Act. [43] Therefore, **we, recommend that "member of the family" should mean "spouse, father, mother, grandfather, grandmother, step-father, step-mother, son, daughter, grandson, grand-daughter, step-son, step-daughter, brother, sister, half-brother, half-sister".** As explained in paragraph 12.20, although spouses and children are separately provided for in most cases, the child who is not within the definition of "child" (for example because he or she is over 16) is in this more general class.

3. Eligibility Summarised

12.29 Eligibility for death benefits depends on a combination of material dependence and family membership in the following manner.

Spouses, provided that they prove dependency (which may include interdependency) are entitled to benefits on death.

Children coming within the definition of "child" are entitled to claim death benefits, and in the case of a child living in the household of the deceased, dependency will be presumed.

Other relatives within the relevant class will be entitled to claim benefits, provided they prove dependency.

We now examine the compensation available to each class of eligible dependent.

II. LUMP SUM PAYMENT

12.30 As already stated (paragraph 12.9), there are good reasons for favouring lump sum compensation as a major form of compensation available to the dependents of a deceased transport accident victim.

12.31 The lump sum is not intended as a replacement of earnings or services provided by the deceased to his or her family, but rather a financial resource to allow family members to adjust to new and difficult circumstances. It is therefore not related to the kind or extent of material support provided by the deceased. A widow without dependent children if employed at the date of her husband's death, could for example use the lump sum to resettle into another home, or meet the cost of household tasks previously undertaken by her husband or perhaps finance a break from her employment. If she were not in employment and did not come within the special categories of need, the sum would provide financial support while she sought employment and settled into a new life. A surviving spouse with dependent children might use the lump sum to repay the mortgage on the family home, thus removing a substantial financial burden and easing the process of readjustment.

12.32 As the lump sum is not intended to replace actual material support we propose a flat-rate lump sum rather than one based on the earnings or value of household services of the deceased. The lump sum proposed is broadly equivalent to the death payment currently made under the Workers' Compensation Act 1926 (paragraph 12.5). However, unlike the Workers' Compensation Act (and contrary to the view expressed in the Working Paper), the maximum lump sum should not be restricted to the case of a deceased earner with a totally dependent family. To do this would be inconsistent with the value which the community places on the shared contributions of both homemaker and breadwinner to the support of the family. Therefore, **we recommend (subject to the recommendations which follow concerning apportionment of the lump sum) that the dependent spouse, children and other dependent members of the family of the deceased (whether the deceased was an earner or non-earner) should be eligible to claim a lump sum payment to a maximum of 130 times AWE ($54,600 at June 1984).**

A. Surviving Spouse and/or Children

12.33 Traditional social values place great importance on the family, and in particular on the family unit of spouses and children known generally as the immediate or nuclear family. This is confirmed by statistics from the 1981 Census which show that a very high percentage (97 per cent) of households in New South Wales consisted of one family [44] and that 65 per cent of families consisted of a married or de facto couple with or without children. [45] Furthermore, road statistics show that a disproportionately high number of deaths caused by transport accidents occur in younger age groups. [46] These facts combine to make it more likely that young, and therefore dependent, children will be part of the surviving family. These factors justify the concentration of death benefits on surviving spouses and children. **We recommend that where the deceased is survived by a dependent spouse and/or children, but no other family dependents, the survivors should be entitled to claim the maximum lump sum. If there is more than one claimant, the Corporation should apportion the lump sum among them, having regard to the degree of dependence.**

12.34 Apportionment should be left to the discretion of the Corporation because it is impossible to anticipate every family situation Many cases involving only a surviving spouse and/or children of the deceased will be relatively straightforward. But there will be more complicated cases, such as the case where the deceased was supporting two families, following a divorce and subsequent remarriage. The Corporation should be guided by criteria such as:

- age and independent means of support; and
- physical or mental disability of the surviving spouse and/or children

B. Surviving Spouse and/or Children and Other Dependent Family Members

12.35 The extended family is a common feature of Australian life. More over there are many situations in which a person provides material support to family members who are not part of his or her household. While immediate

family should be given priority in the allocation of the lump sum, financial dislocation could affect other dependents who are not part of the immediate family. We propose that up to one-third of the lump sum should be available to dependents who are not part of the immediate family, with provision to enlarge this proportion in exceptional circumstances. One example of exceptional circumstances might be where a husband and wife have the care and support of a retarded child over 21 from the husband's prior marriage. This person might live apart from the primary household, but be largely dependent on it. He or she could well need a larger share in the lump sum payable if the father dies and the surviving spouse, who would be entitled to a share in the lump sum is self-supporting. **We recommend that where the deceased is survived by a dependent spouse and/or children and one or more other members of the deceased's family who were dependent on the deceased, those other members of the family should be entitled to claim a share of the lump sum. The share should be determined by the Corporation taking into account the degree of dependence, but should not exceed one-third of the lump sum unless the circumstances are exceptional.**

C. Surviving Dependent Family Members Other Than Spouse and/or Children

12.36 Where the deceased is survived by dependent family members, but not by a spouse or child, the dependent family members should still be entitled to a lump sum payment. The lump sum should not automatically be paid in full as is proposed in the case of a spouse and/or children, but should reflect, up to the maximum, the degree of actual dependence. Therefore, **we recommend that where the deceased is survived by neither a spouse nor children, but one or more dependent family members, those dependents should be entitled to claim the whole or part of the lump sum depending on the degree of dependence. Where there is more than one such dependent, each dependant's share should be determined by the Corporation, taking into account their relative degrees of dependence.**

III. PERIODIC COMPENSATION FOR CHILDREN

12.37 Children should continue to receive support by way of periodic benefits in addition to any entitlement to a lump sum. It would be unreasonable to expect a child to undertake to support himself or herself independently when a parent on whom he or she depends dies, whether that parent was an earner or non-earner. This proposal is designed to provide a substitute source of material support for such children not related to the income of either parent. The level of support suggested is relatively generous compared with other statutory schemes. [47] **We recommend that a child of the deceased who was dependent on the deceased should be entitled to periodic compensation at the rate of 8 per cent of AWE ($33.60 at June 1984). This recommendation applies whether the deceased was an earner or non-earner.** Separate recommendations deal with the upper limits on total compensation payable, for example, when there is a large number of surviving children (paragraphs 12.62-12.65).

12.38 Periodic benefits should cease on the occurrence of events contemplated in the definition of child. [48] Since entitlement to benefits is based on dependency, periodic payments should also end once the child is no longer dependent in fact. Accordingly, **we recommend that periodic compensation to the child should continue until he or she:**

> **(a) attains the age of 16 years, or in the case of a full-time student, or a mentally or physically handicapped child, 21 years;**
>
> **(b) marries or enters into a de facto relationship; or**
>
> **(c) becomes self-supporting.**

12.39 These recommendations are made on the assumption that the periodic payments will not be taxable. Under Division 6AA of Part III of the Income Tax Assessment Act 1936 (Cth). unearned income paid to minors is subject to special rates of tax. [49] Relief from excess tax under these provisions is available in cases of "serious hardship" [50] and, under section 265 of the Income Tax Assessment Act, total or partial relief from payment of tax (not only Division 6AA tax) is provided for, where it can be shown that the exaction of the full amount will entail serious hardship because, *inter alia,* of any loss suffered by the taxpayer. [51] While relief under the hardship provisions may be available with regard to the periodic payments proposed, this cannot be certain. In order to

ensure that the benefits to children receiving benefits are not penalised, it may be necessary to seek an amendment to the Income Tax Assessment Act to exempt such benefits from payment of income tax. [52]

12.40 We see no reason why a child's earnings from part-time employment should affect entitlement to periodic payments. The payments themselves are at a flat rate and are not related to the child's degree of dependence on the deceased. **We recommend that the entitlement of a child to periodic compensation should not be affected by his or her earnings from part-time employment.**

12.41 Furthermore, we do not consider that periodic compensation should be terminated because a child's surviving parent remarries or enters into a de facto relationship. To cease compensation in such circumstances would discourage desirable readjustment and might inhibit moves by the surviving parent towards establishing new relationships. Therefore, **we recommend that periodic compensation to a child should continue, notwithstanding the marriage or entry into a de facto relationship by the surviving parent who has the care and control of the child.**

IV. ADDITIONAL COMPENSATION FOR THE SPOUSE OF AN EARNER

12.42 We have explained why periodic compensation should be paid to a surviving spouse in certain circumstances, notably where there are child-care responsibilities or other special needs. In determining the precise circumstances and level of compensation careful consideration should be given to changes in the community, especially with regard to workforce participation. These changes have not been adequately reflected in other forms of compensation for death. [53] For example, statistical material shows:

> a marked increase in the workforce participation rates of married women generally, but particularly of those with dependents; [54]
>
> an increasing number of workers, both male and female, have moved into part-time work, with women constituting a higher proportion of the part-time workforce; [55] and
>
> a marked increase in the workforce participation rate of married women aged 45 years or more (at a time when the workforce participation rate of all other groups has fallen). [56]

These statistics support the conclusion that many surviving dependents, including women, wish to and do exercise their earning capacity. This trend should not be discouraged by lifetime earnings-related compensation to able-bodied people who are capable of assuming financial responsibility for themselves.

12.43 Against this, the following factors must be considered.

> For women, the most important reason for not actively seeking work is family responsibilities, including the ill-health of another persons inability to find adequate child care or other reasons associated with child care. [57]
>
> Where a family has young children, the woman is almost twice as likely to be out of the labour force as to be in the labour force. As the children grow older, the woman is more likely to be in the labour force than not. The older the dependent child, the more likely it is that both parents will be in the labour force. [58]
>
> The person most likely not to be in the workforce where dependent children are present is the single parent- this would include widows and widowers. [59]

These statistics support the view that it is unreasonable to expect some classes of survivors, especially those with dependent children in their care, to support themselves very soon after the death of a partner.

A. Spouse of Earner with Child-Care Responsibilities

12.44 The surviving spouse of a deceased earner who has child-care responsibilities should be eligible to receive periodic compensation for a period of five years after the death in respect of loss of support. This should be

available whether the survivor is male or female. **We recommend that where the deceased was an earner and the surviving spouse:**

(a) was a dependent of the deceased; and

(b) has the care and control of a child

that spouse should be entitled to claim compensation by way of periodic payments in his or her own right for the loss of support regardless of his or her earnings.

12.45 For the period during which the surviving spouse has child-care responsibilities, the compensation should broadly reflect the contributions made from the deceased's earnings to the family, up to a maximum of five years. Compensation should be calculated as a proportion of the deceased's earnings. Since separate provision is made for periodic compensation to dependent children, we consider that 50 per cent of the deceased's earnings is an appropriate percentage. The maximum payment should be 75 percent of AWE, (that is 50 percent of the ceiling on compensation for loss of earning capacity of 150 per cent of AWE). In general a five year period of adjustment at the level of compensation suggested is an appropriate length of time to allow families to plan their future. For example, in the extreme case of a surviving widow who was pregnant at the time of her spouse's death in a transport accident, the child would be approaching school age when the five years expire. The difficulties associated with entering the workforce for a single parent would then be less onerous. The five year period should allow survivors to plan and undertake retraining programs where appropriate, some of which would be provided by the Corporation.

12.46 There is an obvious difficulty with the payment of periodic compensation to a surviving spouse otherwise than on a needs basis. If payments are taxable in the hands of the recipient, there will be a disincentive for the recipient to undertake or continue employment since extra income derived from employment would attract relatively high marginal tax rates. Clearly, there should be no such disincentive. Accordingly we propose that, if possible, the periodic compensation payable to a surviving spouse with child-care responsibilities during the first five years after the death, should not be taxable in the hands of the spouse. This result could be achieved by the enactment of a specific exemption in the Income Tax Assessment Act 1936 (Cth). [60] Alternatively, it may be that periodic compensation to the surviving spouse, if based (as we suggest) on the net (after tax) earning capacity of the deceased, would not be regarded as taxable income of the spouse. [61]

12.47 We have assumed that the payments will not be taxable and accordingly the recommendation refers to the "net (after tax) earning capacity" of the deceased as the basis for compensation Should the payment be regarded as taxable income of the surviving spouse, it will be necessary to adopt a different approach for this kind of compensation perhaps resorting to a lump sum. **We recommend that periodic benefits to a surviving spouse should be paid by instalments at the rate of 50 per cent of the net (after tax) earning capacity of the deceased up to a maximum of 75 per cent of the after tax equivalent of AWE, for a period of five years from the date of the deceased's death, or until the youngest child in the claimant's care and control attains 16, whichever occurs earlier.**

B. Surviving Spouse of an Earner with Long-Term Child-Care Responsibilities

12.48 Even after five years, a surviving spouse who has a child under the age of 16 years may find it difficult to re-enter the workforce or to earn more than a small amount In these circumstances it is appropriate to maintain the surviving spouse's level of income at a percentage of the deceased earner's income. but to take account of the spouse's earning capacity. We propose that compensation should be paid to bring the spouse's income up to 50 per cent of the deceased partner's income, subject to a limit of 50 per cent of AWE. This compensation should be a supplement only and this should be paid after taking account of the income and unused earning capacity of the surviving spouse. Thus a surviving spouse who has an earning capacity and is capable of exercising it will be expected to do so. **We recommend that if, after five years from the death of the deceased, the surviving spouse**

(a) has the care and control of a child; and

(b) has a combined income and earning capacity less than 50 per cent of the earnings of the deceased (as indexed) or 50 per cent of AWE, whichever is less,

periodic compensation should be paid to that spouse. The compensation should supplement the combined income and unused earning capacity (if any) of the spouse to bring it to 50 per cent of the earnings of the deceased, subject to a maximum of 50 per cent of the A. W. E. ($2 10 at June 1984).

12.49 It is implicit in this form of compensation that it should be regarded as a means of providing for the needs of a family, where the surviving spouse has some limitation on his or her earning capacity because of the child-care responsibilities. It follows that once the youngest child reaches 16 and has less need for household or material support this impediment to earning capacity is removed. In these circumstances, if the surviving spouse is not capable of supporting himself or herself, it is appropriate that social security take over the responsibility. Where children remain financially dependent because they remain students, the periodic benefits paid on their behalf will continue to be received up to the age of 21 years (see paragraph 12.25). Therefore, **we recommend that the additional compensation after the first five years should cease when the youngest child in the care and control of the surviving spouse attains 16 years or where the spouse ceases permanently to have the care and control of a child, whichever is the earlier.**

C. Surviving Spouse of an Earner where the Earning Capacity of the Spouse is Impaired for Reasons other than Child-Care Responsibilities

12.50 Child-care responsibilities are only one factor which can impair a surviving spouse's earning capacity. It may be affected by the spouse's physical an or mental health, his or her age and lack of work experience and skills or even the care of another adult family member. These factors do not necessarily prevent a surviving spouse from undertaking paid work, but they may limit either the kind of work the surviving spouse can do, the hours available in which paid work can be undertaken or the availability of work. The existence of these factors justifies, in our view, the provision of periodic compensation in addition to the lump sum payment, for a period of up to five years after the death of the deceased. Therefore, **we recommend that where a surviving spouse was dependent on the deceased earner and the earning capacity and/or income of the surviving spouse is substantially impaired due to:**

(a) poor health (including mental and physical disability), where the condition was evident at the date of death or within six months of the date;

(b) the fact that he or she is over 50 years of age and lacks relevant work skills; or

(c) the need to care for an aged or impaired member of his or her family or of the deceased's family, where such care was undertaken at the date of the death of the deceased,

periodic compensation should be paid to that spouse.

12.51 Since this form of compensation is based on need during a period of dislocation and adjustment the income and earning capacity of the surviving spouse should be taken into account from the date of the death, whether or not the spouse was earning at the time. During this period the Corporation would be expected to provide opportunities for retraining. If the need for support extends beyond the five year period, it should in our view be met by the social security system. Accordingly, **we recommend that the compensation paid should supplement the combined income and earning capacity (if any) of the surviving spouse to bring him or her to 50 per cent of the earnings of the deceased, subject to a maximum of 50 per cent of AWE ($210 at June 1984). We further recommend that this compensation should cease at the expiration of five years from the date of the deceased's death or the cessation of the impairment of the surviving spouse's earning capacity, whichever is the earlier. Where the impairment temporarily ceases, compensation should be suspended but should resume if the impairment returns within the five year period.**

12.52 In relation to this form of compensation, we have referred to physical or mental disability existing at the time of the death or which develops up to six months later. This is not intended to refer to a physical or mental condition which was the result of the accident causing the death of the spouse. In such a case, independent provision has been made for such a condition under the Scheme. [62] The reference is to an impairment of a surviving spouse, not related to the death, which would, in the ordinary course attract social security benefits.

D. Assessment of Earning Capacity

12.53 In determining the earning capacity of a surviving spouse, for the purpose of assessing the level of periodic compensation, account will need to be taken of the "impairment factor" on which the right to benefits is based. For example, the child-care responsibilities of the surviving spouse would need to be considered in assessing earning capacity. Allowance having been made for this factor, earning capacity should be assessed using, as far as possible, the criteria relevant to the assessment of post-accident earning capacity of an injured transport accident victim. Therefore, **we recommend that in assessing the earning capacity of a surviving spouse, the Corporation should apply the principles, with any necessary modifications, applied to the assessment of the post-earning capacity of an injured person.**

V. REPLACEMENT HOUSEHOLD SERVICES

12.54 Chapter 10 outlined the principles on which replacement household services should be provided by the Corporation, where these services had been provided to family members by the person injured prior to the accident. Earlier in this Chapter we anticipated that where a person killed as the result of a transport accident had provided household services, provision would be made for replacement of these services (paragraph 12.16). As in the case of injured providers of such services, benefits should only be available where the services provided were "substantial". Thus replacement services should not be provided where the deceased performed only occasional minor household work. [63] **We recommend that, subject to the assessment of need, dependent family members of a person:**

(a) who is killed in a transport accident; and

(b) who, before the accident, performed substantial household services for members of his or her household,

should be entitled to replacement services, to the extent necessary for the maintenance and preservation of the household of which the deceased was a member. If the household services rendered by the deceased were substantial, entitlement to benefits should not depend on whether the deceased was an earner or non-earner.

12.55 The general considerations governing the extent of household services to be provided should correspond with those applied in cases where the provider of services has been injured but not killed. [64] Therefore, in assessing the immediate need, account should be taken of the services provided by the deceased, the extent of the need for such services of individual dependents, and the availability of substitute services from other family members. In addition, where a surviving spouse has formed a new relationship which provides additional support to the family, whether financial or in the form of household services, this should also be taken into account Accordingly, **we recommend that in assessing the extent to which replacement household services are necessary, the Corporation should have regard to:**

(a) the household services provided by the deceased before the accident;

(b) the number of dependents, their ages, and need f or household services;

(c) the household services that other family members could reasonably be expected to provide after the death of the person;

(d) any new relationship formed by a surviving spouse of the deceased; and

(e) any special factors affecting the need of the dependents for household services.

In determining what is reasonable for the purposes of paragraph (c), the same criteria should apply as in the case of a disabled service provider.

12.56 It is consistent with the emphas is on adjustment to the changed circumstances caused by death that substitute household services should be concentrated in the period immediately following death. As in the case of

injury to the provider of household services, once emergency needs are met, consideration should be given to the financial position of the household. This should include the extent to which other compensation payable under the Scheme could reasonably be used for the provision of household services. Again, as in the case of injury to the services provider, we propose a limit of two years from the date of death on the provision of household services except in cases of special hardship. Therefore, **we recommend that in assessing the extent to which replacement household services are necessary after the expiration of four weeks from the date of death, the Corporation should have regard to the following additional criteria:**

> **(a) the compensation and other benefits provided to household family members arising out of the transport accident;**
>
> **(b) the earnings and other income of the spouse of the deceased; and**
>
> **(c) the resources, financial or otherwise, available to household family members to meet the need for household services.**

Except in cases of special hardship, replacement household services should not be provided after two years from the date of death.

12.57 The reference to special hardship is intended to cover situations which parallel those in which periodic compensation may be made on the basis of needs, to the surviving spouse of a deceased earner. These would include situations:

> where the deceased was an earner, working part-time and living alone with an invalid spouse for whom he or she provided household services;
>
> where the deceased was a full-time earner but lived in a household where his or her spouse had the full-time care of an elderly relative and the deceased assisted the spouse in providing that care; and
>
> where the deceased and his or her spouse had a number of dependent children and both worked full time.

Even in cases of special hardship, entitlement to household services should still be governed by the overriding principle of need and such services should not be available for more than five years after the death. Accordingly, **we recommend that where it would cause special hardship to terminate the provision of household services at the expiration of two years, the Corporation should have power to continue such services for a further period not exceeding three years.**

VI. LIMITS OF BENEFITS

A. General Limits

1. Time Between Accident and Death

12.58 When a transport accident victim is killed, death usually occurs at the time of the accident or shortly thereafter. [65] In such cases there is no problem of overlap between benefits provided to an injured person prior to death and benefits payable on death. However, if death does not follow immediately on the accident, the injured person will be entitled to all of the benefits normally available under the Scheme until death intervenes. If the death can be shown to be the result of the transport accident injury, the question then arises as to what allowance, if any, should be made against death benefits for benefits provided prior to death. Under the Victorian and Tasmanian no-fault schemes, compensation payable by way of death benefits is reduced by the amount of compensation paid prior to death. [66] We are not persuaded that a straight set-off is justified when account is taken of the distinct purposes served by death benefits. This is especially so if death occurs not too long after the accident, at the end of a period of considerable stress on the injured person's immediate family. The process of adjustment which must be made once death has occurred would have been impossible while the family's resources were directed to the comfort and treatment of the seriously injured family member.

12.59 Under both the Victorian and Northern Territory schemes, no death benefits are payable if the death occurred more than two years after the accident, but under the Northern Territory scheme benefits paid during that two year period are not set off against death benefits. [67] We agree that benefits received after the accident, but prior to death, should be retained and not set off against death benefits. However, we propose a period of five rather than two years. The extension from two to five years is unlikely significantly to increase the number of claims. This is partly because, as time passes, the causal connection between the original injury and death becomes less clear and therefore difficult to establish. After five years, the value of benefits already provided to the injured person is likely to exceed the maximum benefits available on death. In our view, if death occurs more than five years after the accident, no death benefits should be payable. Therefore, **we recommend that where death, caused by or arising out of a transport accident, occurs:**

(a) within five years of the accident, the benefits paid or provided to the accident victim prior to death should not be set off against benefits available on death; or

(b) five years or more after the accident, no further benefits should be payable.

2. Deaths in Rapid Succession

12.60 In some cases several members of a family may be killed in a single car accident. Where several family members are killed or injured at the same time, the existing law permits the payment of compensation to a child or spouse of the deceased who survived only for a few seconds after the deceased's death. [68] In our view it would be inappropriate for the Scheme to pay compensation in such circumstances. For this reason, **we recommend that a person otherwise eligible to claim compensation for the death of another person should not be entitled to such compensation unless he or she survives the deceased for a period of not less than 30 days.**

3. Deaths of Both Parents

12.61 Where both parents are killed in the same transport accident, benefits payable to surviving dependent children should be twice those normally payable when one parent has died. The total loss of parental support and acute problems of readjustment justify the payment of maximum benefits.

B. Limits on Periodic Payments to Spouse and Children

12.62 In actions under the Compensation to Relatives Act, 1897, there is no fixed formula by which a dependent family's share of a deceased breadwinner's earnings is determined for the purpose of calculating the loss of material support provided by the deceased. The share depends on the level of the deceased's earnings and the particular family circumstances. In one recent case heard in the New South Wales Court of Appeal, the Court determined that the proportion of income spent on this particular family (a dependent wife and two children) would vary from 50 per cent to 75 per cent over a period of 35 years. [69] Under the Scheme, the deceased's earnings form the basis for calculation of the periodic payments to a Surviving spouse with dependent children, during the five year period following death (paragraph 12.44). If the deceased had lived, compensation for loss of earning capacity would be limited to 80 per cent of pre-accident earnings up to a maximum of 150 per cent of AWE. [70] It follows that death benefits in the form of periodic payments should be subject to corresponding limits as well as reflecting the degree of dependency of surviving family members. An upper limit of 65 per cent of the deceased's earnings, which we recommend, appears to be sufficiently generous, especially when account is taken of the lump sum payment which can be used to reduce ongoing commitments, such as mortgage repayments, which would have been met out of the earnings of the deceased. **We recommend that, where compensation by way of periodic benefits is paid to a surviving spouse with the care and control of children during the first five years after the death of an earner-spouse, total weekly payments to spouse and children should not exceed 65 per cent of the earnings of the deceased, subject also to a ceiling on the earnings of the deceased of 150 per cent of AWE ($630 at June 1984).**

12.63 A corresponding limit should be imposed on total weekly payments to spouse and children in those categories of need in which a spouse is entitled to periodic payments up to 50 per cent of AWE (paragraphs 12.44 and 12.48). Therefore, **we recommend that where compensation by way of periodic benefits is paid to a surviving spouse:**

(a) with the care and control of children during a period after five years from the death of an earner-spouse; or

(b) in other cases where the earning capacity of the surviving spouse has been substantially impaired during the first five years after the death of an eamer-spouse,

total weekly payments to spouse and children should not exceed 65 per cent of the earnings of the deceased or 65 per cent of AWE, whichever is the lesser.

12.64 When a ceiling is imposed then the Corporation should apportion the amounts payable as between the spouse and children. No set formula is recommended for this apportionment because it could, in the interests of fairness, be adjusted according to the needs of the particular beneficiaries in particular cases. Therefore, **we recommend that the Corporation should have the power to determine how any reduction in the compensation that otherwise would have been payable should be apportioned between the spouse and children.**

12.65 Where no periodic payments are made to a surviving spouse but only to children (this will be the case, for example, where the deceased was a non-earner), it is appropriate to impose a ceiling on these payments equivalent to 32 per cent of average weekly earnings ($134.40 at June 1984). This would be sufficient to provide support and care to a family and there would be no reduction in benefits until the children were independent. **We recommend that where periodic compensation is payable to children only, the total weekly compensation paid to all dependent children should not exceed 32 per cent of AWE.**

C. Death of Spouse or Child

12.66 There is no justification for the continuation of payments of any kind once the eligible spouse or child dies. Therefore, **we recommend that periodic compensation payable to a spouse or child should cease on the death of that spouse or child.**

D. Remarriage of Spouse

12.67 We have already proposed that the marriage of a child excludes the child from being treated as such for purposes of entitlement to benefits (paragraphs 12.25 and 12.38), but we have recommended continuation of a child's benefit if the surviving mother or father of that child remarries (paragraph 12.41). Periodic compensation payable to a surviving spouse should cease on remarriage. **We recommend that compensation by way of periodic benefit to a surviving spouse should cease on the remarriage of the spouse.**

12.68 The termination of the benefit in these circumstances may act as a deterrent to a surviving spouse to remarry. This plainly would be undesirable. Accordingly, a lump sum should be paid to a surviving spouse who remarries during the five years immediately following death. This is designed to offset the disincentive to remarry which termination of periodic benefits might otherwise create. **We recommend that when a surviving spouse who is receiving periodic compensation remarries within four years of the deceased's death, or up to one year before his or her youngest child attains 16, he or she should receive a lump sum payment equivalent to one year's instalments of compensation. If the remarriage occurs in the fifth year after the death, or within one year of the youngest child attaining 16, the spouse should receive a lump sum payment equivalent to the remaining compensation which would have been paid by way of periodic benefit had the marriage not occurred.**

VII. FUNERAL EXPENSES

12.69 Reasonable funeral expenses are provided under all existing schemes. This is one form of economic loss which the family of a deceased person would suffer, regardless of whether they were dependent on the deceased or not. **We recommend that the reasonable funeral expenses of people killed in transport accidents should be met by the Corporation.**

VIII. SOLATIUM

12.70 The Working Paper suggested that, where the deceased was a child, provision for a small payment as compensation for grief and suffering should be made. We were unable, even at that stage, to Justify any large payment and expressed some concern that a small payment might be seen as a form of tokenism and therefore insensitive in the circumstances. We also drew attention to the fact that no provision for such payment exists in any other scheme in New South Wales providing for death benefits. [71]

12.71 The recommendations for the payment of compensation on death have been greatly modified since the Working Paper proposals. Particularly vulnerable groups among survivors have been identified and larger benefits have been recommended. As well as payments to surviving children affected by the death of a parent, more generous provision has been made for family members, especially where a surviving spouse can be identified as having particular difficulties in re-entering the workforce or in increasing workforce participation immediately following on death. These groups have first claim on available resources under the Scheme and it is likely that any money paid as solatium could only be set at a low level. In these circumstances, **we recommend that no compensation should be paid as consolation for grief and bereavement (solatium) to a surviving spouse, children or other dependents of the deceased.**

IX. ADMINISTRATIVE MATTERS

A. Interim Payments

12.72 We have stressed that compensation on death should provide especially for the short-term financial dislocation which death causes. This is an area of compensation where prompt payments to beneficiaries are essential. However, there could be many difficult cases arising out of the proposals concerning eligible claimants and the assessment of compensation. In such cases, delays in assessment could arise. This should not prevent prompt payment to those whose eligibility and minimum entitlement can be easily and clearly established. **We recommend that the Corporation should have power to make interim payments pending determination of claims (including claims for apportionment of a lump sum).**

B. Establishing Eligibility

12.73 Problems may arise in identifying eligible dependents where there is a number of potential beneficiaries for lump sum benefits. It will be essential for the Corporation to develop procedures to make sure that all those entitled to benefits receive them and that there is no overpayment of benefits to one claimant at the expense of another. Therefore, **we recommend that the Corporation should develop procedures to ensure discovery of the identity of all persons eligible to claim the lump sum.**

X. SUMMARY

12.74 The Scheme should provide compensation on the death of a person killed in transport accident. Emphasis should be placed on the readjustment required as the consequence of the death of a family member and also on the need to encourage able-bodied surviving family members to become self-supporting. Benefits should take the form of:

- a lump sum for the benefit of dependent family members; and
- periodic compensation for the spouse and children of the deceased.

Lump Sum

12.75 Dependent family members of the deceased should be entitled to claim 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. Thus the lump sum should be payable whether the deceased was an earner or non-earner. Ordinarily, the spouse and child of the deceased would claim the lump sum. Other family members may claim a share by establishing dependence.

Periodic Compensation: Spouse with Child-Care Responsibilities

12.76 A surviving spouse with child-care responsibilities should be entitled to periodic compensation on the death of an earner, in addition to claiming the whole or part of the lump sum. For a period of up to five years benefits should be paid at the rate of 50 per cent of the earning capacity of the deceased on a net (after tax) basis, to a maximum of 75 per cent of AWE (after tax). Thereafter a surviving spouse should be entitled to periodic compensation if he or she continues to have child-care responsibilities and cannot support himself or herself adequately. In these circumstances, compensation should be available to ensure that the income (including unused earning capacity of the spouse) does not fall below 50 per cent of the deceased's earnings or 50 per cent of AWE, whichever is less. This additional compensation should cease when the youngest child attains 16 or the spouse remarries.

Periodic Compensation: Other Cases of Need

12.77 A spouse without child-care responsibilities may also have special needs because he or she is prevented by circumstances from resuming or undertaking employment. Where the earning capacity of a surviving spouse is substantially impaired due to:

poor health;

advanced age and lack of relevant work skills; or

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

periodic compensation should be payable on the same basis as that which applies to surviving spouses with child care responsibilities during a period beyond five years from the death of the earner-spouse. Compensation in these cases of special need should be paid up to five years from the date of death.

Periodic Compensation: Children

12.78 Dependent children of the deceased, in addition to being able to share in the lump sum, should be entitled to periodic compensation at the rate of 8 percent of AWE ($33.60 in June 1984). This should be paid until the child reaches the age of 16 or, in the case of a full-time student or a mentally or physically handicapped child, 21 years.

Replacement Household Services

12.79 Replacement household services should be available to surviving dependent family members where such services were provided by the deceased. The criteria upon which entitlement to such services is determined should be equivalent to those applying in cases of injury (Chapter 10). This means that replacement household services should be supplied for an initial period of four weeks, after which additional factors such as family resources should be taken into account. Generally, household services should be provided for up to two years from the date of death; in cases of special hardship they should be continued for a further period not exceeding three years.

Funeral Expenses

12.80 Reasonable funeral expenses of people killed in transport accidents should be met by the Corporation.

FOOTNOTES

1. Working Paper, cl.8.

2. *Baker v. Bolton* (1808) 1 Camp 493.

3. See para.2.10.

4. See para.2.34,

5. See para. 14. 100.

6. *Jones v. Schiffman* (1971) 124 CLR 303.

7. *McIntosh v. Williams* [1979] 2 NSWLR 543.

8. *Heffernan v. Accidental Minerals Corporation of Australia* [1978] 2 NSWLR 412.

9. Compensation to Relatives Act, 1897, s.3(2).

10. Law Reform (Miscellaneous Provisions) Act 1944. s.4. See *State Rail Authority of New South Wales v. Sharp* [1981] 1 NSWLR 240.

11. An example would be a child who suffers shock when told, on arriving at a hospital, that a parent has dies. Cf. *McLoughlin v O'Brien* [1982] 2 All ER 298; *Jaensch v Coffey* (1984) 58 ALJR 426.

12. Workers' Compensation Act, 1926, s.8(1), (1A).

13. *Id*., s.8(2).

14. *Id*., s.8(3).

15. *Id*., s.8(4).

16. Accident Compensation Act 1982 (NZ), s.65.

17. *Id.,* s.70.

18. *Id*., s.82.

19. Motor Accidents Act 1973 (Vic.), ss.26, 27.

20. *Id*., s.30(2).

21. Motor Accident (Liabilities and Compensation) Act 1973 (Tas.), schedule 1, part III.

22. *Id*., schedule 1, part IV, cl.1(5).

23. Motor Accidents (Compensation) Act 1979 (NT), ss.22. 23.

24. *Id*., s.25.

25. *Id*., s.24.

26. *Id*., s.26.

27. See paras.2.10, 2.34, 2.38, 2.48 and 2.50.

28. Working Paper, paras.8.13-8.21.

29. Submission W28, p.6.

30. The term "earner" should be given the same meaning as it was in para.7.8.

31. See paras.12.2-12.8.

32. Australian Woodhouse Report, vol.1, paras.357-361.

33. See Working Paper, paras.8.7-8.10.

34. Workers' Compensation Act, 1926, s.6, Motor Accidents Act 1973 (Vic.), s.3; and Motor Accidents (Compensation) Act 1979 (NT), s.4.

35. At the time of writing, the De Facto Relationships Bill and Cognate Bills had been passed by both Houses Of the New South Wales Parliament and were awaiting assent and proclamation.

36. New South Wales Law Reform Commission, *Reporton De Facto Relationships* (LRC 36,1983), paras. 17.4-17.9.

37. Compensation to Relatives Act, 1897, s.7.

38. Workers' Compensation Act, 1926, s.6.

39. Student Assistance Regulations (Cth.), regs.29(2), 41.

40. Sections 94(2A), 103.

41. Section 8(1) (b).

42. Compensation to Relatives Act, 1897, ss.4, 7.

43. Workers' Compensation Act 1926, s.6.

44. Australian Bureau of Statistics, *Summary Characteristics of Persons and Dwellings* (New South Wales), Cat No. 2435.0, p.14, table 18. See also Appendix A, para.A.6.

45. Australian Bureau of Statistics, 1981 *Census of Population and Housing-Census Statement 4* (October 1982) sheet 2, table 9. See also Appendix A, para.A.5, Table A.2.

46. Fifty-six percent of those killed were under 30 years of age. See Traffic Authority of New South Wales, *Road Traffic Crashes in New South Wales, Statistical statement year ended December 31st 1982*, pp.12, 13.

47. See Motor Accidents (Compensation) Act 1979 (NT), s.25; Motor Accidents (Liabilities and Compensation) Act 1973 (Tas), schedule 1, part IV, s.1(4), (5).

48. Submissions W53, para.8.2, W59, paras.5.4, 5.5 and 5.8.

49. Declared by Income Tax Rates Act 1982 (Cth.), ss.14, 16 and schedule II.

50. Income Tax Assessment Act 1936 (Cth), s.102AJ.

51. S W Cavanagh, *Background Paper on the Income Tax Assessment Act 1936* (Cth) (unpublished Commission document, 1984), p.14.

52. A further advantage of a general exemption is that it would apply to "full-time" students between 18 and 21 and not only minors (ie. persons under 18).

53. This is particularly the case in assessment of common law damages. See eg. the comments of Zelling J. in *Fisher v. Smithson* (1977) 17 SASR 223, at p.241 regarding the undervaluing of the losses of children.

54. Australian Bureau of Statistics, *Labour Force Australia, March* 1984 (preliminary estimates), Cat No.6202.0, p.6, table 1.

55. Appendix A, Table A.8.

56. *Id*., Table A. II.

57. *Id*., paras.A.28-A.29.

58. *Id*., Tables A.20 and A.21.

59. *Id*., Paras.A.44-A.45 and conclusions of B. Cass and M. O'Loughlin. *Social Policies for Single Parent Families in Australia* (Social Welfare Research Centre Report No.40, March 1984), p.10, table 3.

60. As may be necessary in the case of periodic payments to children, see para.12.39.

61. Cf. *Federal Commissioner of Taxation v. Slaven* (1984) 15 ATR 242.

62. See paras.14.18-14.19.

63. See para.10.4.

64. See paras.10.5-10.6.

65. For statistical purposes in New South Wiles, both the Traffic Accident Research Unit and the Australian Bureau of Statistics use only those deaths which occur within thirty days of injury. See Traffic Accident Research Unit, *Road Traffic Crashes in New South Wales-Year ended December 31st 1980,* p.7; Australian Bureau of Statistics, *Road Traffic Accidents Involving Casualties (Admission to Hospitals) Australia* (March Quarter 1981), Cat No.9405.0, p.l.

66. Motor Accidents Act 1973 (Vic.). ss.25,26 and 27; Motor Accidents (Liabilities and Compensation) Act 197; (Tas.), part IV.

67. Motor Accidents Act 1973 (Vic.), ss.26, 27; Motor Accidents (Compensation) Act 1979 (NT). ss.22, 23 and 24.

68. Conveyancing Act, 1919, s.35.

69. *Nash v Miners,* 6 April 1983, Supreme Court of New South Wales. Court of Appeal.

70. See paras.8.22, 8.29.

71. Compensation might be payable for the death of a child in consequence of a tort action for nervous shock under the Law Reform (Miscellaneous Provisions) Act, 1944, part III, or as criminal injuries compensation: see Crimes Act. 1900, s.437. It is not available under the Compensation to Relatives Act, 1897 or under any of the existing no-fault schemes either in Australia or New Zealand.

13. Medical, Hospital and Related Services

I. INTRODUCTION

13.1 A person injured in a transport accident is likely to require medical attention and if the injuries are serious, hospital treatment. To achieve prompt and effective rehabilitation, physiotherapy and other ancillary services may also be needed. The injured person may have to recuperate for a period in a convalescent hospital or nursing home. Some injured people, while capable of living in their own homes, will require home nursing services temporarily or permanently. The few who are too disabled to live within the community, even with generous support services, will need long-term institutional care.

13.2 Some of the problems associated with providing the necessary services to accident victims have been dealt with briefly in Chapters 9 and 10. This Chapter examines the ways in which medical hospital and related services can be provided to transport accident victims, without creating cost control problems. Before making recommendations, however, it is necessary to consider current arrangements for the provision of health services generally and the special arrangements which have applied to “compensable” third party claimants-that is, accident victims who have common law negligence claims. The recommendations in this Chapter attempt to integrate the Transport Accidents Scheme with the national health care system.

13.3 This Chapter is not intended to resolve all the difficulties of providing services to transport accident victims. For some years now, these services have been in a state of flux. Funding arrangements between the State and Commonwealth governments have changed frequently, as have internal State controls on the health care system. Because of the fluidity of these arrangements, the recommendations have been framed in general terms and some matters have been left to negotiations between the State and the Commonwealth.

II. A NECESSARY BALANCE

13.4 The prompt provision of high quality medical and related care after the occurrence of an injury in a transport accident is obviously an essential part of a comprehensive compensation scheme. Accordingly, **we recommend that necessary and reasonable medical, hospital and related services should be provided to all people injured in transport accidents.** It is important, however, to be aware of the potential for rapid cost escalation in the area of health services and of the danger this poses to the long term viability of the Scheme. The administration of the Scheme should ensure that so far as possible, costs are kept within reasonable limits and that the opportunities for unnecessary treatment by service providers are minimised. The means by which services are to be provided therefore require careful consideration.

A. The Experience in Other No-Fault Schemes

13.5 The rapid increase in medical and related costs in no-fault schemes, even over relatively short periods, has generated considerable concern. Table 13.1 shows the rate of medical cost increases in the New South Wales workers’ compensation system, the New Zealand accident compensation system and the limited no-fault scheme administered by the Victorian Motor Accidents Board, over the five year period 1977-1982. Victoria and New Zealand statistics confirm that this trend has continued in the more recent period. [1] All figures in the table have been converted to New South Wales dollar values (as at 30 June 1984) to show more clearly the rapid increase in these costs above the general rate of inflation.

Table 13.1: Medical Costs: No-fault Compensation Schemes

Victoria, New South Wales and New Zealand 1977-1982

Scheme	Medical Costs ($ Million NSW 30/6/84 values)		
	1977	1982	% Change

Victorian Motor Accidents Board	4.668 (a)	10.082 (a)	116.0
New Zealand Accident Compensation Corporation	1.263 (b)	2.304 (b)	82.4
NSW Workers Compensation Commission	36.972 (c)	52.359 (c)	41.6

(a) Actuary's Report, appendix K, C3.

(b) *Id*., appendix E11, C1.

(c) Information supplied by Workers' Compensation Commission, Actuary's Report, appendix C4.

13.6 In its 1983 Annual Report, the New Zealand Accident Compensation Corporation expressed its deep concern

> ... at what appears to be a rapid escalation both in treatment fees and the number of treatments being provided ... Discussions are currently under way with a view to the establishment of some simple form of schedule of fees. If agreement in this area cannot be reached then the Corporation may have to consider other alternatives. [2]

A submission from a doctor who practised for some time in New Zealand put forward some reasons for these cost increases. Fraudulent over servicing was, in his view, only one reason for the disproportionate rises.

> The ACC meant relatively easy money for doctors, and those that felt no compunction to over service did very well... There was a natural desire by the doctors to want to treat ACC cases in the medical centre rather than the hosp ital as the latter attracted no fee .... The temptation to experiment on ACC cases was irresistible. When one could charge extra for little extras, the little extras became routine... There was a great temptation to become an ACC specialist. [3]

13.7 The Victorian Motor Accidents Board Annual Report for the year ended 30 June, 1983 noted the "escalating costs associated with the treatment of motor accident cases" and the need to establish "some benchmark of 'reasonable' treatment costs per applicant". [4] The Consulting Actuary noted that:

> [t]he growth in hospital, medical and other costs has slowed in Victoria in the last four years. Victoria is establishing a system for listing the numbers of services of each type provided by each doctor. The total payments made each month by each doctor are monitored. In cases not conforming to normal patterns, the MAB can refer the matter to the Australian Medical Association, or can refuse payment. [5]

B. The Experience of the General Health Care System

13.8 The problem of increasing health care costs has not been restricted to compensation systems but has aroused concern in the general health care system. In 1978, the then Commonwealth Minister for Health noted that:

> [t]he costs of health care per head in Australia have risen from $104 in 1966/67 to $447 in 1976/77-that is, by more than four times in 10 years. Despite this very rapidly rising financial burden on the community there is no evidence available to show a decline in illness. [6]

These and subsequent increases have been blamed upon a variety of factors including an over-supply of doctors leading to increased use of medical services, [7] private insurance and government funding initiatives, [8] and deliberate "medi-fraud". [9]

13.9 These concerns have led to efforts by governments and policy makers to contain expenditure on health care. For example, in unveiling its Medicare program in January 1983, the then Labor Opposition affirmed its commitment to cost containment.

> Labor will seek to build into the health system restraints on medical fees and make conditional the use of public health facilities on the observance of fee restraint... Labor ... will seek through the insurance system to maintain computer monitoring profiles on all doctors; and support the further development of effective accreditation, peer review and hospital audit systems ... In cooperation with the States and the medical profession a Labor government will revise the present medical benefits schedule, adjusting charges in the light of technological developments and modifying relativities particularly where they provide incentives for inappropriate and costly alternative procedures. [10]

C. Lessons for the Transport Accidents Scheme

13.10 The experience of both the compensation and general health systems strongly suggests that recommendations for health care services must be framed with the objective of cost control in mind. Since the general health care system has had to grapple with this problem there is no apparent justification for making recommendations inconsistent with the constraints or procedures imposed by that system. Yet the provision of health care services to compensable accident victims has developed separately from the system applied to other sick or disabled members of the community. In some cases this has led to services being unavailable to accident victims, as has occurred with accommodation in some private hospitals. [11] In others, it has led to service providers charging fees well above those otherwise charged to patients requiring precisely the same services. [12] In principle, this distinction cannot be justified. It can lead to vastly different treatment for compensation patients in comparison to other injured or ill people. This has implications both for costs and for the capacity of the system to meet patients needs. Before making specific recommendations, however, it is important to explain the differences in the provision of health care services for non-compensable members of the community and compensable motor accident victims.

III. EXISTING HEALTH CARE ARRANGEMENTS

A. The Community Generally

1. Medical Costs

13.11 On 1 February 1984, the new Medicare system was introduced. This followed an eight year period, from the commencement of Medibank in 1975, during which no less than five major changes in the health insurance and health care service provision had occurred. [13] Medicare reaffirmed the notion of a universal health care system. It is funded by a levy of 1 per cent on taxable income, up to an earnings ceiling of $70,000 per annum. There are exemptions from levy payments for low income earners and families. in relation to medical costs, Medicare covers 85 per cent of the scheduled fee, subject to the following.

> Where the 15 per cent difference between 85 per cent and the scheduled fee exceeds $10 per service, the patient contribution is limited to $10.
>
> Where the total patient contribution covering the gap between the Medicare contribution and the scheduled fee, exceeds $150 in any one year, Medicare will pay 100 per cent of the scheduled fee for any further services required.

13.12 It is not possible to buy “gap insurance” to cover the difference between the Medicare contribution and the scheduled fee or the fee actually charged. In September 1983, the then Minister for Health stated that

> ... “gap insurance” underpins the practice of fixing charges above the schedule fee... It is only doctors who would be financially better off if gap insurance were permitted. For all of these reasons the Government will not allow gap insurance to be offered. In this way doctors will be encouraged to limit their charge to a level around the schedule fee and this will be important in containing Australia’s overall health bill. [14]

The gap, therefore, can be seen as a tool of cost containment.

13.13 Medicare is administered by a single authority, the Health Insurance Commission, which is also responsible for the government-run “private” health insurance fund Medibank Private. One advantage of a single authority was seen to be the savings in administration and other expenses which would flow from removing the right to offer basic health insurance from the 63 health funds [15] which had previously operated in the field. A single authority was also considered to be an effective means of monitoring and controlling medical costs. The Minister for Health put the argument as follows:

> [t]he other major argument in favour of having a single public fund operate Medicare is the timely and accurate supply of data on doctors’ services in the detection of fraud and over servicing. The contribution of the present system whereby 63 different organisations supply that data means that the accumulation of doctors profiles is dependent upon the speed of the slowest fund. The Health Insurance Commission is currently the timeliest and most accurate fund in Australia ... While the overall responsibility for investigating fraud and over servicing will remain with the Health Department it is pertinent to note that the Health Insurance Commission has been among the most active of the private funds in pursuing suspected cases of fraud. [16]

13.14 The compensable patient constitutes one of the few exceptions to coverage by Medicare. This Chapter later discusses arrangements for such patients in New South Wales, specifically in relation to third party compensable patients. However, the Minister for Health has indicated the Commonwealth’s willingness to examine the current position with State government and general insurance representatives, in order to

> ... simplify the administrative arrangements for these services at some future date. [17]

2. Hospital Costs

13.15 In addition to covering medical costs, Medicare provides for free public hospital accommodation and treatment, by a hospital-appointed doctor. However, a person who wishes to be treated by a doctor of her or his own choice in a public hospital, or in a private hospital, must meet certain costs, either through private health insurance or direct payments to the hospital or the service provider.

Public Hospitals

13.16 A person who wishes to be treated by a doctor of his or her choice in a public hospital must pay a fee of $80 per day for shared ward accommodation. This is not covered by Medicare, and so the patient must meet the cost. Generally, patients making this choice to be classified as private patients are covered by private health insurance. Where a person elects to be treated as a private patient in a public hospital the attending doctor is able to charge separately for his or her services in hospital. Medicare benefits are payable for these services. However, a doctor who treats a public patient in a public hospital cannot charge the patient for these services. Out-patient treatment in public hospitals is also provided free of charge.

Private Hospitals

13.17 Private hospital charges are not covered by Medicare benefits. Doctors at private hospitals charge fees separately for their services. These fees are covered by Medicare, subject to the usual limitations.

13.18 Private hospitals are classified into three classes for the purpose of basic hospital insurance benefits and Commonwealth daily bed subsidies. These classifications are designed to reflect the varying cost structures and nature of services provided by these institutions.

> Private hospitals are a very diverse range of institutions. At one extreme are the major surgical hospitals, mostly run by religious or charitable organisations which provide a level of care and services comparable with that in the major public hospitals. At the other extreme are bush nursing and other small hospitals, generally located in rural areas which, except for a few beds, provide a service similar to that of a nursing home. [18]

Table 13.2 shows the financial consequences of the categorisation of hospitals in terms of daily benefits payable by the Commonwealth and insurance funds.

Table 13.2: Private Hospitals: Basic Contributions

Australia 1984

Category of Hospital	Commonwealth Subsidy	Basic Insurance Benefit
A	$40	$120
B	$30	$100
C	$20	$80

Source: Commonwealth Parliamentary Debates, House of Representatives, 6 September 1983, p.406.

From 1 July 1985, it is expected that the State government will take over the payment of the Commonwealth subsidy, subject to satisfactory financial arrangements being reached with the Commonwealth. [19] This change is designed to allow the State government more direct control over the operations of private hospitals.

13.19 Private hospitals are not obliged to limit their charges to the combined total of the Commonwealth subsidy and the health fund benefit. They are free to set their own charges, which can leave even insured patients with significant costs to meet, although some insurance tables provide greater benefits designed to meet additional costs, for example, in respect of a private room. Private hospitals may levy other charges which are not covered by Medicare or basic private insurance, such as theatre fees, outpatient theatre fees and labour ward fees. Some or all of these may be covered by the higher private insurance tables. There are also time limits in any one year for which higher table benefits will be payable. [20]

Commonwealth/State Financial Arrangements for Hospitals

13.20 The Commonwealth/State financial contributions to the hospital system have been in a state of flux for several years. Following a period during which Commonwealth contributions slowly decreased, [21] in September 1981 the then government discontinued the 50:50 cost sharing arrangement and replaced it with an untied but identifiable general revenue health grant. [22] The revenue to the New South Wales Hospital Fund [23] in the 1983 financial year amounted to $1,418.2 million, of which 34.1 per cent came from the Commonwealth identified health grant. [24] Total payments for subsidies and other assistance for public hospitals from the Fund in that same year were $1,100.3 million. [25]

13.21 With the introduction of Medicare in February 1984, funding arrangements again altered. One of the cornerstones of Medicare was the reintroduction of universal free in-patient and out-patient treatment for public patients at public hospitals. This involved loss of revenue to the State hospital system, as did other Government health care policies. [26] Consequently, in addition to the identified health grants, the Medicare agreement included funding for

(a) revenue losses and additional costs resulting from the removal of in-patient and out-patient fees for eligible persons who elect to be treated free as hospital patients in recognised hospitals; and

(b) revenue losses resulting from a reduction in fees for private patients in recognised hospitals. [27]

Additional compensatory payments were also to be made when a State took over the payment of day bed subsidies of private hospitals. [28] These were subject to the condition that the States provide specified services without charge to eligible patients. [29]

13.22 While it appears likely, in the short term at least, that current financial arrangements will continue, the longer term position is more uncertain. The Medicare Agreement creates a Commonwealth and State Standing Committee on Health Services. [30] Its functions include reviewing

> ... the amounts of grants, the base of the determination of grants ... [and] the development modification and funding of health services in which the Commonwealth and the State are mutually interested. [31]

There is also the possibility that a change in government will lead to significant policy changes.

3. Ancillary Services

13.23 In addition to medical and hospital care, a patient may require ancillary services to meet his or her health needs. These may include physiotherapy, occupational therapy, psychological counselling, dental or optical services, chiropractic services and a range of similar services. Ancillary care is not generally covered by Medicare. although where such services are provided as part of a hospitals out-patient facilities no fees are levied. It is in the area of ancillary care that private-insurance is expected to play an important role. Ancillary services have been excluded from Medicare because of the need to curtail costs and the Government's desire to provide basic health cover at the lowest Cost. [32]

13.24 The ancillary cover which is provided by private funds varies considerably, as does the cost of different tables. All funds provide limits both on the amount refunded for each service and the total annual amount refunded for such service or range of services. Once a person exceeds these limits, he or she must pay for any extra services required.

13.25 Many ancillary services are provided by private practitioners, such as dentists, physiotherapists, chiropractors and optical service providers. Practitioners are generally free to set their own fees, although the professional associations often prepare standard fee schedules for the guidance of members. These schedules are usually some what higher than the refunds provided by ancillary insurance cover. Services also may be provided through rehabilitation centres, out-patient clinics at public and private hospitals and community health centres. Some kinds of services, such as occupational therapy, are likely to be provided through centres and clinics, rather than through private practitioners. Fees may or may not be charged for services provided through centres or clinics. For example, if physiotherapy or other services are provided through a public hospital out-patient clinic, fees are not levied. Dental services are available free from some hospitals in New South Wales to pensioners and low income earners who hold appropriate health concession cards. [33]

4. Convalescent Care

13.26 A patient requiring convalescent care usually goes to a nursing home. However, a patient requiring such care may remain in a public or private hospital where benefits available and fees levied may be considerably higher than if the patient were in a nursing home. Such people may be classified as "nursing home type patients".

Nursing Home Type Patients

13.27 With the introduction of Medicare, the Commonwealth government altered the arrangements for patients who require extended care in a public or private hospital Where a person is hospitalised for a continuous period of more than 35 days, and is no longer in need of acute care [34] or is not undergoing active rehabilitation, [35] he or she will be reclassified as a nursing home type patient. The patient s doctor can issue a certificate stating that the patient continues to require acute hospital care under section 3B of the Health Insurance Act 1973 (Cth), and so avoid this reclassification. The reclassification has several consequences.

13.28 First a patient whether public or private, in a public hospital in New South Wales will be charged a non-insurable patient contribution This is calculated as two-thirds of the single age pension, plus 80 per cent of the supplementary rental allowance ($9.65 per day in August 1984), and is the same amount payable by patients in

New South Wales State-run nursing homes. The contribution varies as the pension varies. Secondly, those patients who opt to be treated as private patients in public hospitals will, in addition, be charged the equivalent of the extensive care nursing benefit rate ($38.35 per day in August 1984). A privately insured patient can claim this amount from the health fund. [36]

13.29 The effect of this new classification on patients in private hospitals was explained by the Commonwealth Minister for Health.

> The effect of these new arrangements will be that an injured patient in a private hospital who is classified as a nursing home type patient will be paid $80 per day less the patient contribution. The payment will be frozen at this level until such time as it is equal to the standard nursing home benefit plus patient contribution. Private hospitals will then be receiving the same amount as public hospitals for their long-stay patients. [37]

In addition to the amount paid by private insurance, the patient will have to pay a non-insurable contribution equivalent to 87.5 per cent of the single age pension ($12.40 per day in August 1984). [38] This amount is greater than the general New South Wales patient contribution referred to in paragraph 13.28, which is payable in New South Wales public hospitals and State-run nursing homes. The decision to set the New South Wales required contribution rate at a lower level than that of the Commonwealth was made in an attempt to “minimise the financial burden placed on individuals”. [39] The higher Commonwealth rate applies, however, to private hospital patients in New South Wales and to patients in other States.

Nursing Homes

13.30 In addition to long-stay patients in public hospitals, patients who require convalescent care or more long-term institutional care maybe accommodated in nursing homes. There are three general classes of nursing homes in New South Wales:

non-government participating nursing homes;

deficit-funded nursing homes;

and State-run nursing homes.

Participating nursing homes are generally profit-making bodies, which operate under the National Health Act 1953 (Cth.). [40] Approximately 66 per cent of all nursing home beds in New South Wales are in such homes. [41] Deficit-funded nursing homes are either charitable or local government run organisations operating under the Nursing Homes Assistance Act 1974 (Cth). [42] These do not receive direct patient benefits from the Commonwealth, but have their deficits met by the Commonwealth on a continuing basis. Almost 23 per cent of all nursing home beds in New South Wales are in this type of institution. [43] State-run nursing homes are those operated by the New South Wales government and, until recently, [44] were excluded from the ambit of most Commonwealth controls, though they received funding from the Commonwealth just over 11 per cent of all nursing home beds in New South Wales are in State-run nursing homes. [45]

13.31 To receive funding, all nursing homes must be approved by the Commonwealth, [46] which controls the number of nursing home beds and their location. [47] The admission of patients is also controlled by the Commonwealth, [48] as is their classification as requiring either normal nursing care or extensive nursing care. [49] A different benefit is payable for patients requiring extensive nursing care to take account of the extra costs in such a case. [50] Any patient, whether requiring extensive or normal nursing, who is admitted to a nursing home must meet the appropriate non-insurable patient contribution. It is widely acknowledged that institutional care, even in a nursing home (as opposed to a hospital) is usually relatively expensive in comparison to home care. [51]

5. Home Nursing Care

Non-Profit Services

13.32 A patient who is able to live at home may require home nursing services, either during a period of recuperation or on a long-term basis. The provision of home nursing services within New South Wales is fragmented. Some are provided throughout patient departments or other sections attached to public hospitals. Community health centres provide home nursing services, as do “independent” community home nursing services, which are funded from Commonwealth subsidies under the Home Nursing Subsidy Act 1956 (Cth.) and from local or State government sources.

13.33 Home nursing care is not covered by Medicare arrangements. Private ancillary health insurance cover may provide benefits for such services. However, in most cases services are provided free, though an optional nominal fee may be charged. Income from patients is negligible, the services relying to a great extent on the provision of government subsidies. The Home Nursing Subsidy Act 1956 (Cth) provides subsidies for the employment of nurses by non-profit organisations not controlled by a State government, except where control is exercised through a public hospital. [52] Where the service receives local government or State funding, the Commonwealth subsidy is limited to an equivalent contribution. [53] In New South Wales, in the 1982 financial year, there were some 89 home nursing organisations funded under this Act. These organisations employed 444 nurses. [54] Approximately $4.8 million was provided to meet these costs in the year ended 30 June 1984. [55] In addition to funding some of these services with the Commonwealth, the State provides a large number of community nurses, either through hospitals or community health centres. The total number of community nurses funded by the State government in the year ended 30 June 1984 was 1,994, 345 of whom were jointly funded with the Commonwealth. [56]

13.34 Problems have been experienced with the existing funding arrangements, and the fact that some services provided by home nurses could be provided by health aides under the supervision of registered nurses. Unless all these services are provided by registered nurses, the Commonwealth subsidy has not been available. [57] Following the general thrust of the 1982 McLeay Report, the Commonwealth Ministers for Health, Social Security and Veterans Affairs recently announced the establishment of the Home and Community Care Program. [58] This program is designed to provide additional services on a more integrated basis for the community care of aged or disabled people. One aspect of this will be a review and, where necessary, the replacement of existing legislation. [59] It is expected that the Home Nursing Subsidy Act will be part of this process. In addition, the State Health Department is placing increased emphasis on this form of service.

Private Services

13.35 A large number of private nursing agencies provide home nursing services. To some extent their fees are covered by private insurance for ancillary services. The costs of visits vary considerably, as does the range of services offered. Costs also vary with the level of skill of the service provider. A registered nurse costs more than an enrolled nurse’s aide, who in turn costs more than an “assistant”. The fees also vary with the time of the visits-evening and weekends being more expensive than day visits during the week.

Domiciliary Nursing Care Benefits

13.36 The Commonwealth currently provides for the payment of a domiciliary nursing care benefit of $3 per day. [60] This applies where an approved person (generally a relative of the patient) [61] provides domiciliary nursing care and the patient would otherwise be eligible to be placed in a nursing home. [62] The benefit is meagre and, if the carer requires a holiday or relief from his or her role, the benefit is not payable for those days. A recently announced initiative of the Commonwealth Department of Social Security on respite care may go some way towards relieving the pressures on carers. The new scheme is designed to provide subsidised short-term accommodation in hostels, approved under the Aged or Disabled Persons Homes Act 1954 (Cth), to allow the carer to “have a break from the rigors of caring for elderly, frail or disabled people”. [63]

6. Institutional Care

13.37 We have discussed the provision of accommodation and care in nursing homes, (paragraphs 13.30-13.31). Institutional accommodation is also provided by various non-profit organisations whose funding is provided under either of the following Acts.

Handicapped Persons Assistance Act 1974 (Cth.).

Aged or Disabled Persons Homes Act 1954 (Cth.).

In addition, some organisations conduct institutions for the care of the aged or disabled for profit without government assistance.

Handicapped Persons Assistance Act 1974

13.38 Under this Act the Commonwealth can provide grants for the construction, maintenance or rental costs of approved projects [64] undertaken by charitable or religious organisations, veterans' organisations, local government bodies or other organisations approved by the Minister for Social Services. [65] Approved projects can include the provision of accommodation for:

> people undertaking approved training, approved activity, therapy or sheltered employment; and
>
> people who need special accommodation because of a disability, to allow them to engage in other employment or an occupation. [66]

Grants can be made to assist in the payment of salaries of people employed by these organisations to provide services, such as training, therapy, sheltered employment, rehabilitation and recreation and to purchase equipment for these sources. [67]

Aged or Disabled Persons Homes Act 1954

13.39 While the majority of hostels covered by this Act service aged people, benefits are also payable for those who are permanently blind or permanently incapacitated for work. The Act provides both capital assistance and continuing benefits. The eligible organisations under this Act are similar to those eligible under the Handicapped Persons Assistance Act. [68] Accommodation for which capital assistance may be provided can be self-contained units or cottages, motel-style hostel accommodation or nursing home accommodation. [69] Subsidies are payable for construction and land acquisition, as well as for upgrading facilities. In addition, eligible organisations can apply for personal care subsidies. [70] Currently, these are $10 per week for residents who require hostel accommodation and who have daily assistance available to them for more substantial household chores such as cleaning and laundry. An additional subsidy of $40 per week is payable for residents who require and have daily assistance in personal care. As noted in paragraph 13.36, subsidies for respite care are also available to approved facilities. [71] In addition to these subsidies, inmates are expected to pay a variable amount towards their accommodation and care, which is generally related to the rate of the invalid or aged pension.

B. The Compensable Accident Victim

13.40 Compensable accident victims are excluded from arrangements which apply to the rest of the community in relation to almost every aspect of health care. In practice, this usually means that the accident victim, or the insurer required to pay compensation, pays higher fees for the same services than a non-compensable person. The emergence of a separate system for compensable accident victims has precluded the application of cost containment mechanisms which have been built into the general health care system. This section examines briefly the arrangements for compensable accident victims injured in motor vehicle accidents. It does not deal with the rather different provisions applying to accident victims entitled to workers' compensation.

1. Medical Costs

13.41 Compensable motor vehicle accident victims are excluded from Medicare medical arrangements by section 18 of the Health Insurance Act 1973 (Cth.). This provides that a person who

> ... has received, or established his right to receive, in respect of (an) injury, a payment by way of compensation or damages (including a payment in settlement of a claim ...) under the law (of a State or Territory) [72]

is ineligible for a Commonwealth benefit to the extent that the compensation relates to medical expenses. Section 18 excludes not only a person who has received, or established, a right to receive compensation, but a person

whose claim has yet to be determined. [73] The health insurance funds also deny benefits in respect of expenses incurred as a result of compensable accidents. [74]

13.42 In New South Wales, the GIO is now the sole compulsory third party motor vehicle insurer. The GIO may pay fees to medical practitioners pending the finalisation of third party claims arising out of motor vehicle accidents where liability is regarded as clear, as is often the case where the injured plaintiff was a passenger in the vehicle, or a pedestrian.[75] Authority for this course of action is found in the Motor Vehicles (Third Party Insurance) Act, 1942, which authorises the GIO to pay a medical practitioner

> ... such amount as is reasonably appropriate to the treatment ... afforded, having regard to the reasonable necessity therefore and the customary charge made in the community for such treatment. [76]

In 1983 the GIO paid out almost $5.9 million in medical expenses, [77] although this was not, of course, the total amount paid out in verdicts and settlements in respect of medical expenses.

13.43 In practice, medical practitioners treating compensable motor vehicle accident victims may render their accounts to the patient or to the GIO, as the third party insurer. No statutory schedule of fees exists and charges by practitioners vary considerably. Some charge fees according to the Medicare schedule; some rely on scales set by the Australian Medical Association; and others on scales prepared by their own associations. The GIO states that the “basis” for their assessment of reasonable medical costs is the Medicare schedule. [78] However, the fees payable by the GIO are not necessarily limited to the scheduled fees, and there is no fixed procedure for determining what is regarded as reasonable in the circumstances. Whether or not the practitioner looks to the patient for payment of any amount not reimbursed by the GIO is a matter for the practitioner.

2. Hospital Costs

13.44 Medicare arrangements for treatment in hospitals exclude compensable cases. [79] Compensable patients are also prevented from recovering public or private hospital costs under any private health insurance held by them, [80] in so far as the hospital treatment relates to the compensable injury. The Medicare agreement specifically grants the State Minister power to

> impose charges in such amounts as he determines in respect of care and treatment rendered by recognised hospitals to compensable patients. [81]

Hospital charges for compensable patients are, therefore, in effect payable by the compulsory third party insurer.[82] Table 13.3 shows the proportion of hospitalised motor vehicle accident cases in 1981 who were regarded as compensable, using the two common measures of “hospital separation” and “in-patient days”.

Table 13.3: Motor Vehicle Accidents: Hospital[(a)], Separations [(b)] and In-patient Days [(c)]

New South Wales 1981

Motor Vehicle Accident Patients only	Public Hospitals (No.)	Private Hospitals (No.)	% of Total
SEPARATIONS			
Third Party	7,109	866	39.0
Workers’ Compensation[(d)]	1,536	176	8.4
Other	10,610	136	52.6

TOTAL	19,255	1,178	100.0
IN-PATIENT DAYS			
Third Party	78,969	5,235	44.1
Workers' Compensation[(d)]	17,842	1,142	9.9
Other	87,130	812	46.0
TOTAL	**183,941**	**7,189**	**100.0**

(a) This does not include private or public nursing homes.

(b) "Hospital Separations" occur when patients are discharged, transferred to another institution or die.

(c) "In-patient days" are the number of days patients occupied hospital beds. Day of admission and day of discharge count as one day.

(d) This includes both journey injuries and course of employment injuries.

Source: Department of Health (New South Wales)

13.45 When Medicare was first introduced, accident cases were all admitted to hospitals as public patients, unless the accident victim opted to be treated as a private patient. [83] This meant that doctors who treated the patients in hospital were unable to raise separate fees for their services until a patient exercised his or her option. Following opposition from the medical profession this procedure has been altered. A potentially compensable patient is now admitted as a private patient of the treating doctor nominated either by the hospital or the patient In addition, the patient must sign an election form as to whether she or he wishes to be treated as a private or public patient, should the claim for compensation not proceed. [84]

13.46 In relation to the payment of hospital costs of compensable patients, new administrative arrangements have been introduced since the release of the Working Paper. [85] Prior to 1 July 1983, public hospitals forwarded accounts in respect of compensable patients to the GIO. Where liability was not in dispute, payments were made to individual hospitals on the basis of gazetted average costs for out-patient and in-patient services at those hospitals. [86] These average costs, as provided for under the Motor Vehicles (Third Party Insurance) Act, 1942, vary considerably depending upon the range of services available at the hospital. For example, in August 1984, a modern full-scale hospital such as Mount Druitt had a gazetted daily in-patient bed-day cost of $322.54, while a lower intensity care provider such as the Gloucester Soldiers' Memorial Nursing Home had a cost of $43.93 per day. [87]

13.47 These arrangements were administratively cumbersome and led to considerable delay in settlement of accounts. Following negotiations between the GIO and the Department of Health, agreement was reached whereby

> ... the GIO, in lieu of payment of individual accounts, will make quarterly lump sum payments in accordance with a formula developed specifically for this purpose. [88]

In addition, the new arrangements, which commenced on 1 July 1983, provided for a lump sum payment of all outstanding accounts up to that date to be made to the Department of Health. [89] The agreed sum paid was $10 million. [90] The formula used to assess the future lump sum payments was based on traffic accident statistics and the projected State average daily bed costs, with allowance made for the following factors:

- the proportion of accident victims who are compensable;

the proportion of accident victims treated at public hospitals;

the average length of stay in hospital;

the average number of out-patient treatments; and

the cost of out-patient treatment as a proportion of daily bed costs. [91]

An adjustment was to be made at the end of the financial year to allow for the actual State average daily bed costs and the actual number of compensable victims. [92] The New South Wales Department of Health reported that almost $23.3 million [93] had been paid under this formula in 1983 and 1984, in addition to the sum paid for outstanding claims up to 1 July 1983.

13.48 While these arrangements simplify the administrative procedures for payment, hospitals are still required to keep records of the numbers of patients and their possible compensable status and to notify the GIO of their admission. If the patient is accepted as one where the GIO maybe liable, nothing further occurs. If, however, the person is assessed by the GIO as non-compensable, the hospital is notified. The hospital then refers to the election form noted in paragraph 13.45 and classifies the patient as either public or private. [94]

13.49 Where a compensable patient is admitted to a private hospital, the hospital bills the GIO or the patient directly. Under the Motor Vehicles (Third Party Insurance) Act, 1942, fees are payable directly to the hospital in accordance with a scale prescribed by regulation. [95] However, these regulations have not been updated and, in practice, the GIO pays fees according to the Workers' Compensation Regulations which govern payments to private hospitals. [96] The fee scales have not been updated since September 1982, [97] and were strongly criticised in a submission from the Private Hospitals and Nursing Homes Association of Australia Ltd.

> The amount is below the usual benefits payable to private hospitals for non-compensable patients, and has led to a minor role for the private sector. It is presently not financially viable for private hospitals to treat such persons. Reimbursement of private hospitals for compensable patients at the same rate as non-compensable patients would end the discrimination against the private sector. [98]

3. Other Services

Ancillary Care and Home Nursing

13.50 Compensable patients are treated differently from the rest of the community in relation to ancillary and nursing services.

While out-patient services are generally provided free to the general community, the hospital records such services provided to compensable patients and these form part of the bulk arrangements for the payment of hospital costs by the GIO; [99]

Private health insurance for ancillary services does not pay benefits in relation to the compensable injury. [100]

When a compensable person requires home nursing care, non-profit home nursing organisations may charge a higher fee than the nominal fees usually charged to other community members. For example, because of its status as a "public hospital", the fees of the Sydney Home Nursing Service for compensable patients are prescribed in the workers' compensation and third party hospital fee schedule. [101] In August 1984 the fee per visit was approximately $15 in comparison to the nominal fee of $2 which is normally charged.

The Commonwealth domiciliary nursing care benefit is not payable where a patient is eligible for compensation. [102]

Nursing Homes and Other Institutional Care

13.51 When a compensable patient is admitted to a nursing home, whether it's a participating, deficit-funded or State institution, normal funding arrangements do not apply. In participating nursing homes, the normal Commonwealth nursing home benefit is not payable. [103] However, it is possible for a patient to apply for a provisional benefit payment on condition that an undertaking is given that if compensation is later received he or she will reimburse the Commonwealth "whatever amount the Minister considers reasonable". [104] Charges levied on compensable patients in participating nursing homes are generally the combined value of the uninsurable patient contribution and the Commonwealth nursing home benefit. In those homes where the patient contribution required is higher than the normal uninsurable sum this is also payable.

13.52 In deficit-funded nursing homes, the usual fee fixed for patients does not apply to compensable patients. The fee applied to them is equivalent to the combined value of the Commonwealth nursing home benefit for New South Wales and the Commonwealth uninsurable patient contribution. [105] In State-run nursing homes, no commonwealth nursing home benefit is payable for compensable patients. Fees are levied in line with the workers' compensation and third party schedule of fees, [106] which represent the daily average costs of the specific institutions.

13.53 Whether or not compensable cases are accommodated in the institutions, premises constructed under the Handicapped Persons Assistance Act and the Aged or Disabled Persons Homes Act are not excluded from the various benefits available for the construction or continuing costs of these places. In the case of hostel and personal care benefits and respite care benefits these are payable regardless of the compensable status of a resident so long as he or she is otherwise eligible.

IV. PROPOSALS

A. Introduction

13.54 This Chapter has outlined the arrangements for the provision of health care services to the community through the general health care system and the quite different arrangements which apply to compensable motor vehicle accident victims. There were undoubtedly good historical reasons for the emergence of separate systems, particularly the fact that arrangements for compensable cases developed at a time when there were serious gaps in the coverage available to members of the community generally. The introduction of the national health care system has made it impossible to justify the continuation of distinct systems for the provision of health care services to compensable and non-compensable accident victims.

13.55 In principle no distinction should be drawn between compensable and non-compensable accident victims so far as access to health services is concerned. All accident victims, in our view, should participate in the national health care system and should receive services on the same conditions. Similarly, the remuneration paid to service providers should be the same regardless of whether the patient has a claim to compensation under State law. The problem of determining a fair approach to the remuneration of service providers is difficult to resolve and indeed the answers may vary over time. Whatever solution is adopted, the national health care system should be applied generally. Any other view is likely to undercut the objectives of the national health care system and perpetuate confusion among patients and service providers.

13.56 The argument of principle can be reinforced by a number of practical considerations.

> If current practices are maintained, a separate system for compensable patients is likely to lead to a higher fee structure in such cases for medical hospital and related services. This will detract from the objective of cost control that should be pursued vigorously by the compensation system. Reference has already been made to the difficulties experienced by other schemes in this regard.
>
> The policy issues concerning the treatment of patients do not vary, as far as the health system is concerned, according to whether the patients happen to be compensable or non-compensable. There are obvious advantages of efficiency and economy if a single body undertakes the difficult and delicate task of resolving those policy issues. The Commonwealth and the State are clearly better equipped for this task, which includes negotiations with service providers, than is the Corporation responsible for the proposed Scheme.

There are also obvious administrative advantages for the Health Commission, as the authority responsible for Medicare, to process claims for fees by medical practitioners and others providing services to transport accident victims. If the Corporation were to perform this role, separate payment procedures and cost control measures would be required. This would result in considerable duplication of effort, inefficiency and the risk of inconsistency in approach. The problems would be avoided if transport accident victims were treated in the same way as other disabled or sick members of the community.

The provision of health care services through the national system would clear the path for moves towards a national compensation scheme. If a national compensation scheme is to develop in Australia, the provision of health services to accident victims will have to be integrated within the general health care system. Preservation of the current fragmented scheme would also preserve formidable barriers to the process of integration.

B. Medical and Hospital Funds

1. Provision of Services

13.57 The suggestion that medical and hospital costs should be removed from the scope of specific accident compensation schemes is by no means new. In a recent High Court case, for example, Justice Murphy commented on this question.

> Early negligence law evolved when there was practically no social welfare, but in Australia it should now be developed consistently with the existence of a fairly comprehensive national medical and hospital scheme and social security benefits ... Medical and hospital costs, at least to the extent that they might be payable or recoverable under the national scheme, should not continue to be ahead of damages in personal injury claims. Alteration of the common law to allow for orders for those costs as they arise ... may be an advance on the present system which requires estimation at the trial of all these costs. In an efficient system, operating against the background of a National Health Scheme, they should not be claimable (either at common law or under statutory compensation schemes). [107]

In its submission, the Law Society of New South Wales accepted that there was a case for taking medical expenses out of the common law system.

> The Society believes that the whole question of payment of medical expenses needs to be reassessed in the light of the decision of the Commonwealth Government to introduce Medicare. This proposal ... will be funded by all Australian taxpayers, including New South Wales motorists... There may well be a case for taking medical expenses out of the common law system altogether. [108]

These suggestions have not yet been taken up in any systematic way, although there have been attempts to move away from the award of a lump sum to cover future hospital and medical expenses. [109] The Northern Territory has come the closest to integrating the compensation and health care system, with hospital costs being excluded from the no-fault scheme which has replaced the common law negligence action. [110]

13.58 For the reasons already given, **we recommend that transport accident victims should be entitled to receive hospital and medical services through the general health care system on the same basis as other sick and disabled members of the community.** The consequences of this recommendation will be that transport accident victims will be entitled to:

reimbursement or coverage of medical costs to the extent of 85 per cent of the schedule fee, except that where the patient contribution exceeds $150 in any year, reimbursement or coverage is increased to 100 per cent of the schedule fee; and

free treatment as public patients in public hospitals.

We deal later with the financial implications of the recommendations to the health care and compensation systems (paragraphs 13.62-13.68).

13.59 A further consequence of the recommendation in paragraph 13.58 is that a transport accident victim who wishes to have a doctor of his or her choice, or who otherwise wishes to be treated as a private patient in either a public or private hospital, will be required to meet the cost unless he or she is privately insured. This, in turn, implies that health funds should be permitted to offer cover of this kind to accident victims and to adjust contributions to take account of the additional financial burden that will follow from the change to their rules.

13.60 It would be possible to implement the recommendation simply by making the costs of hospital and medical care non-compensable under the Scheme. This would appear, for example, to avoid the operation of section 18 of the Health Insurance Act 1973 (Cth) and to remove the legal barrier to transport accident victims claiming benefits under Medicare (see paragraph 13.41). However, unilateral action of this kind by the State would have important financial implications for the Commonwealth and the health funds. Moreover, it would be open to the Commonwealth to amend the Health Insurance Act 1973, or to make financial adjustments in grants to the State as a means of offsetting any financial disadvantages that might flow from the exclusion of medical and hospital expenses from the Scheme. Thus **we recommend that the application of general health care arrangements to transport accident victims should be the subject of negotiations between the State and the Commonwealth.** We would expect these negotiations to lead to agreement by the Commonwealth to extend Medicare arrangements to transport accident victims and to permit health funds to offer additional cover for hospital services required as a private patient following a transport accident.

13.61 Should the Commonwealth, contrary to our expectations, not be prepared to negotiate along the lines indicated, it will be necessary for the Scheme to make its own arrangements for the provision of medical and hospital services to transport accident victims and for payment to service providers. This approach would be feasible, as it is a variation on arrangements currently operating for compensable third party and workers' compensation cases. However, it is far less satisfactory than the approach recommended.

2. The Cost

13.62 The proposal that medical and hospital services should be provided to transport accident victims through the national health scheme does not resolve the question of how those services are to be financed. It is possible for all patients to be treated under the system, yet for the funding for a particular category of patients to come from a separate source. There are three major funding options:

financial integration within the existing health care system, so that the Scheme bears no portion of the cost of providing medical and hospital services to transport accident victims, the cost being borne by the Commonwealth, the State and the health insurance funds;

the Commonwealth subsidises the Scheme by meeting a proportion of the cost of providing medical and hospital services to transport accident victims equivalent to the proportion of the cost it now meets for non-compensable patients; or

the Scheme bears the whole cost of providing medical and hospital services to transport accident victims.

Financial Integration

13.63 If the treatment of accident victims is to be wholly integrated within the general health care system, the cost of treatment should be borne by the agencies responsible for meeting the cost of treating other sick and disabled people. This would involve the Commonwealth meeting the following costs of treating transport accident victims:

payment of normal Medicare benefits for medical services;

payment of normal reimbursement of State hospital costs for public and private patients; and

payment of normal Commonwealth subsidy to private hospitals.

The State (rather than the Scheme) would meet

the balance of hospital costs for public and private transport accident patients, after deduction of Commonwealth reimbursement and health fund contributions.

The health insurance funds would provide:

> payment of normal accommodation benefits for insured transport accident patients in public hospitals; and
>
> payment of appropriate benefits, depending on level of cover, for insured transport accident patients in private hospitals.

13.64 The effect of financial integration would be to shift the cost of treating transport accident victims from the Scheme to the general health care system, and specifically to the Commonwealth, the State and the health funds. In principle, we consider this to be the soundest approach, not because it produces savings for the Scheme, but because the financial arrangements for treating transport victims would be the same as for other sick and disabled members of the community. However, while this is the ideal solution it would be unrealistic to assume that there will be no barriers to its acceptance. The State, for example, would be required to forego revenue for its hospital system from an identifiable source (the motor vehicle accident compensation system) and to replace this by allocations from general revenue. Similarly, the Commonwealth would be required to find additional resources to meet the costs of an additional class of patients, presently excluded from Medicare, although we take the view that there are sound reasons for the Commonwealth being prepared to consider this course of action (paragraph 13.66).

Commonwealth Subsidy

13.65 The second approach differs from the first in that the Commonwealth would in effect, provide a subsidy to the proposed Scheme but the State would not. Thus the Corporation (like the GIO) would reimburse the State hospital system on a bulk basis in respect of the hospital services provided to compensable transport accident victims. [111] However, the Commonwealth would provide a subsidy by meeting the costs of providing hospital and medical services to transport accident victims to the same extent as it meets treatment costs of other sick and disabled people.

13.66 In both the first and second options a justification for the Commonwealth providing support is that in this way it could foster the development of a no-fault scheme. Moreover, as pointed out in Chapter 17, the Commonwealth would receive some important financial advantages as the result of the introduction of the Scheme (paragraphs 17.54-17.57). The present Commonwealth Government has given no assurance about financial assistance, but it has indicated a willingness to negotiate with States which wish to introduce appropriate no-fault schemes. [112] The consulting actuary has estimated that if the Commonwealth meets the cost of treating transport accident victims in the manner suggested the cost of the Scheme (on a “plateau” pay-as-you-go basis) could be reduced by about $24 per vehicle per annum. If either the first or second options were adopted, the Commonwealth would need to take steps to allow health funds to of fer coverage for hospital services required as the result of a transport accident.

Costs Borne by the Scheme

13.67 It is possible that the Commonwealth will be prepared to provide hospital and medical services to transport accident victims through Medicare, but not to meet any portion of the cost of doing so. In this case, the Corporation will be required to reimburse the Health Insurance Commission for benefits paid to or in respect of transport accident victims. If this is to be done, the Corporation should make the reimbursement on a bulk basis rattler than on a case by case basis in order to minimise administrative expenses.

Recommendations

13.68 **We recommend that the cost implications of extending general health care arrangements to transport accident victims should be the subject of negotiations between the State and the Commonwealth.** it would be appropriate for the Commonwealth to subsidise the Scheme to significant extent. The subsidy should take the form of the Commonwealth meeting part of the costs of providing hospital and medical services to transport accident victims, preferably to the same extent as it meets treatment costs of other sick and disabled people.

C. Ancillary Services and Home Nursing

13.69 Ancillary services, such as physiotherapy, occupational therapy, home nursing, chiropractic services and speech therapy may be essential to the treatment and rehabilitation of transport accident victims. As noted earlier, Medicare does not generally cover ancillary services, although the health funds offer limited coverage (paragraphs 13.23-13.25). The provision of and payment for these services requires a different approach from that proposed for medical and hospital services, since no single community scheme operates in the field. Of course, from the Scheme's point of view, it would be ideal if Medicare were extended to ancillary services, since this would further the integration of the compensation and general health care systems.

13.70 It is clear that transport accident victims requiring ancillary services should have them provided. Where those services are available under Medicare they should be provided on the same basis as hospital and medical services (including arrangements negotiated with the Commonwealth for sharing of the cost). **We recommend that, where ancillary services are not available through Medicare, the Corporation should arrange the provision of ancillary services and home nursing reasonably required by transport accident victims.** As discussed earlier, the Corporation will need to exercise care to ensure that the cost of these services is kept within reasonable bounds. Consistent with the approach taken in other areas, we would favour the Corporation providing the services, at least in part, by bulk or sessional arrangements with existing government or non-profit service providers, such as hospital out-patient services, community health care centres or home nursing services. Where these facilities cannot provide the necessary services, the Corporation should be able to negotiate appropriate arrangements with private service providers. Such arrangements are likely to include a negotiated fee schedule or bulk billing procedure for transport accident victims, together with careful monitoring procedures to prevent over servicing or waste within the system.

D. Nursing Home and Institutional Care

13.71 We recommend in Chapter 10 that the Corporation should meet the reasonable costs of a disabled person required, because of the disability, to live in an institution subject to a deduction for board and lodging (paragraphs 10.50-10.52). The current arrangements for patients accommodated in nursing homes accept the concept of a fee for board and lodging in the form of the non-insurable patient contribution (paragraphs 13.28-13.31). In the case of nursing home accommodation it would be possible for the State and the Commonwealth to negotiate arrangements similar to those contemplated for the provision of hospital and medical services, since a national system is in place. For example, the Commonwealth maybe prepared to make its usual contributions towards nursing home accommodation where such accommodation is required by transport accident victims. If so, it would pay the appropriate benefit, which varies according to whether the patient requires ordinary or extensive nursing care, and the usual fees to deficit-funded nursing homes (paragraph 13.30). If the Commonwealth were not prepared to pay these benefits and fees in respect of transport accident victims, as is the case at present (paragraphs 13.51-13.52), the Corporation would reimburse the Commonwealth for benefits and contributions paid by it to nursing homes. The least satisfactory option would be for the Corporation to pay equivalent benefits or contributions directly to nursing homes accommodating transport accident victims. **We recommend that the cost of providing nursing home accommodation to transport accident victims should be the subject of negotiations between the State and the Commonwealth.** To the extent that the Commonwealth is prepared to meet the whole or a portion of the cost, savings would accrue to the system.

13.72 Reference has been made earlier to current arrangements for care in non-nursing home institutions (paragraphs 13.37-13.39, 13.53). The Scheme should provide accommodation in such institutions where necessary. Negotiations for cost-sharing with the Commonwealth should include non-nursing home institutional nursing care for transport accident victims.

V. SUMMARY

13.73 This Chapter proposes that all people injured in transport accidents should be entitled to necessary and reasonable medical, hospital and related services. The Chapter also notes the importance of cost control mechanisms, which operate in some areas of health care, such as the provision of medical services through Medicare.

13.74 The arrangements governing the provision of health services and the payment of service providers are still in a state of flux, despite the introduction of Medicare in 1984. The Chapter briefly outlines current arrangements in the areas of

medical services;

hospital services;

ancillary services;

home nursing care;

nursing home care; and

institutional care.

In some cases, particularly where medical and hospital services are required, the arrangements applied to members of the community do not apply to compensable third party patients-that is, patients who have or might have common law claims under the compulsory third party system. The separate systems may work initially to the disadvantage of compensable patients who are excluded from benefits available to the rest of, the community while they await settlement of their claim. A further consequence of the separate systems is that compensable cases may be charged higher fees than other members of the community for the same services. While these are ordinarily met by the third party insurers, this means that the compensation system does not have the benefit of cost control measures operating under the general health care system.

13.75 On principle and for administrative and cost containment reasons, transport accident victims should receive hospital and medical services through the general health care system on the same basis as other sick and disabled members of the community. This will require Commonwealth cooperation, for example, by extending Medicare arrangements to transport accident victims.

13.76 Apportioning the cost of providing such services assuming Commonwealth cooperation, raises separate issues. Ideally, there should be financial integration of the Transport Accidents Scheme and the general health care system. This would mean that the cost of treating such victims would be borne not by the Scheme. but by the Commonwealth, the State and the health funds in the same way as they meet the costs of treating other people requiring health care services. It is reasonable to expect the Commonwealth to share the costs of providing medical, hospital and related services to transport accident victims, in recognition of the other financial advantages which would accrue to it from the introduction of the Scheme. If the Commonwealth met the cost to the same extent as it meets hospital and medical costs of other people, the saving to the Scheme (on a “plateau” pay-as-you-go basis) is estimated at $24 per vehicle per annum.

FOOTNOTES

1. Actuary’s Report, paras.6.1, 7.1.

2. *Report of the Accident Compensation Corporation for the Year Ended 3l March 1983* (New Zealand), p.9. See also Actuary’s Report, paras.6.9-6.10.

3. Submission S58, p.2.

4. Motor Accidents Board, *Tenth Report of the Motor Accidents Board Year Ended 30 June 1983.* p.10. See also note 1 above. paras.7.8-7.12.

5. See note 1 above, para.7.12.

6. The Hon. R Hunt, Minister for Health, “Health Care Costs Control Programme-May 1978”, Ministerial Statement to the House of Representatives, pp.1-2.

7. R. McEwin and A. Gibson, “The Control of Growth in Health Services-Education, persuasion or coercion?”, paper based on a lecture delivered at the Australian and New Zealand Association for the Advancement of Science Congress, Auckland, New Zealand, 26 January 1979, pp.17-19; see also Dr. N. Blewett “Labor’s Health Plan-Summary of Arguments”, January 1983, p.7, para.3.

8. *Id.,* Dr. N. Blewett, pp.1,2 and pp.6-7, para.2, see also note 6 above, pp.1-6.

9. See note 6 above, pp.6-7.

10. Australian Labor Party, “Medicare”, January 1983, pp.8-10.

11. Submission W86, pp.1-2.

12. See eg. the special schedule of fees chargeable to people eligible for compensation under either the Motor Vehicle (Third Party Insurance) Act 1942 or the Workers’ Compensation Act, 1926: *Supplement to the Government Gazette of New South Wales*, No.80, 22 May 1984, pp.2605-2611.

13. For a discussion of these changes see G Palmer, ‘Politics, Power and Health: From Medibank to Medicare”, (Sept-Oct 1983) *New Doctor* p.19.

14. Commonwealth Parliamentary Debates, House of Representatives, 6 September 1983, p.402: Dr. N. Blewett.

15. *Id*., pp.407-408.

16. *Id*., p.409.

17. *Id.,* p.401.

18. *Id*., p.406.

19. *Id*., p.407. See also Department of Health, *Annual Report Year ended June 1983* (New South Wales), p.9.

20. See eg. Medibank Private’s Top Hospital cover which is limited to 75 days, subject to rules about “nursing home patients”. After that period, benefits fall to Basic insurance level. The Hospital Contribution Fund and Medical Benefits Fund both have 60 day limits, again subject to rules about nursing home type patients.

21. Health Commission of New South Wales, *Tenth Annual Report* 1981/82*,* p.26.

22. See note 19, p.6.

23. The Hospital Fund is designed to cover subsidies and other assistance for public hospitals, recurrent costs of State and psychiatric hospitals, recurrent costs of community health services. acquisition of sites and buildings, erection of buildings and purchase of equipment: *ibid*.

24. *Id*., pp.6-7.

25. *Ibid.*

26. For example, the introduction of the status of “nursing home type patients” (paras.13.27-13.29) also led to a decrease in revenue to the State hospitals. The Medicare Agreement included this as one of the adjustment factors in assessing additional grants. See Agreement under sub-section 23F(1) of the Health Insurance Act 1973 (Cth) between the Commonwealth of Australia and the State of New South Wales in relation to the provision of hospital services and other health services (in this Chapter called the “Medicare Agreement 1984”), cl.4.6 (a)(iii). See also cll. 8.6, 9.6.

27. Medicare Agreement 1984, cl.4.1.

28. *Id*., part 10 and cl.4.6 (c)(ii). See also note 14 above, p.404.

29. Medicare Agreement 1984, part 6, esp. cll. 6.1-6.3.

30. *Id*., part 12.

31. *Id*., cl.12.5.

32. See note 14 above, p.403.

33. Department of Health, *Medicare-New South Wales Information Manual* (December 1982), section 5. This manual notes that there are 27 hospitals providing dental services in New South Wales including Westmead, Hornsby, Royal Newcastle and Royal North Shore.

34. Health Insurance Act 1973 (Cth.), s.3(1): “nursing home type patient”.

35. Department of Health (New South Wales), Circular No.84/18, issued 16 January 1984, para.3.3(b).

36. *Ibid.*

37. See note 14 above. p.407.

38. National Health Regulations, reg.29, and Nursing Homes Assistance Regulations. reg.5A. This rate commenced on 3 May 1984, under both Regulations.

39. See note 35 above, attachment V, “Suggested Letter to Long-stay Patients”.

40. National Health Act 195 3 (Cth.), parts V, VA.

41. Figures supplied by the Nursing Home Benefits and Services Branch, Department of Health (Commonwealth), as at 23 July 1984.

42. See especially definition of “eligible organization”, s.3(l).

43. See note 41 above.

44. See Health Legislation Amendment Act (No.2) 1983 (Cth), s.35(4).

45. See note 41 above.

46. Nursing Homes Assistance Act 1974 (Cth.). s.4: National Health Act 1953 (Cth.). s.40AA.

47. National Health Act 1953, ss.39A, 40AA(3D) and Nursing Homes Assistance Act 1974, ss.3A(7), 4(3D). When introducing the amending legislation, the Minister noted the importance of restricting the growth of nursing homes, and the need to ensure the provision of an appropriate balance between home care and institutional care: Commonwealth Parliamentary Debates, House of Representatives, 10 November 1983, pp.1558-1559.

48. National Health Act 1953 (Cth.), s.40AB; Nursing Homes Assistance Act 1974 (Cth.). s.4(6)(b).

49. National Health Act 195 3 (Cth.). s.40AF.

50. *Id*., ss.47, 49.

51. See eg. Department of Health, *Relative Costs of Home Care and Nursing Home and Hospital Care in Australia*. (Commonwealth, December 1979), Monograph Series No.10, see also the McLeay Report.

52. Home Nursing Subsidy Act 1956 (Cth.), s.5,

53. *Id*., s.6.

54. Department of Health, *Annual Report of the Director-General of Health 1982-83* (Commonwealth). p.191, table 14.

55. Figure provided by Department of Health. Of this, $4.2 million went to joint State/Federal funded services.

56. Figures provided by the Department of Health (New South Wales) in letter dated 20 August 1984.

57. The McLeay Report, paras.7.53-7.62.

58. *Joint Press Statement by the Ministers for Social Security, Health and Veterans Affairs: New Directions on Care for Aged and Disabled People.* 21 August 1984.

59. *Id*., p.2.

60. National Health Act 195 3 (Cth.). part VB; see especially s.58GA.

61. *Id*., s.58E (3)(c).

62. *Id*., s.58E (3)(a).

63. Minister for Social Security, Senator D.J. Grimes, *News Release*, 11 April 1984.

64. Handicapped Persons Assistance Act 1974 (Cth.), parts II, III and IV.

65. *Id*., s.3: “eligible organisations”.

66. *Id*., s.6 (a), (b).

67. *Id*., parts V, VI.

68. Aged or Disabled Persons Homes Act 1954 (Cth.), s.2 and parts II, III.

69. Department of Social Security, *Assessment Officer Handbook of Instructions,* p.1.

70. Aged or Disabled Persons Homes Act 1954 (Cth.), parts II, III.

71. *Id.,* s.10c.

72. Health Insurance Act 1973 (Cth.), s.18(i)(b).

73. *Id*., s.18(4),(5) and (6). A person yet to receive compensation may for provisional payment of Medicare benefits, but may be required to repay the benefits if the compensation claim is successful.

74. All funds have adopted rules to this effect in accordance with a circular issued by the Department of Health (Commonwealth) MB128/HB103, to registered organisations in July 1976.

75. Working Paper, para.11.25.

76. Motor Vehicles (Third Party Insurance) Act, 1942, s.25(l) (e).

77. Letter from Mr. D. Mockler, Manager, Third Party Claims Section, GIO, dated 23 July 1984.

78. *Ibid.*

79. Medicare Agreement, schedule A; see also cl.8.5.

80. Health Insurance Act 1973 (Cth.), s.35A (private hospitals). Private insurance to cover public hospital accommodation. where a person opts to be treated as a private patient, also does not apply: see Department of

Health (Commonwealth) Circular No. MB128/HB103, to registered health insurance organisations, issued in July 1976.

81. Medicare Agreement, cl.9.6.

82. Motor Vehicle (Third Party Insurance) Act 1942, s.25(1)(a),(b) and (c). In relation to ambulance expenses. see s.25(1)(d).

83. See note 35 above, para.3.3(c).

84. Department of Health (New South Wales), Circular No.84/89, issued 9 March 1984.

85. *Supplement to the Government Gazette of New South Wales,* No.80, 22 May 1984, pp.2605-2611.

86. Motor Vehicles (Third Party Insurance) Act, 1942, s.25 (1)(a), (b).

87. See note 85 above, pp.2607-2609.

88. Department of Health (New South Wales), Circular No.83/130, issued 27 April 1983, p.1.

89. Department of Health (New South Wales), Circular No.83/223, issued 22 July 1983, p.1.

90. See note 77 above.

91. See note 88 above.

92. *Id.,* p.2.

93. Figure obtained from the Finance Section. Department of Health (New South Wales).

94. See note 89 above, p.2.

95. Motor Vehicles (Third Party Insurance) Act, 1942, s.15 (1)(C)-, Motor Vehicles (Third Party insurance Regulations, reg.10.

96. Regulations are made under Workers' Compensation Act, 1926, s.10(3) (a). See Workers' Compensation Regulations, 1926, division IV, reg.2. The scale provides (in August 1984) for a daily bed rate of $125 and theatre fees of $80.

97. *Government Gazette of New South Wales,* No. 126, 17 September 1982, p.4385.

98. Submission W86, p.1.

98. See note 88 above.

99. Department of Health (Commonwealth), Circular No. MB128/HB103 provides that registered health insurance organisations can determine their own rules in relation to ancillary tables-see p.48. Consistent with the policy applicable to other forms of cover, ancillary benefits for compensable patients are usually excluded by each health funds own rules.

100. *Government Gazette of New South Wales,* No.80, 22 May 1984.

101. *Id*., p.2611.

102. National Health Act 1953 (Cth.), s.59.

103. *Ibid.*

104. *Id*., s.59(6).

105. Nursing Homes Assistance Regulations. The current fee is $313.25 per week for ordinary care compensable patients and $355.25 per week for extensive care patients (August 1984).

106. See note 100 above, p.2605.

107. *Jaensch v. Coffey* (1984) 58 ALJR 426, at pp.429-430, per Murphv J.

108. Submission W28, pp.31-32.

109. See paras.4.13-4.15.

110. Motor Accidents (Compensation) Act 1979 (NT), s.18.

111. Virtually 100 per cent of transport accident victims would be compensable under the proposed Scheme. Under the current scheme only about half of motor vehicle accident victims admitted to hospital are classified as compensable (paragraph 1.44).

112. *Australian Financial Review,* 22 August 1984, p.20.

14. Scope of the Scheme

I. INTRODUCTION

14.1 Chapter 1 explained why, despite the wide terms of reference, this report is restricted to proposing a Scheme for compensating transport accident victims (paragraphs 1.33-1.46). This Chapter examines more closely the kinds of accidents that should be included in the Scheme by defining the forms of transport that should be covered and analysing the geographical scope of the Scheme. It also deals with the abolition of other rights to compensation and the problems created by overlap between this Scheme and surviving sources of compensation, including that available for work-related injuries. Finally, the Chapter considers the conduct, if any, that should disqualify a person from benefits under the Scheme.

14.2 Many of the problems dealt with in this Chapter would be avoided if a national compensation scheme were in force providing comprehensive coverage to all accident victims. Any scheme which is less than comprehensive necessarily gives rise to difficult questions of causation and coverage. While these difficulties should not impede moves towards a more satisfactory system of compensation for transport accident victims, they illustrate the desirability of ultimately adopting a broader approach to accident compensation.

II. TRANSPORT ACCIDENTS

A. Forms of Transport

1. Motor Vehicles

14.3 A transport accidents compensation scheme must cover injuries and death sustained in motor vehicle accidents, which constitute a substantial proportion of all transport accidents. Definitions developed in relation to the system of compulsory third party motor vehicle insurance are of considerable assistance in defining a motor vehicle accident for the purposes of the Scheme.

14.4 Section 5(1) of the Motor Vehicles (Third Party Insurance) Act, 1942, defines a motor vehicle as:

> ... any motor car, motor carriage, motor cycle or other vehicle propelled wholly or partly by any volatile spirit, steam gas, oil or electricity, or by any means other than human or animal power, and includes a trailer.

The term “motor vehicle” should be defined in the same terms for the purposes of the Scheme. The definition has been given a broad interpretation [1] and has been held to include a tractor converted into a loader [2] and a mobile crane. [3] If the same definition is adopted, interpretations of the existing legislation should be helpful to the Corporation and to the appeal tribunals.

14.5 Section 5B(1) of the Motor Traffic Act, 1909, requires a motor vehicle to be registered, and therefore subject to compulsory third party insurance, before it is used or driven on a public street. This means that agricultural vehicles and private recreational vehicles such as trail bikes and dune buggies do not have to be registered or insured provided they are used exclusively on private land. However, if such a vehicle is unregistered and is involved in an accident on a public street, the accident victim subject to proving fault under the existing law, can recover damages from the Nominal Defendant. [4] When a registered vehicle is involved in accident on private land, any damages recovered by the victim will be paid through the compulsory third party insurance system. Assuming that the registration requirements for motor vehicles remain unchanged, there is good reason for the Scheme to operate on a basis comparable to that now applying under the Motor Vehicles (Third Party Insurance) Act. That is, the Scheme should apply to death or bodily injury caused by or arising out of the use:

(a) on public property, of any motor vehicle; and

(b) on private property, of a registered motor vehicle.

2. Public Transport

14.6 The other major class of transport which should be included in the Scheme is public transport. The reasons for extending the Scheme beyond motor vehicles to public transport is explained in Chapter 1 (paragraphs 1.45-1.46). Section 3 of the State Transport (Co-ordination) Act, 1931, defines a public motor vehicle as one which is

> (i) used or let or intended to be used or let for the conveyance of passengers or of goods for hire or for any consideration or in the course of any trade or business whatsoever; or
>
> (ii) plying or travelling or standing in a public street for or in hire or in the course of any trade or business whatsoever.

While this definition adequately conveys the sense of the word “Public”, it does not go far enough in its coverage of forms of transport. There is no sound policy reason for distinguishing between public vehicles such as buses and taxis, and other forms of public transport such as trains and ferries. The Scheme should therefore extend to all forms of public transport whether publicly or privately owned, including buses, taxis, railway trains, ferries and water taxis.

14.7 The general approach in the application of the Scheme to public transport is to build, so far as possible, on the existing system of compulsory third party insurance and on the system of self-insurance, backed by Government guarantee, such as that practised by the Urban Transit Authority and State Rail Authority. Of the forms of public transport referred to in paragraph 14.6, one or other form of insurance applies to buses (whether publicly or privately owned), taxis, railway trains and ferries operated by the Urban Transit Authority. However, neither privately owned ferries nor water taxis are subject to compulsory third party insurance. All ferries in the Port of Sydney are subject to the licensing provisions of the State Transport (Co-ordination) Act, 1931. [5] During the 1981-82 financial year, the Commissioner for Motor Transport approved the issue of licences authorising the operation in the Port of Sydney of four eight-seater aqua taxi-cabs.[6] Such licensing practices provide a basis for the introduction of compulsory levies for compensation purposes. It is desirable that privately owned ferries and water taxis should be brought within the Scheme and that legislation should be introduced imposing registration requirements on such forms of transport. In addition, owners or operators should be required to pay contributions in respect of privately owned ferries and water taxis on a comparable basis to that applied to privately owned motor vehicles (although not necessarily at the same rates).

3. Other Forms of Transport

14.8 There are special reasons of consistency for the inclusion within the Scheme of privately owned ferries and water taxis, despite the fact that they are not at present subject to compulsory insurance. However, the extension of the Scheme to other forms of private transport would require consideration of the practical problems of extending registration and levy requirements. We now refer to two such forms of transport: powered vessels and bicycles.

Powered Vessels

14.9 A Vessel

> ... propelled by mechanical power capable of producing a speed of not less than ten knots and not more than 19.8 metres in length

must be registered under the Water Traffic Regulations, 1969. The Regulations also provide for the licensing of drivers of such vessels. A number of submissions supported the inclusion of these vessels in the Scheme. [7] However, we have been advised by the Maritime Services Board, which administers the Regulations, that the Board had considered imposing compulsory third party insurance but the move was assessed as not “cost-effective”. Apart from the cost factor, there are other difficulties in extending the Scheme to some, but not all forms of private water transport. For example, decisions would have to be made whether to include accidents caused by unidentified vessels and what special provisions, if any, are necessary for injuries sustained by participants in water sports such as water-skiing.

Bicycles

14.10 Bicycle riders are frequently injured or killed in accidents. To the extent that such accidents arise out of the use of motor vehicles or forms of public transport, the Scheme would provide compensation to the cyclist or his or her family. However, if a cyclist is injured or killed in an accident not involving any other vehicle or public conveyance, compensation would not be provided under the Scheme, unless a specific extension were to be made. There are difficulties facing any such extension. For example, given that a large proportion of bicycle owners and riders are children and that many bicycles are used primarily on private property, there may be practical problems in imposing registration and levy requirements. If no levy could be imposed, the Scheme would incur a potentially costly liability with no directly offsetting source of revenue.

14.11 In principle, the Scheme should extend to accidents arising out of the use of powered vessels and bicycles and, for that matter, other forms of transport But since more information is required and some practical problems need to be resolved, we do not recommend that the Scheme be applied beyond motor vehicles and forms of public transport at this stage. However, once the Scheme is under way the Corporation can be expected to gather data that would enable informed decisions to be made about the inclusion of other forms of transport. The Corporation should therefore have the power to recommend to the Government that a class of vehicle or other conveyance should be included in the Scheme, with or without registration and compulsory insurance requirements. If the Government accepts the recommendation it would irritate amendments to the governing legislation or regulations.

4. Motor Sports

14.12 In the no-fault component of the Victorian scheme, compensation for income loss or impairment of earning capacity is denied where the injured person

> ... was in a motor car in a place other than a highway and taking part in a race, or other competition or trial or testing the motor car for a race competition or trial. [8]

The Victorian scheme does permit a person injured in these circumstances to claim other benefits, such as hospital and medical expenses. Under the Tasmanian no-fault scheme, scheduled benefits (medical funeral and death benefits and disability allowance) are denied where the

> ... death or bodily injury was caused by or arose out of the use of a motor vehicle in a motor vehicle race... in which the injured person was taking part. [9]

The Northern Territory scheme excludes injured persons from entitlement to compensation for loss of earning capacity and lump sum compensation in circumstances almost identical to those described in the Victorian Act. [10]

14.13 The unusually high risks created by motor sports should not be borne by the community at large. Moreover, the social significance of motor racing is that it is a sport, not a form of transportation. A transport accidents scheme therefore, should not cover persons engaged in motor racing nor should it disturb the present rights and liabilities of people who engage in that sport. In particular, the right to sue and the liability to be sued for damages arising out of motor racing should not be disturbed. Motor racing is thereby afforded no special treatment compared with other sporting activities: It follows that a limited exclusion of the kind adopted in Victoria does not constitute a satisfactory solution. Accordingly, the term “transport accident” should be defined so as to exclude motor sports. The effect of dealing with the matter in this way is that, while people injured in the course of motor sports would have no right to compensation or benefits under the Scheme, their common law rights, if any, would not be affected.

B. Transport Accident Defined

14.14 **We recommend that, for the purposes of the Scheme, a “transport accident’ should be defined as one caused by or arising out of the use of:**

(a) a motor vehicle, except a motor vehicle being used for the purpose of organised motor sport, provided that where the accident occurs, otherwise than on a public street the motor vehicle is registered under the law of New South Wales;

(b) an omnibus, taxi-cab, railway train, water taxi, water f erry or other form of public transport, whether the accident occurs on land or water or on private or public property; and

(c) any other class of vehicle or form of transport included in the Scheme from time to time.

C. Commonwealth Vehicles

14.15 Commonwealth vehicles do not carry third party insurance under the Motor Vehicles (Third Party Insurance) Act, 1942. Compensation payable by way of damages against the driver of a Commonwealth vehicle is, in practice, paid by the Commonwealth and special provision is made with respect to uninsured Commonwealth vehicles in the Commonwealth Motor Vehicles (Liability) Act 1959-1973. [11] **We recommend that motor vehicles and any forms of public transport owned or operated by the Commonwealth in New South Wales should be included in the Scheme.** It is assumed that the Commonwealth will undertake to pay a contribution on each vehicle or other form of transport. An alternative is for the Commonwealth to meet the actual cost of paying compensation or providing other benefits to people injured or killed as the result of an accident caused by or arising out of the use of a Commonwealth vehicle. However, this will involve difficulties of apportionment where more than one vehicle is involved. While these would not necessarily be insuperable, the more convenient approach would be for the Commonwealth to pay the appropriate contribution.

III. DEATH OR BODILY INJURY

14.16 **We recommend that the Scheme should apply to death or bodily injury caused by or arising out of a transport accident**. For this purpose it is necessary to explain more fully what is meant by “bodily injury”. It most obviously includes direct physical injury to the person but may include pre-natal injury, injury resulting from nervous shock and damage to artificial members (limbs or organs) and aids.

A. Pre-natal Injury

14.17 Until comparatively recently, there was considerable uncertainty whether a child born deformed Could sue at common law if the deformity was the consequence of injury done by some act of the defendant while the child was *en ventre sa mere* (‘ie. during pregnancy). This uncertainty was partly explained by lack of confidence in the medical evidence necessary to establish the required causal connection. [12] But the uncertainty in this area would seem to have been resolved by the Supreme Court of Victoria which upheld a claim for pre-natal injury resulting from an accident involving the mother in her pregnancy. [13] The Supreme Court decision appears to reflect sound policy and there is no good reason for denying recovery for pre-natal injury under the Scheme. **We recommend that pre-natal injury should be included in the definition of bodily injury.** However, the common law rule, that no claims can be made on behalf of a child before its birth should apply under the Scheme.

B. Nervous Shock

14.18 The general rule now operating at common law permits recovery for injury resulting from nervous shock, provided that some form of mental disturbance (grief is not sufficient) was a reasonably foreseeable result of the defendants wrongdoing. [14] This is most easily established where the person suffering shock was a party in, or a witness to, the accident caused by the defendant. More recent cases have extended the protected class to those within hearing who came upon the accident almost immediately after it happened, [15] and to those who from some distance away came upon the consequences of it, even some hours later. [16] In New South Wales, under section 4(1) of the Law Reform (Miscellaneous Provisions) Act, 1944, a parent or spouse of a person killed, injured or put in peril can recover (in the Supreme Court only) for mental or nervous shock, although not a witness to the accident or its consequences at any stage. Thus a mother could claim for nervous shock suffered when told of her daughter’s death the day after it occurred. [17] Brothers, sisters and children of the person killed,

injured or put in peril have an action for nervous shock under the Act, provided they were within sight or hearing of the accident.

14.19 There is no sound reason for excluding injury resulting from nervous shock from the Scheme. In the context of motor vehicle third party insurance legislation, it has long been held to be a form of "bodily injury". [18] Furthermore, there is no justification for the kind of distinction made in the 1944 Act among different members of the family. We prefer an approach which treats uniformly all people suffering nervous shock as the result of a transport accident and which does not impose any requirement of physical proximity to the accident. Subject to establishing the necessary causal connection between the accident and the injury, **we recommend that injury or incapacity resulting from nervous shock should be included in the definition of bodily injury.** We are conscious that this extends the class of potential claimants beyond that currently recognised by the common law, although the scope of the common law is consistently being expanded. [19] This is unlikely to pose special difficulties for the Scheme, but we think it is an area which should be kept closely under review to ensure that the cost of extending entitlement to compensation does not prove excessive.

C. Artificial Members and Aids

14.20 The definition of "bodily Injury" in section 5(1) of the Motor Vehicles (Third Party Insurance) Act, 1942, includes "damage to the person's crutches, artificial members, eyes or teeth other artificial aids or spectacle glasses". There is a similarly extended definition of bodily injury under the New Zealand scheme.[20] In some Australian jurisdictions a narrower view has been taken,[21] but the inclusion of such members and aids in the definition of bodily injury is consistent with the provision made for them as part of the rehabilitative process (paragraphs 9.52-9.55). Accordingly, the definition now contained in the Motor Vehicles (Third Party Insurance) Act should be adopted. **We recommend that bodily injury should be defined to include damage to artificial members, eyes or teeth, crutches or other artificial aids or spectacle glasses.**

IV. PROBLEMS OF CAUSATION

A. Death or Bodily Injury "Caused by or Arising out of the Use of" a Motor Vehicle or Other Forms of Transport

14.21 We have recommended (paragraph 14.14) that a transport accident should be defined as one *caused* by or *arising out of the use of* one or other of the forms of transport included in the Scheme. This phrase is used in section 10(1)(b) of the Motor Vehicles (Third Party Insurance) Act, 1942, which requires the third party policy to provide insurance

> ... in respect of the death or bodily injury to any person caused by or arising out of the use of the motor vehicle ... [22]

The Working Paper canvassed a number of different ways in which the meaning of this phrase might be limited. [23] We prefer to leave the phrase unqualified in the expectation that the already substantial body of case law on the interpretation of the identical phrase in current legislation will provide guidance to the Corporation and to the appeal tribunals. This is not to say that the present state of the law is free from uncertainty in borderline cases. But we are not convinced that any alternative formulation would be any more certain. Moreover, the current interpretation strikes a sensible balance between confining coverage to incidents occurring in the course of the actual movement of persons or goods and extending the Scheme to events which have no more than a purely coincidental connection with the relevant form of transport.

14.22 In a recent decision, the High Court reviewed the interpretation of the phrase "caused by or arising out of the use of" when used in the context of injuries suffered in motor vehicle accidents. [24] The relevant principles include the following.

> Where a vehicle falls within the definition of motor vehicle, "use" extends not only to its use as a vehicle, that is as a means of conveyance, but to any use to which it is ordinarily put.

> The term “arising out of” requires a less proximate relationship between injury and relevant use than is required by the words “caused by”. [25]

14.23 In *Fawcett v. BHP By-Products Pty. Ltd.*[26] The bucket on a mechanical loader jammed and the driver tried to dislodge it while the loader was stationary. Because of its worn condition the bucket came off and struck the driver. The injuries suffered by the driver were held to have been caused by or arisen out of the use of a motor vehicle, for the purpose of a claim against the third party insurer by the drivers employer. In *Commercial and General Insurance Co. Ltd.* v. *Government Insurance Office of New South Wales* [27] a mobile crane was in use in a fixed position on a construction site when a rigger was injured as a result of the negligence of the crane driver. The riggers injury was also held to have been caused by or arisen out of the use of a motor vehicle. The same approach was recently applied [28] when a driver was knocked over by a compressor as it was being lifted off the back of a truck by a crane, having been returned after a period of hire. But an injury to a worker when the cable of a winch snapped, was held not to have been caused by or arisen out of the use of a flat top truck on which the winch drum had been fixed but which itself was immobilised. [29]

14.24 The broad interpretation given to the words “arising out of” is illustrated in both third party motor vehicle insurance cases and decisions under the Victorian and Tasmanian no-fault schemes. The words have been held to extend to: injury to a bicycle rider who collided with a stationary and unoccupied motor car, [30] burns suffered when a parked campervan exploded; [31] and even a blow from a rock thrown from an unidentified vehicle which had been driven up to the point from which the rock could be thrown. [32] But an event purely coincidental to the use of a vehicle is not sufficient, such as the blow from a falling branch as a person is entering a car. [33]

14.25 More difficult are those cases in which a person is injured while loading goods on or off a vehicle.

> The loading of a vehicle designed to be used, and ordinarily used, for the carriage of goods is a necessary element in its ordinary use. Loading it is incidental to the use of it in the normal way. But that does not mean that whatever is done that is incidental or ancillary to such a loading is itself a use of the vehicle in the relevant sense. Therefore, if a person suffers bodily injury when engaged upon some task connected with loading, the question whether his injury was caused by or arose out of the use of the vehicle depends upon whether it was a consequence, direct and not remote, of the operation of loading. [34]

Thus injuries caused while unloading, by a jammed door on a livestock float [35] or a faulty rear door on a panel van, [36] were both regarded as caused by or arising out of the use of the respective vehicles. However, there was no relevant “use” of a truck from which the plaintiff was transferring cartons when he injured his back lifting a carton. [37] But a mail delivery contractor who injured her back while seated in her vehicle, in the course of transferring mail and other items from the seat beside her to a roadside mailbox, was held to have sustained an injury arising out of the use of the vehicle. [38]

14.26 A line has been drawn consistently between injuries arising out of the use of the vehicle and those sustained while “working on” the vehicle. Even to start the engine of a vehicle in the course of working on it does not necessarily constitute a use of that vehicle. [39] Thus it has been held that repairing or inspecting a vehicle in the course of repair is not using it in the required sense, [40] although inspecting an engine to locate an unusual noise was held to be part of its use because the inspection took place in the Course of moving the vehicle from one part of a driveway to another. [41] Again there will be cases in which the line is not easy to draw but the broad principles of interpretation have been well developed by the courts and a more detailed formulation would not escape the problem of borderline cases.

B. Pre-Accident Condition

1. The Causal Connection

14.27 It is implicit in the phrase “caused by or arising out of the use of” that the death or injury for which benefits are sought under the Scheme must be the result of a transport accident and not of some other independent accident or condition. Cases which have arisen under the New Zealand scheme illustrate that there may be no causal relationship between an accident and the subsequent amputation of a chronically infected finger [42] or a heart attack suffered within hours of the accident. [43] Similarly, the injury sustained in the transport accident may

simply reveal the existence of another disability unrelated to the accident. For example in *Day v. Standard Waygood Ltd*., [44] a workers' compensation case, it was discovered that a hand injured in a work accident was cancerous and hid to be amputated for that reason. What was brought forward was not the disability itself, which was unrelated to the work accident, but the *discovery* of the disability. No special recommendation is required for these cases, although of course there may be difficult questions of fact to resolve.

2. Existing Disability or Incapacity

14.28 The victim of a transport accident may have been suffering from a disability immediately before the accident perhaps resulting from an earlier injury or disease. That disability may or may not have had an effect on the victim's earning capacity at the date of the accident. For example, the victim may have had a leg amputated some years before the transport accident because of a disease and the loss of the leg may have reduced his or her earning capacity from $500 per week to $300 per week. If the transport accident causes the victim to lose his or her remaining leg, and to become totally incapacitated for work, the question is what approach the Scheme should take to compensation for loss of earning capacity and permanent disability.

14.29 In these circumstances it is well established at common law that liability for a negligent act is limited to the *additional* disability or incapacity attributable to that act. [45] The justification for this approach is that the wrongdoer should be liable only for the consequences of his or her own action. Since the victim was already disabled or incapacitated at the time of the accidental injury, the accident did not cause the total disability or incapacity, but only the additional disability or incapacity flowing directly from the accident. In this case the approach of the common law is sound and should be adopted by the Scheme. Indeed this approach is implicit in the earlier recommendations, such as those relating to assessment of loss of earning capacity (Chapter 7). Thus, in the example in paragraph 14.28 the Scheme would be liable to compensate the transport accident victim only in respect of the difference between his or her immediate pre-accident and post-accident earning capacity(that is, $300 per week). Similarly, the compensation for permanent disability would be limited to the difference between compensation for the loss of both legs and compensation for the loss of one leg.

14.30 Other compensation schemes have adopted a more generous approach. In particular, section 7(2A) of the Workers' Compensation Act. 1926 provides that

> [c]ompensation shall be payable in respect of an injury which, but for existing incapacity, would have resulted in total or partial incapacity of the worker. Such compensation shall be payable as if such total or partial incapacity had in fact resulted from the injury.

The language of this sub-section indicates that it is attributing to the work-related injury consequences that normally could not be said to have "resulted from" it. The policy implicit in the sub-section may be justified by the protective approach that the workers' compensation system has historically taken to injured workers. However, there is no good reason for transferring this policy to the Transport Accidents Scheme. The question which has to be answered is what incapacity did the transport accident cause; not what incapacity might it have caused if circumstances had been different. Speculation of the kind implicit in the second question is best avoided. The phrase "caused by or arising out of the use of" a transport accident is adequate to bring about the preferred approach and no special provision required.

3. Latent Disability or Incapacity

14.31 At the date of the accident, the victim may not be suffering from any observable disability or incapacity, but may have a latent condition which makes it likely or even inevitable that such a disability or incapacity will occur in the future. In these circumstances, the accident may simply cause the disability or incapacity to occur rather sooner than otherwise. At common law, in a case of acceleration (as it is known), the defendant is liable only for the additional consequences of acceleration, such as the longer period of incapacity for work or of pain and suffering. [46] If the incapacity is capable of cure or alleviation by the same remedial measures as would have been used at a later date, the accident may have caused no compensable injury at all. [47] This means that the court will often have to speculate as to whether a particular disability would have occurred independently of the accident. In one High Court case, for example, damages were discounted by reference to the probability that a rare psychosomatic disease, occurring in people predisposed to hysteria and masochism, which was triggered by the accident would have been triggered by some other future events. [48]

14.32 While the common law approach has logical force, it involves considerable uncertainty because of the need to predict the onset of a disability or incapacity which has been brought about (or hastened) by the accident. [49] In some cases it will be quite clear that a disability, although not yet in evidence, is imminent. In others there will be doubt as to whether the disability will occur and, if so, when. We prefer an approach under which compensation otherwise payable would not be reduced by reason of an existing latent disability not yet in evidence at the date of the accident. In other words, if a disability or incapacity results from a transport accident, the fact that the same disability or incapacity would have or might have occurred in the future should not reduce the benefits available under the Scheme. We appreciate that this approach, which is consistent with that taken under the workers' compensation system, [50] may occasionally result in apparent overcompensation. However, this is preferable to a speculative assessment of what might have happened but for the transport accident, especially if the speculation could work to the disadvantage of the accident victim or create a continuing threat of loss of compensation. **We recommend that in determining whether an incapacity or disability was caused by or arose out of a transport accident, no regard should be had to any latent condition existing at the time of the accident, but not then productive of disability or incapacity. This should be so notwithstanding that the latent condition would or may have resulted in or contributed to a later disability or incapacity.**

4. Susceptibility to Injury

14.33 It is a well-established principle at common law, which has been adopted in no-fault accident schemes [51] that people responsible for payment of compensation must take their victim as they find him or her. [52] Compensation is therefore payable for the full extent of the injury, even though its extent is the consequence of a special or abnormal susceptibility and is far greater than would be suffered by a "normal" person not suffering from the susceptibility. This principle applies not only where the physical consequences are far worse than would normally be expected (the so-called "egg-shell skull" case), but also where the immediate physical consequences are no worse than normal but the resulting incapacity is much greater. An example of the second class of case is the injury to one eye of a person who has already lost the sight of the other eye and is thus rendered completely blind. With eyesight in one eye such a person may have been able to perform to full earning capacity, but with no sight in either eye his or her earning capacity may be completely destroyed. Compensation for loss of earning capacity in such cases would be based on the difference between pre-accident and post-accident earning capacity, in accordance with the general principles outlined in Chapter 8. [53] The common law principles are sound and should be followed. The assumption underlying these principles, namely that the incapacity would not have occurred at all were it not for the accident, applies to transport accidents covered by the Scheme. No additional recommendation is needed to achieve this result.

C. Post-Accident Aggravation of Injury

14.34 The previous section dealt with problems which arise when the transport accident combines with an existing condition whether latent or patent, to produce the injury or incapacity. Another problem arises where an injury caused by or arising out of a transport accident is aggravated or overtaken by a later accident or illness. For this purpose the common law distinguishes between events which are causally connected with the transport accident and those which are not.

1. Consequences of the Transport Accident

14.35 Post-accident complications which aggravate the injury and which can be medically linked with it, present no practical difficulties and are clearly a continuation of the original injury and a consequence of the accident. [54] More difficult are external events which would not have happened had it not been for the accident. The general test of causation at common law is the "but for" *or sine qua non* test which relies on an answer to an apparently simple question: would the consequence have occurred were it not for the relevant event? On this basis responsibility has been extended to accidents during convalescence from the original injury, such as a fall caused by restricted vision from wearing a surgical collar [55] or a dizzy spell resulting from a head injury. [56] However the "but for" test if applied literally has led to results which the courts have found unacceptable. In *Lindeman Ltd.* v. *Colvin*, [57] the claimant in a workers' compensation claim went for a walk in the hospital grounds while convalescing from the work injury. As he was going down some steps, he fell and broke his leg. It was held that walking was part of the resumption of normal life and the fact that he would not have been in the hospital grounds were it not for the injury did not make the work injury the cause of his fall. The additional disability caused in the

fall was therefore not a consequence of the original injury. It was not a case in which the claimant's injury had put him off balance or caused the fall in any immediate sense. In such cases the original injury is often said not to be the "real" cause of the later injury. Alternatively, the occurrence of the later event and the original injury are described as a mere "coincidence". [58]

14.36 The concepts employed by the courts to resolve these cases, such as "rear, or "proximate" cause, are imprecise and conceal value judgments, but it is not clear that any more precise formulation is feasible. It might be possible to distinguish between later events which were directly attributable to the disability, such as the surgical collar cases, [59] and those merely occurring in circumstances in which the claimant would not have been placed but for the original accident, such as the walk in the hospital grounds in *Lindeman Ltd. v. Colvin*. [60] But any rule stated in such terms is likely to prove inflexible or difficult to apply. The High Court has indicated that the problems of causation are to be resolved by the application of broad commonsense principles. [61] Similarly, we prefer to leave such questions to the good sense of the Corporation and appeal tribunals for resolution, consistently with the general objectives of the Scheme and using ordinary rather than technical concepts of causation.

2. Independent Events

14.37 The disability or incapacity sustained by the accident victim may be overtaken or superseded by a disability or incapacity which was bound to occur regardless of the accident or, at least, was quite independent of the accident and its consequence. For example, a person disabled in a transport accident may later be rendered totally incapacitated as the result of a stroke which on the medical evidence, would have happened in due course even if the accident had never occurred. Alternatively, the person may suffer a further disability as the result of an independent event, such as the collapse of a staircase, which is unrelated to that person's physical condition. The approach of the common law to the first case is clear: the compensation otherwise recoverable will be reduced, on the ground that the stroke was inevitable and thus the consequences of the accident were limited to the period between the date of the original disability or incapacity and the date this was overtaken by the consequences of the stroke. [62] Because of the once-and-for-all rule (paragraph 2.29), a stroke suffered after the damages had been assessed would have no effect on them thus leaving the accident victim with a "windfall" when compared with the case in which the stroke had occurred before assessment. The response of the common law to the supervening independent event is less clear. [63] It may depend on whether the later independent event gives rise to a separate claim for compensation since the courts have been reluctant to allow the wrongdoing of one person to be used as a basis for relieving or reducing the liability of another. [64] Regardless of whether this is a proper approach for the common law, entitlement based on considerations of fault even if indirect, is inappropriate to a no-fault compensation scheme. There is also a more general difficulty with the assertion that the accident victim would have been exposed to the independent event had the original accident not occurred.

> If one's object is to determine what would have happened if a tort had not been committed, the occurrence of any event after the tort has been committed is not necessarily a reliable indication that the event would have occurred if the tort had not been committed. [65]

14.38 In contrast to the complexity and uncertainty of the common law, the approach taken under the workers' compensation system is uncomplicated and more favourable to the injured person. Where a worker suffers partial or total incapacity in a work-related accident and subsequently suffers a non-work-related injury which alone would have produced total incapacity, compensation for the work-related incapacity is not affected. [66] The compensation is maintained until the incapacity diminishes or disappears. [67] This principle applies whether the subsequent injury is the result of some external event or of illness or old age. [68]

14.39 We prefer the approach taken under the workers' compensation system. Once disability is caused by a transport accident it does not cease to be the result of the accident at some future time merely because the same disability would have occurred at that time through some other cause. The causal link with the original accident has not been broken in so far as that disability or incapacity persists. Moreover, to apply the common law principles would require the Corporation to withdraw benefits from an accident victim at a point when that person's condition has deteriorated. This would not only strike most people as unfair but would seem especially so because the decision to withdraw benefits could hardly ever be made without some degree of uncertainty

about whether the supervening incapacity would have occurred in any event. Accordingly, **we recommend that a person entitled to benefits under the Scheme should not have those benefits reduced or terminated by reason of an event, not caused by or arising out of the transport accident, which causes further disability or incapacity to that person, or which would have resulted in the same disability or incapacity. In such circumstances benefits should continue at the same level and for the same period as if the event had not occurred.**

V. COVERAGE OF THE SCHEME

A. Geographical Scope

14.40 Not all transport accident victims, regardless of residence or the place where the accident occurred, should be entitled to benefits under the Scheme. It is clearly reasonable to require that either the victim or the accident, or both, should have some connection with New South Wales. The Working Paper suggested that the Scheme should cover

> accidents occurring within New South Wales, irrespective of the victim's place of residence and of the place of registration of the vehicle involved; and
>
> accidents occurring outside New South Wales, provided that the victim was a resident of New South Wales and provided a vehicle which was registered (or should have been registered) in New South Wales was involved.

After further consideration we have come to the conclusion that this proposal requires refinement.

1. Other Schemes

14.41 Other no-fault motor vehicle schemes have adopted a variety of geographical limitations. The Northern Territory and Tasmania have chosen residence and place of accident respectively, as the principal geographical connection. Benefits under the Northern Territory scheme are payable to Northern Territory residents where the accident occurred in the Territory or in a Territory vehicle. [69] Compensation under the Tasmanian scheme is available where the accident occurs in the State, regardless of the residence of the victim, so long as the accident involves a vehicle registered in that State. [70] The Victorian provision is more complex. Under the Victorian Motor Accidents Act 1973, the no-fault scheme applies to:

> a Victorian resident in Victoria who sustains injuries that were, or whose death was, caused by or arose out of the use in Victoria of a motor car;
>
> a person who sustains injuries that were, or whose death was, caused by or arose out of the use in Victoria of a registered (that is, registered under the [Victorian] Motor Car Act 1958) motor car;
>
> a person who sustains injuries that were, or whose death was, caused by or arose out of the use in Victoria of a motor car the identity of which cannot be established; and
>
> a person who sustains injuries that were, or whose death was, caused by or arose out of the use, in any other part of Australia, of a registered motor car where the person who sustained the injuries or who died was the driver or a passenger of the motor car when the accident occurred. [71]

2. Our Approach

14.42 The formulae applied in the Australian no-fault schemes thus rely on one or more of the following factors:

> residence of the victim;
>
> place of accident; and

place of registration of the motor vehicle.

There are arguments in favour of each of these factors playing a part in determining the geographical scope of the Scheme. The residence of the victim is an important criterion because each State clearly has a special obligation to protect its own residents, although of course there will be limits on the extent to which New South Wales residents injured in accidents elsewhere in Australia should be entitled to benefits under the Scheme. The special obligation gains added force from the fact that New South Wales residents, directly or indirectly, will provide virtually all the resources required for the Scheme, such as contributions by motor vehicle owners or fares paid as passengers in public. The place of the accident is important because the territorial approach to rights and obligations is well entrenched in our legal system. There would be, in our opinion, a community expectation that accidents occurring in New South Wales, generally speaking, should attract the provisions of a compensation scheme established under New South Wales law. The third factor, the place of registration of the vehicle (or other means of conveyance), is also significant because in practice a contribution will be payable in respect of the vehicle. It is reasonable to expect that the protection associated with the contribution should "travel" with the vehicle or its occupants.

14.43 The problem is to decide which factors or combinations of factors should establish eligibility to claim compensation under the Scheme. It is necessary to ensure that the protection accorded by the Scheme is not so narrow as to cause injustice. Yet the solution should not impose undue cost burdens on New South Wales residents nor inflict unreasonable duties on the Corporation, particularly in relation to non-residents who may present special problems relating to assessment and access to rehabilitation and other services. We have concluded that the necessary connection with New South Wales should be regarded as established if two of the three relevant factors we have identified are present in a particular case. Thus the Scheme should cover death or bodily injury to:

residents of New South Wales killed or injured in a transport accident in New South Wales;

people resident in Australia but not in New South Wales killed or injured in a transport accident in New South Wales, caused by or arising out of the use of a New South Wales registered motor vehicle or equivalent; and

residents of New South Wales killed or injured in a transport accident outside New South Wales but within Australia caused by or arising out of the use of a New South Wales registered motor vehicle.

It is also necessary to include accidents involving unregistered or unidentified motor vehicles in order to cover cases now covered by the Nominal Defendant provisions. [72]

3. Limits on Coverage

14.44 There are two particular categories of accident victims not covered by this formulation to which attention should be directed. First, New South Wales residents injured or killed outside the State in a transport accident which does not involve a New South Wales vehicle or outside equivalent are not covered. This is consistent with the approach taken in the no-fault schemes of other States or Territories. [73] It is desirable in principle for New South Wales residents to be protected against loss sustained in transport accidents wherever they travel in Australia. However, we do not think that it is practicable to recommend, at the outset, that a New South Wales resident, for example, injured by a Victorian car while crossing the road in Melbourne, should be entitled to compensation under a New South Wales compensation scheme. Experience under the Scheme may suggest, in due course, that an extension can be made, within financial constraints, or that reciprocal arrangements with other States or Territories permit a similar result to be achieved.

14.45 The second category not covered concerns residents of other States involved in accidents in New South Wales, but in which no New South Wales vehicle (or equivalent) is involved. This could happen, for example, when a Queensland visitor, driving a Queensland car, is injured when the car runs off the road in New South Wales and strikes a tree. In this case the connection with New South Wales is insufficient to warrant compensation being available under the Scheme, at least in the absence of cooperative arrangements among the States and Territories. There would be no common law action in such a case but where the State or Territory of residence has its own no-fault scheme, as in Victoria, that scheme may provide benefits to a resident of that State or Territory injured in New South Wales. Therefore the remedy is in the hands of the State or Territory of

residence of the injured person. In this way our proposals would protect a New South Wales resident injured in a New South Wales car in an accident in another State.

14.46 There is one special difficulty concerning non-residents injured in transport accidents within New South Wales, who have no claim under the proposed Scheme. We have recommended, in effect, that no common law action should be available to any person injured in a transport accident in New South Wales. The effect of this will be to deny the injured non-resident both the right to claim under the Scheme and the right to bring a common law action. If the non-resident is injured in an accident in which no New South Wales vehicle or equivalent is involved, it may be that no common law action would be available under existing law, as in the example in the previous paragraph. However, in some cases an action could be brought-such as a case in which the non-resident is injured by the negligence of the driver of another interstate registered vehicle. If, for example, two Queensland residents, driving their own cars, collide in New South Wales near the Queensland border, the problem could not be overcome by a common law action in Queensland because of technical “conflicts of laws” rules. [74]

14.47 However it should be emphasised that people whose rights could be adversely affected in this way are relatively small in number since we are here referring only to out-of-state residents who are victims in a New South Wales transport accident not involving a New South Wales vehicle or other form of transport and who could prove fault on the part of some other person. As long as reform in this area proceeds on a State by State basis, such anomalies inevitably arise. But the fact that only a few people may be affected does not justify ignoring the problem. The most satisfactory approach is for reciprocal arrangements between New South Wales and other States or Territories to ensure that any gaps in compensation cover are filled. Thus the problem of the non-resident left without a remedy could be solved by appropriate amendments to the conflict of laws rules in other States or Territories or by New South Wales agreeing to provide coverage under the proposed Scheme in return for the other State or Territory closing similar gaps in the protection accorded to New South Wales residents who are injured in that other State or Territory. [75] Of course, if the other State or Territory were prepared to introduce a scheme similar to that proposed for New South Wales the problems of coordination could be readily overcome. Be that as it may, we are firmly of the view that, before the Scheme is introduced, discussions should be held between the New South Wales Government and representatives of Commonwealth, State and Territory Governments. The objective should be to identify gaps in coverage and to ensure, as far as possible, that remedial action is taken.

14.48 In addition to this action. one further step should be taken. Provision should be made for vehicles (or other forms of transport) registered in another State or Territory to pay an contribution which would allow those vehicles to be regarded as registered in New South Wales for the purposes of the Scheme. This would allow people living in areas bordering New South Wales to ensure that they have full coverage under the Scheme for accidents involving their vehicles in New South Wales. It would also provide a means of protection for non-residents who travel regularly by car within New South Wales, perhaps for business purposes. In some circumstances it may be necessary to go further. At present, for example, interstate buses carrying fare paying passengers in the course of interstate trade do not have to be registered in New South Wales [76] and do not necessarily have to take out third party insurance in this state. [77] In order to ensure that non-resident passengers on such buses are protected under the Scheme for any accident in New South Wales, it is appropriate to require the owners to pay the appropriate contribution to obtain coverage under the Scheme.

4. Recommendations

14.49 **We recommend that the Scheme should apply to, and only to, death or bodily injury suffered by:**

> **(a) a resident of New South Wales whose death was, or injuries were, caused by or arose out of a transport accident in New South Wales;**
>
> **(b) a person not resident in New South Wales (but resident in Australia) whose death was, or injuries were, caused by or arose out of a transport accident in New South Wales, provided that a motor vehicle or other form of transport, involved in the accident, was registered, or required to be registered, in New South Wales, or was operated by the Urban Transit Authority of New South Wales or State Rail Authority of New South Wales;**

(c) a person not resident in New South Wales (but resident in Australia) whose death was, or injuries were, caused by or arose out of a motor vehicle accident in New South Wales in which the identity of the motor vehicle which caused the accident cannot be established; and

(d) a person resident in New South Wales whose death was, or injuries were, caused by or arose out of a transport accident occurring in Australia but outside New South Wales, provided that a motor vehicle or other form of transport involved in the accident was registered, or required to be registered, in New South Wales, or was operated by the Urban Transit Authority of New South Wales or State Rail Authority of New South Wales.

We further recommend that a motor vehicle or other form of transport capable of registration in New South Wales, which is registered in another State or Territory, should be deemed to be registered in New South Wales for the purposes of the Scheme on payment of such contribution as is prescribed.

B. Residents and Non-Residents

1. Definition of Resident

14.50 The residence of an accident victim is fundamental to the recommendations concerning the geographical scope of the Scheme. Because a person may be resident in more than one place at one time, it is necessary to define the term with some care. The concept of "principal residence" is useful for this purpose. By the term "principal residence" we mean the place where a person spends most of his or her time or to which he or she normally returns after absences for purposes of business or employment or other interruptions of a temporary nature. Some allowance should also be made for the person with a proven intent to take up a new residence within a given period of the accident. Therefore, **we recommend that a person should be regarded as resident in Australia, or in any State or Territory of Australia, where that person had, at the time of the transport accident, his or her principal place of residence there, or intended, within six months of that accident, to establish his or her principal place of residence there.**

14.51 Although people resident outside Australia at the date of the accident generally should be excluded from benefits under the Scheme (paragraph 14.53), this proposal could work harshly, for example, on an Australian citizen, resident overseas, who is injured in a transport accident in New South Wales. To overcome this, **we recommend that an Australian citizen who is killed or injured in a transport accident in New South Wales and whose principal place of residence at that date is outside Australia should be deemed to be resident in the State or Territory in which he or she had his or her last principal place of residence in Australia.** This recommendation would not apply to an Australian citizen who had never had a principal place of residence in Australia.

2. Overseas Residents

14.52 As a general rule, entitlement to benefits under the Scheme should be limited to persons resident in Australia at the date of the transport accident. There is a disproportionate administrative burden placed on the Scheme where a person entitled to benefits resides outside New South Wales, particularly in view of the emphasis placed on the provision of rehabilitation and attendant care. This burden would be considerably greater where the person is an overseas resident as opposed to a resident of another State or Territory. But there are also considerations of policy which distinguish the person resident in a State or Territory of Australia from a person resident overseas. Given the degree of movement between States and Territories, particularly those sharing a common border, the blanket exclusion of residents of other States and Territories from the Scheme would be unjustifiably restrictive. Even if the inclusion of these people imposes a substantial cost on the Scheme this could be offset to some extent by reciprocal arrangements of the kind referred to in paragraph 14.47. Neither of these considerations applies to overseas residents. Consequently, both practical and policy considerations combine to suggest their exclusion from the Scheme. People engaged in overseas travel are normally encouraged to take out private accident insurance and are not entitled to assume that accidental injury sustained in an overseas country will result in compensation under the law of that country. The proposal is consistent with that practice.

14.53 The requirement of residence should be applied to the victim of the transport accident, but not the dependent family members of a resident who is killed in a transport accident leaving such dependent family

members resident overseas. A recent immigrant maybe killed, for example, leaving no spouse or child, but a dependent mother in another country. The residence, in New South Wales or another State or Territory, of the person killed in such a case, with other relevant factors, should be sufficient to justify payment to the mother of the whole or part of the lump sum payable on death. Therefore **we recommend that benefits under the Scheme, other than those payable in respect of death, should not be payable or provided to persons not resident in Australia at the date of the accident.**

3. Beneficiary under the Scheme takes up Residence Overseas

14.54 An Australian resident injured in a transport accident who is entitled to benefits under the Scheme, may subsequently take up residence overseas. In these circumstances, there may be considerable practical difficulties associated with the maintenance of the full range of benefits to which he or she would otherwise have been entitled. In addition the new country of residence may provide some or all equivalent benefits free of charge or at a real value less than the Australian value. Similarly the real value of equivalent nominal incomes may differ. However, we are not persuaded that the practical difficulties and differences in economic circumstances between Australia and other countries are sufficient reasons for terminating benefits automatically if a person leaves Australia. An important issue of civil liberties is involved. An incapacitated person who wishes to leave Australia should not automatically be disadvantaged in doing so by the removal of benefits. Moreover, removal of benefits would conflict with the main purposes of the Scheme, especially in cases where a family in an overseas country could provide support not available in Australia, thus enhancing rehabilitation and possibly reducing institutional costs. The desirability of maintaining benefits must be balanced against the practical difficulties of providing them and keeping them under review. Provision should be made to enable the Corporation to adjust benefits to the changed circumstances and to relieve the Corporation of the obligation to maintain benefits which pose especially difficult practical problems.

14.55 In accordance with this approach, the Corporation should have power, within general guidelines, to continue payment of compensation for loss of earning capacity and to meet rehabilitation expenses where a person in receipt of benefits takes up residence in another country. Where the accident victim has received an assessment of permanent incapacity, compensation should continue to be paid in accordance with that assessment. Medical and hospital expenses would be governed by the general regulations under Medicare relating to the provider of medical and hospital services. Emigration from Australia would not affect compensation for permanent disability, but we think it inappropriate that support services, whether in the form of homemaker services, attendant care or otherwise, should continue. Thus, **we recommend that, if a person who is injured in a transport accident and is entitled to continuing compensation or benefits under the Scheme takes up residence outside Australia after the date of the accident:**

> **(a) the Corporation should continue to pay compensation for loss of earning capacity to the extent it considers appropriate having regard to the circumstances of the person, the general levels of earnings in the country of residence or proposed residence and the opportunities to verify the extent of the person's continuing incapacity, provided that if there has been an assessment of permanent incapacity, compensation should be paid in accordance with the assessment;**
>
> **(b) the Corporation should continue to meet the cost of rehabilitation services to the extent it considers appropriate, having regard to the needs and circumstances of the person, the comparative costs of the services, the person's eligibility for benefits in the country of residence or proposed residence and the opportunities to verify the person's continuing need for such services; and**
>
> **(c) the provision of homemaker and attendant care services and other continuing benefits and allowances should be terminated.**

14.56 Similar questions may arise in relation to death benefits. The surviving family members may take up residence overseas after the accident victim has died (or be resident overseas at the date of death). This should not affect the lump sum payment available to dependents. Nor should it affect the periodic compensation payable to children or the earnings-related periodic compensation payable to the surviving spouse during the five year period after the death. However, needs-based periodic compensation, payable to a surviving spouse in certain circumstances, should not be available to a person not resident in Australia. The reason is that it would be too difficult to determine the continuing income and earning capacity of the non-resident. Accordingly, **we**

recommend that needs-based periodic compensation in respect of death should not be available for a surviving spouse who is not resident in Australia.

VI. ABOLITION OF OTHER RIGHTS TO COMPENSATION

A. Introduction

14.57 It is a basic feature of the Scheme that it is intended to be the exclusive source of compensation for transport accidents under the law of New South Wales. It follows that other rights to compensation for a transport accident injury should be abolished, as far as the New South Wales legislature is competent to do so. The most significant source of transport accident compensation under the existing law is the common law negligence-action. But rights to compensation for transport injuries may also arise under:

the Workers' Compensation Act, 1926 and similar statutory compensation schemes;

the law applying to liability for defective products; and

the law governing occupiers' liability.

Abolition of all other rights to compensation for death or injury caused by or arising out of a transport accident would affect those areas of the law as well as the common law negligence action.

14.58 Transport accidents may occur as the victim is travelling to or from work (so-called "journey accidents") [78] or in the course of his or her employment (as where the driver of a delivery van is injured in a collision during working hours). Accidents of this kind create an overlap between the workers' compensation system, supplemented by the possibility of an action for damages against the employer, and the Transport Accidents Scheme. For reasons given later, we do not propose that entitlements to claim workers' compensation or damages from the employer should be abolished, although it is suggested that the injured worker be required to elect between these entitlements and benefits under the Scheme.

B. Defective Products

14.59 The phrase "death or bodily injury caused by or arising out of the use of a motor vehicle" includes cases in which the accident resulted from a defect in the vehicle, such as faulty brakes. If an accident is caused by such a defect, a number of actions for damages may be available under existing law. A person injured as a result of a defect may have an action for

breach of contract against the person from whom he or she purchased the defective vehicle or other means of conveyance;

negligence against the person responsible for creating or failing to remove the defect; or

breach of warranty under the Trade Practices Act 1974 (Cth.). [79]

14.60 An action may be brought in contract for breach of implied condition of fitness for a particular purpose or of merchantable quality under section 19 of the Sale of Goods Act 1923. As an action in contract, it can only be brought by the buyer against the retailer or other person from whom the purchase was made. However it is not necessary to prove negligence on the part of the retailer in order to recover. There is also a limited extension of the contractual right in section 64(5) of the Sale of Goods Act, 1923, [80] by which a court, in an action in contract for breach of the condition of merchantable quality against a seller, may add the manufacturer as a party to the proceedings if it appears that the defect ought to be remedied by the manufacturer.

14.61 In the landmark negligence case of *Donoghue v. Stevenson* [81] the duty of a manufacturer to exercise reasonable care in the design and manufacture of products was established. A manufacturer who is shown to be negligent will be liable to a person injured as a result of a defect in the negligently manufactured product. The

principle applies to motor vehicles and, by analogy with the manufacturer, has been extended to repairers, [82] suppliers, [83] and owners. [84] The negligence action is available to an injured person who has no contractual relationship with the negligent defendant. Thus a repairer was held liable to a bystander struck by the flange of the wheel of a truck which came loose as the truck drove past the bystander. [85]

14.62 Under the Trade Practices Act 1974 (Cth.) a manufacturer is liable to a consumer for defective goods, despite the absence of a contractual relationship, where there is a breach of implied conditions traditionally associated with the law of contract (paragraph 14.60). [86] Although this is a significant expansion of liability it is limited by the definition of "consumer" and "goods". Except in the case of goods not of merchantable quality, a "consumer" is confined to the person to whom the goods were originally supplied [87] and "goods" are those ordinarily acquired for personal domestic or household use or consumption. [88] Subject to these limitations, a manufacturer in breach of any of the relevant obligations is liable for loss or damage caused by the breach.

14.63 It would be inconsistent with the principles on which the Scheme is based to preserve common law or statutory rights arising out of a defective product involved in a transport accident. There is no good reason why, in a no-fault scheme, a victim in a transport accident which happened to be caused by a defective vehicle should be entitled to compensation any different from that available to transport accident victims in general. However, the New South Wales legislature, although having power to abolish or modify rights under the law of the State, has no power to override Commonwealth legislation. Consequently the right to damages under the Trade Practices Act cannot be affected by a New South Wales statute. It would be possible for the State Government to request the Commonwealth Government to limit the operation of the Trade Practices Act so that it does not apply to people injured in transport accidents who have remedies under the Scheme. Indeed we think that the State Government should make such a request. If the request is not acted upon the matter will have to be dealt with by provisions designed to prevent double compensation (paragraphs 14.92-14.93, 14.95-14.96).

14.64 If the transport accident victim is denied the right for example, to sue the manufacturer of a defective vehicle under the law of New South Wales, the effect may be to remove a powerful incentive to the maintenance of high manufacturing standards. This is one area in which the publicity associated with an action in negligence may have an indirect deterrent effect on poor manufacturing practices. [89] Other remedies for defective manufacture may have a similar effect A question also arises as to whether manufacturers should be relieved of meeting some of the costs of injury and death caused by defective products, at the expense of motor vehicle owners or drivers and patrons of public transport. There is an economic argument that manufacturers should bear the costs of defective manufacture (although ultimately the costs will be passed on to consumers and the community at large). These matters raise some very important policy issues to which attention should be given by the Corporation after the Scheme is implemented. A possible solution is to permit the Corporation to sue those who would have been liable had the injured person's right to claim damages not been abolished. It is, however, arguably contrary to the no-fault philosophy underlying the Scheme that the Corporation should pursue rights based, at least in part-on fault Another argument is that safety is better promoted by the establishment and rigorous enforcement of appropriate safety-standards, than by the haphazard operation of civil remedies. There is a further problem in determining precisely what the Corporation would be entitled to recover. If the Corporation were to be entitled to claim indemnity for its obligation to pay periodic compensation it would be necessary to determine whether the manufacturer should be entitled to liquidate its liability by a once-and-for-all lump sum payment. We are inclined to the view that the Corporation should have the right to claim an indemnity against, sav, the manufacturer of a defective vehicle to cover the cost of providing compensation to a person injured as the result of the defect. However, it is appropriate for further consideration to be given to this question once the Scheme is in operation.

C. Occupiers' Liability

14.65 Although strictly a branch of the law of negligence, the liability of occupiers for injury sustained by entrants on occupied premises has been treated as a separate area of law. This is largely because of the complex set of rules which distinguish between different categories of entrants and attribute to each one a particular standard of care. [90] It is in relation to railway accidents that injuries currently subject to the rules of occupiers liability will often fall within the definition of transport accident. The rights at common law of a person struck down by a train while crossing a railway line, lawfully [91] or unlawfully, [92] would traditionally be determined by means of the rules of occupiers' liability. If death or bodily injury caused by or arising out of the use of a railway train is included in the definition of transport accident (paragraph 14.14), such a case would clearly be covered by the Scheme.

14.66 The complexity of the occupiers' liability rules at common law has been repeatedly criticised and in some jurisdictions they have been replaced by statutory provisions in simpler and more general terms. [93] Their replacement, even in the limited area of transport accidents, by no-fault compensation would be especially welcome to those who accept the shortcomings of the negligence action in general. [94] However, concern has been expressed by the State Rail Authority [95] that the inclusion in the Scheme of accidents traditionally covered by occupiers' liability rules will impose a substantial additional cost because trespassers on railway tracks are often left without rights to compensation under the existing law. While this is undoubtedly a genuine concern, we do not see it as a reason for limiting the application of the Scheme. It would be anomalous, for example, if a person who wanders carelessly into the path of a motor vehicle is entitled to full benefits while another (perhaps a child) who is struck by a train in corresponding circumstances, is left without any compensation. The appropriate solution to any financial burden is for the cost to be passed on to the users of the railway system. The State Rail Authority also referred to the "disproportionate number of deaths and injuries which result from suicide attempts". [96] In this regard the Authority's concern is met by the exclusion from the Scheme of death or injury "intentionally self-inflicted" (paragraph 14.116).

D. Conclusion

14.67 With the exception of work-related injuries, no other area of the law requires exemption from a general abolition of existing rights to compensation for transport accident injuries in favour of benefits under the Scheme. Therefore, **we recommend that, subject to the special provisions made with regard to work related injuries, all rights, whether under common law or statute, to compensation for death or bodily injury caused by or arising out of a transport accident should be abolished, except for compensation payable or benefits provided under this Scheme.**

VII. INDEMNIFICATION OF NEW SOUTH WALES OWNER/DRIVER

14.68 While victims of transport accidents in other States and Territories continue to be entitled to bring common law negligence actions if they can establish fault, the owner and/or driver of a New South Wales registered form of transport may be exposed to common law liability. This could occur, for example, where a New South Wales resident, driving his or her own vehicle, is held liable in damages for an accident occurring in Victoria. Clearly the practice embodied in existing motor vehicle third party insurance, that the owner and/or driver should be indemnified for any such liability, should be continued. Therefore, **we recommend that the owner and/or driver of a motor vehicle or other form of transport which is registered in New South Wales should be indemnified by the Corporation for any liability for death or bodily injury arising under the law of any other State or Territory.**

VIII. WORK-RELATED ACCIDENTS

A. The Workers' Compensation System

14.69 Chapter 2 described the main features of the workers' compensation system in Australia with particular reference to New South Wales. Under the New South Wales Workers' Compensation Act, 1926, compensation is payable for injury "arising out of or in the course of employment". [97] Compensation is also payable for injury sustained on a journey, such as between the worker's place of abode and place of employment. [98] The two main areas of overlap between workers' compensation and the Scheme are transport accidents which occur

on the way to or from work (journey accidents); or

in the course of employment

1. Journey Transport Accidents

14.70 Not all journey accidents are transport accidents within the scope of the proposed Scheme. A person who falls over, for example, while walking to work would be covered by workers' compensation for any incapacity, but not by the Scheme. Table 14.1 deals with journey accidents which involve a means of transport In 1981-82 these constituted 63.6 per cent of all journey accidents reported to the New South Wales Workers' Compensation Commission, excluding cases of less than three days' incapacity.

Table 14.1: Workers' Compensation: journey Injuries(a)

New South Wales 1980-1982

Means of Transport Cases	Fatal Cases (Number)	Non-Fatal (Number)
Rail	3	151
Motor vehicle	69	7,248
Other(b)	2	347
Total	**74**	**7,746**

(a) Excludes cases of less than three days' incapacity.

(b) Some of these may involve means of transportation, such as bicycles, not necessarily within the scope of the Scheme.

Source: *Workers' Compensation Statistics, New South Wales, Year ended 30 June, 1982,* p.8, table 3. [99]

During 1981-82 the total amount paid in respect of all journey injuries which resulted in death or incapacity for three days or more was approximately $30 million. [100]

14.71 The Working Paper referred to the historical reasons for journey accidents being brought within the workers' compensation system even though they do not occur in the course of the workers employment. This step was a means of ensuring that a worker injured while travelling to and from work received compensation, since there was no guarantee that the common law would provide a remedy. [101] Submissions received before the publication of the Working Paper differed on the question of whether journey accidents should remain within the workers' compensation system. [102] Differing solutions to this problem have also been adopted elsewhere. In Victoria the workers' compensation legislation requires the Motor Accidents Board to reimburse employers (or their insurers) in respect of their liability for motor vehicle journey accidents under the Workers' Compensation Act 1958. Consequently, the cost of these claims is transferred to the Board, provided the worker is otherwise eligible for compensation under the Victorian motor vehicle accidents scheme. [103] In Tasmania, the no-fault motor vehicle accidents scheme does not include any liability to indemnify employers in respect of journey accidents. [104] In England the Pearson Royal Commission, by a narrow majority, recommended that injuries sustained in journey accidents should be included within the equivalent of the workers' compensation scheme. [105]

14.72 The Working Paper expressed the view that the responsibility for compensating injuries and deaths sustained in journey transport accidents should be transferred from the workers' compensation system to the proposed Transport Accidents Scheme. Four reasons were given. [106]

> The establishment of a no-fault Scheme for transport accident victims reduced the force of the historical reasons for placing journey accidents within the workers' compensation system.

The employer, generally speaking, has no control over the risk of injury to the worker during journeys to and from work. [107]

The present system creates the potential for disputes by requiring fine distinctions to be drawn to take account of interruptions, deviations and breaks of journey.

The transfer of financial responsibility for journey accidents to the Scheme would provide savings to workers' compensation insurers and to employers.

Submissions from the Labor Council of New South Wales [108] and individual unions [109] strongly disagreed with the Suggestion that existing entitlements to workers' compensation should be replaced by entitlements under the proposed Scheme. Subsequent discussions with the Labor Council and trade unions confirmed their adherence to the current workers' compensation arrangements. although they were prepared to accept any additional benefits that might be conferred on workers by the Scheme.

14.73 We retain the view that there is much to be said for removing journey accidents from the workers' compensation system and placing journey transport accidents within the Scheme. However, journey accidents have come to be regarded as an integral part of the workers' compensation system which, in turn. plays an important part in the negotiation and formulation of industrial awards governing rates of pay and conditions of employment. In short, the workers' compensation system has to be assessed against a wider industrial background of which it effectively forms a part. We have concluded, therefore, that any major change in the scope of workers' compensation should be determined in a comprehensive review of the system itself, the first stage of which is already under way. [110] This view is reinforced by the difficulties that would be created in relation to the significant proportion of journey accident victims who would not be covered by the Transport Accidents Scheme. However, as with other work-related deaths and injuries, victims (or their families) of journey transport accidents should be free to elect whether they wish to retain their workers' compensation entitlement or to claim benefits under the Scheme. This will ensure that, as far as workers' compensation entitlement is concerned, the injured worker is no worse off under the proposed arrangements and may be considerably better off in cases of long-term incapacity. We return later to detailed recommendations in relation to election (paragraphs 14.85-14.94).

2. Course of Employment Transport Accidents

14.74 A considerable number of transport accidents occur in the course of the victim's employment During 1981-82, for example, there were 43 fatal "road traffic cases" and 1,203 non-fatal "road traffic cases" arising out of the use of a motor vehicle in the course of employment. [111] The Working Paper inclined to the view that compensation for transport accident victims injured or killed in the course of employment should generally continue to be governed by the workers' compensation system. [112] In view of the conclusions concerning journey accidents, we confirm the opinion expressed in the Working Paper.

14.75 The Working Paper also pointed out that if course of employment transport accidents remain within the workers' compensation system, not all transport accident victims would be entitled to the same no-fault benefits, since there are differences between the benefits available under the proposed Scheme and those available under the workers' compensation system. [113] Of course the ultimate answer is to integrate the two systems, preferably within the framework of a national scheme. However, in the meantime it was suggested that consideration could be given to minimising the differences in benefits by permitting a worker injured in the course of employment to receive "top-up compensation" from the Scheme where its benefits were more generous than those available under the workers' compensation system. Upon further consideration we do not favour a top-up approach in relation to each set of benefits, but prefer (as was foreshadowed in the Working Paper) to give the injured worker or his or her family an election between the two systems. This conclusion has been reached for two main reasons. First, the Scheme should not fulfil a supplementary role of the kind traditionally performed by the common law in workers' compensation cases. The Scheme has been constructed to provide a first and only system of compensation; to the extent that it overlaps with existing compensation systems, it should be presented as a complete alternative and not entrenched in a merely supplementary role. Secondly, the administrative task of assessing benefits on a "top-up" basis, item by item, would be extremely difficult if not impossible, since the items of compensation are differently defined in the two systems. There would be even greater difficulty in matching lump sum redemption under the Workers' Compensation Act with entitlements to

periodic compensation under the Scheme. In short the administrative problems arising from a top-up approach would be overwhelming.

14.76 We conclude that workers injured in course of employment transport accidents should have the right to elect between benefits under the Scheme and under the workers' compensation system (paragraphs 14.85-14.91). There are, however, special reasons that justify permitting a worker, who has elected to receive benefits under the Scheme, to retain the right to compensation under the workers' compensation system in respect of the first five days' incapacity (paragraph 14.94).

3. The Cost of Course of Employment and Journey Claims

14.77 Granting an election to workers injured in transport accidents occurring in the course of employment or on the way to or from work does not resolve the problem of which scheme-workers compensation or transport accidents-should bear the cost of compensation. In order to deal with this question it is necessary to understand the present relationship between workers' compensation and the compulsory third party motor vehicle insurance system. The position is complex, but is broadly as follows.

> Where the worker is injured in a motor vehicle accident and is entitled to claim workers' compensation, but has no claim for damages against the employer or a third party, the employee s workers' compensation insurer or the employer (if a self-insurer) meets the whole cost of the claim. [114]
>
> Where the injured worker is entitled to workers' compensation and also has a common law claim against a negligent stranger, he or she can recover both the workers' compensation and common law damages, but the former is, in effect, set off against the latter. [115] Workers' compensation payments are initially made by the workers' compensation insurer or the self-insurer, but are recoverable from the compulsory third party insurer (the GIO). [116]
>
> Where the injured worker is entitled to workers' compensation and also has a claim in damages against the employer (for example, because of the employee s vicarious liability for the negligence of a co-employee), he or she can recover both the workers' compensation and damages, but the former is, in effect-set off against the latter. [117] Workers' compensation payments are initially made by the workers' compensation insurer, but if the employer also has compulsory third party insurance with a separate insurer there should be a contribution from both insurers. [118]
>
> Where the injured worker is entitled to workers' compensation and also has a claim in damages against the employer and a stranger (or where a co-employee of the worker and a stranger were each negligent), he or she can recover both the workers' compensation and damages, but the former is, in effect set off against the latter. [119] If the employer is insured, the cost of compensation should ultimately be shared among the workers' compensation insurer, the employees compulsory third party insurer and the strangers third party insurer (in practice the last two being the GIO). [120]

The end result is that part of the cost of course of employment and journey claims involving motor vehicle accidents are met by the compulsory third party insurance system, although reliable figures on the precise extent of the contributions are not available. [121]

14.78 Despite the provision for election, in relation to workers injured or killed in transport accidents occurring in the course of employment or on the way to or from work, the workers' compensation system should continue to bear the cost of meeting such claims broadly to the same extent as it now does. Our view would be different if, for example, journey transport injuries were taken out of the workers' compensation system and placed exclusively within the Scheme. However, unless and until that happens, the workers' compensation insurer and the Corporation (taking over the functions of the compulsory third party insurer) should meet the cost of compensation in respect of journey and course of employment transport accidents in roughly the same proportions as have applied in the past. The appropriate formula should be determined by negotiations between the Corporation and workers' compensation insurers in the light of past experience. The sharing of costs should be undertakers not on a case-by-case basis, but by bulk payments or adjustments to the negotiated formula. The formula would be easier to negotiate if a sole authority is established for the workers' compensation system, but

there is no reason, in principle, why a formula cannot be developed which applies to all insurers and self-insurers in the workers' compensation area.

4. Recommendations

14.79 Where the workers' compensation system overlaps with the Scheme, workers' compensation entitlements should not be affected unless the person entitled to compensation elects to come within the Transport Accidents Scheme. We here use the term "workers' compensation" to cover not only claims under the Workers' Compensation Act, 1926, but also similar claims under any relevant industrial agreement, award or statutory scheme applicable to the industry in which the accident victim is employed. Accordingly, **we recommend that, notwithstanding the abolition generally of rights to compensation (other than rights under the Scheme) for death or injury caused by or arising out of a transport accident, rights to compensation under the Workers' Compensation Act, 1926, and any similar rights under an industrial agreement, award or statutory scheme under a law in force in New South Wales, should not be affected, except to the extent specifically provided in this Scheme.**

14.80 **We recommend that the cost of meeting claims arising out of transport accidents occurring in the course of employment or on the way to or from work should be met by employers and their insurers on the one hand, and by the Corporation on the other, in roughly the proportion such claims are currently divided between the workers' compensation system and the compulsory third party insurance system. This recommendation should be implemented by negotiated agreements between the Corporation and employers and insurers, using past experience as a guide. The agreements should provide for block payments or adjustments pursuant to an appropriate formula.**

B. Common Law Actions and Work-Related Accidents

14.81 A worker injured in a transport accident occurring in the course of employment or in a journey accident may have a common law or statutory claim, for example under the Compensation to Relatives Act 1897, in addition to his or her entitlement to workers' compensation. The claim may be against:

- another person such as a careless driver or manufacturer whose negligence caused the accident;
- the injured workers employer, where the accident was caused by the negligence of a fellow worker for whose acts the employer is liable (under the doctrine of "vicarious liability");
- the injured worker s employer, for failure to ensure the safety of the vehicle which caused the accident; or
- the injured worker's employer, for personal negligence or negligence in some other way in failing to maintain a safe system of work, or for breach of statutory duty.

The Working Paper expressed the view that it would be inappropriate to allow retention of common law rights in respect of the first two situations. This was said to create unjustifiable distinctions among classes of accident victims and, in relation to the first kind of claim, would require the maintenance of a system of third party insurance for a limited class of case. The question whether, in the third and fourth situations, common law and related rights should be retained was left open.

14.82 We remain of the view that the injured worker's common law rights against a person *other than the employer* should not be retained, even where the injury was suffered in the course of employment. Retention would not only create the need for special insurance measures but would mean that a negligent driver, manufacturer or other person would be held liable according to the quite fortuitous circumstance that the injured victim happened to be acting in the course of employment or travelling to and from work at the time of the accident. We can see no justification for such a result in view of the objectives of the Scheme.

14.83 The vicarious liability of the employer for the negligent acts of a co-employee of the victim presents more difficult issues. This case arises, for example, where a worker travelling as a passenger in a truck in the course of employment is injured by reason of the driver's negligence (the driver being a co-employee). On the one hand, it is undesirable that courts should continue to determine liability for compensation in transport accidents according to notions of fault that are no longer appropriate. It is also undesirable to create a class of transport accident

victims who have remedies not available to other victims. On the other hand, so long as the common law action survives for work-related accidents, fault will continue to be applied as a criterion of liability by the courts and, as we have recognised in relation to workers' compensation, some victims will have alternative remedies open to them. Moreover, there is a strong argument that the passenger in the truck should be in no worse position than other workers injured by the negligence of their co-employees in non-transport accidents. For example, it would be anomalous if a worker injured by a negligently operated registered fork-lift truck in a factory were to be denied a common law action for damages, while a worker injured by an unregistered machine were to have such an action available on proof of negligence or breach of statutory duty. The future of the common law action and work-related injuries should be considered in the context of a general review of compensation arrangements for workers suffering incapacity and disability. We have concluded that, while the common law action remains for work-related injuries, the action should be available to a person injured, or the relatives of a person killed, in a transport accident caused by the negligence of a co-employee of the victim. Such an action would, of course, lie against the employer.[122] It follows that the employer should continue to be liable for failing to provide a safe vehicle or system of work or for breach of statutory duty. Accordingly, **we recommend that the action for damages at common law or under the Compensation to Relatives Act, 1897, against an employer should not be abolished where death or injury to a worker arose out of or in the course of his or her employment, notwithstanding that it was caused by or arose out of a transport accident.**

IX. DOUBLE COMPENSATION

14.84 It is a generally recognised principle of compensation law that an accident victim should not be compensated for the same loss more than once from different sources. Although, for the purpose of compensation of transport injuries, the Scheme is intended to be comprehensive and exclusive, until the development of a national scheme alternative sources of compensation will remain which overlap and duplicate benefits available under the Scheme. The previous section of this Chapter dealt with the overlap created by the workers' compensation system in relation to course of employment and journey accidents. Compensation systems outside the legislative control of the State of New South Wales are another source of potential overlap. These may be the product of the common law or of legislation of the Commonwealth or other States or Territories. Questions of double compensation will also be raised where a transport accident victim receives payment for disability or incapacity such as sick pay, accident insurance, superannuation or social security ("collateral benefits"). It is therefore necessary to decide how the Scheme should interact with such alternative sources of compensation and what provision should be made to prevent double compensation.

A. Election and Alternative Sources of Compensation

14.85 Transport accident victims entitled to benefits under the Scheme may also be entitled to compensation under

- the Workers' Compensation Act, 1926, or similar rights under awards or other legislation where the transport accident occurred in the course of employment or on a journey to or from work;
- the Trade Practices Act 1974 (Cth.), where the accident was the result of a defective vehicle;
- a no-fault compensation scheme of another State or Territory the geographical scope of which overlaps with the New South Wales Scheme, (such as a case in which a Victorian resident, travelling in a Victorian registered vehicle, is injured in a collision in New South Wales with a New South Wales registered vehicle and wishes to claim under the Victorian Scheme); and
- a common law action under the law of another State or Territory, in circumstances in which common law rights have not been affected by their abolition in New South Wales (such as a case in which a New South Wales resident, travelling in a New South Wales registered vehicle, is injured in a collision in Queensland with a negligently driven Queensland registered vehicle and wishes to sue in Queensland in a common law action).

14.86 In all these cases the person entitled to benefits under the Scheme should be required to elect whether he or she will claim those benefits or rely on another source of compensation. As a general rule, a reasonable period

for such election is three months from the date of the accident. The period should not be any longer because unnecessary delay in electing to claim under the Scheme would jeopardise the objectives of rapid rehabilitation and early assessment. In setting the limit, allowance should also be made for those cases in which the first symptoms of the transport injury are not apparent until some time after the accident.

14.87 During the three month period the person would be free to pursue any claim to compensation other than under the Scheme and to accept benefits pursuant to such claim subject to provision for set-off if a subsequent claim is made under the Scheme. But once a claim is lodged under the Scheme, the decision would be final and no further claim to, or recovery of, compensation outside the Scheme should be permitted. In practice a claimant would be required to elect formally not to pursue any other remedy. This election would be made effective under New South Wales law by amendments to legislation such as the Workers' Compensation Act, 1926, creating alternative remedies. The amendments would be designed to ensure that the election precludes claims under that legislation. The same approach cannot be used for alternative remedies created by the law of the Commonwealth or another State or Territory, since the New South Wales Parliament cannot require the election to be enforced by authorities in another jurisdiction. There the election should be supported by a provision requiring benefits under the Scheme to be terminated if action is taken or compensation received under a scheme or procedure established in another jurisdiction. The Corporation should also have power to recover any benefits paid under the Scheme where action is taken or compensation received in breach of an election (paragraph 14.95). In practice it may prove possible to negotiate agreements with authorities in other jurisdictions to ensure that elections prove to be effective in relation to compensation schemes in those jurisdictions. Special arrangements will be required to deal with elections by children and the mentally disabled and to prevent the "splitting" of claims by the surviving family members of a person killed in a transport accident.

14.88 Although a person entitled to benefits under the Scheme would generally be permitted to recover compensation outside the Scheme within the three month period without prejudice to his or her entitlement under the Scheme, recovery of compensation in the form of a lump sum which represents a redemption of periodic payments or a final settlement of damages should exclude entitlement to benefits under the Scheme. Since a lump sum payment of this kind is meant to represent compensation for total loss, we see no reason why a person who accepts such a payment should not be regarded as forfeiting any further right to compensation In some cases, there would also be insuperable practical difficulties in identifying the components of such a lump sum for purposes of set-offs against benefits available under the Scheme if a subsequent claim under the Scheme were permitted. But the exclusion should not apply to lump sum disability payments for limited purposes, such as those for specific impairments under section 16 of the Workers' Compensation Act, 1926, although efforts should be made to avoid such payments before the time for election has passed.

14.89 **We recommend that where a person is entitled to benefits under the Scheme in respect of death or bodily injury and is also entitled to compensation or damages under a law in force in New South Wales or under the laws of the Commonwealth or of another State or Territory in respect of the same death or bodily injury, such person should be given a period of three months from the date of the accident or from the onset of symptoms (whichever is later) to elect between the Scheme and the other source of compensation. Such an election should be permitted within the three month period whether or not any other claim for compensation is made during that time, except that, if an amount by way of a lump sum in redemption of entitlement to periodic payments or in final settlement of the claim (but not a payment under section 16 of the Workers' Compensation Act, 1926, or any similar payment) has been recovered in respect of the death or injury, no claim under the Scheme should be permitted.**

14.90 There may be circumstances in which excessive hardship would be caused if the three month period were rigidly adhered to. For example, a person may have been genuinely unaware of his or her entitlement under the Scheme throughout that period. In such cases the Corporation should have power to extend the period. One particular case which would require sympathetic consideration is the transport accident victim who, in the *bona fide* belief that he or she has a valid claim outside the Scheme, fails to establish that claim. It would be very unlikely that such an outcome would be known before the expiration of the three month period but, once known, it would then be apparent that that person had not made an effective choice. Specific provision should be made to permit a claim to be made in such a case outside the three month period. Accordingly, **we recommend that the Corporation should have power to extend the period of three months where undue hardship to the claimant would otherwise be caused. In particular, if a claim or proceedings other than a claim under the Scheme is concluded by a bona fide determination that the claimant has no right to compensation and**

no compensation has been received by the claimant, the period of three months should be extended to permit a claim to be made under the Scheme.

14.91 Our general approach is that, subject to a three year limitation period, late lodgement of claims should not affect entitlement to benefits. Of course some benefits, such as support services, cannot be made available retrospectively. However, where the claimant has recovered compensation from some other source this will operate by way of set-off, as we now explain.

B. Avoiding Double Compensation

1. Set-Offs

General Principles

14.92 Benefits payable or available under the Scheme should not duplicate compensation already received from another source. It is reasonable to require of claimants who elect to make a claim under the Scheme that any compensation recovered up to the date of lodgement of the claim should be set off against benefits under the Scheme. The earlier recommendations have dealt with the problem of setting off a lump sum against periodic payments and other benefits by denying the recipient of the lump sum a right to claim under the Scheme. Nonetheless, set-offs still present difficult practical problems, although these cannot be avoided as long as other sources of compensation are available. While some comparisons will be easy, such as periodic payments in lieu of wages or lump sum disability payments, in other cases there will be no obvious equivalent to the compensation available under the Scheme and the Corporation will have to use its judgment in determining the extent of the set-off which is reasonable and appropriate. Even with regard to earnings-related compensation, adjustments may have to be made, for example, where the compensation already paid is on an after-tax basis under the basis (as under the Victorian no-fault scheme),[123] compared with a pre Scheme. **We recommend that where a person who elects to claim under the Scheme has already been paid or has recovered compensation under a law in force in New South Wales or under the laws of the Commonwealth or of another State or Territory in respect of the same death or bodily injury for which the claim is made, such compensation should be set off against benefits otherwise payable or available under the Scheme.** The Corporation will need to have power to make the appropriate adjustments to ensure that, where the benefits received are not precisely comparable with those under the Scheme, the set-off is reasonable. As in other areas, special attention will have to be given to the possible “splitting” of claims in the event of death.

14.93 There may be cases in which the amount already received from another source exceeds the benefits payable for the equivalent incapacity or disability under the Scheme at the time a claim under the Scheme is made. As a general rule any such surplus should be deducted from future benefits. If this is not done, it would be an open invitation to claim benefits until the very end of the three month period and only then elect to transfer to the Scheme. Such a situation would be inconsistent with the aim of encouraging entry into the Scheme at the earliest time in order to maximise prospects of rehabilitation. If the surplus is deducted from future benefits, there will be no particular incentive to delay transfer to our scheme. However, where such a surplus exists, the process of deduction from future benefits should be gradual and made in such a way as to avoid unnecessary hardship. Accordingly, we **recommend that, where a person elects to claim benefits under the Scheme and the compensation previously paid or provided under a law in force in New South Wales or under the laws of the Commonwealth or of another State or Territory is greater than that available under the Scheme to the date of election, appropriate adjustments should be made to future benefits under the Scheme until the excess is absorbed.**

Special Provision for Work-Related Injury

14.94 Notwithstanding the recommendation on set-offs in the preceding paragraphs, it is necessary to make special provision for earnings-related compensation recovered under the Workers’ Compensation Act, 1926, or similar schemes in force in New South Wales. Workers entitled to workers’ compensation should retain payments in respect of the first five days incapacity notwithstanding that the Scheme does not provide compensation for that period. If compensation for loss of earnings is greater under the workers’ compensation system than under the Scheme for the first three months of incapacity, the worker should not be required to adjust his or her claim retrospectively. In other words, if periodic compensation under the workers’ compensation system is higher for that three month period (as it may be, since compensation is paid at the rate of 100 per cent of the current wage,

rather than 80 per cent of actual earnings), the worker should be able to retain the higher level of compensation for that period. The reason for this is that it is desirable to encourage the worker suffering medium to long-term incapacity to come into the Scheme. If the worker in effect has to repay additional workers' compensation benefits received during the first three months of incapacity, he or she might be deterred from transferring to the Scheme. While provision should be made to preserve these advantages, no further exception is necessary or desirable. In those few cases, such as where a lump sum payment under section 16 of the Workers' Compensation Act might exceed the payment for permanent disability under the Scheme, in practice Such payments should be withheld until the period for election has expired. **We recommend that, notwithstanding the general provisions for set-off, compensation or damages received prior to lodgement of a claim under the Scheme under the Workers' Compensation Act, 1926, or similar legislation in force in New South Wales for loss of earnings:**

> **(a) for the first five working days of incapacity, and**
>
> **(b) for any other period, to the extent that such compensation exceeds the amount payable under the Scheme f or loss of earning capacity in equivalent circumstances,**

should not be set off against benefits otherwise payable or available under the Scheme.

2. Forfeiture and Assignment of Rights

14.95 The most effective way to eliminate the risk of double compensation once a person has elected to claim under the Scheme is to deny that person the right to make further claims or accept compensation from any other source. Since the person has three months in which to decide between the Scheme and any alternative, it is not unreasonable to insist that once the decision is made to claim under the Scheme it should be final. Accordingly, **we recommend that once a person has made a claim under the Scheme that person:**

> **(a) should not be permitted to enforce any other entitlement to, or accept payment of, compensation in respect of the same death or bodily injury for which the claim is made; and**
>
> **(b) should be disqualified from further entitlement to benefits under the Scheme and liable to repay benefits under the Scheme if the other entitlement is enforced or payment accepted in breach of this prohibition.**

14.96 There may be cases where it is reasonable, despite the finality of the claimant's election, to expect some or all of the cost to be borne by the other source of compensation. We have already referred to the case of workers' compensation. The problem may also occur, for example, where the transport accident victim's injury has been aggravated by medical negligence. In such a case, the aggravation would be compensable under the Scheme (paragraph 14.35). However, the medical negligence would not be a "transport accident" and a common law action against the negligent doctor or hospital would therefore not have been abolished by our earlier recommendations. We think it is desirable, when a claim is made, that entitlement to compensation from other sources should be assigned, to the extent possible, to the Corporation. Accordingly, **we recommend that, where a claimant is entitled to compensation otherwise than under the Scheme in respect of death or bodily injury for which compensation is payable under the Scheme, any such entitlement should, to the extent possible, be assigned by operation of law to the Corporation.**

14.97 It might be inappropriate for the Corporation to enforce any entitlement the transport accident victim might have to compensation under the no-fault transport accident schemes of other States or Territories. A more constructive approach would be to establish co operative arrangements between the Corporation and equivalent bodies in other States and Territories in order to rationalise compensation procedures. The Victorian Motor Accidents Act 1973, addresses this problem by empowering the Motor Accidents Board

> (1) [to] enter into an agreement with any public statutory body constituted by or under a corresponding law to this Act relating to the payment of amounts to a person who sustains injuries that were, or whose death was, caused by or arose out of the use of a motor car, where-
>
> > (a) the accident occurred in a participating State; and

(b) the person injured or killed was not resident in the participating State in which the accident occurred but was resident in another participating State.

(2) An agreement... shall provide that in respect of a claim for payment of compensation to persons injured or to relatives of persons who die, as a result of a motor accident where the accident occurred-

(a) in Victoria, the provisions of the Motor Accidents Act 1973 shall apply; and

(b) in any other participating State, the provisions of the law that is in relation to the Motor Accidents Act 1973 a corresponding law shall apply.

(3) For the purpose of this section, "participating State" means Victoria and any other State or Territory under the law of which any public statutory body which enters into an agreement under sub-section (1) is constituted. [124]

A provision in these terms would not be practicable unless the geographical scope of the Scheme were identical to that under the Victorian Scheme. The necessary flexibility is better achieved if the power is granted to the Corporation in more general terms. **We recommend that the Corporation should have the power to enter into arrangements with any body exercising similar functions in any other State or Territory, for the purpose of recoupment or exchange of benefits or for any other form of cooperation necessary for the efficient administration of the Scheme.**

C. Collateral Benefits

14.98 The term "collateral benefits" issued to describe benefits paid to an accident victim for a disability or incapacity independently of a right to compensation. Entitlement to such benefits often does not depend, as compensation has traditionally depended, on proof that the disability or incapacity resulted from an injury suffered in consequence of another's wrongdoing (such as negligence in a common law action), or as the result of certain kinds of accidents (such as course of employment accidents in a workers' compensation claim). In most cases, entitlement to collateral benefits is based on the disability or incapacity as such and not on its source. Collateral benefits include:

accident insurance;

sick pay and holiday pay;

superannuation and retirement pension;

payments pursuant to a provident or social welfare scheme;

social security benefits; and

ex gratia payments.

But even though such benefits differ in character from accident compensation, their payment clearly creates a risk of double compensation. We first describe briefly how collateral benefits are treated under existing compensation systems in New South Wales and then indicate the suggested approach under the Scheme.

1. The Existing System

Common Law

14.99 At common law sick pay is seen as a direct wage substitute and is therefore set off against damages for loss of wages or earning capacity, [125] subject to an allowance for loss of future sick pay entitlement, if any. [126] On the other hand, accident insurance is not set off, on the ground that it is the product of the injured parties prudence and should not be used to benefit the wrongdoer. [127] *Ex gratia* payments are not set off on the ground that it would be against public policy to discourage private charity. [128] Other collateral benefits have been dealt

with under the general principle that where the benefit is intended to be enjoyed independently of the injured party's right to damages, it should not be set off. [129] Thus superannuation payments and most pensions including invalid pensions, [130] retirement pensions [131] and widows' pensions, [132] are not set off. In the recent High Court case of *Redding v. Lee*, [133] it was held by a narrow four to three majority that unemployment benefits should be set off.

Compensation to Relatives

14.100 It is expressly provided in the Compensation to Relatives Act, 1897, that the following should not be taken into account in assessing damages in a wrongful death claim:

> any sum payable under a contract of insurance;
>
> any sum payable out of any superannuation, provident or like fund or by way of benefit from a friend by society, benefit society or trade union; and
>
> any sum payable by way of pension, including widows', repatriation and invalid pensions. [134]

In addition it has been held that *ex gratia* payments should not be set off. [135]

Workers' Compensation

14.101 Under the Workers' Compensation Act, 1926, the injured worker is entitled to both compensation and ordinary pay for any periods of paid leave to which the worker is entitled. [136] A worker entitled to both compensation and sick pay may elect to receive compensation in lieu of sick pay. [137] The Workers' Compensation Commission has a discretion to take into account payments made to the worker by his or her employer during the period of incapacity [138] but this decision is rarely used to reduce benefits. [139] Superannuation payments are not set off. [140]

2. Proposals for the Scheme

14.102 For similar reasons to those given by courts in common law actions (paragraph 14.99), sick pay and holiday pay received by a claimant under the Scheme should be set off against benefits otherwise payable for loss of earning capacity. In such circumstances sick pay is indistinguishable from actual wages so that, to the extent that it has been paid, there has been no real loss to be compensated. However, the receipt of sick pay or holiday pay will usually lead to loss of entitlement in the longer term. Rather than try to allow for this in the calculation of benefits, the claimant should be offered a choice whether to take sick or holiday pay or compensation. This approach is consistent with that taken under the Workers' Compensation Act and would allow sick or holiday pay to be treated on the same basis as other sources of compensation. It follows that if the claimant elects to take sick pay or holiday pay it would be set off against entitlement under the Scheme. If the claimant elects not to take the sick or holiday pay it would not be set off. This should be subject to the right of the claimant to retain sick pay or holiday pay for the first five working days of incapacity (unless he or she is receiving workers' compensation for that period). One justification for the recommendation not to award compensation under the Scheme in respect of the first five days of incapacity was that employed people could reasonably be expected to have recourse to sick pay or holiday pay for that period. Accordingly, **we recommend that a claimant who is entitled to sick pay or holiday pay in respect of a period of incapacity should be able to elect whether to take such pay or claim compensation for loss of earning capacity for that period. If the claimant elects to take such pay, the amount received should be set-off against the compensation otherwise payable for loss of earning capacity, except that there should be no set-off:**

> **(a) for the first five working days of incapacity; or**
>
> **(b) for any other period, to the extent that the sick pay or holiday pay exceeds the compensation under the Scheme for loss of earning capacity for that period.**

14.103 Collateral benefits generally should not be set off. In the case of *ex gratia* payments and accident insurance, as with sick pay, we follow the reasoning taken at common law. In addition, it is desirable to

encourage people to take out insurance, particularly those whose earning capacity is above the maximum by reference to which compensation can be assessed. To a considerable extent the reasoning applied to accident insurance can also be applied to superannuation benefits: that is, the prudent claimant should be allowed to enjoy the fruits of his or her own contribution to financial security. In addition, the practical difficulty, if not impossibility of devising a satisfactory set-off rule to apply to the wide variety of superannuation schemes which exist is sufficient reason in itself to refrain from any attempt at setting off superannuation payments. This is not designed to support or encourage the concept of double compensation However, the remedy for double compensation lies with the superannuation funds which could limit superannuation payments in compensable cases.

14.104 Under section 115C of the Social Security Act 1947 (Cth.), sickness benefits may be refused where compensation from another source is payable. There is provision for recoupment of benefits already paid to a recipient of compensation. [141] Where periodic payments are made. such as those envisaged in respect of loss of earning capacity under the Scheme, the recipient Would normally be disqualified from claiming unemployment benefits. [142] It would seem that compensation under the Scheme would not disqualify a claimant from receiving an invalid pension, but of course the usual assets or income tests would apply. In *Redding v. Lee* [143] some of the judgments in the High Court suggested that the Act should be amended to require termination and recoupment of pensions where compensation was recovered, [144] although the comments were made in a case involving lump sum damages. The Scheme should be treated as a scheme of first recourse and the Commonwealth should make whatever adjustments are necessary to avoid double compensation. Because of the uncertainties surrounding the operation of the existing provisions of the Social Security Act, it may be necessary for discussions to be held with the Commonwealth in order to ensure, for example, that people receiving relatively modest compensation under the Scheme are not deprived entirely of social security benefits and that anomalies are avoided. But these are matters to be worked out between the State and Commonwealth Governments. **We recommend that benefits available to a claimant under the Scheme should not be reduced or otherwise affected by the payment of, or entitlement to, ex gratia payments, accident insurance payments, retirement pensions, superannuation and similar benefits, or pensions or benefits under Commonwealth legislation**

14.105 The same general principles should apply to death benefits. There should be no set-off of collateral benefits against the lump sum award or periodic payments to a surviving spouse and/or children during the five year period after death. [145] However, the needs-based payments provided for in the recommendations [146] would require superannuation pension payments and the like to be taken into account in determining the income of the claimant.

X. EXCLUSIONS

14.106 The extent to which accident victims should be denied benefits under the Scheme by reason of their conduct is a difficult and sensitive issue. It has not proved possible to reach agreement on this question and the differences of opinion within the Commission undoubtedly reflect differences in the wider community. The difficulties are also illustrated by the divergent approaches taken by the Australian no-fault motor vehicle compensation schemes and the New Zealand scheme.

A. Exclusions under Existing Schemes

1. New Zealand

14.107 Under the New Zealand scheme a person is disqualified from all benefits where the injuries were “wilfully self-inflicted”. [147] In the case of suicide, some survivors’ benefits may be paid where there is special need, but a person convicted of the murder or manslaughter of another covered by the scheme is not entitled to benefits. [148] Apart from these exclusions, the Accident Compensation Corporation may decline, wholly or partly, to give rehabilitation assistance and to pay compensation if to do so would, in its opinion, be “repugnant to justice”. [149] Thus the New Zealand scheme simply leaves the problem to be resolved by the Corporation in individual cases, with little guidance in the governing legislation.

2. Victoria

14.108 Section 16(1) of the Motor Accidents Act 1973 sets out the categories of applicants who can be denied compensation for income loss or deprivation or impairment of earning capacity. These categories include people who were committing, when the accident occurred, various driving offences, including unlicensed driving and driving as owner of an uninsured motor car. Other excluded categories of people are those whose injuries are self-inflicted and those who are injured while participating in a race, competition or trial in a place other than a highway. There is no exclusion of hospital, medical and associated expenses. From information supplied by the Victorian Motor Accidents Board, less than 1 per cent of claims for loss of earning capacity in the year 1 July 1982 to 30 June 1983 were denied on grounds of exclusion. This estimate does not, of course, include those people who made no claim because they obviously fell within an excluded category.

3. Tasmania

14.109 In contrast to the Victorian Act, the Tasmanian Act denies scheduled benefits (medical, funeral and death benefits and disability allowances) in respect of:

> death or injury resulting from intentionally causing or attempting to cause death or injury;
>
> death or injury caused by or arising out of the use of a motor vehicle in a motor vehicle race in which the person killed or injured was taking party; or
>
> death or injury caused by or arising out of the use of a motor vehicle in the commission of, or in the furtherance of the commission of, an offence of dishonesty or violence, that person being a party to the use of that vehicle for that purpose. [150]

Medical and disability benefits are also denied to people convicted of a number of listed driving offences including unlicensed driving. [151]

4. Northern Territory

14.110 All benefits under the Northern Territory scheme are denied to people using a motor vehicle without the consent of the owner for the commission of an indictable of fence, for the purpose of resisting arrest or inflicting injury on themselves or other people. [152] Compensation for loss of earning capacity and the lump sum payment for scheduled injuries are denied in cases involving particular driving offences, unlicensed driving except in an emergency, and race competitions or trials. [153]

B. Matters of Principle

1. The Policy Choice

14.111 There are two fundamentally different views on exclusions from benefits under a no-fault compensation scheme. One is that broad exclusions from the scheme conflict with its basic purpose since denying benefits on the ground of criminal conduct or other improper behaviour is a return to fault This is not the place to reiterate the arguments against fault as a principle underlying compensation law, but broad exclusions can be regarded as incompatible with a scheme which seeks to eliminate fault as a determinant of entitlement to compensation. The arguments in favour of broad exclusions often resemble those used to justify the concept of fault as a reason for denying or reducing damages to an injured person. This was evident in Submissions contending that the community's "sense of justice". Would be offended if a person whose criminal conduct had caused the accident were to be compensated on exactly the same basis as the innocent victim. [154] On this view, the Scheme should not compensate those whose injuries resulted from their own misconduct, since they are the authors of their own misfortune. Accordingly, public resources should not be used to compensate them, at least at a level higher than basic social security benefits. To this can be added an argument based on deterrence. If the communities objective is to discourage certain kinds of conduct, such as driving under the influence of alcohol, that objective could be undermined if a wrongdoer is entitled to compensation. However, those who favour narrow exclusions point out that the alleged deterrent effect of reduced compensation lacks emperical evidence to support it, just as there is no reliable evidence to support retention of fault on grounds of deterrence (paragraph 3.37-3.39).

14.112 The issue is complicated for present purposes because the proposed Scheme covers only transport accident victims. Those members of the Commission who support broad exclusions are influenced by the limited scope of the Scheme. In their view it is especially difficult to justify generous compensation under such a Scheme to a person whose criminal conduct is the cause of his or her own injury and possibly injury and even death to others. The limited scope of the Scheme means that some victims of other types of accident, such as home accidents, however innocent, are left uncompensated and the contrast cannot be justified, at least until the advent of a comprehensive scheme. Their view is reinforced by the fact that to exclude a person from the Scheme does not leave him or her entirely without support, which is likely to be available in the form of free hospital and medical care and entitlement to social security. The approach does not deny the validity of the argument that, in principle, compensation and punishment for criminal conduct should not be confused. Rather it measures that principle against the imperfections and inevitable anomalies of significantly different compensation systems operating side by side.

14.113 The contrary argument is that the clear distinction between compensation and punishment for criminal conduct ought not to be compromised, especially in a no-fault scheme. The importance of effective rehabilitation and of providing financial security to the victim and his or her family are no less because the person injured or killed was guilty of a crime. It is one thing for a person's financial means to be affected by a penalty imposed by the criminal law. But it is another for the compensation system to impose a penalty, a task for which it is not equipped. This argument has particular force in relation to a scheme which makes a total commitment to the no-fault principle. By contrast, under dual schemes, there is no inconsistency of principle between the wide class of exclusions which operate in the "no-fault" component and the retention of the common law action for negligence. The use of the compensation system as a means of punishment for criminal conduct is especially inappropriate if the Corporation itself has to determine the nature and extent of the benefits to be excluded. For this reason, the solution adopted in New Zealand by which the Accident Corporation may decline compensation where to do otherwise would be "repugnant to justice" (paragraph 14.107) is not satisfactory. This is to confuse the role of the courts with that of a Corporation administering a no-fault scheme.

2. What is Excluded?

14.114 This brings us to a second and related question If benefits are to be excluded for improper conduct, does this mean all, or only some, of the benefits available under the Scheme? The solutions adopted by existing schemes demonstrate the range of possible answers. Under both the New Zealand and Northern Territory schemes, all benefits are denied in certain cases, while earnings-related compensation is denied in some other cases in the Northern Territory. In Victoria the general approach is to deny earnings-related compensation Lump sum payments for scheduled injuries are affected in Tasmania (combined with medical and hospital expenses). (See paragraphs 14.107-14.1 10). There is no doubt that the range of benefits affected is influenced by the kind of conduct caught by the exclusion rules. The wider the conduct caught, the less sweeping the denial of benefits; the narrower the conduct, the more benefits that are denied.

14.115 It is very difficult to suggest which class, or classes, of benefits are more appropriately excluded in preference to others. The most important to retain are benefits closely related to treatment and rehabilitation such as medical and ancillary services, attendant care and support services. But denying compensation for permanent disability and for loss of earning capacity also presents difficulties. If the lump sum payment for permanent disability were withheld from a person whose disability resulted from misconduct, the denial would affect only the most seriously injured and it is difficult to justify penalising only this class of wrongdoer. If compensation for loss of earning capacity is to be refused, for example on the ground of conviction for a criminal offence, there will inevitably be a delay, often substantial, between the accident (and commission of the alleged criminal offence) and conviction. Either compensation payments already made will have to be refunded, perhaps after the convicted claimant has fully recovered and is no longer receiving benefits, or compensation payments have to be deferred where it appears a charge has or will be laid, as in Victoria. The former approach presents obvious administrative problems, while the latter could work considerable injustice on those subsequently acquitted of criminal charges.

C. Proposals

1. Self-Inflicted Injury

14.116 The one exclusion on which we hold a unanimous view is that no benefits should be paid where the death or injury is wilfully self-inflicted. This is a ground for exclusion in all other schemes. One reason why self-inflicted injury stands apart from other grounds for exclusion is its association with possible abuse. No earnings-related compensation scheme can ignore the regrettable need to guard against cases of injury deliberately inflicted in order to obtain benefits. **We recommend that benefits under the Scheme should not be available in respect of intentionally self-inflicted death or bodily injury.**

2. Crimes of Violence

14.117 Some members of the Commission, while recognising the difficulties of imposing an exclusion for criminal conduct generally, are particularly concerned at compensation and benefits being provided to a person engaged in committing a criminal offence at the time of the accident. This is an especially sensitive issue from the perspective of the community's sense of justice. Discussions following publication of the Working Paper suggest that many members of the community would be offended at the prospect that people guilty of crimes of violence could receive full benefits under the Scheme. Those holding this view extend it to benefits available to members of the family of a person killed in the course of an act of violence. They are influenced by the fact that, in the absence of a comprehensive compensation scheme, the families of many accident victims innocent of criminal wrongdoing have no entitlement to compensation. Other members of the Commission consider that even an exclusion for the extreme case of violent criminal conduct would undermine the principle that the compensation and criminal justice systems have different objectives and should be separately administered. They note that all benefits would be suspended during a period of imprisonment (paragraph 14.123) and that this would have a substantial effect on claimants convicted of crimes of violence. Members of the Commission, though equally divided on the following recommendation, agree that it should have the status of a majority recommendation and should be incorporated in draft legislation. On this basis **we recommend that benefits should not be available under the Scheme in respect of bodily injury or death sustained by a person in furtherance of or incidental to the commission of a crime involving an intention to inflict serious violence or substantial damage to property, for which he or she is convicted or against whom the offence is proven.**

3. Driving Offences

14.118 The majority of the Commission favour no further exclusions. However, all members of the Commission agree that if, contrary to the majority view, further exclusions should be adopted, they should not be framed in general terms such as "indictable offence". [155] The wide range of unrelated and relatively minor crimes included in this term make it inappropriate as an exclusion. Similar difficulties arise in relation to a phrase such as that used in the Tasmanian legislation which links offences of "dishonesty and violence" in its exclusion provision. [156] It would be better to take the approach in the subsidiary exclusion provision of the Tasmanian legislation which lists a number of specific driving-related offences. [157] Putting aside serious crimes already dealt with any further exclusion can only be justified where the criminal conduct complained of was in the form of a driving offence which materially contributed to the accident. The minority recommendation therefore adopts an adaptation of the subsidiary Tasmanian provision.

14.119 The majority of the Commission has not been persuaded that a driving offence, even if it materially contributed to the accident, is sufficient to overcome the more fundamental objection in principle to denying compensation through the Scheme. The problems are especially acute if a blanket exclusion is proposed irrespective of-the seriousness of the offence. The quadriplegic whose blood alcohol level is marginally above the prescribed limit would stand to lose extensive benefits over a lifetime, while the driver guilty of manslaughter who escaped with minor injuries would have very little to lose by the exclusion This distorts the priorities normally adopted as part of the criminal process. Furthermore, the knowledge that conviction for a relatively minor offence could automatically deprive an accused person of substantial benefits under the Scheme might influence judges, juries and magistrates in deciding whether to convict and might also influence sentencing in a haphazard way. The majority considers that this could have an arbitrary effect on the administration of justice and that the relationship between the compensation system and the criminal law should be worked out more systematically.

14.120 If the compensation and criminal justice systems were more closely coordinated, would this overcome some of the problems identified in the previous paragraph? Consideration was given, for example, to a proposal to grant judges and magistrates in criminal proceedings power to deny or reduce benefits under the Scheme as part of the sentencing process. This would have the advantage of allowing some account to be taken of the

seriousness of the offence in determining the benefits which should be denied or-reduced, although this would complicate the sentencing process in that the court would have an additional sentencing option for certain classes of offenders. It might not be easy to determine the extent to which benefits should be denied, or the relationship between that option and other kinds of penalties. Moreover, the proposal does not overcome the administrative problems created by the substantial delay between the accident and the conclusion of criminal proceedings.

14.121 Despite the difficulties, careful attention should be devoted to the relationship between the accident compensation system and the criminal justice system. In particular, consideration should be given to allowing or perhaps requiring the judge or magistrate in criminal proceedings to take account of benefits available under the Scheme, both past and future, in determining the appropriate sentence for a transport accident victim convicted of an offence related to the accident This approach would allow, for example, the severity of a pecuniary penalty to be determined having regard to compensation entitlements. However, the court would act in accordance with the general principles of sentencing, which take account of the seriousness of the offence and the circumstances of the accused, including his or her responsibilities for the support of family members. Attention would need to be devoted to the enforcement of any penalty. it may be appropriate to establish special procedures to permit a financial penalty to be recouped out of benefits under the Scheme. The value of this approach in principle is that it does not confuse the distinct functions of the compensation and criminal justice systems, yet acknowledges the concern of many people in the community that accident victims guilty of criminal misconduct should not ultimately enjoy the same benefits as victims who have been guilty of no such misconduct. When this is combined with the later recommendation that benefits should be discontinued during a period of imprisonment, the means may be available to satisfy the communities sense of justice, yet preserve the integrity of the compensation scheme. For these reasons, a majority of the Commission **recommends that,** subject to the discontinuation of benefits during imprisonment, **there should be no further exclusions from the Scheme on public policy grounds. However, consideration should be given to revising sentencing procedures to empower or require judges and magistrates to take into account entitlements to benefits under the Scheme when sentencing for offences related to transport accidents and to establish mechanisms for the enforcement of penalties against entitlements under the Scheme.**

14.122 Two members of the Commission [158] would recommend that benefits should not be available under the Scheme in respect of death or bodily injury sustained by a person who commits one or more of certain offences, provided the conduct giving rise to the offence or offences materially contributed to the transport accident. The offences referred to are:

manslaughter;

culpable driving under Section 52A of the Crimes Act, 1900;

driving at a speed or in a manner that is dangerous to the public under section 4(1) of the Motor Traffic Act, 1909;

malicious injury to property under section 247 of the Crimes Act, 1900;

driving a motor vehicle with more than the prescribed concentration of alcohol in the driver s blood under section 4E of the Motor Traffic Act, 1909; and

driving a motor vehicle while the driver is under the influence of intoxicating liquor or of a drug under section 5(2) of the Motor Traffic Act, 1909.

4. Imprisonment

14.123 The earlier discussion foreshadowed an intention to exclude people in prison from benefits under the Scheme. To the extent that discontinuation of benefits in such circumstances is indirectly associated with conviction for a crime connected with the transport accident it effectively reduces benefits in such cases. However, unlike general exclusion on the grounds of conviction for an offence it does not operate retrospectively and thus avoids the administrative problems associated with retrospective adjustment. Moreover, because the term of imprisonment is likely to reflect the seriousness of the crime, it operates less arbitrarily than general exclusion. More generally, a person in prison has access to the medical, hospital and rehabilitation services

within the corrective services system. There is no good reason why facilities under the Scheme should be used to supplement or replace them. It would also be contrary to accepted public policy for the Scheme to provide financial support by way of periodic payments for loss of earning capacity during a period of imprisonment. Therefore, **we recommend that all benefits under the Scheme should be suspended while a person otherwise eligible for benefits is imprisoned pursuant to conviction or sentence for any crime.**

XI. SUMMARY

14.124 This Chapter examines the scope of the Transport Accidents Scheme. Many of the issues discussed in the Chapter would not arise under a national compensation scheme, since they concern the relationship between the Scheme and other sources of compensation. However, a scheme confined to transport accidents is not universal and thus raises difficult questions of causation and coverage. Some of these difficulties would be reduced if the Commonwealth and other Australian States and Territories were prepared to enter into cooperative arrangements to minimise overlap between compensation schemes and to increase the opportunities for efficient administration. The Corporation should have power to enter into such arrangements with any body exercising similar functions elsewhere in Australia.

Transport Accidents

14.125 The Scheme should apply to death or bodily injury caused by or arising out of a transport accident. A transport accident, generally speaking, is one involving the use of a motor vehicle or a form of public transport such as train or ferry. Bodily injury should include not only physical disability but nervous shock and damage to artificial members and aids.

Latent and Supervening Conditions

14.126 In determining whether disability or incapacity was caused by or arose Out of a transport accident, no regard should be had to any latent condition such as a disease of gradual onset existing at the time of the accident, which was not then productive of disability or incapacity. This should be so even though the latent condition ultimately would have resulted in disability or incapacity had the accident not occurred. An accident victim entitled to benefits under the Scheme should not have those benefits reduced or terminated by reason of a subsequent event, such as a second accident, causing further disability or incapacity.

Geographical Scope

14.127 The Scheme should apply to death or bodily injury suffered by:

a New South Wales resident killed or injured in a transport accident in New South Wales;

a non-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.

Overseas residents injured in a transport accident in New South Wales should not generally be entitled to compensation under the Scheme.

Common Law

14.128 In general rights to compensation arising out of a transport accident should be abolished, except for the rights to compensation under this Scheme.

Work-Related Accidents

14.129 A worker's right to claim damages against a negligent employer for a transport accident occurring in the course of employment should remain unaffected by the Scheme. Rights to compensation for injured workers under the New South Wales workers' compensation system should not be affected by the Scheme. Thus a worker injured in a transport accident in the course of employment or on a journey to or from work should continue to be entitled to workers' compensation.

Compensation from Other Sources

14.130 A person may be entitled to claim compensation under the Transport Accidents Scheme and under some other scheme or system. This could occur, for example, where the claimant has a common law action for damages in another State or rights under the New South Wales workers' compensation system. In these circumstances, the general rule should be that the person has three months to elect whether to claim under the Scheme or to pursue other remedies. If the person elects to receive benefits under the Scheme, he or she should have to account fully for any compensation received from the other source. An exception should apply where an injured worker claims workers' compensation and elects to come under the Scheme within the three month period. In this case the worker should be entitled to retain workers' compensation in respect of loss of earnings:

for the first five days of incapacity; and

for any other period (up to the date of election) if the compensation is greater than that paid under the Scheme.

14.131 Benefits under the Scheme should not be reduced or otherwise affected if the accident victim receives moneys in the form of *ex gratia* payments, accident insurance, retirement pensions, superannuation or pensions or benefits under Commonwealth legislation.

Exclusions

14.132 The question of exclusions raises difficult questions concerning the relationship between a scheme designed to compensate on a no-fault basis and the criminal justice system. All members of the Commission agree that benefits should not be available in respect of intentionally self-inflicted death or bodily injury and that benefits otherwise available should be suspended while a person is in prison. A majority takes the view that:

benefits should not be available under the Scheme in respect of bodily injury or death sustained by a person while committing a serious crime; but

there should be no further exclusions from the Scheme on public policy grounds.

However, consideration should be given to revising sentencing procedures to empower or require the courts to take into account compensation under the Scheme in determining penalties for offences related to transport accidents.

FOOTNOTES

1. *Government Insurance Office of New South Wales v. R.J. Green & Lloyd Pty. Ltd.* (1966) 114 CLR 437, at p.444, per Barwick C.J.

2. *Fawcett v. B.H.P. By-Products Pty. Ltd.* (1960) 104 CLR 80.

3. *Johnson and Morris Pty. Ltd. v. Government Insurance Office of New South Wales* [1972] 2 NSWLR 743: *Commercial and General Insurance Co. Ltd. v. Government Insurance Office of New South Wales* (1973) 129 CLR 374.

4. Motor Vehicles (Third Party Insurance) Act 1942, s.30(1).

5. Further Schedule to Act.

6. Commissioner for Motor Transport, *Annual Report 1981-1982* (New South Wales), p.20.

7. See eg. Submissions S40, p.16; W34: and W55.

8. Motor Accidents Act 1973 (Vic.), s.16(1)(f).

9. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), s.24(1)(d).

10. Motor Accidents (Compensation) Act 1979 (NT), s.9

11. Section 5(1).

12. J.G. Fleming, *The Law of Torts* (6th ed. 1983). p.153.

13. *Watt v. Rama* [1972] V.R. 353.

14. *Mount Isa Mines Ltd. v. Pusey* (1970) 125 CLR 383.

15. *Hinz v. Berry* [1970] 2 QB 40, *Mount Isa Mines Ltd. v. Pusey* (1970) 125 CLR 383.

16. *Chadwick v. British Railways Board* [1967] 1 WLR 912: *McLoughlin v. O'Brian* [1982] 2 WLR 982. See now *Jaensch v. Coffey* (1984) 58 ALJR 426.

17. *State Rail Authority of New South Wales v.* Sharp [1981] 1 NSWLR 240.

18. *Boyle v. Nominal Defendant* (1959) 59 SR (NSW) 413.

19. *Juensch v. Coffey* (1984) 58 ALJR 426.

20. Accident Compensation Act 1982 (NZ). ss.76, 77.

21. In *Moore v. Nominal Defendant* [1983] 1 Qd R 507, loss or damage to spectacles consequential on bodily injury was held not to be bodily injury for purposes of the Motor Vehicles Insurance Act 1936-1979 (Qld.).

22. See also eg. Motor Accidents Act 1973 (Vic.), s.3 (2) (c).

23. Working Paper, para.10.2.

24. *State Government Insurance Commission v. Stevens Brothers Pty. Ltd.* (1984) 58 ALJR 346.

25. *Government Insurance Office of New South Wales v. R.J. Green & Lloyd Pty. Ltd.* (1966) 114 CLR 437.

26. (1960) 104 CLR 80.

27. (1973) 129 CLR 374.

28. *State Government Insurance* Commission v. *Stevens Brothers Pty. Ltd.* (1984) 68 ALJR 346. See also *Dawson v. Stevens Bros. Pty. Ltd.* (1983) 32 SASR 375.

29. *Harvey Trinder (NSW) Pty. Ltd. v, Government Insurance Office of New South Wales* (1966) 114 CLR 449.

30. *Lamont v. Motor Accidents Board* [1983] VR 88.

31. *Harris v. Motor Accidents Board,* Appeal No.9 of 1980, Victorian Motor Accidents Tribunal.

32. *Brewer v Incorporated Nominal Defendant* [1980] VR 469.

33. *McGuire v. Motor Accidents Board,* CCH Victorian Workers' Compensation Guide-Cases on the Motor Accidents Act, No.74-130.

34. *Government Insurance Office of New South Wales v. PJ Green & Lloyd Pty. Ltd.* (1966) 114 CLR 437, at p.447, per Windeyer J.

35. *Vaux v. Law Union and Rock Insurance Co.* Ltd. (1961) 78 WN (NSW) 588.

36. *Stewart v. Sydney County Council* [1973] 1 NSWLR 444.

37. *Gray v Murray* [1979] Tas R 48.

38. *Harkin v. Motor Accidents Board,* CCH Victorian Workers' Compensation Guide-Cases on the Motor Accidents Act No. 74-130.

39. *Government Insurance Office of New South Wales v.* King (1960) 104 CLR 93, at pp.99-100, per Menzies J.

40. *Mapleson v. Motor Accidents Board,* Appeal No.4 of 1975, Victorian Motor Accidents Tribunal, *Aquilina v. Noel Schmutter (Sales) Pty. Ltd.* 4 August 1983, Supreme Court of New South Wales, Yeldham J.

41. *Ryan v. Motor Accidents Board,* Appeal No.6 of 1976. Victorian Motor Accidents Tribunal.

42. *Application for Review by* A (1979) 4 ACCR (NZ) 56.

43. *Application for Review by H* (1978) 3 ACCR (NZ) 42. See also *Accident Compensation Corporation Medical Information Bulletin* No.25 (October 1982), pp.3-4.

44. (1941) 65 CLR 204.

45. *Performance Cars Ltd. v. Abraham* [1962] 1 QB 33.

46. *Neall v. Watson* (1960) 34 ALJR 364; *Hole v. Hocking* (1962) SASR 128.

47. *Zumeris v. Testa* (1972) VR 839.

48. *Wilson v. Peisley* (1976) 50 ALJR. 207.

49. *Cutler v. Vauxhall Motors Ltd.* [1971] 1 QB 418, at p.432, per Russell L.J.

50. *Salisbury v. Australian Iron & Steel Ltd.* (1943) 44 SR (NSW) 157.

51. *Appeal* by V (1980) 5 ACCR (NZ) 55

52. *Neall v. Watson* (1960) 34 ALJR 364; *Smith v. Leech Brain and Co. Ltd.* [1962] 2 QB 405: *Robinson v. Post Office* [1974] 1 WLR 1176; *Pipikos v. W. Brown and Sons Pty. Ltd.* [1970] SASR 508, and *Hoffmueller v. The Commonwealth* (1981) 54 FLR 48.

53. Note that compensation for permanent disability under the proposals in Chapter 11 would be based on the difference between the compensation payable in respect of the loss of one eye and that payable in respect of total blindness.

54. *Beavis v. Apthorpe* [1963] NSWR 1176: *Stephenson v. Waite Tileman Ltd.* (1973) 1 NZLR 152.

55. *Wieland v. Cyril Lord Carpets Ltd.* [1969] 3 All ER 1006: *Pyne v. Wilkenfeld* (1981) 26 SASR 441.

56. *Lindeman Ltd. v. Colvin* (1947) 74 CLR 313, at p.317, per Latham C.

57. (1947) 74 CLR 313.

58. H L A Hart and A M Honore, *Causation in the Law* (1959), pp.153-156.

59. *Neallv. Watson* (1960) 34 ALJR 364; *Smith v.Leech Brainand Co. Ltd.* [1962] 2 QB 405; *Robinson v. Post* Office[1974] 1 WLR 1176; *Pipikos* v. *W. Brown and Sons Pty. Ltd,* [1970] SASR 508, and *Hoffmueller v. The Commonwealth* [1981] 54 FLR 48.

60. (1947) 74 CLR 313.

61. *Fitzgerald v. Penn* (1954) 91 CLR 268, at p.277; *National Insurance Co. of New Zealand v. Espagne* (1960) 105 CLR 569, at pp.590-597.

62. *Jobling v. Associated Dairies Ltd.* [1982] AC 794.

63. Cf. *Faulkner v. Keffalinos* (1971) 45 ALJR 80: *Baker v. Willoughby* [1970] AC 467: and *Griffiths v. The Commonwealth* (1983) 50 ACTR 7

64. *Jobling v. Associated Dairies Ltd.* [1982] AC 794, at pp.810-811, per Lord Russell of Killowen, at p.8 15, per Lord Keith of Kinkel.

65. *Griffiths v. The Commonwealth* [1983] 50 ACTR 7, at p. 15, per Jenkinson J.

66. *Hanvood v. Wyken Colliery Co* [1913] 2 KB 158; *Ward v. Corrimal-Balgownie Collieries Ltd.* (1938) 61 CLR 120.

67. *Doudie v. Kinneit Cannel and Coking Coal Co. Ltd.* [1947] AC 377.

68. *McCann v. Scottish Co-op. Laundry Association Ltd.* [1936] 1 All ER 475; *Salisbury v. Australian Iron and Steel Ltd.* (1944) 44 SR (NSW) 157.

69. Motor Accidents (Compensation) Act 1979 (NT). s.7.

70. Motor Accidents (Liability and Compensation) Act 1973 (Tas.), s.23(1).

71. Motor Accidents Act 1973 (Vic), s.13(2).

72. See para.2.19.

73. Our formulation is more generous to the resident than the equivalent Victorian provision. The latter covers a Victorian resident injured or killed outside the state, provided that he or she was the driver of or passenger in a Victorian vehicle. We suggest that there should be coverage if the New South Wales resident is injured or killed outside the State and the injury or death is caused by or arises out of the use of a New South Wales vehicle.

74. The rule in *Phillips v. Eyre* (1870) LR 6 QB 1, means that if the negligent (Queensland) driver is not really liable under the law of New South Wales, because of the abolition of the common law action, he or she is not liable to be sued under Queensland law: *Koop v. Bebb* (1951) 84 CLR 629; P E Nygh, *Conflict of Laws in Australia* (4th ed. 1984), ch.18; C S Phegan “Tort Defences in Conflict of Laws-The Second Condition of The Rule in *Phillips v. Eyre* in Australia” (1984) 58 *Australian Law Journal* 24.

75. The specific problem referred to in para. 14.45 (the collision between two Queensland vehicles) could be met by Queensland legislating to overturn the conflicts of law rule that would prevent the victim bringing an action in that State.

76. State Transport (Co-ordination) Act, 193 1. s.12(1).

77. Motor Vehicles (Third Party Insurance) Regulations, 1942, reg.17.

78. Workers’ Compensation Act, 1926, s.7(1)(b).(c) and (d).

79. Part V. divisions 2, 2A.

80. Inserted by the Commercial Transactions (Miscellaneous Provisions) Act, 1974.

81. [1932] AC 562. See para.2.11 above.

82. *Stennett v. Hancock and Peters* [1939] 2 All ER 578.

83. *Andrews v. Hopkinson* [1957] 1 QB 229.

84. *Lexmead Ltd. v. Lewis* 1982 A.C. 225; *Meth v. Moore* (1982) 44 ALR 409.

85. *Stennett v. Hancock and Peters* [1939] 2 All ER 578.

86. Trade Practices Act 1974 (Cth.), ss.74B-74G

87. *Id*., s.4B(1).

88. *Id*., s.74A(2) (a).

89. See para.3.38.

90. See generally J G Fleming, *The Law of Torts* (6th ed. 1983), ch.21; H. Luntz, A D Hambly and R Hayes, *Cases and Commentary* (1980), ch.9; and W L Morison, C S Phegan and C Sappideen, *Cases on Torts* (5th ed. 1980), ch.13.

91. *Commissioner for Railways v. McDermott* [1967] 1 AC 169.

92. *Commissioner for Railways v. Quinlan* [1964] AC 1054; *Herrington v. British Railways Board* [1972] AC 877.

93. A recent example is found in the Occupiers' Liability Act 1983 (Vic.).

94. As described in Chapter 3.

95. Letter attached to Submission W41.

96. *Ibid.*

97. Workers' Compensation Act, 1926, s.6.

98. *Id*., s.7(1)(b),(c) and (d). A journey accident is not exclusively one occurring on the way to or from work. However, for ease of presentation, the two concepts are treated as interchangeable.

98. *Id*., s.7(1)(b),(c) and (d),

99. This table covers injuries arising from daily or other periodic journeys under the Workers' Compensation Act, 1926, s.7(1) (c), (d). The table extracts those accidents where the agency of the accident was a means of transportation.

100. *Workers' Compensation Statistics,* New South Wales, Year ended 30 June 1982, p.22. table 1.

101. Working Paper, para.10.25.

102. Journey accidents should remain within the workers' compensation system: see Submissions S37, annexed paper, p.5: S57. p.12, cf. Submission S44, p.8.

103. Workers' Compensation Act 1958 (Vic.), s.8(2A)-2H).

104. Motor Accidents (Liabilities and Compensation Act) 1973 (Tas.), s.14(3).

105. Pearson Report, vol.1, paras.858-867.

106. Working Paper, para.10.28.

107. See *Hobsons Pty. Ltd. v. Thorne* [1954] WCR 59, at pp.59-60, per Street C.J.

108. Submission S32.

109. Submission W33.

110. News Release by the Premier of New South Wales, the Hon N K Wran, QC, MP, 8 May 1984.

111. See note 100 above, pp.47-50, table IX. This does not include all course of employment injuries involving motor vehicles, but only those classified as “road traffic” cases in the statistics. It also includes only those which resulted in death or incapacity for three days or more.

112. Working Paper, para.10.30.

113. *Id*., para 10.34.

114. Motor Vehicles (Third Party Insurance) Act-1942, s.10(2).

115. Workers’ Compensation Act 1926, s.64(1) (a).

116. *Id*., s.64(1)(b), (c).

117. *Id*., *s.63: Australian Iron & Steel Pty. Ltd.* v. Government *Insurance Office of New South Wales* [1978] 2 NSWLR 59, at p.63.

118. See *Commercial & General Insurance Co. Ltd. v. Government Insurance Office of New South Wales* (1973) 129 CLR 374. As to self-insurers, see *Australian Iron & Steel Pty. Ltd. v. Government Insurance Office of New South Wales* [1977] NSWLR 446, at p.448.

119. Workers’ Compensation Act, 1926, s.64(1) (a).

120. *Id*., s.64A.

121. The GIO has estimated that slightly under 1 percent of workers’ compensation claims arise from the use of motor vehicles in circumstances where liability could be attributed to a person other than the employer and recovery action was taken by the insurer. Letter from Third Party Claims Manager to Commission, dated 20 June 1983.

122. One consequence of this proposal, together with other recommendations, is that the employer (or the insurer) vicariously liable for the negligence of a co-employee of the victim, would have no right to claim a contribution from a third party partially responsible. However, account should be taken of this in the negotiated agreements referred to earlier (para.14.78).

123. See para.4.30.

124. Motor Accidents Act 1973 (Vic.). s.74A.

125. See para.2.32, H. Luntz, *Assessment of Damages* (2nd ed. 1983), ch.8.

126. *Graham v. Baker* (1961) 106 CLR 340.

127. *Bradburn v. Great Western Railway* Co. (1874) LR. 10 Ex. 1.

128. *Redpath v. Belfast & County Down Railway.* [1947] NI 167; *Wollington v. State Electricity Commission of Victoria (No.2)* [1980] VR 91.

129. *National Insurance Co. of New Zealand Ltd. v. Espagne* (1961) 105 CLR 569. See generally N Seddon & J L R Davis, *Report on Relationships Between the Principal Commonwealth Social Security Benefits and Other Forms of Compensation,* December 1982.

130. *Ibid., Redding v. Lee* (1983) 57 ALJR 393.

131. *Jones v. Gleeson* (1965) 39 ALJR 258.

132. *Lindquist v. Maier* [1980] Qd R203.

133. (1983) 57 ALJR 393.

134. Compensation to Relatives Act, 1897, s.3(3).

135. *Peacock v. Amusement Equipment Co. Ltd*. [1954] 2 QB 347.

136. Workers' Compensation Act, 1926, s.7(2B).

137. *Id.,* s.7(2C).

138. *Id.,* s.13.

139. F Marks, *Workers' Compensation Law and Practice in New South Wales* (1983), p.261.

140. Workers' Compensation Act, 1926, s.13.

141. See para.2.60.

142. See para.2.61.

143. (1983) 57 ALJR 393.

144. *Id.,* at p.406, per Murphy J, at p.41 3, per Deane J.

145. See paras.12.58-12.59.

146. See in particular, para.12.48.

147. Accident Compensation Act 1982 (NZ), s.90.

148. *Id*., s.91.

149. *Id*., s.92.

150. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), s.24(1).

151. *Id*., s.24(2).

152. Motor Accidents (Compensation) Act 1979 (NT), s.10(a).

153. *Id*., s.9.

154. See eg. Submissions S43, p.5; W48, p.9; and W84.

155. As used in Motor Accidents (Compensation) Act 1979 (NT), s.10(a).

156. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.). s.24(1)

157. *Id*., s.24(2).

158. Justice Rogers and Mr. Sperling.

15. Administration of the Scheme

I. INTRODUCTION

15.1 The major objectives of the Transport Accidents Scheme are to promote the rapid and effective rehabilitation of transport accident victims and to ameliorate the unavoidable consequences of accidents by establishing a comprehensive compensation system. The principles by which these objectives are to be achieved have been discussed at length in earlier Chapters. Should the proposals be accepted, these principles will be embodied in legislation which will provide the framework for the day-to-day operation of the Scheme.

15.2 The legislation cannot be self-executing. The administration of the legislation will shape the nature of the Scheme. “Administration” refers to the functions necessary to ensure that people injured in transport accidents receive the benefits to which they are entitled and that the statutory scheme is carried into effect. It includes processing claims made by injured people, assessing initial and continuing entitlements to benefits, providing benefits (whether in the form of monetary compensation goods or services), developing procedures to detect and minimise abuse and providing policy advice relating to the Scheme.

15.3 A number of submissions took up the theme that the quality of administration is central to the ultimate success of the Scheme. [1] Some, although sympathetic to the Administrative objectives outlined in our Working Paper, were sceptical as to whether they could be achieved. For example, the Paraplegic and Quadriplegic Association of New South Wales expressed its concern

> ... that the proposed Corporation will become another costly Government instrumentality that would award compensation according to strict guidelines rather than being sympathetic to the needs of the transport accident victim and determining the level of compensation accordingly. [2]

In New Zealand, supporters of the principles embodied in that country’s accident compensation scheme have been critical Of unnecessary rigidity in the administration of that scheme. Writing in 1981, GWR Palmer, one of the framers of the New Zealand scheme and now the Deputy Prime Minister of New Zealand, commented that:

> ... one of the most substantial Sources of complaint ... has related to the adversary attitudes which have been taken up in the administration of the scheme. There has been something of the attitude of an insurance company out of whom money must be prised with the help of lawyers. Some of this penny-pinching has probably cost more than it has saved and is certainly incompatible with the principles upon which the scheme is based. [3]

We are aware of the potential for abuse. However, it is feasible, by a combination of legislative directions and guidelines, high quality decision-making, effective external scrutiny of the administering authority and a departure from the traditional adversary approach to the resolution of compensation claims, to attain the objectives of the Scheme.

15.4 Clearly the administration of the Scheme will play an important role in determining whether the objectives of the legislation are achieved. For example, the emphasis we place in this Report on the rehabilitation of accident victims will require a commitment from administrators going beyond a grudging willingness to abide by the letter of the legislation. If rehabilitation is to be pursued vigorously and effectively, it will be necessary not only to devote resources to the task, but to ensure that decision-making reflects rehabilitation as a paramount objective. Similarly, it is essential that the administering authority accepts the responsibility of ensuring that injured people receive their full statutory entitlement. Should the authority insist that all claimants establish, without assistance, every element of their claim, the task confronting them will often be very formidable and important objectives of the Scheme would be frustrated.

15.5 This Chapter first considers the objectives of administration. It then examines the general functions that should be performed by the body responsible for the administration of the Scheme. Next, the nature and structure of that body (which we call the Accident Compensation Corporation of New South Wales) are examined. Finally, the Chapter considers a mechanism for policy review, involving the establishment of an agency independent of the Corporation. Chapter 16 examines the process of claims assessment and appeals from Corporation

decisions. The purpose of these Chapters is not to resolve all the issues that will be faced by administrators, but to provide a framework within which they will discharge their responsibilities.

II. PRINCIPLES OF ADMINISTRATION

15.6 Few would dispute the proposition that all compensation schemes should be administered efficiently. One way of assessing efficiency is to determine the proportion of the Scheme's income that is consumed in administrative expenses (or, to put it another way, the ratio of expenses to compensation and other benefits provided for claimants). Clearly it is desirable that the administrative expenses incurred by the Scheme be kept as low as possible, *consistent with the Scheme's overall objectives.* Every dollar spent *unnecessarily* on administration reduces the resources available to claimants or, alternatively, requires additional funds to be channelled to the Scheme. But this does not mean that the Scheme's administrators should regard the reduction of administrative expenses as a goal to be pursued at all costs. There are other objectives, of equal or greater importance, which administrators of the Scheme should attempt to achieve. Some of these will increase administrative expenses, while others will certainly increase the total benefits provided to claimants. Thus it is not enough simply to judge the Scheme by reference to a criterion such as the ratio of expenses to benefits. It is necessary to take account of other goals. There are five matters which should be taken into account in determining questions relating to the administration of the Scheme.

15.7 The first does not relate solely to administration, but should influence strongly the decision-making processes of the Corporation. This can be described as the *principle of entitlement*. By this we mean that the legislation should create a right to benefits and that the Scheme should be administered so as to ensure that claimants receive their full statutory entitlement. In addition, claimants should receive the assistance required to present their claims effectively. It follows from this principle, as far as administration of the Scheme is concerned, that doubts about eligibility should be temporarily resolved in favour of claimants until it is clearly established that they are not eligible. As a former Chairman of the New Zealand Accident Compensation Corporation has suggested:

> [c]ompensation is to be looked on as an entitlement; there is no room for a suspicious or grudging attitude towards claimants. [4]

This is particularly the case in a scheme designed to provide comprehensive compensation to a class of accident victims. The principle requires that benefits under the Scheme should be accessible to accident victims, regardless of their understanding of the system or their place of residence. The Accident Compensation Corporation must be prepared to take measures to overcome the problems created by ignorance, language difficulties, lack of means and geographical isolation.

15.8 The principle of entitlement also suggests that the Accident Compensation Corporation should refrain from adopting an adversary approach to claimants. It is not appropriate, for example, that the Corporation should require a claimant, at his or her peril and without assistance, to prove every element of a claim. In practice the interests of the Corporation and of claimants will not always be identical. Obviously it will be necessary for the Corporation to take measures to detect fraudulent or false claims. Equally clearly some claims, although made in good faith, will not be accepted by the Corporation-Disputes on both matters of fact and of law will arise and will have to be resolved, ultimately (if necessary) by an appeal tribunal. But the fact that some disputes are unavoidable should not prevent the Corporation from actively assisting injured people to lodge claims. Nor should it prevent the Corporation attempting to ensure that claimants, however diffident or unfamiliar with official procedures, receive their full statutory entitlement to compensation. The provision for interim assessment, discussed in Chapter 16, is an important practical application of the principle of entitlement.

15.9 A second matter relevant to administration is the *principle of independence*. The administration of the Scheme should be independent of the Government of the day to the maximum extent possible. Obviously, this principle is subject to the ultimate law-making responsibility of Parliament, which retains the power to amend or repeal the legislation governing compensation arrangements. In this sense it might be said that compensation schemes are vulnerable to political interference. But this is true of all schemes including the common law negligence action, and follows inevitably from the system of parliamentary democracy. Our concern is that the day-to-day administration of the Transport Accidents Scheme should be independent of control or influence by

government and that any significant policy changes should be implemented through legislation rather than by means of directions to the administrators of the Scheme. It would be destructive of the Scheme if, for example, a Minister could direct, without any amending legislation, that harsher eligibility criteria should be adopted as a means of curbing expenditure on benefits. Similarly, it would be unacceptable if government directions effectively limited the seances available to transport accident victims under the Scheme.

15.10 Thirdly, administration of the Scheme should be influenced by the *principle of flexibility.* As has been explained elsewhere, the Scheme must be capable of performing a range of functions, not merely the payment of monetary compensation to claimants. For example, this Report has consistently stressed the importance of rehabilitation as an objective and the complex relationship between rehabilitation and the assessment of compensation. The recommendations contemplate that benefits should be made available to injured people in a variety of forms, including professional and support services. Depending on the circumstances, these might be provided by the Corporation itself or might be provided by existing agencies at the Corporation's request and at its expense. Moreover, the administrators of the Scheme will need to assess entitlement to compensation or to continuing benefits in an infinite range of circumstances and to formulate guidelines for the exercise of powers and discretions. Consequently the Scheme must be capable of responding flexibly to the particular circumstances and needs of claimants or people receiving benefits and of adjusting rapidly to the competing demands placed on the compensation system.

15.11 The remaining principles relate specifically to the decision-making process. If the Scheme is to be successful the administrators must accept the fundamental importance of the *principle of high quality decision-making*. As Professor T G Ison, a former chairman of the British Columbia Workers' Compensation Board, has recently observed, the failure to develop such a system can have "a very high cost in terms of delay, confusion, error and injustice". [5] Accordingly, the initial determination of claims and the continuing assessment of entitlement should be the responsibility of well-trained and well-educated decision-makers who have the necessary authority to determine claims and to undertake appropriate investigations. It would be a basic error if the assessment of entitlement to compensation whether initially or on a continuing basis, were entrusted to relatively junior employees of the Corporation. This vital task should be the responsibility of senior assessing officers who deal with applications and review files and who are the claimants I point of contact with the Scheme (see paragraphs 16.16-16.19). The Corporation will need to take steps to ensure that a consistent approach to claims and to the assessment of continuing eligibility is maintained by assessing officers. It would be an equally basic error if reliance were placed on the appeal system to correct poor quality decision-making. If this occurred, the cost in both economic and social terms would be considerable and the opportunity, among other things, for rapid rehabilitation would be seriously reduced. The appeal structure proposed in Chapter 16 is of course designed to enable a dissatisfied claimant to secure independent review of an unfavourable decision. However, the decision-making process is designed to encourage the Corporation to make decisions on the basis of full information and a careful assessment of relevant criteria, rather than to act on inadequate material in the hope that errors will be corrected at the next stage in the process.

15.12 A related principle is that of speed in decision-making and in providing compensation. High quality decision-making necessarily involves the speediest possible determination of claims consistent with the verification of entitlement. Once a claim is accepted, compensation should be provided without delay. One major deficiency in the common law system of compensation is that accident victims may have to wait several years or more to obtain a decision. This not only causes financial hardship in the intervening period, but is detrimental to rehabilitation Chapter 9 stresses that early intervention is crucial to the success of rehabilitation and that accident victims require security if they are to benefit from rehabilitation programs. Moreover, the general principle of entitlement will have little practical value unless compensation under the Scheme is assessed speedily. The Scheme should be capable of providing some benefits almost immediately after the accident and of paying compensation for loss of earning capacity to incapacitated earners within two weeks of the date of the accident. Where a full consideration of a claim requires time, compensation should usually be paid promptly pending the determination.

15.13 **We therefore recommend that the administration of the Transport Accidents Scheme should be founded upon five basic principles:**

entitlement;

independence;

flexibility;

high quality decision-making; and

peed in decision-making and in providing compensation.

III. ADMINISTRATIVE FUNCTIONS

15.14 The essential functions of the Accident Compensation Corporation, as administrator of the Transport Accidents Scheme, fall into six broad categories:

promotion of the Scheme and assistance to claimants;

policy formulation;

assessment of claims and of continuing entitlement to benefits, payment of benefits and provision of services;

coordination of existing services such as rehabilitation and home help;

collection of statistics and research; and

promotion of accident prevention and safety.

A. Promotion of the Scheme and Assistance to Claimants

15.15 The Corporation should take positive measures to publicise the Scheme, the benefits available and the procedures for making claims. Accident victims, in particular, must have ready access to information about the Scheme and advice as to the lodgment of claims. The Corporation should have a division responsible for disseminating information making contact with accident victims and assisting claimants with the preparation of claims.

15.16 One way in which the Corporation can reach the more seriously injured accident victims is by funding the employment in public hospitals of liaison staff equipped to offer information and assistance to the victims of transport accidents and their families. These officers could, for example, be social workers employed by the Health Department whose responsibilities could include advising injured people of the existence of the Scheme, supplying claim forms and offering assistance in preparing claims. In addition, these officers should be responsible for making preliminary inquiries as to likely rehabilitation needs and after-care services required and should liaise with the Corporation's rehabilitation officers where appropriate.

15.17 This form of assistance should be supplemented by the Corporation's own officers, whose functions would include providing information over the counter on benefits under the Scheme and eligibility for those benefits. Officers performing these tasks should not be responsible for assessing claims or continuing eligibility for benefits. They should, however, be prepared actively to assist accident victims and their families in preparing claims and in gathering material required to support those claims or to prevent the termination of benefits. The Corporation should be alert to the need to provide interpreters and, ideally, counter staff should be able to communicate directly with most non-English-speaking claimants. The Scheme should also embody the concept of independent claimant representatives who advise claimants and persons already receiving benefits and, if necessary, act on their behalf in pursuing a claim or resisting a threat to their continuing entitlement to benefits. This matter is discussed in paragraph 16.14.

B. Policy Formulation

15.18 The Corporation will need to play an active policy-making role in at least two ways. First, the day-to-day decision-making responsibilities of the Corporation will require it to formulate policy guidelines for the assistance of staff. While these guidelines must be drafted within the framework of the governing legislation and regulations,

there will always be considerable room for interpretation of statutory principles and for judgment to be exercised in deciding how to implement general policies. Moreover, new strategies will be necessary to give effect to changes to the legislation, whether by amendment or by novel judicial interpretation The experience of other compensation schemes confirms that it will also be necessary to prepare detailed policy guidelines. These guidelines, although primarily intended for internal use, should be readily available to claimants, claimant representatives, legal advisers and members of the public generally. This is also discussed in paragraphs 16.23-16.24.

15.19 The second policy-making function to be performed by the Corporation is that of advising the Government on the operation of the Transport Accidents Scheme and on any proposals for change to the governing legislation. The Corporation should not be the sole source of policy advice of this kind. In particular, we later propose the establishment of an independent Policy Review Committee to advise the Government (and the Corporation) as to the administration and overall effectiveness of the Scheme (paragraphs 15.59-15.60). Nonetheless, the Corporation is likely to be able to make a major contribution to policy formulation in the light of its experience with the Scheme.

C. Assessment of Entitlements and the Provision of Benefits

15.20 The Accident Compensation Corporation will be responsible for the receipt, assessment and determination of claims from accident victims. In addition, it will have to assess the continuing eligibility of accident victims for benefits in the light, for example, of chances in their medical condition and fluctuations in the extent of their post-accident earning capacity. Where a person is eligible for benefits, the Corporation must provide, or ensure the provision of those benefits promptly. Thus the functions and powers of the Corporation should include:

receiving claims and material in support of or bearing on claims;

assessing claims in accordance with the legislation and policy guidelines;

assessing the continuing entitlement of accident victims to benefits under the Scheme;

undertaking the necessary inquiries to establish eligibility or continuing entitlement to benefits;

paying monetary compensation to people injured and the families of people killed in transport accidents;

ensuring the provision of medical, rehabilitation and ancillary services to injured people; and

providing or ensuring the provision of other benefits, such as home modifications, aids and

appliances and support services to which accident victims are entitled.

15.21 Linked to these functions is the further role of detecting and minimising fraud. Fraud will be encountered in any statutory scheme providing benefits to members of the public. Clearly the governing legislation should create offences to cover the case of people making fraudulent claims or misleading the Corporation. There should also be provision for recovery of over-compensation in cases of fraud. The Corporation, although operating from a standpoint of claimant entitlement, cannot avoid the responsibility of developing procedures designed to detect offences of this kind and to discourage fraudulent practices. It is important that this responsibility should not overshadow or detract from the obligations to claimants, the vast majority of whom will be honest and seeking only to claim their rights under the legislation. The responsibility for investigating cases of suspected fraud, as opposed to carrying out standard inquiries or gathering information to support a claim should not be vested in the officer whose task it is to assess claims and eligibility for continuing benefits. If the assessing officer were to carry out or supervise the investigation of suspected fraud there would be a serious danger of confusion of roles. On occasion an assessing officer might initiate an investigation but where suspected fraud is involved it should be undertaken by a separate section of the Corporation. However, decisions as to entitlement following such an investigation should be made by the assessing officer.

D. Coordination

15.22 Many benefits to which claimants will be entitled under the legislation, including medical, hospital and rehabilitation services and support services, will not be provided by the Corporation but by existing service providers. This matter is discussed in detail in Chapters 9 and 10. The diversity of providers will require the Corporation to make strenuous efforts to coordinate the provision of services. It would be desirable for assessing officers to be responsible for coordinating the provision of services to accident victims. This would avoid the need for claimants to deal with a number of different officers and would minimise the danger of inconsistency in the approaches to assessment and the provision of services on a day-to-day basis.

E. Research

15.23 TheCorporationisuniquelywell-placedtocollectstatisticaldatarelatingtotransport accidents and the operations of the Scheme. Material of this kind is clearly essential for policy-making purposes and for predicting trends in the cost of the Scheme. In addition, the policy-making responsibilities of the Corporation require access to a wide range of information, not necessarily of a statistical nature, on such matters as accident prevention rehabilitation, disability and incapacity resulting from transport accidents and the system of review and appeal. The research required to gather the necessary statistics and other information could be undertaken by the Corporation or by outside bodies, perhaps with the financial support of the Corporation. The Corporation itself should have an active research function and should publish statistical and other material resulting from research programs. Care should be taken not to duplicate the work of existing agencies such as the Traffic Accident Research Unit.

F. Accident Prevention and Safety

15.24 In the course of discussion of the Working Paper, the primary importance of accident prevention has been repeatedly emphasised, particularly by those involved in road safety. The New Zealand Woodhouse Report stated that accidental injury demanded attack on three fronts: prevention rehabilitation and compensation in that order. [6] These priorities were repeated in the Australian Woodhouse Report [7] and they have been adopted in Chapter 5. Our recommendations concentrate on rehabilitation and compensation as the principal functions of the Corporation but this is not intended to detract from the primary importance of prevention. It is, however, consistent with the approach to other aspects of the Scheme, such as rehabilitation that duplication of the work of existing agencies should be discouraged. In the field of transport accident prevention agencies such as the Traffic Accident Research Unit of the New South Wales Traffic Authority and the STAYSAFE Committee of the New South Wales Parliament [8] are already in existence. The Traffic Accident Research Unit and its predecessor, the Road Safety Council, were active in the promotion of compulsory wearing of seat belts [9] and the First Report of the STAYSAFE Committee. [10] provided the catalyst for the introduction of random breath-testing in New South Wales. The most constructive role for the Corporation in such circumstances is to supplement the work of such agencies and to provide support which would expand their activities and enhance their effectiveness.

15.25 The Corporation will have access to data of special significance for accident prevention and safety. Statistics compiled by the Corporation should help to identify causes of accidents and of particular types of injury. The Corporation should liaise closely with existing agencies to ensure that they have the benefit of this information and to develop, where appropriate, joint strategies for promoting safety on the roads and in the public transport area. It may well be, for example, that the detailed information gathered by the Corporation on the nature and duration of incapacity arising from transport accidents will assist in identifying more specifically the factors creating a high risk of long-term incapacity. While the Corporation should not seek to duplicate the work of existing agencies, it would be appropriate for it to provide additional funds for bodies concerned with the promotion of safety and prevention. The costing of the Scheme includes provision for an allocation of $2 per vehicle for safety and prevention purposes (paragraph 17.38). In addition, the Scheme should create maximum incentives to safety, for example, by imposing loadings on the levies payable by drivers or motor vehicle owners whose activities create a high risk of accidents. This is referred to further in paragraphs 17.34-17.35.

G. Conclusion

15.26 In summary, **we recommend that the body administering the Scheme should be responsible for the following general functions:**

> **promotion of the Scheme, dissemination of information concerning entitlements and assistance to people claiming or entitled to benefits;**

policy formulation for the purposes of administration and advice to government;

assessment of claims and of continuing entitlement to benefits, payment of monetary compensation and the provision of other benefits;

coordination of the delivery of services to transport accident victims;

research; and

promotion of accident prevention and safety.

IV. THE ACCIDENT COMPENSATION CORPORATION

A. The Options

15.27 There are four major options in relation to the body responsible for administering the Transport Accidents Scheme. These are:

a government department (whether existing or new);

an existing Organisation with experience in claims handling and compensation, such as the Government Insurance Office of New South Wales or private insurers;

the State Compensation Board of New South Wales; and

a statutory authority specifically created to administer the Scheme.

Precedents exist for each of these models.

15.28 The Australian Woodhouse Committee recommended that the proposed national compensation scheme should be administered by the Department of Social Security. [11] Because the scheme would embrace sickness benefits and invalid pensions as well as most of the widows' pension scheme, this was thought to be the most appropriate solution In addition, the Committee considered that this course would avoid confusion for people wishing to claim benefits, and would reduce duplication of staff and facilities. [12] The National Rehabilitation and Compensation Bill tabled in Federal Parliament in 1977 adopted the Woodhouse recommendation. [13] The Commonwealth Government Employees' Compensation Scheme is administered by the Commissioner for Employees' Compensation. [14] The Commissioner and his or her staff are established as a division of the Department of Social Security, although separate offices are generally maintained throughout Australia.

15.29 The Northern Territory no-fault motor accidents scheme provides an example of an insurer, albeit a government agency, administering a compensation scheme. The Territory Insurance Office administers the scheme in addition to conducting workers' compensation and general insurance business. [15] In Tasmania, the Motor Accidents Insurance Board is responsible for conducting the third party insurance system, as well as the no-fault motor accidents scheme which supplements the common law negligence action in that State. [16] However, the Board was created when the no-fault scheme came into force and took over responsibility for collecting compulsory third party motor vehicle insurance premiums from the Government Insurance Board.

15.30 The State Compensation Board of New South Wales will be responsible for administering both the workers' compensation scheme and the sporting injuries scheme. [17] The Board, which will be subject to the control and direction of the responsible Minister, will consist of four members, one being the Boards Chief Executive Officer and three being part-time members. [18] The Board will succeed to the administrative functions formerly exercised by the Workers' Compensation Commission of New South Wales following the separation of the judicial and administrative functions of that body effected by the Workers' Compensation (Amendment) Act 1984. The Board's functions will include the licensing and supervision of insurers and self-insurers, the conduct of vocational

and rehabilitation programs for disabled workers and the administration of certain ancillary arrangements such as the Uninsured Liability and Indemnity Scheme.

15.31 The accident compensation schemes in New Zealand and Victoria are administered by statutory authorities established for that purpose. The Victorian motor vehicle no-fault scheme, which supplements the common law negligence action, is administered by the three-member Motor Accidents Board. [19] The Board is separate from the State Insurance Office which since 1977, has been the sole compulsory third party insurer in Victoria. In New Zealand, the Accident Compensation Corporation administers the comprehensive no-fault scheme operating in that country. [20] The Corporation consists of up to six members appointed on the recommendation of the Minister in addition to the Managing Director of the Corporation and the General Manager of the State Insurance Office. [21]

B. An Independent Statutory Authority

15.32 In our view, the Transport Accidents Scheme should be administered by an independent statutory authority established specifically for that purpose. The authority should be called the Accident Compensation Corporation of New South Wales. We have five main reasons for this view.

> A statutory authority is more likely than a department or other body subject to ministerial control to be independent of the government of the day in the administration of the Scheme.
>
> A new statutory authority is more likely than existing agencies, particularly those which have operated within the framework of an adversary model to implement the objectives of the Scheme. The new body should formulate fresh policies, practices and procedures designed to give effect to the objectives stated in this Report.
>
> A statutory authority is well-placed to ensure consistency of decision-making and of practices relating to the provision of compensation in its various forms. Such consistency, which is essential to the effectiveness of the Scheme, would be difficult or impossible to achieve if more than one Organisation, such as a number of private insurers, were responsible for administering the Scheme.
>
> A statutory authority is also well-equipped to discharge the wide range of functions imposed on the administrator of the Scheme. No existing body, nor the future State Compensation Board, is called upon to perform such a range of functions.
>
> There are grave difficulties in requiring an existing agency to administer a Scheme which differs in important respects from the other responsibilities of that agency.

15.33 We recognise that there are some short-term advantages in appointing an existing agency as administrator of the Scheme. The GIO has established premises, staff experienced in compensation matters and record-keeping systems that could perhaps be adapted to the demands of a new scheme. This will also be true of the State Compensation Board which will inherit such facilities from the Workers' Compensation Commission.

15.34 Nonetheless, we are firmly of the view that the administering authority should not be one of the existing agencies. While the GIO has considerable experience in the field of motor vehicle accident compensation. this experience has been acquired within the framework of an adversary system. The GIO would necessarily encounter great difficulty in adjusting to a system in which the common law negligence action plays no part. In addition, the GIO would presumably continue to be involved in liability insurance for other kinds of accidents on a commercial basis. The very different philosophies, as well as different functions and responsibilities, would require a flexibility of management that would be extraordinarily difficult to achieve. Of course, the GIO will need to be involved in handling the residue of compulsory third party claims after the introduction of the Transport Accidents Scheme.

15.35 In its first submission, the GIO argued that it should be the body to administer the no-fault. It Transport Accidents Scheme if that Scheme were to operate in addition to the common law. [22] However, in a later submission the GIO recognised the advantages in the Scheme being administered by a new authority but contended that management of funds for investment should remain its responsibility. [23]

15.36 The problems raised for the Scheme if administered by the GIO would be greatly exacerbated if a number of private insurers also participated. NRMA Insurance Ltd., which I recently wrote compulsory third party insurance in New South Wales, expressed interest in under writing a no-fault Scheme. [24] The Insurance Council of Australia submitted that private Insurers should be permitted to participate in the Scheme. [25] However, the participation of a number of insurer administrators would lead to undesirable unevenness in the management of claims and the provision of services and make it very difficult to overcome the adversary approach which characterises the current system. This is of special significance in a scheme which emphasises rehabilitation and which attempts to integrate compensation and rehabilitation arrangements. Moreover, obvious difficulties would arise in processing claims in the event of and, private insurer withdrawing from the Scheme. Finally, premium competition and inter-insurer disputes of the kind experienced in the workers' compensation industry are difficult to avoid in practice.

15.37 Neither do we consider the State Compensation Board to be an appropriate choice. While there is overlap between the workers' compensation scheme and the proposed Transport Accidents Scheme, in relation to transport accidents occurring in the course of employment or on the way to or from work, the underlying philosophy and the range of benefits and services available are different. The Board, like the GIO would have great difficulty adapting to the new Scheme, particularly as it would retain responsibility for the administration. Of the separate workers' compensation system. On the other hand, if in the future the benefits under the workers' compensation system and the Scheme become uniform, or very similar, the case for a single authority would be very strong.

15.38 For these reasons, **we recommend that the legislation establishing the Transport Accidents Scheme should create a new authority to be known as the Accident Compensation Corporation of New South Wales. The Corporation should be responsible for the administration of the Scheme.**

V. STRUCTURE OF THE ACCIDENT COMPENSATION CORPORATION

15.39 This Part deals with the major issues concerning the structure and responsibilities of the Accident Compensation Corporation. It does not attempt, however, to resolve all questions which may arise in practice. It is impossible to anticipate all the administrative problems that will occur and many important details must be left to the skills of the administrators.

A. Accountability

15.40 The Accident Compensation Corporation will perform very important public functions. It will administer a wide-ranging compensation scheme and will collect and expend substantial sums of money. The decisions of the Corporation, whether relating to individual cases or to more general policy questions, will affect large numbers of people. Clearly the community has a vital interest in the administration of the Scheme and in the proper management of public funds devoted to the Scheme. It is appropriate that the Corporation should be accountable to the public at large through Parliament. Accordingly, **we recommend that the Corporation should be required to submit a report on its activities to Parliament annually and that its accounts should be audited by the Auditor General.** In accordance with established practice in New South Wales, a Minister will take responsibility for providing information to Parliament about the operations of the Corporation and the administration of the Scheme. We do not think it appropriate to recommend which Ministerial portfolio should incorporate this responsibility.

15.41 While a Minister will be responsible for the Corporation's activities in Parliament the governing legislation should not subject the Corporation to the direction and control of the responsible Minister. The decisions of the Corporation in individual cases will be subject to the right of a dissatisfied claimant to appeal to an independent tribunal and the Corporation's general policy will be subject to oversight by the Policy Review Committee recommended later in this Chapter. It will of course be open to Parliament to amend the governing legislation to correct misguided or inappropriate interpretations of the legislation Consequently the activities of the Corporation will be subject to numerous checks and to close external scrutiny. In these circumstances it is unnecessary to impose Ministerial direction and control on the Corporation. More importantly, such direction and control would contravene the principle of independence, which is of paramount importance in the administration of the Scheme.

It would be unsatisfactory, for example, if a Minister could direct the Corporation to act in a manner which might affect the rights of claimants under the Scheme. While claimants would still retain their rights of appeal in such a case, the opportunities for direct political involvement in the administration of the Scheme should be minimised. For these reasons, we reject the New Zealand model which requires the Accident Compensation Corporation, in the exercise of its functions and powers, to give effect to the policy of the Government as communicated to it from time to time in writing by the responsible Minister. [26] In so doing we adopt the approach taken with respect to the Victorian Motor Accidents Board and the Tasmanian Motor Accidents Insurance Board. [27] Thus, **we recommend that the Corporation should not be subject to Ministerial direction or control in the administration of the Scheme.** In so recommending we have adopted the model of the State Bank of New South Wales which, although generally responsible to a Minister, is not subject to that Minister's control and direction and is empowered to determine its own policy and control its own affairs. [28]

B. Management

15.42 The Corporation will require a governing Board to determine policy (subject to oversight by the proposed Policy Review Committee) and to control its affairs. In turn, the Board will require a power of delegation to the executives, officers and employees of the Corporation. [29] We do not make a firm recommendation as to the nature and term of appointment of members of the Board, although our preference would be a five-member Board, four of whom would hold office on a part-time basis. One part-time member could be appointed Chairperson of the Board and members would generally be appointed for five years, and be eligible for reappointment. This model is similar to that adopted for the Accident Compensation Corporation of New Zealand [30] and for the Tasmanian Motor Accidents Insurance Board. [31] **We recommend that the overall policy formulation and management of the Corporation should be the responsibility of a Board consisting predominantly of part-time members.**

15.43 Board members should be appointed on the basis of their expertise and experience in matters relevant to the responsibilities of the Accident Compensation Corporation. Members might be appointed, for example, from the legal, medical or rehabilitation professions, or because of their expertise in financial management or the conduct of public corporations. With one exception we do not think the Board of the Corporation is the place for interest group representation. The one exception is that the Board should include a member with special knowledge of the problems of seriously disabled people. Such a person might himself or herself be disabled. Part-time Board members should not, by reason of their office, be subject to the Public Service Act, 1979. [32]

15.44 The full-time member of the Board should be the Corporation's Chief Executive. This is a crucial position, especially in the early development of the Scheme. The Chief Executive's position should be regarded as very senior, reflecting the heavy responsibilities in policy formulation and decision-making. The salary and allowances which we assume would be determined in practice pursuant to the Statutory and Other Offices Remuneration Act, 1975, should be at least equivalent to those paid to judges sitting on the Accident Compensation Appeal Tribunal discussed in Chapter 16. This would be an appropriate recognition of the Chief Executive's role, reinforcing the view that the quality of decision-making within the Corporation of fundamental importance and that undue reliance should not be placed on appeal procedures to ensure that the objectives of the Scheme are being met. The Corporation's Chief Executive should be designated as Managing Director, but the position should be kept distinct from that of Chairperson. [33] This is necessary to ensure that the part-time members have a substantial and independent role to play in the conduct of the Corporation's affairs. Thus, **we recommend that the day-to-day administration of the Scheme, subject to the direction of the Board, should be the responsibility of the Corporation's full-time Chief Executive. The Chief Executive should be a member of the Board and should be known as Managing Director.**

C. Staff Structure

15.45 In order to discharge its various responsibilities efficiently and sympathetically, the Corporation will require flexibility in staffing policies. In particular, the Corporation should not be subject to staff ceilings imposed by the State Public Service Board, and should be empowered to engage consultants and others with special expertise for short-or long-term projects. The Corporation should also be free to offer terms and conditions of employment which vary from those imposed by the Public Service Act 1979. One example of the need for flexibility is in relation to medical practitioners who are required to assess claimants and to participate in their care and treatment. The Corporation should be free to enter appropriate agreements with medical practitioners, including

specialists, in order to obtain the medical advice and services required. The Corporation may also wish to offer security of tenure to certain categories of staff, such as clerical and secretarial staff, and to include staff in the State Superannuation Scheme. On balance, the flexibility required by the Corporation will best be achieved if its staff are not subject to the Public Service Act. [34] The fact that the Corporation's expenses are to be met from users' contributions rather than from Consolidated Revenue, adds weight to this conclusion. We note that in its 1983 Annual Report the GIO observed that public service employment practices created difficulties for staff and for the management of the Office.

> For example, the system for appeal against appointments is expensive to administer and is demotivational in its effect on staff concerned and the State Superannuation Scheme is not satisfactory in respect of some classes of employee. [35]

15.46 The personnel practices of statutory authorities in New South Wales have been the subject of inquiry and report by the Review of New South Wales Government Administration. [36] The most recent recommendations of that Review suggest the adoption of an Act setting down policies and procedures to which all statutory authorities would adhere. It would embody the principle of equal employment opportunities in relation to base grade recruitment, adopt similar criteria for promotion and similar procedures for recruitment to promotion positions as those under the Public Service Act 1979, and permit the Government to draw up regulations concerning the advertising of positions. Exemption of sections of an authorities workforce from some of its provisions would be possible. [37] The purpose of these proposals is to improve the personnel practices of statutory authorities and to bring them into line with certain public service standards. If this legislation is implemented, consideration will need to be given to the extent to which the Corporation should be subject to its provisions in view of the need for flexibility and specialised expertise. In this respect it is relevant to recall that at present there are 24 declared statutory authorities with State Government employees outside the Public Service. [38] **We recommend that the staff of the Corporation should not be subject to the Public Service Act, 1979. We further recommend that the Corporation should be empowered specifically to engage consultants on a part-time, casual or sessional basis.**

15.47 The realisation of the principle of high quality decision-making in practice will require the staff members responsible for deciding claims, whom we describe as assessing officers, to be selected with particular care. The internal structure of the Corporation should reflect their special significance in the administration of the Scheme. Candidates for appointment should be required to meet demanding educational standards and should have the personal attributes necessary to implement the objectives of the Scheme. The positions should not be filled by clerical staff. Rather, assessing officers should be appointed on the basis of open competition for advertised vacancies. The salary and work conditions of assessing officers, whose role is discussed in Chapter 16, should reflect their importance to the Scheme.

15.48 In addition the Corporation should pay particular attention to the training of assessing officers and, indeed, of other staff of the Corporation. It is important to acknowledge that many of the functions envisaged for the Corporation, including the integration of the compensation and rehabilitation systems, are novel and challenging. The Corporation will need to develop training programs to make staff aware of the objectives of the Scheme and of the measures required to achieve them. **We recommend that careful attention should be paid to selecting and training the staff, especially assessing officers who will be responsible for deciding claims.**

D. Decentralisation

15.49 The size of the State and the spread of its population present a potential problem for the efficient administration of the Scheme. Experience in New Zealand and elsewhere has demonstrated that prompt identification of claimants, rapid processing of claims and ready access to rehabilitation and other services are essential if the objectives of the Scheme are to be realised. Problems with the use of the State Insurance Office as an agent for claims handling have led the Accident Compensation Corporation in New Zealand to reabsorb that function decentralising its own operation at the same time. [39] This process has been assisted by the installation of new computer facilities and the preparation of detailed manuals containing guidelines and instructions on all aspects of claims handling, assessment, rehabilitation and review. Professor Ison has stressed that "high quality primary adjudication" requires decentralised administration, with the adjudicator having the personal responsibility for undertaking Inquiries, including, where appropriate, the questioning of the claimant. He argues that a centralised administration is

> ... most unfortunate [and] tends to promote stereotyped responses to apparent Situations. Local administration makes it easier to distinguish the variables relevant in each case.... It is essential to claims adjudication that the adjudicator should be in the affected community... [40]

We have already stressed the importance of the accessibility of the Scheme to injured people.

15.50 We agree strongly with the view that decentralised administration is essential to the determination of claims and to achieve the necessary degree of direct personal communication with claimants, employers and the providers of rehabilitation services. This is particularly so in New South Wales where, apart from Sydney, Newcastle and Wollongong, there are 11 centres which with a population in excess of 23,000. [41] There are 10 major hospitals with rehabilitation facilities in the Sydney metropolitan area and most regional centres, some which have a high motor vehicle accident rates, are served by major rehabilitation units. [42] In addition these centres are important sources of employment, often serving surrounding districts. Despite this, some have high unemployment rates during times of recession and a concentrated effort is likely to be required by the Corporation if work is to be preserved or found for those seriously incapacitated in transport accidents. For these reasons, **we recommend that, to the maximum extent practicable, the administration of the Scheme, including the assessment and determination of claims, should be decentralised. For this purpose the Corporation should be empowered to establish regional offices.**

15.51 The objective of decentralisation is consistent with the Corporation establishing agency arrangements in country areas. Arrangements of this kind, using for example the GIO, government departments or health funds, might be particularly important in the early days. These arrangements should be confined to functions that can be performed by agents without detracting from the objectives of the Scheme. The functions could include receiving claims for transmission to the Corporation and paying monetary compensation at the direction of the Corporation. The assessment of claims should not be delegated to an agent. Accordingly, **we recommend that the Corporation should be empowered to establish appropriate agency arrangements, but these should not extend to the determination and assessment of claims.**

E. Investment of Funds

15.52 In its submission, the GIO argued that it should manage and invest the funds collected for the new Scheme. [43] The reasons advanced include the following.

> If the Corporation undertook the task, it would require an investment capacity which, in the experience of the State Superannuation Board and the GIO, would not be easy to achieve, partly because of the difficulties faced by government organisations in attracting able investment staff. It would be undesirable for the new Corporation to compete with existing government bodies for scarce investment staff.
>
> Of the $1,400 million then in the compulsory third party fund, more thin S600 million was in the form of investments, such as loans on housing or loans to local government authorities, which could not readily be realised. The State Government had guaranteed the liabilities of the third party fund and could be called on to meet that guarantee if the fund ran down quickly and investments could not be realised.
>
> The net cash inflow to the third party funds was approximately $175 million. If premiums suddenly stopped, the net cash outflow would be very substantial and would impair the GIO's capacity to support investment in areas of interest to the government.

15.53 There is a precedent for this approach in Victoria, where collection and investment of the premiums required to fund the no-fault motor accident scheme is the responsibility of the sole authorised insurer, the State Insurance Office. Funds are called for by the Board from the Office to meet its liabilities, although it has a power of short-term investment in such manner as the Treasurer approves. [44] The consequence is that the Board acts on a cash flow basis, and does not require the investment experience or facilities of an insurer. [45] This approach can also assist in avoiding any conflict of interest between investment and claims management policies. **We therefore recommend that the GIO should be responsible for the investment and management of the funds generated by the Transport Accidents Scheme, to the extent that they are not required by the Corporation to meet its liabilities.** We return to the question of the funding of the Scheme in Chapter 17,

including whether the Scheme should operate on a fully funded basis (which would generate a very large fund for investment) or on a pay-as-you-go basis (which would not).

F. Liability to Taxation

15.54 Consideration will need to be given to the Corporation's liability for Commonwealth taxes such as income tax, bank account debits tax, and sales tax; and for State duties and taxes including stamp duty, pay-roll tax, and land tax. We assume that in common with other statutory authorities, pay-roll tax and stamp duty on ordinary transactions would be payable, [46] but special attention should be paid to the possible incidence of stamp duty for the coverage acquired in place of existing third party insurance. That form of insurance is presently liable to duty of 15 cents as a liability Policy. [47] The coverage offered under the proposed Scheme, is of a different nature and in some respects resembles disability insurance, which would be dutiable at a higher rate. Since the Corporation will be a public authority constituted under a State Act and the Scheme is not intended to operate on a profit basis, no question of income tax should arise. [48] We note, however, that the GIO has an obligation, effected as part of the general Commonwealth/State funding arrangements, to pay to the State Treasury the equivalent of Commonwealth income tax otherwise payable as a result of its operations. [49] Exemption from the bank account debits tax is a matter for the Commonwealth. [50]

15.55 Exemption from financial institutions duty [51] would seem appropriate, as would exemption from land tax, [52] although we make no firm recommendations on these matters. Special consideration would need to be given to possible relief from sales tax if the Corporation supplies aids and appliances other than by way of sale. [53]

VI. POLICY REVIEW

15.56 This Report discusses a number of ways in which the policy objectives of the Scheme can be encouraged. These include specifying in the governing legislation the benefits available to injured accident victims, including automatic indexation; [54] imposing positive statutory duties such as the duty of the Corporation to provide benefits to eligible claimants, allowing the Corporation to be free from Ministerial direction and control, and establishing a full appeal system. Despite these measures, further provision should be made for independent assessment of the policies and administrative practices adopted by the Corporation.

15.57 There are three major reasons for a continuing assessment of this kind.

> First-the Corporation inevitably will face important questions of interpretation, administrative policy and the exercise of discretionary judgment. These are of critical importance to the Scheme and should be reviewed by an external body not embroiled in day-to-day administrative tasks. The purpose of the review should be to determine whether the Corporation's decisions promote the objectives of the Scheme.
>
> Secondly, as has been previously emphasised, the Corporation's primary concern should not be to conserve resources but to ensure that claimants receive their statutory entitlements. Nonetheless, the reality is that the interests of the Corporation and of claimants will not always coincide. If the Corporation were effectively the sole or even the major source of policy advice to Government and to Parliament, there is a danger that it might adopt an unduly conservative approach to administration for financial reasons. An independent policy review body would do much to counter such a tendency.
>
> Thirdly, the appeal procedures recommended in Chapter 16, although important, should not be regarded as the principal means of reviewing policy decisions of the Corporation. If undue reliance is placed on the mechanism of appeal, the effect will be to reduce the quality and flexibility of the decision-making process within the Corporation Moreover, there will be important policy questions that are not suitable for determination by appeal tribunals or which simply do not reach those tribunals because of the sporadic nature of appeals.

15.58 Several submissions suggested that an independent committee or board should be established to oversee the activities of the Corporation and to guide its policies generally or in particular areas. The Handicapped and Disabled Person's association, for example, called for

> ... a committee or overseeing body of disabled people employed by the scheme to advise and monitor such areas as rehabilitation and aid/equipment supply. [55]

The Nambucca Welfare Committee contended that there

> ... should be a continuing independent review committee to monitor policy guidelines of the Accident Compensation Corporation ... This committee should include representatives from disabled groups whose membership comprises persons incapacitated in transport accidents. [56]

15.59 For reasons already given we agree that an independent body should be established to report on the operation of the Transport Accidents Scheme. This task should include monitoring the activities of the Corporation including its policy guidelines, administrative policies and interpretations of the governing legislation. The independent body, which could be called the Accident Compensation Policy Review Committee, should also have power to recommend legislative amendments in order to overcome defects in or to improve the Scheme. It should have power to report to the Minister whenever there is reason to do so, but should be under a duty to report annually to Parliament The Committee should be concerned with the overall conduct of the Scheme and should not intervene in individual cases. However, its responsibilities would include proposing changes in the practices of the Corporation and for this purpose it should have power to comment on the handling of particular cases and decisions reached in them. Consequently, the Committee should have power to examine files and to require the Corporation to provide information on general policy and practice and on the processing of individual claims. The Committee should be constituted by part-time members, but should be served by a small full-time secretariat. Its membership should be drawn both from experts in the field of accident compensation and from groups with a special interest in the field, such as disabled people, rehabilitation workers, the trade union movement. employers, motorists, public transport authorities and the insurance industry.

15.60 **We recommend that the legislation should establish an independent body to be known as the Accident Compensation Policy Review Committee. The Committee should be under a duty to report annually to Parliament on the operations of the Scheme and should be empowered to recommend changes to legislation and to the practices of the Corporation. The Committee should be empowered to require the Corporation to provide information relating to the Scheme and to the processing and determination of individual claims.**

15.61 The Corporation may wish to comment on reports of the Policy Review Committee and should be free to do so, whether in annual reports or otherwise. In some circumstances it may be appropriate for the Corporation to be required to comment, such as on occasions when the Policy Review Committee points to what it sees as serious defects in administration. Accordingly, **we recommend that the Minister should have power to require the Corporation to respond in writing to a report of the Policy Review Committee within a specified period.**

VII. SUMMARY

Principles

15.62 The quality of administration of the Transport Accidents Scheme will be of fundamental importance in determining whether the objectives of the Scheme will be realised. Administration of the Scheme should be based on five principles:

> the principle of entitlement, under which the Scheme is administered so as to ensure that claimants receive the benefits to which they have a statutory right;
>
> the principle of independence from the Government of the day;
>
> the principle of flexibility, allowing the scheme to provide a wide range of benefits and to respond to the circumstances of individual claimants;

the principle of high quality decision-making, requiring well-trained and well-educated officers to have the necessary authority to determine claims; and

the principle of speed in decision-making and in providing compensation.

Administrative Functions

15.63 The Scheme should be administered by an independent statutory authority known as the Accident Compensation Corporation of New South Wales. The Corporation's functions should include:

promoting the Scheme, and disseminating information about the Scheme to people claiming or entitled to benefits;

formulating policy for the purpose of administration and giving advice to Government;

assessing claims and continuing entitlements to benefits, paying monetary compensation and providing other benefits;

coordinating the delivery of services to transport accident victims;

undertaking research; and

promoting accident prevention and safety.

Management

15.64 The overall responsibility for the management of the Corporation should be that of a Board. Day-to-day administration of the Scheme should be entrusted to a full-time Chief Executive. To the maximum extent practicable, the administration of the Scheme, including the determination of claims, should be decentralised.

Accountability

15.65 TheCorporationshouldbesubjecttocloseexternalscrutinyandbemadeaccountable in several ways.

It should be required to report annually to Parliament and to submit its accounts for audit by the Auditor-General.

The policies and practices of the Corporation should be kept under review by an independent Policy Review Committee reporting directly to Parliament.

Claimants should have a full right of appeal to an independent tribunal against adverse decisions of the Corporation (Chapter 16).

FOOTNOTES

1. Submissions W23, pp.25-26; W24, p.33; W28, p.16-1 and W81, p.5.

2. Submission W85, p.2.

3. GWR Palmer, "What Happened to the Woodhouse Report" [1981] *New Zealand Law Journal* 561, at p.567.

4. The quotation is part of a summary of the comments made by Mr BD Inglis, QC, former chairman of the Accident Compensation Corporation in discussion at a conference on Accident Compensation. One of the conference papers, by GWR Palmer, is published at [1981] *New Zealand Law Journal* 561, and the summary of Mr Inglis' comments follows at p.572.

5. TG Ison, “Workers’ Compensation-The Canadian Experience”, paper delivered at the conference entitied “Workers Compensation-New Directions?”, South Australian Ministry of Labour (Adelaide, May 1984), p.15.

6. New Zealand Woodhouse Report, p. 19, para.2.

7. Australian Woodhouse Report, vol.1, para.8.

8. joint Standing Committee of the Parliament of New South Wales on Road Safety.

9. See D. Herbert, *Road Safety in the Seventies: Lessons for the Eighties* (Traffic Accident Research Unit. Research Report 4/80,1980); N. Skinner, M. Henderson and D. Herbert, *Compulsory Wearing of Seat belts-A Feasibility Study* (Traffic Accident Research Unit, Research Report 6/70, 1970).

10. Joint Standing Committee on Road Safety, *Alcohol, other Drugs and Road Safety* (First Report, 1982).

11. Australian Woodhouse Report, vol.1, para.317.

12. *Id*., paras.314-315.

13. National Rehabilitation and Compensation Bill 1977 (Cth.), cll.7, 8, and part VIII.

14. Compensation (Commonwealth Government Employees) Act 1971 (Cth.), s.9.

15. Motor Accidents (Compensation) Act 1979 (N.T), s.6: Territory Insurance Office Act 1979 (NT), s.5.

16. Motor Accidents (Liabilities and Compensation) Act 197 3 (Tas.). ss.4, 30.

17. See generally, Workers’ Compensation Act 1926, part IV, division 2, as amended by the Workers’ Compensation (Amendment) Act, 1984, schedule 6. As to commencement of this legislation, see para.2.42.

18. Workers’ Compensation Act, 1926, S. 31(2)(3), as amended by the Workers’ Compensation (Amendment) Act, 1984, schedule 6.

19. Motor Accidents Act 197 3 (Vic.), ss.5, 6.

20. Accident Compensation Act 1982 (NZ), s.4(1).

21. *Id*., s.4(2).

22. Submission S51, p.1.

23. Submission W17, pp.3-4.

24. Submission W52, pp.1, 21-22: see also letter from N.R.M.A. Insurance Ltd., dated 15 November 1983.

25. Submission W71, p.8.

26. Accident Compensation Act 1982 (NZ), s.10(1).

27. Motor Accidents Act 1973 (Vic.). s.86: Motor Accidents (Liabilities and Compensation) Act 1971 (Tas.), s.9.

28. State Bank Act 1981, s.9(2). Cf. Water Resources Commission Act, 1976, s.4(2)(f); Maritime Services Act, 19;5, s.3(1A): Metropolitan Water, Sewerage and Drainage Act, 1924, s.7(2), Electricity Commission Act, 1950. s.7; and Transport Authorities Act, 1980, s.11(c) which refers to the state Rail Authority of New South Wales and s.33(1)(c) which refers to the Urban Transit Authority of New South Wales.

29. One model is the Government Insurance Act, 1927, ss.3B, 3BB.

30. Accident Compensation Act 1982 (N.Z.), s.4(2), (3).

31. Motor Accidents (Liabilities and Compensation) Act 197 3 (Tas.), s.4. The Victorian Board is constituted of three part-time members, who are appointed for terms up to five years: Motor Accidents Act 1973 (Vic.). s.6.

32. Cf. Government Insurance Act. 1927. schedule 2, c11.11.12, which regulate the office of the Director. See also schedule 3 regulating meetings of the Board.

33. Cf. Motor Accidents Act 1973 (Vic.), s.6-Motor Accidents (Liabilities and Compensation) Act 1973 (Tas), s.4(2): and Territory Insurance Office Act 1979 (NT), s.10, under which the Chief Executive officer is not a Board member.

34. Cf. Electricity Commission Act, 1950. s.64; Metropolitan Water, Sewage and Drainage Act. 1924. s.26 and Transport Authorities Act, 1980, s,47. Staff of the Victorian Motor Accidents Board are not subject to the provisions of the Public Service Act 1958 (Vic); Motor Accidents Act 1973 (Vic.), s.10(3).

35. GIO, Annual *Report 1982-1983,* p.19.

36. This Review. conducted under the chairmanship of Dr P Wilenski, delivered an Interim Report, *Directions for Change* (1977). and a Further Report, *Unfinished Agenda* (1982).

37. Review of New South Wales Government Administration, *Unfinished Agenda* (1982), pp.54-56.

38. Public Service Act 1979, ss.124-125. See also Public Service Board of New South Wales, *Report for the Year Ended 30 June 1983,* appendix C. In the background to the guidelines presented by the of New South Wales Government Administration, it was noted that three-quarters of all State Government employees were in statutory authorities outside the Public Service (para.1.1).

39. J L Fahy, *Accident Compensation Coverage* (7th ed. 1983), pp.11-12.

40. See T G Ison, note 5 above, p.14.

41. Australian Bureau of Statistics, *Persons and Dwellings in Local Government Areas and Urban Centres in New South Wales* 1981. Cat. No.2401.0, pp.33-39.

42. Health Commission of New South Wales, Tenth Annual *Report 1981/82.* pp.37-54. See also Background Paper by Dr. J. Voss on rehabilitation facilities, prepared with the assistance of Professor R. Jones, for the New South Wales Law Reform Commission, dated 20 July 1983.

43. Submission W17, pp.3-4.

44. Motor Accidents Act 1973 (Vic.), ss.60, 65.

45. See Motor Accidents Board, *Annual Report for Year ended 30 June 1981*, (Victoria 1982), p.4.

46. For example. State pay-roll tax is generally payable by State authorities although s.10 of the Pay-Roll Tax Act, 1971, provides that exemption may be granted to some statutory bodies. There is no general exemption in the Stamp Duties Act, 1920, for State authorities, and express provision is contained in s.10A(2) of the Government Insurance Act 1927, applying the Stamp Duties Act, 1920, to policies of insurance issued by the GIO in the same manner and to the same extent as they apply to policies of insurance issued by other insurers.

47. Stamp Duties Act 1920, schedule 2. Under s.88 D of the Stamp Duties Act, 1920, responsibility is imposed on the GIO to furnish returns and pay duty on third party motor vehicle policies.

48. Income Tax Assessment Act 1936 (Cth.). s.23(d); see also *Renmark Hotel Incorporated v. Federal Commissioner of Taxation* (1949) 79 CLR 10, at p.16.

49. Government Insurance Act 1927, s.10A(1).

50. Bank Accounts Debits Tax Administration Act 1982 (Cth.), s.3(1).

51. Stamp Duties Act 1920, s.98U(1)(c). as inserted by the Stamp Duties (Financial Institutions Duty) Amendment Act, 1982.

52. The Land Tax Management Act,1956, contains provision for exemption in respect of lands owned by certain public authorities: ss.10(1), 3(1): see also ss.10B, 10D.

51. Regard will need to be paid to the Sales Tax (Exemptions and Classifications) Act 1935-1973 (Cth.), s.5(1) and schedule 1. item 74.

54. W Clayton, “Compensation in New Zealand”, paper delivered at a conference entitled “The Compensation of Motor Accident Victims in Victoria-A Model for Australia?”, Law Institute of Victoria (Melbourne, October 1983), pp.2.11-13; J R Wilson, “Accident Compensation-a Union Viewpoint” [1983] *New Zealand Journal of Industrial Relations* 113, at pp.117-118. See also Submission W9. pp.8-9.

55. Submission W14, p.1.

56. Submission W83, p.2.

16. Decision Making: Assessment and Appeal

I. INTRODUCTION

16.1 Chapter 15 expressed the view that the administration of the Scheme will be of crucial importance. This Chapter examines one critical aspect of administration namely, assessment of eligibility for benefits under the Scheme. The assessment may relate to initial claims by accident victims or their families, or to their eligibility for continuing benefits such as periodic compensation for loss of earning capacity.

16.2 Part II of the Chapter deals with the decision-making process within the Corporation. The analysis is not exhaustive, partly because some matters have already been dealt with in Chapter 15, but mainly because the details will need to be worked out by the Corporation within the legislative framework. Nonetheless, attention is directed to some important issues including the need to achieve high quality decision-making within the Corporation.

16.3 The proposed system of appeals from decisions of the Corporation is described in Part III. The fundamental principle underlying the recommendations on the appeal system is that a claimant should be entitled to independent review of an unfavourable decision. This should include the opportunity for review of the decision on the merits by a judicial tribunal. However, the appeal system should avoid delays, excessive legalism and high costs. The most appropriate model to achieve these objectives is that followed in relation to social security appeals under the Commonwealth system of administrative law, taking account of changes recently proposed by the Administrative Review Council. [1] This involves a two-tiered system of appeal.

> The first should be available to a dissatisfied claimant and should be conducted speedily and informally by independent bodies, known as Compensation Review Panels. These Panels should be loosely modelled on Social Security Appeals Tribunals (SSATs). They should have power to substitute their own view of the merits of the case for that of the Corporation and should not be found by the policies of the Corporation (other than those imposed by legislation).
>
> The second appeal should be open to either the claimant or the Corporation. This appeal should be considered by the Accident Compensation Appeal Tribunal which should be modelled on the Commonwealth Administrative Appeals Tribunal (the AAT). The Tribunal should be presided over by a judge, but should include lay members. It should also have power to assess the merits of the case without being bound by the policies of the Corporation.

An appeal on questions of law would lie to the New South Wales Court of Appeal.

II. DECISION-MAKING WITHIN THE CORPORATION

A. The Claims Process

16.4 The assessment of compensation under the Scheme will commence, in the usual case, with a claim by the accident victim or a member of his or her family. The claim could be lodged by the person entitled to benefits or by someone acting on his or her behalf. Claims should be submitted on simple, standard forms which specify the information required by the Corporation. It is not appropriate in this Report to prescribe the content of the claim form. Obviously, however, the form should seek information about the relevant accident; the nature of injuries sustained; the likely duration of incapacity for work, and details of employment and pre-accident earnings. In some circumstances, as where support services are urgently required, a claim could be made by telephone and later confirmed in writing.

16.5 The reports of medical practitioners treating an accident victim will be of great importance, particularly in the early stages of a claim. Indeed, in most cases of short-term incapacity there would be no need for the Corporation to go beyond the claim form, the treating doctors report and standard verification of the claimant's pre-accident earnings. Each claim should usually be accompanied, or followed, by a standard medical certificate which sets out the history, diagnosis and treatment of the particular condition or injury. The certificate should include an opinion as to the claimants fitness or otherwise for his or her normal work and an estimate as to the likely period of incapacity. The information on the certificate should be sufficient to enable the Corporation, through the assessing officer, to judge whether the injuries are consistent with the circumstances of the transport accident. In adopting a non-adversarial approach to claims, the Corporation should generally be prepared to rely on the report of the treating doctor, particularly in the initial stages of assessment. In the ordinary case, therefore, there would be no need for the claimant to be referred to a series of doctors or to seek a range of medical opinions. It would be appropriate for the corporation to produce brochures or manuals for the guidance of medical practitioners preparing certificates. The brochures should contain relevant policy guidelines and explain the significance of medical certificates in the decision-making process. The Corporation's assessing officers should liaise closely with medical practitioners to encourage the submission of reports promptly. While it is in the interests of claimants that such reports should be provided promptly, it is not appropriate for the Corporation to have power to compel treating doctors to provide information. If the necessary information is not forthcoming, the Corporation should have power to require the claim and to be examined by another doctor who is willing to prepare a report, subject to the right of the claimant to refuse to submit to such an examination. Private medical practitioners should be paid a prescribed fee by the Corporation for such reports.

16.6 The Corporation will need to obtain or receive information sufficient to enable it to assess compensation for loss of earning capacity. Basic information will be provided by the claimant on the claim form. As a matter of course the Corporation would verify the information with the employer or former employer of the claimant, who should be required to forward a certificate of earnings when requested to do so. As for medical practitioners, the Corporation should publish and distribute brochures to assist employers to understand the nature of the Scheme and their role within it. As discussed in Chapter 8, the assessment of compensation for a self-employed person is likely to be a more complicated task. It will be necessary for a self-employed person to supplement the claim form with appropriate records such as taxation returns, business accounts and records of payments to employees for additional services provided during the claimants incapacity.

16.7 In order to assess a claim, it may be necessary for the Corporation to undertake investigations beyond those already described. There may be doubt, for example, as to whether the accident was a "transport accident" and further inquiries may be needed to ascertain the precise circumstances of the accident. In some cases it will be necessary to obtain information concerning a claimants previous employment record or the nature of a disability existing at the date of the accident. Many other examples could be suggested. Clearly the Corporation should have appropriate powers to investigate and assess claims.

16.8 It is important that transport accidents causing injury and death come to the attention of the Corporation as soon as possible. This will put the Corporation on notice that there are potential claims under the Scheme and provide an opportunity to gather routine information. Reporting of accidents will assist the Corporation to contact and advise people eligible for benefits who may be unaware of their entitlements. For these reasons the Corporation should adopt measures designed to secure full reporting of accidents likely to lead to claims. These measures could include the following:

compulsory reporting by drivers, owners and public transport operators of all transport accidents causing death or injury; [2]

the supply to the Corporation of police accident reports; [3]

the supply to the Corporation of workers' compensation claim forms concerning transport accidents occurring in the course of employment or journeys to and from work; and

notification by hospitals of the admission of people injured in transport accidents.

Where an accident involving injury or death has been reported, but no claim has been lodged within, say, eight weeks the Corporation should attempt to locate the accident victim or his or her family. While personal contact would be preferable, the Corporation should at least send a letter advising of rights under the Scheme, together with a claim form and information as to where advice could be sought.

B. Assessment of Continuing Entitlement to Compensation

16.9 In addition to deciding initial claims under the Scheme, the Corporation will be required to assess an accident victim's continuing entitlement to compensation For example, the Corporation will have to determine when compensation for loss of earning capacity should end because the injured person has resumed his or her pre-accident employment. Similarly, the provision of substitute homemaker services will end when the accident victim has substantially recovered from his or her disability. Indeed, in all cases other than permanent disability or incapacity, it will be necessary to decide when benefits provided on a periodic or continuing basis are no longer warranted. This imposes a heavy responsibility on the Corporation.

16.10 Nor is the Corporation's task limited to deciding when benefits should commence and terminate. It will also have to review the claimant s position to take account of circumstances warranting a variation (but not termination) of benefits. For example, an injured person will often be wholly incapacitated for a period and partially incapacitated for a further period. During the second period, the extent of incapacity may vary according to the amount of part-time work he or she can physically manage or can obtain. Similarly, the need for support services will vary according to the injured person's degree of disability and family circumstances, both of which can change over time. It follows that the Corporation must develop procedures to enable it to issues not merely whether a claimant continues to be entitled to benefits, but the extent of that entitlement. These procedures should be designed to bring relevant changes of circumstances to the Corporation's attention, yet should do so in a way which minimises intrusion into the life of the claimant. Some earlier recommendations have been framed with this problem in mind. In particular the proposal for assessment of permanent incapacity (paragraphs 8.52-8.60) provides a means by which a person suffering long-term incapacity can avoid regular reviews of his or her post-accident earning capacity. This proposal, although important, does not overcome the need for a sensitive approach to the assessment of continuing entitlement to compensation.

16.11 As with the initial assessment of claims, the primary sources of information for continuing assessment will be the claimant, his or her treating doctor and, where there is partial incapacity, his or her employer. In the case of a more serious disabled person, the advice of the rehabilitation team working with the claimant will be important in assessing the extent of continuing loss of earning capacity. It will be necessary for regular, although not necessarily frequent, reviews to be made of a claimant's physical condition and of his or her capacity for work. The frequency of the reviews should reflect the need to minimise intrusion into the claimants life. Thus if a claimant is clearly likely to be totally incapacitated for a substantial period it would be futile and unnecessary to require medical reports otherwise than at long intervals. In general the Corporation would rely heavily on the views of the treating doctor or rehabilitation team, although it must have power to require independent medical examination or assessments of post accident earning capacity. In some circumstances other agencies could guide the Corporation in its assessment. For example, Chapter 10 suggests that substitute homemaker services could be provided, subject of resources being made available, through the Home Care Service of New South Wales. This services, or a similar organisation, would have the expertise required to apply the statutory criteria governing entitlement to such services. This does not mean that the Service would decide questions of eligibility, but simply that it would advise the Corporation which would be responsible for making the decision.

16.12 Not all benefits under the Scheme are provided on a continuing or periodic basis. Thus a transport accident victim suffering permanent disability will be entitled to lump sum compensation, assessed in accordance with the principles stated in Chapter 11. The Corporation will need to develop appropriate procedures for determining the amount of compensation. This is clearly a case in which a medical assessment will be of paramount importance, since the criteria are medical in character, rather

than economic or social, although the Corporation will remain responsible for making the decision. The decision, once made, will stand and will not require review. Similarly, a severely disabled person is likely to be entitled to the cost of home modifications (paragraphs 10.41-10.49). While this benefit might be claimed on more than one occasion during a lifetime, the assessment of reasonable cost will be made at the time of the application and will not involve continuing review by the Corporation.

C. Powers

16.13 **We recommend that the Corporation should have power to assess and investigate claims for compensation under the Scheme, including the continuing entitlement of claimants to compensation and the extent of that entitlement. The Corporation should have power to require claimants and employers, or former employers, of claimants to provide information reasonably required to assess claims.**

D. Advice to Claimants

16.14 Reference has already been made to the Corporation's role in assisting claimants (paragraphs 15.15-15.17) and to steps that should be taken to ensure that transport accidents come to its notice (paragraph 16.8). This role is of great importance, but does not dispense with the need for claimants to have access to a source of advice which is seen to be clearly independent of the Corporation. The Corporation should support such a development by providing funds to suitable organisations to engage claimant representatives. The functions of these representatives would include advising claimants of their rights under the Scheme and assisting them to prepare claims, present supporting material and maintain compensation. In addition claimant representatives have a substantial role to play in representing or assisting claimants in appeals, particularly before the Compensation Review Panels to which we refer later (paragraphs 16.39-16.56). Bodies such as community legal centres, welfare organisations and hospitals are likely to be prepared to employ claimant representatives, on the basis that reasonable costs are met by the Corporation. **We recommend that the Corporation should provide assistance to accident victims and their families in preparing claims, presenting supporting material and maintaining continuing entitlement to compensation. In addition, the Corporation should provide funds to enable organisations to engage claimant representatives. These representatives should provide advice and assistance to claimants, and should act on behalf of claimants seeking review of Corporation decisions.**

16.15 Independent advice and representation cam of course, be obtained from legal practitioners.Noimpedimentsshouldbeplacedinthewayofaclaimantwhowishestoobtain legal advice whether from a private practitioner or a legal aid agency. A claimant may wish to obtain advice from an independent source and may prefer legal advice to other forms of assistance. This choice should be respected. However, claimants should not be encouraged to seek legal advice as a matter of course, in the expectation that the cost of such advice will be met by the Corporation. This is likely to introduce an undesirable adversary element into the administration of the Scheme and increase costs unnecessarily. Where disputes arise between the Corporation and claimants, legal practitioners have an important role to play, particularly in appeals to the Accident Compensation Appeal Tribunal. But the vast majority of cases will involve no substantial difficulty and no dispute between the Corporation and the claimant. The decision-making and appeal system proposed adequately safeguards the rights of claimants without requiring the Corporation to pay the costs of legal assistance at the initial stages of the claim. The question of legal costs on appeal is dealt with later (paragraphs 16.55, 16.78)

E. Assessing Officers

16.16 Emphasis has been placed upon the significance of high quality decision-making in the administration of the Scheme. It is important that the Corporation appoints well qualified assessing officers, who should be responsible for the Corporation's decision-making functions (paragraph 15.47). We stress that each claim should be the responsibility of a single assessing officer. This officer should make decisions affecting the claim and should be the principal point of contact with the claimant. As Professor T G Ison has observed:

> [a]ny social insurance system will appear to be a faceless bureaucracy unless there is someone a claimant can meet and identify as the person responsible for the decisions on his claim. [4]

Further, we agree with his comment that

> ... there is one ... golden rule that is essential to the quality of primary adjudication-Success tends to be inversely proportionate to the number of people involved in the decisions on a claim. As far as possible, one person must be responsible for all the decisions relating to a claim, and for all communications relating to that claim. [5]

16.17 It follows that assessing officers should have authority both to make the necessary investigations in relation to claims and to reach decisions. Unless this is done, the Corporation's decision-making may be based on incomplete information and may be delayed. It is an error to assume that, because there is a comprehensive appeal system, less care need be taken with the initial decision within the Corporation. The Corporation's duty is to assess claims fully and apply the statutory criteria correctly.

16.18 Theassessingofficershouldadoptaflexibleapproachtothedecision-makingprocess. Personal communication between the claimant and the assessing officer may be necessary to reach a correct decision and to ensure that the claimant feels he or she has been treated fairly. The claimant should be advised of difficulties in acceding to the claim and invited to provide further evidence or argument to the assessing officer. In some cases, an informal hearing may be appropriate, and this possibility should be among the range of procedural options open to the assessing officer. [6] Thus the assessing officer should not adopt a purely passive role, waiting for the claimant to establish every aspect of his or her claim. On the contrary, the assessing officer should accept the responsibility of gathering information to assess the claim. As Professor T G Ison puts it

> ... where the available evidence is insufficient for a definite answer, the first role of a claims officer is to consider what further evidence might reasonably be obtained, and then to initiate the steps necessary to obtain that evidence. [7]

As mentioned in Chapter 15, the assessing officer should not be responsible for investigating suspected fraud or abuse, although he or she should have power to suggest an investigation. This task should be entrusted to a separate division of the Corporation (paragraph 15.21).

16.19 Accordingly, **we recommend that the assessment of each claim and of a person's continuing entitlement to compensation should be the responsibility of a single assessing officer. This officer should coordinate the collection of the information required for the purposes of assessment and should also coordinate the provision of services to claimants. The Corporation should ensure that assessing officers have authority to make the necessary investigations and decisions in relation to claims and continuing entitlements.**

F. Medical Assessment

16.20 In proposing that the responsibility for determining claims should rest With an assessing officer, we have rejected the view that decision-making functions should be entrusted to medical boards or individual medical practitioners. The use of medical boards to resolve issues of entitlement is by no means novel. In Queensland, for example, the findings of Medical Boards finally determine the eligibility of workers for compensation under the Workers' Compensation legislation of that State.[8] Some submissions supported the view that the assessment of incapacity for the purposes of the Scheme should be decided by medical practitioners or rehabilitation teams. Thus the New South Wales Branch of the Australian Medical Association stated that:

> [a]ny proposal that may disregard the overall medical responsibility for determining individual degrees of disability or advising on individual rehabilitation prospects, will be doing the disabled person concerned and the community at large, a grave injustice. It is the opinion of the Branch that the assessment of disability for both non-economic loss compensation and assessment of loss or

> reduction of earning capacity should be vested in the rehabilitation team together with input from appropriately trained loss assessors. [9]

The New South Wales Workers' Compensation Self Insurers' Association proposed that an independent Medical Board. with wide powers of adjudication, should be established and that ideally its decision should be final. The Association anticipated

> ... that considerable savings could be achieved in both settlement time and money, as protracted and costly legal disputes would be eliminated. The worker would also benefit in having his claim resolved much more expeditiously. [10]

While these comments were made in the context of the Workers' Compensation system, they could be applied to the proposed Scheme.

16.21 There is little doubt that a system of medical boards, the decisions of which are final and conclusive, could expedite the decision-making process. But this would be achieved at a substantial price. The decisions of Queensland's Medical Boards, for example, involve not merely purely medical questions but the application of statutory criteria to the claims of injured workers. Similarly, under the Scheme we propose, compensation for loss or impairment of earning capacity does not depend simply on the claimant's medical condition. but on a range of factors including economic conditions and employment opportunities. While the views of the treating doctor or the rehabilitation team will be of very considerable value, they should not necessarily be decisive. The assessing officer may have to take other factors into account and, in some cases, it may be appropriate to obtain a report from a doctor or other professional nominated by the Corporation before a decision is made. Moreover, the "efficiency" of Medical Boards in Queensland depends partly on the final and conclusive character of their decisions. Our view is that a right of appeal should be available to dissatisfied claimants and such a right is likely to remove some of the apparent advantages of medical boards. We appreciate that the argument for medical boards is strongest in relation to claims for compensation for permanent disability, since the questions are essentially medical in character. Even here, however, the assessing officer should make the decision, since there may be room for different opinions on the application of the relevant guidelines.

16.22 For these reasons we conclude that decisions on claims should be made by assessing officers within the Corporation and not by medical panels. However, the Corporation should have power to require the claimant to be medically examined by a doctor or doctors nominated by it, provided the requirement is reasonable. The claimant should be entitled to refuse to undergo such an examination if, for example, it involves unreasonably intrusive or risky procedures. The Corporation should take special care to ensure that medical practitioners reporting on matters relevant to a claim not only have the necessary expertise but understand the nature of the assessment process and the role of medical assessment within it. However, **we recommend that the Corporation should have power to require a claimant to undergo reasonable medical examination by a doctor (or panel of doctors) nominated by the Corporation. The Corporation should take the resulting report into account in reaching a decision but, if the decision is unfavourable, should make the report available to the claimant.**

G. The Claims Manual

16.23 As already noted (paragraph 15.18), the Corporation will have to formulate guidelines for the assistance of assessing officers and other staff, since any legislation will leave room for interpretation and the exercise of judgment. These guidelines should be embodied in a claims manual. The New Zealand Accident Compensation Corporation has produced a detailed manual, which contains information on the Corporation's policies and claims processing requirements and procedures. [11] The manual is not, however, generally available to members of the public or those who advise them. The New South Wales counterpart will be an important document which should be published. Public disclosure of policy adopted by government agencies is consistent with modern principles of administrative law and encourages both fairness and consistency in decision-making. The manual will assist claimants or those advising them to submit information or arguments to support their claims. The

lawfulness of the Corporation's policy guidelines can be checked, challenged, and reforms advocated where appropriate. As Professor Ison has observed:

> [t]he ordinary structure of social insurance generates natural pressures that militate against procedural due process, and rules requiring, for example, the disclosure of medical reports, are not likely to be observed unless there is continuous monitoring to ensure compliance. One structure to achieve this monitoring is for the agency to publish its procedural rules, including its rules on the disclosure of medical reports. If any failure to comply with the rules can become obvious to claimants there is surely a greater probability of the rules being followed. [12]

16.24 Accordingly, **we recommend that the Corporation should prepare and publish a detailed claims manual.** This manual should not bind the appeal tribunals, although they would give weight to the carefully formulated views of the Corporation as to the administration of the Scheme (assuming those views are not beyond the powers conferred by the legislation). Subject to the role of the appeal tribunals, the Corporation's officers should assess claims in accordance with the guidelines laid down in the claims manual. The manual, embodying as it will the Corporation's policies, should be under continual review by the independent Policy Review Committee (paragraphs 15.59-15.60).

H. Interim Assessment

16.25 It is essential that assessment and the payment or provision of compensation take place as soon as practicable after lodgment of the claim. This can be a period of great social and financial dislocation and distress for accident victims and their families. The Corporation should aim to pay periodic compensation for loss of earning capacity within two weeks of a claim being lodged; other benefits, such as homemaker services, may be needed almost immediately after the accident But if the goal of high quality decision-making is to be realised, speed of assessment should not be achieved at the expense of a suitably thorough investigation of the claim. To permit both speed and accuracy to be achieved, the Corporation should have power to make an interim assessment of entitlement under the Scheme. If, for example, the payment of periodic compensation for loss of earning capacity is likely to be delayed because of difficulties in assessing entitlement, the Corporation should have power to make an interim assessment on the basis of the material available. [13] While it is not appropriate to lay down a rigid rule, we consider that an interim assessment should be made in respect of loss of earning capacity if a full assessment will take more than one month to complete. Interim assessments are likely to be particularly important where the claimant is self-employed or where the transport accident victim has died. Interim assessment should not be confined to periodic compensation. For example, it may be clear that a claimant is entitled to compensation for permanent disability, but the extent of the disability is not precisely clear. In these circumstances ail interim assessment would allow a portion of the lump sum to be paid speedily.

16.26 **For these reasons, we recommend that the Corporation should have power to make an interim assessment of compensation under the Scheme and to act on such an assessment.** The interim assessment should not limit or bind the Corporation in respect of subsequent assessment. In order to encourage the Corporation to exercise its power at an early stage **we recommend that, where the interim assessment results in the claimant being under-compensated or over-compensated, the Corporation should make the necessary adjustments to remedy the position.** These adjustments could take the form of the Corporation paving arrears of compensation, deducting over-compensation from future payments to the claimant or requiring the claimant to repay the amount of over-compensation. However, **we also recommend that the Corporation should have power to waive the requirement that the claimant refund over-compensation if he or she has acted in good faith, has complied with the reasonable requests of the Corporation, and would suffer hardship if the requirement were to be enforced.**

1. Adverse Decisions

16.27 Clearly the Corporation will have occasion to make decisions adverse to a claimant whether in respect of an initial claim under the Scheme or of a continuing entitlement. Where such a decision is made it should be communicated to the claimant without delay. Notification should include a statement

of the findings and of the reasons for the adverse decision and should also include information as to the rights to, and means of instituting, an appeal from such a decision including the time limits on applications. The provision in the Victorian legislation which places the onus on claimants to request reasons for an adverse decision, [14] offends against the principle of entitlement and may operate unfairly against claimants. **We recommend that, where the Corporation has made what it considers to be an adverse decision on a claim, the claimant should be notified to that effect within 14 days of the making of the decision, by a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.** [15] In some cases it may not be clear to the Corporation that the decision is adverse, since the claim will not necessarily be for a specific form or amount of compensation. If, however, the claimant considers the decision to be adverse, he or she should have a right to request reasons for the decision. In this case the statement of reasons should constitute the notification for the purpose of time limits in relation to appeals.

J. Time Limit

16.28 Substantial delays in lodging claims can present serious problems for the Scheme. Stale claims, for example, can create difficulties in determining whether a disability or attributable to a transport accident. Delays are likely to prevent the accident victim deriving maximum benefits from rehabilitation programs. These considerations suggest that there should be a limitation period applied to claims under the Scheme. On the other hand, the principle of entitlement suggests that delays ought not necessarily to preclude a person from claiming compensation. On balance there should be a requirement that claims be lodged within one year of the accident, or the date the disability, or incapacity becomes evident, whichever is later, but the period should be extended if the claimant has a reasonable excuse for failing to lodge a claim within the period. The period of one year takes into account the importance of early contact with the Scheme and the fact that, unlike the common law negligence actions, there is no need for injuries to stabilise before a claim can be determined. While the one year period should be capable of extension, the extension should not continue beyond three years from the date of the accident or onset of symptoms. If Such a limit were not to apply, the Scheme would be faced with formidable questions of causation which might be impossible to resolve. We think that the absolute limitation period should be three years. This is less than the limitation period of six years for common law negligence actions [16] but, as stated above, the Scheme does not require injuries to have stabilised before a claim can be determined. **We recommend that a claim for compensation under the Scheme should be lodged within one year of the date of the accident or the onset of symptoms, whichever is later. A claim outside this period should be entertained if the claimant has a reasonable excuse for failing to lodge the claim within the period. However, no claim should be entertained if made more than three years from the date of the accident or of the onset of symptoms, whichever is later.** These provisions should not apply to cases where a person makes a claim, then appears to recover or overcome the incapacity', and later makes another claim arising out of the original accident.

K. Secrecy and Protection from Defamation

16.29 It will be necessary to impose requirements of secrecy on the Corporation to ensure that the information gathered is not disclosed otherwise than for the purpose of processing claims or the performance of the Corporation's other statutory responsibilities. The legislation will also need specifically to protect officers of the Corporation, medical practitioners and others who prepare reports or provide other information to the Corporation. Accordingly, **we recommend that the governing legislation should impose secrecy requirements on the Corporation concerning information supplied in relation to individual claims and should extend appropriate protection against defamation to officers of the Corporation, medical practitioners and others required to supply such information.**

III. THE APPEAL STRUCTURE

A. Introduction

16.30 The Corporation will have authority to make decisions affecting the rights of accident victims and their families. These rights will be of great importance to the individuals concerned and perhaps of considerable monetary value. It is essential that a dissatisfied claimant be permitted to appeal to an independent judicial tribunal against an unfavourable decision by the Corporation. An effective appeal system is necessary to protect the rights of claimants and to ensure that the concerns of those who fear an administrative or "bureaucratic" decision-making process are not realised. [17] An appeal system must add to the cost and complexity of the scheme. Clearly delay and expense would be minimised if the Corporation, like Medical Boards in Queensland, could make final and unreviewable decisions. But the price of such a system would be very high indeed. It would be quite unacceptable if the Corporation could apply its own interpretation of the legislation and decide factual questions without facing the external scrutiny of independent appeal tribunals.

16.31 This commitment to an independent appeal system is consistent with the emphasis placed on high quality decision-making within the Corporation. If the Corporation performs its role satisfactorily, the proportion of cases giving rise to appeals should be very low. [18] It would be a serious error if the Corporation were to rely on the appeal system as a reason for devoting less attention to decision-making than the task warrants. Moreover, the medical system should be seen as an integral part of the decision-making process. This point has been addressed by the Administrative Review Council in the context of social security.

> A review system is not, except in the simplest situations, merely the addition of a means of independent review at the end of and outside an existing decision-making structure. Where the volume of decisions and appeals is large it should be considered and designed as a total process which may require adjustments within the original decision-making structure itself. Given the benefits of administrative review the process is justified provided it does not involve a disproportionate use of resources having regard to the importance of the subject matter to persons affected by decisions. This involves balance in the application of resources to the tasks of primary decision-making, internal review and external so that correct decision-making at the primary level is encouraged and so that disputes are resolved, where this can be done justly and efficiently, at the earlier and less costly-stages of the process rather thin later. [19]

16.32 In our view, an appeal system should:

> promote high quality decision-making within the Corporation;
>
> provide an opportunity for full review of the Corporation's decision on the merits;
>
> be independent of the Corporation;
>
> avoid delay, excessive formality and high costs; and
>
> be modelled on appeal structures already operating in Australia.

Also of significance is the observation of the Administrative Review Council that a system of review of administrative decisions should aim "to provide for the resolution of grievances by correct and authoritative decisions which command general confidence". [20] It is the Council's view that to achieve this aim a review authority should

> have powers and procedures for effective and efficient fact finding;
>
> observe high standards of procedural fairness; and
>
> be accessible, both physically and psychologically, to people seeking review. [21]

B. A Two-Tiered System

16.33 The preferred appeal system follows broadly the structure for social security appeals under Commonwealth law, subject to certain modifications proposed by the Administrative Review Council. [22] Appeals from decisions of the Department of Social Security on claims for pensions and benefits are heard in the first instance by Social Security Appeals Tribunals (SSATS) established by Ministerial direction in 1975. The Tribunals generally comprise three members, two of whom are part-time and appointed by the Minister while the third is seconded from the Department of Social Security. They have no power to set aside Departmental decisions, but are limited to recommending to the Director-General of Social Security that a decision be affirmed, varied or annulled. The Administrative Review Council has recommended that SSATs be placed on a statutory footing, that they should have power to make binding decisions and that their procedures, which vary considerably from State to State, should be made uniform. [23] Since 1980 the Administrative Appeals Tribunal (AAT) has had jurisdiction to review decisions of the Director-General in matters which have been considered by SSATS. [24] The AAT reviews decisions on their merits and may

> ... exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision. [25]

16.34 As in the social security appeals system, there should be a two-tiered system of appeals from decisions of the Corporation. While both tiers should have power to review the Corporation's decision on the merits, each should play a distinctive role. The first stage should provide an "accessible, speedy, informal and economical form of review",[26] with procedures designed to deal with a substantial number of cases. Compensation Review Panels, which should conduct the first stage of appeal, should provide a reasonable opportunity for the aggrieved person to put his or her case. However, the Panels should not conduct lengthy hearings and should not usually give detailed consideration to policy questions. The second appeal should be heard by a body to be called the Accident Compensation Appeal Tribunal and should provide a further opportunity to review decisions on the merits. In addition, the Tribunal should be particularly concerned to formulate general principles for the guidance of the Corporation and Compensation Review Panels. While this stage should also be characterised by flexible and informal procedures, there will be an opportunity for the parties to canvass disputed questions of policy and fact in greater detail.

16.35 In suggesting a two-tiered appeal system, with the first appeal being considered by an independent body, we have taken a different approach from the New Zealand system. There, initial assessments are reviewed by a senior officer of the New Zealand Accident Compensation Corporation called a Review Officer. While this officer is required to act independently, he or she is an employee of the Corporation. [27] The first review of a decision under the proposed Transport Accidents Scheme should be undertaken by a body which is independent of the Corporation and has power to make decisions binding on the Corporation. While the Compensation Review Panels will have similar functions to the internal review mechanism in New Zealand, namely, to provide accessible, economic, prompt and informal review of initial decisions, they will hive the added advantage of being independent of the Corporation and perceived is such by claimants and their advisers.

16.36 There is a danger that an internal system of review would detract from the goal of high quality decision-making because of the belief that mistakes can be corrected within the Corporation, before an external body examines the decision. One commentator has noted that in New Zealand

> ... most revisions that occur on a reconsideration are not explicable upon any ground except that the initial process of investigation and decision was insufficiently thorough. But that, in turn, is encouraged by the process of reconsideration. If, following an application for review, any ill-considered decision can be patched up in the office in which it was made, the incentive to thoroughness is less than it would be if each claims officer knew that, following an application for review, any ill-considered decision would reach the scrutiny of a hearing officer. Thus reconsideration impedes the appeal process from operating as a quality control device in respect of initial decisions. [28]

A further factor is that an internal review may not be taken seriously by claimants or their advisers, ultimately leading to delays and increased costs. The experience of the Commonwealth Commissioner

for Employees' Compensation suggests that, where the first opportunity for review of an adverse decision is internal, applicants and their lawyers have tended to treat that internal review less seriously. even withholding crucial evidence until the matter comes on appeal to the Administrative Appeals Tribunal. [29] An independent review, however informal, will help to avoid this result. This is particularly so if an appeal to the second tribunal can only be made after the first has made a determination.

16.37 We have also considered whether there should be a single tribunal to determine appeals from the Corporation, rather than a two-tiered system. While this solution, on the surface, appears likely to be simpler and to reduce delays, the opposite is more likely to be the case. Many claims will raise relatively simple issues while others will raise complex factual medical or policy questions. A two-tiered system allows the simpler cases to be resolved rapidly by the use of informal procedures which can be especially adapted to the needs and circumstances of accident victims, many of whom will be disabled. The more difficult cases, requiring detailed investigation of facts or administrative policies, can be dealt with by the second tribunal if not resolved satisfactorily on the first appeal. A single tribunal would be required to process ill claims within a single procedural framework, without the benefit of a previous determination by an independent body and without the possibility of further review on the merits in more difficult cases. The Administrative Review Council considers that in a large volume jurisdiction, such as social security and (as we anticipate) accident compensation a two-tiered system is better able to process appeals speedily having due regard to fair procedures. The Council has noted that the Repatriation Review Tribunal, as the single external review body in the repatriation jurisdiction, has been unable to fulfill its role adequately because its high caseload has produced delays in the processing of appeals.

16.38 There is a further advantage in the appeal structure we propose. A two-tiered system, with the first tier providing an informal but independent review, is likely to limit the opportunity for review of decisions within the Corporation itself. This kind of internal review, after an initial decision has been made, can cause significant delays. [30] The procedure suggested will not preclude the Corporation conceding a claim before the first appeal, such as where an obvious error has been made. However, the consideration required for such a concession should not delay the appeal. Of course there can be no question of a negotiated settlement of a claim, in the sense of a compromise position between the claimed amount and the offered amount. The claimant will either be entitled to an amount determined on statutory criteria or not. The Corporation should have no authority to compromise a claim.

IV. THE FIRST STAGE: COMPENSATION REVIEW PANELS

A. The Appeal

16.39 **We recommend that a person aggrieved by a decision of the Corporation, or by its failure to make a decision within a reasonable period, should be entitled to appeal to an independent Compensation Review Panel.** The range of decisions to be made by the Corporation, even with respect to a single claim, render the imposition of specific time limits on decision-making impracticable. However, the Corporation should be conscious of the need to process all claims promptly. By empowering the Panels to consider complaints of failure to make decisions within a reasonable period, the legislation would establish a practical means of monitoring the Corporation's performance in this regard and decided appeals will result in useful guidelines on acceptable processing times for the Corporation. The term "person aggrieved" is used in the recommendation because there may be other people, such as service providers, who have been affected adversely by a decision of the Corporation and wish to appeal. The term "claimant' when used in the text includes a "person aggrieved". The function of the Panels should be to review the merits of the Corporation's decision and to determine whether it was the correct or preferable one.

16.40 Compensation Review Panels should be readily accessible to dissatisfied claimants. We agree with the Administrative Review Council that

> ... the number of independent initiatives required of claimants in pursuing their rights should be kept to the minimum practicable. [31]

As suggested earlier, the Corporation should be required to notify the claimant in writing of an adverse decision and to advise of appeal procedures that are available. Eight weeks is an appropriate period within which an appeal should be lodged, subject to the Panels having power to extend the period. **We recommend that an appeal to a Compensation Review Panel should be lodged within 56 days of the claimant or other aggrieved person being notified by the Corporation of an adverse decision. The Panel should have power to extend the period when there are good reasons for doing so.** Notification of appeals should usually be in writing, but the Panels should have authority to accept appeals lodged orally or by telephone in appropriate circumstances.

16.41 The Corporation should not be party to proceedings before a Panel if the Corporation were a party, informality and expedition which are important objectives, would be jeopardised and an unnecessarily adversarial approach might be injected into the appeal at an early stage. It is enough that the Panels should have power, as recommended later, to require the Corporation to provide relevant information and to request the Corporation to explain its policies. Thus, **we recommend that the Corporation should not be a party to proceedings before a Compensation Review Panel.**

B. Decision-Making Powers

16.42 The Panel's function should be to review the merits of the Corporation's decision. A Panel should not be confined to deciding whether the decision was unlawful or manifestly unreasonable. **We recommend that Compensation Review Panels should have power to reverse, affirm or vary the decision under review, to substitute their own decision or to remit the matter to the Corporation with or without directions. The panels should have all the powers and discretions conferred on the Corporation and should not be bound by the policies of the Corporation.** We refer later in the Chapter to the nature and scope of these powers, in discussing the role of the Accident Compensation Appeal Tribunal (paragraphs 16.57-16.59). We emphasise here that the Panels should have decision-making and not merely recommending powers. When the issues in a case are complex, or raise important policy questions, the Panels should have power to refer the matter directly to the Accident Compensation Appeal Tribunal.

C. Constitution of the Panels

16.43 Compensation Review Panels should include people with expertise in the issues faced by the Corporation and with an understanding of the Scheme. The view expressed by the Administrative Review Council in relation to SSATs also applies to the Panels.

> Multi-member panels are necessary if the desirable range of expertise and skills in social security appeals ... is properly to be represented. [32]

We recommend that each Compensation Review Panel should be constituted by three members appointed by the Minister. The Chairperson should be legally qualified, while the other two members should be people with skills or expertise in other relevant disciplines. These disciplines could include medicine, rehabilitation, employment and welfare. Generally, the members of the Panels should serve part-time for terms of three to five years, with an opportunity for re-appointment, although there is room for variation in these matters. Depending on the volume of claims it may be appropriate to appoint some non-legal members on a full-time basis.

16.44 The Administrative Review Council has recently recommended, by a majority, that officers of the Department of Social Security should continue to serve on the SSATS. The Council argued that the Departmental members would provide the SSATs with valuable information about Departmental administration and practices. [33] Currently, the Departmental members also administer the SSATS. However, in our view, the inclusion of an officer of the Corporation on a Panel would undermine its independence in the eyes of claimants. [34] The independent members of the Panels should quickly acquire a working knowledge of the operations and policies of the Corporation and the Panels will have

power to obtain information from the Corporation. Accordingly, **we recommend that officers of the Corporation should not be members of Compensation Review Panels.** The Panels will require administrative support and full-time staff will have to be provided for this purpose.

D. Procedures

1. Informality and the Rules of Evidence

16.45 In considering the appropriate procedures for Compensation Review Panels we have taken into account

> ... the importance of balancing the need, on the one hand, for the first tier appeal process to be both speedy and informal, with the need, on the other hand, for the process to maintain an appropriate standard of procedural fairness. [35]

The notion of procedural fairness must be adapted to the volume of appeals and the need to ensure that decisions are reached speedily. This is particularly so at the first stage of the appeal process, in which there should be maximum flexibility as to the conduct of the proceedings. **We recommend that proceedings before Compensation Review Panels should be conducted with as little formality and technicality, and with as much expedition as fairness to the appellant, the requirements of the legislation and a proper consideration of the subject under review permit. Other than this requirement, the procedures of the Panels should be within their discretion.** [36] **Furthermore, the Panels should not be bound by the rules of evidence, but should be empowered to inform themselves on any matter in such manner as they think appropriate.** [37] Similar recommendations are made later in relation to the Accident Compensation Appeal Tribunal (paragraphs 16.66-16.72).

16.46 It is not appropriate to prescribe in detail the form of the proceedings before the Panels, except to emphasise the need for informality and expedition. In some cases no oral hearing will be necessary, the Panel will be able to act simply on the material in the file and other documents before it. Where there is a hearing, it should generally take the form of an interview or discussion between the appellant, or his or her representative, and the Panel. The material on which the discussion will be based will be the Corporation's file and any other relevant evidence or argument the appellant may wish to present, such as a further medical report or an explanation of statements made in the claim form. In cases of urgency, or where distance is a problem. telephone hearings may be employed.

2. The File

16.47 Upon the lodging of an appeal, the Corporation should forward the file to the Panel determining the appeal, with a view to a copy being made available to the appellant. [38] If the Corporation considers there are good reasons for withholding documents from the appellant (as where sensitive medical information might be thought harmful to the appellant's well-being) it should to the Panel for an appropriate order. **We recommend that, within 14 days of an appeal being lodged, the Corporation should forward the file to the Compensation Review Panel. Unless there are special circumstances, a copy of the fire should be made available to the appellant. Sensitive medical information should be forwarded to a medical practitioner nominated by the appellant.**

3. Open Hearings

16.48 While hearings will not always be held, proceedings before Compensation Review Panels should be subject to scrutiny and therefore should be open to the public. [39] However, Panels should not be required to advertise their sittings. In addition, an appellant should have the right to request that the hearing be closed to the public. The matters which should be taken into account by a Panel in considering such a request could include:

> whether the appellant would be inhibited in presenting his or her case;

whether personal or sensitive information, particularly relating to the appellant's physical or mental condition should be protected from disclosure; and

whether informality and expedition would be secured by such an order.

We recommend that proceedings before Compensation Review Panels should be open to the public uiiless a **Panel, on the request of the appellant, orders otherwise.**

E. Powers

16.49 The Panels should have powers sufficient to prevent appellants suffering hardship pending the determination of appeals and to ensure that information required to decide appeals is obtained. **We recommend that Compensation Review Panels should have power:**

(a) to stay or qualify the suspension, reduction or cancellation of compensation and to order the Corporation to accede, wholly or in part, to a **claim pending determination of an appeal;**

(b) to require the Corporation to provide information relevant to an appeal and to invite the Corporation to present argument or material to the Panels; and

(c) to require an appellant to submit to reasonable examination by a nominated doctor or panel of doctors, or by other nominated professional persons.

F. Representation

16.50 Panels should be prepared to guide appellants as to the evidence or arguments which might be relevant to their case. Despite the informality of the proceedings, many appellants will require additional assistance to present their cases effectively. On occasions this assistance could be provided by friends or relatives. The claimant representatives, to whom we have referred (paragraph 16.14), will also have an important function to perform before the Panels.

16.51 We have considered whether legal practitioners should be prohibited from appearing before the Panels. It can be argued that the presence of lawyers is likely to inhibit the flexibility and informality neccssary in the first stage of the appeal process. [40] In particular, their presence could result in adversary atmosphere which is counterproductive and introduces unnecessary delay and expense. While it is essential that speed and informality be preserved, a prohibition on legal representation cannot be justified. Decisions of the Corporation and of the Panels will often have crucial bearing on the lives of transport accident victims. In these circumstances they should be free to seek legal advice and, if they wish, to have legal practitioners present material or appear for them before the Panels. Moreover, the establishment of a system of claimant representatives will not necessarily mean that sources of adequate advice will be readily available to all accident victims in the State. Legal representation is permitted before SSATs and the Administrative Review Council has recommended that this practice be continued. [41]

16.52 Accordingly, **we recommend that, in proceedings before a Compensation Review Panel, an appellant should be entitled to be represented by a person of his or her choice, whether or not legally qualified.** The Panels should be alert to the dangers of increased formality and should insist that all representatives act in accordance with the procedures the Panels regard as appropriate to the first stage of appeal. In other words, the Panels themselves will bear responsibility for ensuring that they determine appeals without delay or undue formality, taking account of the availability of a second opportunity to seek review on the merits.

G. Witnesses

16.53 We have also considered whether the Panels should be given powers to summon witnesses and to take evidence on oath. The Administrative Review Council has recommended that SSATs should

not be given these powers. The Council argued that such powers might tempt some members to duplicate the more formal hearings associated with the AAT [42] and lead to delays as the proceedings become unduly formal and adversarial in character. We endorse the views expressed by the Council and suggest that the Panels should not have the power to summon witnesses, take evidence on oath or require the production of documents except by the Corporation.

H. Expenses and Costs

16.54 The accessibility of Compensation Review Panel is so dissatisfied claimants will depend in part on the arrangements made with respect to the expenses of the appeal An appellant, whether successful or unsuccessful, should not be liable for any costs incurred by the Corporation in connection with the proceedings. (The Corporation will not be a party, but may incur costs in compiling and presenting information to the Panel). Where the appellant succeeds, the Corporation should reimburse the expenses reasonably incurred in presenting the appeal. These could include the travel and accommodation expenses of the appellant and of any witnesses appearing before the Panel, the cost of preparing documents or collecting information required in the proceedings and the expenses of medical examinations required or approved by the Panel. **We recommend that an appellant should not be liable to meet the costs of the Corporation relating to proceedings before a Compensation Review Panel. A successful appellant should ordinarily be reimbursed for the reasonable expenses of the appeal. The Panels should have power in exceptional circumstances to order the Corporation to reimburse the expenses of an unsuccessful appellant.**

16.55 An appellant should be entitled to have a legal representative act on his or her behalf in proceedings before a Panel. The question of the costs of such representation is not an easy one to resolve. If costs are awarded too liberally, the appeal process may become protracted, expensive and adversarial. If they are never available, injustice may be caused to appellants who succeed in overturning a decision of the Corporation, or who are deterred from challenging an adverse decision. **We recommend that where a legally represented appellant succeeds, he or she should be awarded costs in accordance with a modest fixed scale which recognises the informal and expeditious nature of proceedings before Compensation Review Panels. In exceptional circumstances, the Panels should be able to award such costs to an unsuccessful appellant.** An example of such circumstances would be where a Panel requests advice on policy matters from the Corporation and this advice justifies a response prepared by a legal representative on behalf of the appellant.

1. Reasons for Decision

16.56 Compensation Review Panels should be obliged to give their decisions in writing and provide reasons. A statement of reasons, particularly if it includes findings on material facts, will enable the appellant and the Corporation to assess the soundness of the decision and to decide whether to appeal further. This requirement will also protect both appellants and the Corporation against careless or arbitrary decisions and will encourage the Panels to address “solely ... those issues which should be taken into account in reaching a decision”. [43] **We recommend that Compensation Review Panels should be required to give decisions in writing and to provide statements of their findings on material facts and reasons for their decisions. A statement should be reduced to writing within 14 days of a request to that effect by an appellant or by the Corporation.**

V. THE SECOND STAGE: THE ACCIDENT COMPENSATION APPEAL TRIBUNAL

A. The Appeal

16.57 Compensation Review Panels are likely to dispose finally of a high proportion of appeals by dissatisfied claimants. Where a Panel allows an appeal and reverses the Corporation’s decision, the appellant s claim will have been successful. Where an appeal is dismissed, the appellant, although

unsuccessful, may be satisfied that he or she has had a reasonable opportunity to put the case and that no further appeal is warranted. Some appellants, although remaining dissatisfied, will simply decide not to pursue the appeal. The New Zealand experience under the comprehensive accident compensation scheme is that the great majority of applications for review do not proceed beyond the stage of internal review. [44] The experience with social security appeals in Australia also tends to confirm that most appeals will be finalised in the first stage of the appeal process. [45]

16.58 Nonetheless, it seems clear that a significant volume of appeals under the proposed Scheme will proceed to the second tier. The precise volume is impossible to predict. It may be, for example, that neither the social security nor New Zealand experience will prove to be a reliable indicator in New South Wales which has a reputation for a high rate of litigation. The second tier of appeals is potentially very important, not only in establishing standards to be followed by the Corporation, but in determining the rights of individual claimants.

16.59 An appeal from a decision of a Compensation Review Panel should lie at the instance either of the claimant or the Corporation. The Corporation, although not a party to proceedings before the Panel, may wish to appeal, for example, when a decision has important implications for the administration of the Scheme. The appeal should be to the Accident Compensation Appeal Tribunal and should be brought within three months of the Panel's decision. **We recommend that an appeal from the decision of a Compensation Review Panel should lie to the Accident Compensation Appeal Tribunal. Both the appellant in proceedings before the Panel and the Corporation should have the right to appeal. The Corporation should be a party to the proceedings before the Tribunal. An appeal should be instituted within three months of the Panel's decision unless the Tribunal extends the time for appeal.** An appeal to the Tribunal should be available only from a decision of a Panel-, it should not be possible to appeal directly from a decision of the Corporation to the Tribunal. In our view when the Corporation appeals from a decision of a Panel, the claimant should ordinarily be entitled to continuation of benefits pending the appeal.

B. Decision-Making Powers

16.60 As stated above, the appeal structure for the Scheme should broadly follow that for social security appeals. The Tribunal, as the second tier in the appeal structure, should have a role and powers similar to that of the AAT under Commonwealth law. The AAT has the same powers and discretions as the initial decision-maker. In particular, it has power to review the correctness of the initial decision and to determine, in the circumstances of the case, the preferable decision. The function of the AAT has been described in a leading case as follows.

> It is to review the administrative decision that is under attack before it. In that review, the Tribunal is not restricted to consideration of the questions which are relevant to a judicial determination of whether a discretionary power allowed by statute has been validly exercised. Except in a case where only one decision can lawfully be made, it is not ordinarily part of the function of a court either to determine what decision should be made in the exercise of an administrative discretion in a given case or, where a decision has been lawfully made in pursuance of a permissible policy, to candidate upon the merits of the decision or the propriety of the policy. That is primarily an administrative rather than a Judicial function. It is the function which has been entrusted to the Tribunal.
>
> The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal. [46]

16.61 It has been established as a general principle that the AAT is not bound by the policies formulated by the body whose decision is under review. The principle has been expressed by the Federal Court as follows.

> The Tribunal was entitled to take into account Government policy which was not inconsistent with the provisions or the objects of the [relevant legislation] ... although it was not under a statutory duty to regard itself as being bound by that policy. However, it was not entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general Government policy might be. [47]

This expresses the approach which should be taken under the Scheme. The Accident Compensation Appeal Tribunal should not be bound by the policies of the Corporation, but should be free to determine the weight that should be given to policy statements or guidelines. The Corporation's views, in the ordinary course, would be taken into account. The Review of New South Wales Government Administration took a different view of the proper role of an administrative tribunal, recommending that it should be bound to follow and implement relevant Government policy. [48] The Accident Compensation Corporation, however, is to develop its own policies and is not to be subject to the direction or control of the Government, except through legislation. In view of this it is proper that the policies of the Corporation should be subject to scrutiny by appeal tribunals.

16.62 **We recommend that the Accident Compensation Appeal Tribunal, like Compensation Review Panels, should have power to reverse, affirm or vary the decision under review, to substitute its own decision or to remit the matter to the Corporation. The Tribunal should have all the powers and discretions conferred on the Corporation and should not be bound by the policies of the Corporation.**

C. Constitution of the Tribunal

16.61 The constitution of the Accident Compensation Appeal Tribunal should reflect the importance of its decisions to individual accident victims and to the public generally, the complexity and sensitivity of the subject, and the monetary value of the rights at stake. A Judge of the New South Wales Workers' Compensation Commission stated in a submission to us that he thought it

> ... unlikely that the people of New South Wales would accept decisions at a lower level than that [of a judge] in matters of such importance. [49]

We agree that the Tribunal should be constituted by one or more judges. In this Commission's 1973 *Report on the Right of Appeal from Decisions of Administrative Tribunals and Officers, it* was stated that

> ... public confidence in the competence, independence and impartiality of the [Public Administration] Tribunal could not, in our view, be secured or maintained unless it was presided over by a ... judge. [50]

16.64 However, the Tribunal should not be constituted by a judge alone. As justice Else-Mitchell warned two decades ago, the training which lawyers have is not always conducive to the development of "the expertise which is necessary to an efficient and expeditious determination of administrative questions" and of an understanding of "the real policy considerations which it is the function of administrative tribunals to apply". [51] The AAT is constituted by judges, practising lawyers and other members with appropriate experience, qualifications or skills including knowledge of economics, industrial relations, and public administration. [52] The President of the AAT is responsible for constituting the Tribunal for particular cases. [53] The Act provides the President with a range of options in relation to the constitution of the tribunal including multi-member and single-member Tribunals. [54] Experts from relevant fields other than law also constitute the New South Wales Land and Environment Court for some purposes. [55] While it is clearly inappropriate that non-lawyers should determine issues of law, it is essential that people of relevant experience or qualifications should join the tribunal when other issues are presented. **We recommend that the Accident Compensation Appeal Tribunal should generally be constituted by a judge of the status of a District Court judge, sitting with two non-judicial members. In cases raising issues of law only, the Tribunal should be constituted by a judge sitting alone.**

16.65 It is desirable that a small panel of people should be available to sit as members of the Tribunal. These people could be expected to develop familiarity with and expertise in the area of accident compensation, which is likely to enhance their contribution to the Tribunal. As suggested earlier (paragraph 16.43), there are several disciplines of particular significance to the decision-making process. **We recommend that non-judicial members should be selected from a panel of people with skills or expertise in relevant disciplines. They should serve on a part-time or full-time basis for terms of up to seven years and should be eligible for re-appointment.** [56] **The non-judicial members should have the same vote as the judicial member, except that questions of law should be decided in accordance with the opinion of the judicial member.** [57]

D. Procedures of the Tribunal

1. Informality

16.66 In general, it is expected that the Tribunal will be the forum for reconsidering the more complex cases arising in the Jurisdiction, or those raising issues of policy or practice of general application. We envisage, therefore, that the proceedings will differ from those before Compensation Review Panels in several ways.

> Hearings will tend to be longer, although they should not be prolonged.
>
> The Corporation will be a party to the proceedings.
>
> The parties are more likely to be legally represented.
>
> A greater degree of formality is likely to be observed by the Tribunal.
>
> The evidence and policy issues will usually be examined in more depth than before the Panels.

16.67 Despite these differences, the general principles stated in the legislation should be the same as those applying to Compensation Review Panels and to the AAT. Thus, **we recommend that proceedings before the Accident Compensation Appeal Tribunal should be conducted with as little formality and technicality, and with as much expedition, as fairness to the parties, the requirements of the legislation and a proper consideration of the matters before it permit. Other than this requirement, the procedures of the Tribunal should be within its discretion.** [58]

16.68 There is unlikely to be a standard procedure applicable to every proceeding before the Tribunal. The Tribunal should

> ... remain flexible in its procedures. making such adaptations as are appropriate in the circumstances of the case. [59]

Much will depend, for example, on whether the appellant is represented and the approach taken by his or her representative to the proceedings. The Tribunal will also be influenced by the nature and complexity of the issues and whether more information is required in order to review the decision under challenge. It may decide to elicit information on its own initiative, particularly if an appellant (other than the Corporation) is unrepresented, or to go beyond the contentions raised by the parties. The Tribunal will have to accommodate the need to assist a person who might otherwise fail for want of guidance. On the other hand, the Tribunal will be concerned to avoid undue interference in the presentation of a case. [60]

16.69 There is also room for flexibility in procedural matters such as the question of which party should open the proceedings. The Federal Court has recently addressed the subject of the legal onus of proof in administrative appeals, noting that confusion could arise if strict legal burdens were applied in the proceedings.

> There is certainly no legal onus of proof arising from the fact that this is an “appeals” tribunal, because the AAT is required ... to put itself in the position of the administrator in carrying out its review and, in the light of the material before the AAT, (not the material before the administrator...) make its own decision in place of the administrator’s [T]here is no presumption that the administrator s decision is correct. It is possible to imagine a case where the Act which the administrator is applying places a requirement or onus on one or other of the parties to an issue to establish a particular state of facts on which the administrators decision would be based. If that were so, the same requirement for onus would apply before the AAT. [61]

Thus procedural questions are not necessarily to be answered by reference to the legal onus or burden of proof. The AAT, for example,

> ... may depart from the accustomed order of openings, evidence, addresses. It may sometimes consider that an applicant in person would be assisted by hearing the respondents opening, and perhaps the respondents evidence, before presenting his or her own case, and direct that the proceedings be ordered accordingly. [62]

2. Rules of Evidence

16.70 The AAT is not bound by the rules of evidence. One commentator has observed that

> [s]trict general application of the rules of evidence as a whole as they are applied in the courts would hopelessly restrict the ability of the Tribunal to come to rational decisions about the substantive merits of the case. [63]

We accept this view and **recommend** (as we have with respect to Compensation Review Panels) **that the Accident Compensation Appeal Tribunal should not be bound by the rules of evidence but should be empowered to inform itself on any matter in such manner as it thinks appropriate.**

16.71 This recommendation will permit the Tribunal to accept evidence which would be inadmissible in a court, treating the weakness as influencing its weight rather than its admissibility. The question of what material should be considered should be determined on the basis of fairness to the parties. The leading statement of the practice of the AAT is as follows.

In informing itself on any matter in such manner as it thinks appropriate, the Tribunal endeavours to be fair to the parties. It endeavours not to put the parties to unnecessary expense and may admit into evidence evidentiary material of a logically probative nature notwithstanding that that material is not the best evidence of the matter which it tends to prove. But the Tribunal does not lightly receive into evidence challenged evidentiary material concerning a matter of importance of which there is or should be better evidence. And the requirement of a hearing and the provision of a fight to appear and be represented carries with it an implication that, so far as is possible and consistent with the function of the Tribunal, a party should be given the opportunity of testing prejudicial evidentiary material tendered against him. It is generally appropriate that a party should have an opportunity to do more than give evidence to the contrary of the evidence adduced on behalf of the other party. He should be given an opportunity to test the evidence tendered against him provided that the testing of the evidence seems appropriate in the circumstances and does not conflict with the obligation laid upon the Tribunal to proceed with as little formality and technicality and with as much expedition as the matter before the Tribunal permits. [64]

16.72 Statements made orally to Compensation Review Panels should not be admissible in proceedings before the Tribunal, unless both parties consent. The Panels should determine matters speedily and informally. If evidence of the information presented to the Panels could be given to the Tribunal as a matter of course, there is a danger that Panel hearings could become more formal and that unrepresented persons could find themselves at a disadvantage ill Subsequent proceedings. **We recommend that evidence of statements made orally to a Compensation Review Panel should not be admissible in proceedings before the Accident Compensation Appeal Tribunal, unless**

the parties consent. This recommendation is not intended to exclude reference being made to reasons for decisions given by Panels where these, in turns refer to evidence given before them.

3. Preliminary Conferences

16.7; The Tribunal's power should include directing the parties to attend a preliminary conference. The objects of such a conference would be

> ... to clarify the issues; to give some indication of the kind of evidence which the parties will be producing at the hearing; to give some guidance, to all unrepresented applicant or to a practitioner inexperienced in the .jurisdiction, as to the procedure at the hearing and the kind of evidence which will be required, to as ascertain the probable length of the hearing and any other relevant information; and, where appropriate, to encourage the resolution of the matter in issue without the need for an actual hearing. [65]

The conference would also allow the Tribunal to assess the adequacy of medical evidence, with a view to determining whether a further medical examination should be required. In some circumstances, is where a disabled person cannot easily travel. the preliminary conference (and indeed other proceedings of the Tribunal) could be conducted by telephone.

4. Open Hearings

16.74 As for Compensation Review Panels, we recommend that proceedings before the Accident Compensation Appeal Tribunal should be open to members of the public unless the Tribunal orders otherwise.

E. Powers

16.75 We recommend that the Accident Compensation Appeal Tribunal should have all the powers of a Compensation Review Panel to prevent a party suffering hardship pending determination of the appeal and in obtaining information required to dispose of the appeal (see paragraph 16.49).

F. Representation

16.76 The case for permitting legal representatives to appear before the Tribunal is even stronger than in relation to Compensation Review Panels. The Corporation will be a party to the proceedings and the Tribunal is likely to consider the issues in greater depth than the Panels. We recommend that a party to proceedings before the Accident Compensation Appeal Tribunal should be entitled to be represented by any person whether or not legally qualified.

G. Witnesses

16.77 While Compensation Review Panels should not have the powers to summon witnesses, take evidence on oath or require the production of documents, it is appropriate for the Tribunal to have such powers. **We so recommend.**

H. Expenses and Costs

16.78 The should have power to award costs. However, in general, an appellant, even if unsuccessful, should not have to pay the costs of the Corporation. An exception could be made where an appeal is regarded as frivolous or vexatious. A successful appellant should normally receive order for costs, including those relating to legal representation in with a scale approved by the Tribunal. Thus, **we recommend that:**

> **(a) the Accident Compensation Appeal Tribunal should have power to award costs;**

(b) an award of costs should not be made in favour of the Corporation unless the circumstances are exceptional; [66]

(c) in exceptional circumstances the Tribunal should be able to award costs in favour of an unsuccessful appellant; and

(d) costs of legal representation should be awarded in accordance with a scale approved by the Tribunal.

A factor that the Tribunal Could take into account in considering a costs order is whether an appellant on legal advice or otherwise, failed to participate fully in proceedings before a Compensation Review Panel.

1. Reasons for Decision

16.79 Like Compensation Review Panels, the Tribunal should be required to give decisions in writing and a statement of reasons, either orally or in writing. If delivered orally, the reasons should be reduced to writing within 14 days of the request of a party. This will facilitate the parties consideration of further appeal and the adequate preparation of a case. **We recommend that the Accident Compensation Appeal Tribunal should be required to give its decision in writing and to give a statement of the reasons for the decision. We further recommend that at the request of a party the reasons should be reduced to writing within 14 days.**

J. Placement of the Tribunal

16.80 Thus far we have referred to the Accident Compensation Appeal Tribunal without relating it to existing court or tribunal structures. The options include vesting the functions of the Tribunal in

a new and separate Tribunal;

a division of the new Compensation Court;

a division of the District Court;

the Administrative Law Division of the Supreme Court; or

a State equivalent of the AAT, should one be established.

16.81 We have no doubt that the most satisfactory approach would be to integrate the Accident Compensation Appeal Tribunal within a general system of administrative appeals under State law. This Commission's 1973 Report on administrative appeals recommended that a Public Administration Tribunal should be established in New South Wales, as a single tribunal with power to review administrative decisions on their merits. [67] In 1982 recommendation was supported by the Review of New South Wales Government Administration. [68] Such a Tribunal would largely, if not entirely, overcome the fragmentation of review of administrative action which is a characteristic of current State law. With a fragmented system, uniformity and consistency, which are important qualities in administrative decision-making, are very difficult to achieve. The Public Administration Tribunal. If established in accordance with the 1973 Report, would perform a similar, although not identical, role at State level to that now performed by the AAT under Commonwealth Moreover, there would be little difficulty in adapting the Public Administration Tribunal to perform the role and functions suggested for the Accident Compensation Appeal Tribunal. **We recommend that, ideally, the role and functions of the Accident Compensation Appeal Tribunal should be performed by a general Administrative Appeals Tribunal established under State law.**

16.82 Having regard to the lapse of time since the Commission's 1973 Report and the 1982 recommendation of the Review of New South Wales Government Administration, it cannot be assumed that a general Administrative Appeals Tribunal will be established in time to perform the role and

functions of an Accident Compensation Appeal Tribunal. It is therefore necessary to deal with the interim period until, if ever, an Administrative Appeals Tribunal is established. One member of the Division, Justice Rogers is strongly of the view that existing courts should be used, if possible, to discharge the duties of the Accident Compensation Appeal Tribunal. This view is not shared by other members of the Division and is reported as a minority opinion. According to Justice Rogers, it would be undesirable in the extreme that yet another separate tribunal should be constituted. This would be unsound both from the point of view of the proper administration of justice and as a matter of general administration In his view, the Judicial arm of government should be constituted within the one structure and the long standing tradition of supervision of inferior courts and tribunals by the higher courts should continue. Administratively, it is only by an integrated court system that the best use can be made of both judicial and support staff and the necessary facilities such as court rooms. It would be undesirable and an unnecessary expenditure to create yet another registry with support staff for a separate and distinct tribunal, not to mention court premises and other facilities.

16.83 Justice Rogers argues that on any view, the proposed tribunal will be staffed by lawyers as well as by non-legal members and those lawyers will be drawn from the same pool as District Court judges and the judges of the Workers' Compensation Commission. To the extent that the criticism is justified that the judges would be affected by being steeped in the tradition of adversary proceedings, the same criticism would apply to any other lawyer tribunal member. Judicial records show that there can be drawn from among judges people prepared to entertain novel functions in the same way as from barristers or solicitors. Under existing legislation, such as the Mental Health Act, 1958 and the Adoption of Children Act, 1965, Judges sit with assessors. In the same way as judges of the Federal Court are able to sit as presidents and deputy presidents of the Trade Practices Tribunal with assessors, Judges of New South Wales courts would be able to sit and adapt themselves to the requirements of the Accident Compensation Tribunal. Justice Rogers proposes that there be established as a Division of the District Court or Compensation Court (succeeding to the judicial functions of the Workers' Compensation Commission-see paragraph 2.42) an Accident Compensation Appeal Division to which should be seconded judges nominated for that purpose by the Chief Judge of the chosen court. They should give first priority to disposing of the work of the Division but would otherwise be available to carry out the general work of their court.

16.84 The majority of the Division is not persuaded that the use of the existing court system in the manner suggested by Justice Rogers would best serve the aims of the Scheme. In his statement Justice Rogers refers to the long-standing tradition of supervision of inferior courts and tribunals by the higher courts. The maintenance of this tradition is not inconsistent with the majority view that issues of law ultimately should be determined by the Court of Appeal of the Supreme Court of New South Wales (paragraph 16.87) and the acknowledgment that the Supreme Court should have a continuing role in reviewing administrative action (paragraph 16.89). It is not necessarily correct that the lawyers appointed to a separate Tribunal would all be chosen from the same pool as that which provides judges for the District Court and Workers' Compensation Commission. The latter are almost always drawn from practising barristers steeped in the adversary tradition who have usually had experience in that system as applied to accident compensation. There are highly qualified lawyers with different backgrounds who may be well suited to undertake the special functions of the Tribunal. It is not easy to find analogies to the Tribunal in the court system currently operating in this State. There are significant differences between what is expected of the Tribunal and the functions exercised in the examples used by Justice Rogers, such as jurisdiction under the Mental Health Act, 1958 and the Adoption of Children Act, 1965.

16.85 The majority of the Division takes the view that it is likely to prove extraordinarily difficult for existing courts to perform the functions envisaged for the Tribunal. These functions are quite novel as far as State law is concerned. The Compensation Court, for example, would be faced with the problem of resolving workers' compensation claims according to one set of rules and procedures, while deciding transport accident claims on a substantially different basis. District Court Judges would be required to make a transition from rigid adherence to rules of evidence in criminal trials or common law negligence actions, to reviewing administrative decisions on their merits in accordance with informal procedures. It would be especially undesirable if the practices associated with adversary litigation in common law claims were applied to the suggested appeal system, which is designed to achieve different objectives. The same problems would apply to Supreme Court Judges. In addition, it 's doubtful whether it is

appropriate for judges of the Supreme Court to have to decide appeals of the kind which will arise under the Scheme at this level. A further problem is that all existing courts would have to determine the priority which should be accorded transport accident claims in relation to other categories of work. This might create special problems for a Court such as the District Court which has a very heavy workload of criminal cases.

16.86 The majority prefers the establishment of a separate Accident Compensation Appeal Tribunal is an interim measure pending the establishment of a comprehensive system of administrative appeals in the State. The Tribunal should comprise a small group-perhaps only two-full-time Judges with the Status and salaries of District Court Judges. It may be for reasons of economy, to draw on the services of nominated Judges of the District Court or Compensation Court on a part-time basis, [69] particularly because of the need to service the State. These Judges should be selected on the basis of their suitability to undertake the special tasks required of the Tribunal. As recommended earlier, the Tribunal should also include non-lawyer members (paragraphs 16.64-16.65). **We recommend that, pending the establishment of a general Administrative Appeals Tribunal under State law, the Accident Compensation Appeal Tribunal should be created as a separate body. Membership of the Tribunal should include a small group of judges of District Court status, serving full-time. Nominated judges of the District Court or Compensation Court should be eligible to serve as members on a part-time basis. In accordance with earlier recommendations, membership should include non-lawyers.**

VI. FURTHER APPEAL

16.87 The Accident Compensation Appeal Tribunal should be the final arbiter of fact-as it will have the opportunity to review the evidence fully and to observe witnesses. It should not, however, be the final arbiter on issues of law. There is no reason to deny claimants a right of appeal on point of law to the Court of Appeal. [70] In addition, the tribunal should have power, on its own motion or at the request of a party, to refer a question of law arising in a proceeding before it to the Supreme Court. This course may be preferred by the tribunal when confronted with a difficult and complex question of law. **We recommend that an appeal should be available on issues of law from the Accident Compensation Appeal Tribunal to the Court of Appeal of the Supreme Court of New South Wales, and that the Tribunal should itself have the power to refer a question of law to the Supreme Court.** Where a claim arises on a point of law it should be possible for the issue to be presented by leave of the Tribunal or the Court of Appeal directly to the Court of Appeal without the need for a decision by the Tribunal.

16.88 An appeal would be available, by leave, from a decision of the Court of Appeal to the High Court of Australia.

VII. OTHER REVIEW

16.89 The Supreme Court of New South Wales has jurisdiction to review administrative actions in accordance with the general principles of judicial review. The Administrative Law Division of the Court has power to order public bodies or officers to perform certain duties or to refrain from doing certain acts, and power to make declarations regarding the powers of such bodies or officers. [71] The establishment of an Accident Compensation Appeal Tribunal would not directly affect the existing power of judicial review. The proposed Tribunal will be essentially a body determining administrative appeals and its existence should not prevent claimants approaching the Supreme Court for judicial review of administrative actions in appropriate cases, although that Court in exercising its powers would ordinarily take account of other remedies available to the claimant.

16.90 The Ombudsman Act, 1974 offers a different method of review of administrative actions. Individual decisions of the Corporation could be the subject of complaints to the New South Wales

Ombudsman, who has power to investigate and report on complaints as to the administration of public authorities. [72] This important additional safeguard will supplement the appeal procedures in individual cases and the general policy review to be undertaken by the Policy Review Committee. It is to be noted, however, that the Ombudsman has a discretion to refuse to investigate a complaint. [73] In exercising this discretion one of the factors which may be taken into account is whether an alternative and satisfactory means of redress is available to the complainant. [74] Thus a dissatisfied claimant who has not sought redress by means of the appeal procedures will not necessarily be granted assistance by the Ombudsman.

VIII. SUMMARY

Decision-Making Procedures

16.91 The Corporation will require decision-making procedures to process a large number of claims under the Scheme and to assess the entitlement of incapacitated and disabled people to continuing benefits. It will also need powers to investigate claims and to receive information relating to them. However, in the usual case, the-primary sources of information should be the claimant, the treating doctor and the claimants employer.

16.92 The Corporation should not administer the Scheme on an adversary basis, but should actively attempt to ensure that all injured people receive the benefits to which they are entitled. It should, for example, adopt measures to secure full reporting of accidents likely to lead to claims. Assistance should be provided to claimants in preparing claims and gathering supporting information. Funds should also be provided to outside organisations to enable them to engage claimant representatives, who should provide advice and assistance to .claimants and could act on behalf of people seeking review of Corporation decisions. The policy guidelines formulated by the Corporation should be published, so that claimants and their advisers have the opportunity of responding to the Corporation's requirements.

16.93 In accordance with the principle of high quality decision-making referred to in Chapter 15 (paragraph 15.11) the assessment of each claim should be the responsibility of a single assessing officer who should have the authority to make the necessary investigations and decisions in relation to claims and continuing entitlements. Decision-making functions should not be delegated to medical boards or to individual medical practitioners, primarily because the statutory criteria do not usually relate to purely medical questions but require a reference to economic, social and vocational considerations. Medical assessments, including those by rehabilitation services, will usually be of considerable importance, but this should not detract from the responsibility of the corporation to determine claims under the Scheme.

The Appeal System

16.94 It is essential that claimants have an opportunity to obtain independent review of Corporation decisions, including an opportunity for a review by a judicial tribunal on the merits. The appeal system should, to the maximum extent practicable, avoid delay, formality and substantial costs, but adhere to high standards of procedural fairness. The appeal tribunals should be readily accessible to dissatisfied claimants, who should be notified of unfavourable decisions by the Corporation and advised of the right to appeal.

16.95 These objectives can best be achieved by adopting the model for social security appeals under Commonwealth law proposed by the Administrative Review Council. There should be a two-tiered system of appeals.

> The first appeal should be to independent bodies known as Compensation Review Panels. They should conduct appeals speedily and informally and should have power to substitute their view of the merits of each case for that of the Corporation.

The second appeal should be to an Accident Compensation Appeal Tribunal, which should have powers similar to those of the administrative Appeals Tribunal (AAT) under Commonwealth law. These include assessing the merits of claims without being bound by the Corporation's policies.

An appeal on questions of law should be available from the Accident Compensation Appeal Tribunal to the Court of Appeal.

16.96 Compensation Review Panels should be constituted by three members. The Chairperson should be legally qualified, and the remaining members should have skills or expertise in other relevant disciplines. The Corporation should not be a party to proceedings before the Panels. An appellant should be entitled to be represented by a person of his or her choice, whether or not legally qualified. A Successful appellant should ordinarily be reimbursed for the necessary expenses of the appeal, including legal costs in accordance with a modest fixed scale. The Panels should emphasise speed and informality in decision-making.

16.97 The Accident Compensation Appeal Tribunal should ordinarily be constituted by a judge and two non-judicial members having skills in relevant disciplines. Like the Panels, the Tribunal should not be bound by rules of evidence and should conduct the proceedings with as little formality and technicality as fairness permits. in practice, hearings before the Tribunal will tend to be longer than those before the Panels, partly because it is likely to be concerned with the more difficult issues. The Corporation will be a party to appeals heard by the Tribunal and legal representation is likely to be more common. The Tribunal should have power to award costs.

16.98 Ideally, the Accident Compensation Appeal Tribunal should be integrated within a comprehensive system of administrative appeals for the State. In the absence of such a system, it is proposed that the Tribunal should be established as a new and separate body, although judges could be drawn from existing courts.

FOOTNOTES

1. Administrative Review Council. *The Structure and Form of Social Security Appeals* (Report No.21, 1984).

2. It should be an offence to fail to report an accident although. in the case of a driver or owner who is also a claimant this obligation could be satisfied by lodging a claim form. Cf. Accident Compensation Act 1982 (NZ), s.93; Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), s.21.

3. Cf. Motor Accidents Act 1973 (Vic.). s.85.

4. T.G. Ison, *Accident Compensation* (1980), p.87.

5. T.G. Ison, "Workers' Compensation-The Canadian Experience", paper delivered at the conference entitied "Workers' Compensation-New Directions", South Australian Ministry of Labour (Adelaide, May 1984). p.15.

6. See note 4 above, p.82.

7. *Id*.. p.94.

8. Workers' Compensation Act 1916 (Qld.). s.41C.

9. Submission W60. p.4.

10. Submission S27, p.2.

11. Accident Compensation Corporation, Claims Manual 1983 (New Zealand). para.1.1.

12. See note 4 above. p.105.

13. Cf. Accident Compensation Act 1982 (NZ). ss.59(5), 88.

14. Motor Accidents Act 197 3 (Vic.), s.50.

15. Cf. Administrative Appeals Tribunal Act 1975 (Cth). s.28(1). This formula was approved by the New South Wales Government Administration, *Unfinished Agenda* (1982), p.57.

16. Limitation Act. 1969, s.14(1).

17. See Submissions W24. p.32: W28, p.3: S32. pp.25-26: and S40. pp.6-7.

18. As a comparison the New Zealand Accident Compensation Commission (as it then was). received over 12,000 applications for review of primary decisions in its first five years of operation. This figure was less than 2 per cent of total claims handled during the period: Accident Compensation Commission, *Purpose, Progress* (New Zealand, 1980). p.22. During 1982-83 the Corporation received 4.096 applications for review. This number was equal to 2.8 per cent of the number of applications received in the same period: Accident Compensation Corporation, *Report of the Accident Compensation Corporation for the year ended 3l March 1983* (New Zealand. 1983), p.9.

19. Administrative Review Council. *Social Security Appeals* (Report No.8. 1981). para.8.002.

20. *Id*.. para.8.001.

21. *Ibid.*

22. See note 1 above. Our proposal differs from the appeal systems implemented in the other Australian no-fault schemes. The Tasmanian and Northern Territory appeal tribunals are judicial tribunals: Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.), s.12(2A) and Motor Accidents (Compensation) Act 1979 (N.T.), s.28. In the Northern Territory, a dissatisfied claimant must direct his or her appeal to the Board of the Territory Insurance Office which administers the no-fault compensation scheme: Motor Accidents (Compensation) Act 1979 (N.T.), s.27. An appeal from the Board's decision may be taken to the Motor Accidents (Compensation) Appeal Tribunal, constituted by a Supreme Court Judge: s.29(1). In Victoria, the Motor Accidents Act, 1973 provides for internal review of primary decisions when the Board receives a request to provide reasons for an adverse decision: Motor Accidents Act 1973 (Vic.), s.51. The Board may vary or revoke its earlier decision. If the claimant is not satisfied with the Board's decision, he or she may appeal to the Motor Accidents Tribunal: s.50. The Tribunal is constituted by barristers and solicitors of not less than seven years standing, who sit individually to consider appeals: ss.37(1), 39(1). The Tribunal may substitute its own opinion or belief for that of the Board, or exercise a discretion in a different manner. where the appeal is against a decision dependent on an opinion or belief of the Board, or the exercise of t discretion by the Board: s.52.

23. See note 1 above, paras.112, 118.

24. Social Security Act 1947 (Cth.), s.15A.

25. Administrative Appeals Tribunal Act 1975 (Cth.), s.43(1).

26. See note 1 above, para.104.

27. Accident Compensation Act 1982 (N.Z.), s. 102.

28. See note 4 above. p.109.

29. Commissioner for Employees' Compensation, *Annual Report 1981-1982* (Commonwealth 1982), pp.11-14.

30. See note 1 above, p.13, table 2. The table shows that in the second quarter of 1983, the time from receipt of an application for review to a recommendation by the SSAT accounted for only about one-third the time needed to process such applications. The remaining time was taken up in internal review by the Department and subsequent consideration of the SSATs recommendation.

31. See note 1 above. para.70.

32. *Id*., para. 122. Cf. Community Welfare Act 1982. Schedule 9, cl.2(1) which provides for Community Welfare Appeals Tribunals.

33. See note 1 above, para.123.

34. *Id*., paras.195-202. for dissenting views.

35. *Id*., para.88.

36. Cf. Administrative Appeals Tribunal Act 1975 (Cth.). s.3(1)(a).(b). *Id.,* s.33(1)(C).

38. Submission W27, p.5. Cf. Administrative Appeals Tribunal Act 11)75 (Cth.). s.7.

39. In this we adopt a dissenting view of the Administrative Review, Council: see note 1 above, paras.203-207.

40. D. C. Pearce. “The Australian Government Administrative Appeals Tribunal” (1976) 1 *University of New South Wales Law Journal* 191. at pp.203-204.

41. See note 1 above, para.146.

42. *Id*., para. 142.

41. See note 40 above, pp.201-202.

44. Although the figures cannot be directly related, during 1982-83 4,096 applications for internal review were lodged with the Corporation and only 232 appeals were lodged: see Accident Compensation Corporation. *Report of the Accident Compensation Corporation for the year ended 31 March 1983* (New Zealand, 1983), p.9. See also earlier Annual Reports of the Corporation.

45. Department of Social Security, 1982-83 *Annual* Report (Commonwealth, 1983). pp.54-55.

46. *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, at p.589, per Bowen C.J. and Deane J.

47. *Id*., p.580. See generally M.D. Kirby, “Administrative Review: Beyond the Frontier Marked Policy-Lawyers Keep Out” (1981) 12 *Federal Law Review* 121.

48. See Review of New South Wales Government Administration, note 15 above, p.59.

49. Submission W27, p.1.

50. New South Wales Law Reform Commission, *Report on the Right of Appeal from Decisions of Administrative Tribunals and Officers* (LRC 16, 1973). para.149.

51. R. Else-Mitchell, “The Place of the Administrative Tribunal in 1965”, paper reproduced in the Papers of the Third Commonwealth and Empire Law Conference (1965), p.65, at p.74.

52. Administrative Appeals Tribunal Act 1975 (Cth.). s.7.

53. *Id*., s.20(1).

54. *Id.,* s.21(1).

55. Land and Environment Court Act, 1979. ss.12, 30, 36. and 37. See also Anti-Discrimination Act 1977. s.69B providing that the Equal Opportunity Tribunal established by s.69B is to be constituted by one judicial member and two other members. The Act does not list the qualifications for ordinary membership.

56. Administrative Appeals Tribunal Act 1975 (Cth), s.8(1) (c).

57. Cf. Administrative Appeals Tribunal Act 1975 (Cth.), s.42(1). See also Anti-Discrimination Act 1977, s.108 (2).

58. See para. 16.45 and Administrative Appeals Tribunal Act 1975 (Cth.), s.33(1).

59. A N Hall, “Aspects of Federal jurisdiction: The Administrative Appeals Tribunal (Cth.)” (1981) 57 *Australian Law Journal* 389, at p.403.

60. *Sullivan v. Secretary. Department of Transport* (1978) 20 ALR 323. at pp.342-343.

61. *McDonald v. Director-General of Social Security,* 27 March 1984, Federal Court of Australia, transcript of judgment at pp.6-7. per Woodward J.

62. R. Baimford, “The Administrative Appeals Tribunal in Practice” (1984) 58 *Law Institute Journal* 799, at p.808.

63. R.K. Todd. “Administrative Review Before the Administrative Appeals Tribunal-A Fresh Approach to Dispute Resolution. Part II” (1981) 12 *Federal Law Review* 95. at p.96.

64. *Re Saverio Barbaro and the Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1, at p.5. per Davies J.

65. See note 62 above. p.807.

66. As to an award of costs against a legally aided person, see Legal Services Commission Act. 1979, s.47.

67. See note 50 above. paras.146, 155.

68. See Review of New South Wiles Government Administration, note 15 above. p.57.

69. See. generally. Submission W27.

70. Section 289 of the Community Welfare Act 1982, gives a right of appeal to the Supreme Court from the Community Welfare Appeals Tribunal. See also Compensation Court Bill, 1983, cl.33. Pursuant to s.48 of the Supreme Court Act, 1970, the appeal would be heard by the Court of Appeal of the Supreme Court of New South Wales.

71. Supreme Court Act 1970, s.53(3B); Supreme Court Rules, 1970, schedule H.

72. See generally Ombudsman Act, 1974. ss.12(1), 13 and 26. For definition of “public authority”. see s.5(1).

73. *Id.,* s.11(3).

74. *Id.,* s.11(4)(b)(v).

17. Financial Aspects

I. INTRODUCTION

17.1 This Chapter deals with the cost of the Scheme and the means of funding it. The recommendations have not been formulated by reference to a pre-determined cost. However, as noted in Chapter 5, the cost of benefits is necessarily a consideration in determining the nature of the Scheme (paragraphs 5.16-5.17). The objective has been to create an equitable compensation scheme for victims of transport accidents, within the range of costs the community can reasonably be expected to bear.

17.2 The recommendations in this Report vary in important respects from the tentative proposals put in the Working Paper. In some cases, such as compensation for non-earners' loss of earning capacity, the changes have added materially to the cost of the Scheme. In the result, however, the estimated cost of the Scheme, according to the consulting actuary. appears to be substantially less than the cost of the existing compulsory third party insurance system assessed on the same basis. This is so despite the fact that the proposed Scheme offers a wider range of benefits, maintains periodic compensation over the whole period of incapacity and provides compensation for all victims of transport accidents subject only to very limited exclusions.

17.3 The abolition of the common law negligence action has made substantial savings possible. The main reasons for this are the exclusion of damages for non-economic loss such as pain and suffering in cases of short-term disability and the elimination of the high incidental costs of a fault-based system. The high cost of the fault-based system is increased if combined with a limited no-fault scheme such as that operating in Victoria. The cost of such a scheme, if adopted in New South Wales, would exceed that of the existing system based exclusively on fault (paragraph 17.19).

17.4 In presenting cost estimates it is appropriate to sound a note of caution. Estimates of the cost of any scheme, particularly one not yet in place, cannot be precise. Actual costs will vary according to such factors as accident and incapacity rates, general economic conditions affecting employment opportunities and the interpretation of eligibility criteria. The major assumptions on which the estimates have been prepared are summarised in this Chapter and dealt with more fully in the consulting actuary's report, which has been published separately. [1] The estimates should not be taken for more than they are: predictions, based on careful evaluation of relevant data from New South Wales and other jurisdictions, of the likely cost of the proposed Scheme. If the assumptions on which the estimates are based turn out to be inaccurate, the estimates themselves will be inaccurate. But the qualification also applies to estimates of the cost of existing compensation schemes since these, too, will be affected by many of the factors likely to influence the cost of the proposed Scheme. Making the appropriate allowances for the difficulties of predicting future costs, there is little doubt that the proposed Scheme is affordable by the New South Wales community and cannot simply be rejected on grounds of cost. It may have the additional advantage, when compared with the existing scheme, of producing significant savings but this is not the major reason for proposing a new compensation system.

17.5 Part IV of this Chapter examines possible sources of funds. It is suggested that the Scheme should be funded primarily out of contributions paid by owners of motor vehicles in much the same way as compulsory third party motor vehicle insurance premiums finance common law claims. Contributions on a comparable basis should be made by the Urban Transit Authority and State Rail Authority to cover the cost of public transport accidents involving their vehicles. Another source of funds that should be tapped is a levy on drivers' licences. The objectives of safety and accident prevention should be furthered by loadings on contributions and licence fees reflecting risks created by classes of vehicles and the safety records of individual drivers. The concluding section of the Chapter considers ways in which the Commonwealth can reasonably be expected to assist in sharing the cost of the Scheme.

II. COST ESTIMATES

A. Data and Assumptions

17.6 The consulting actuary has costed the Scheme as it relates to motor vehicle accidents. Because of the relative paucity of information, it has not been possible to estimate the cost of extending the Scheme to all forms

of public transport, nor is it necessary to do so. If, as we recommend, public transport authorities contribute to the Scheme the proportion of costs attributable to their activities, there will be no additional burden on privately owned motor vehicles or on drivers. Moreover, this form of contribution will not materially alter the present practice under which the public transport authorities act as self-insurers in respect of their common law liability.

17.7 In preparing the estimates, extensive use was made of experience under the New Zealand and Victorian no-fault schemes. [2] One reason for this is that the nature of the compensation system affects the behaviour both of the injured and of the providers of services to the injured. Data from existing no-fault schemes outside New South Wales consequently may be a more reliable guide to the future costs of a similar New South Wales scheme than the cost of the existing third party insurance system. [3] In addition, Australian third party systems have normally recorded only the bare minimum of data needed for claims processing, premium setting and audit. The GIO has thus been unable to provide all information needed to estimate the costs of the proposed Scheme, [4] although use was made of GIO estimates of claims by out-of-state residents and long-term hospital and medical costs. [5] The Australian Bureau of Statistics was a source of information on the needs of the handicapped [6] and statistics published by the Traffic Accident Research Unit of the Traffic Authority of New South Wales together with the 1981 Australian Census were used to estimate the cost of death benefits. [7]

17.8 A number of assumptions were made for the purpose of estimating costs. Among the most important were the following.

> A long-term annual rate of 400 fatalities per million vehicles has been assumed. This is an 11 per cent reduction on the 1982 rate, but an 18 per cent increase on the 1983 rate of 340 fatalities per million vehicles. In 1983 the introduction of random breath-testing had an unusual impact, unlikely to be equalled in later years. [8] The number of fatalities were used as a means of comparing data from different years from New Zealand, New South Wales and Victoria. This procedure was employed because admissions to hospital per fatality, and the average stay in hospital have remained fairly stable in different places and at different times despite large variations in the number of fatalities per million vehicles. [9]
>
> Incapacity rates for earners were assumed to be 50 per cent higher than rates estimated from the New Zealand motor vehicle fund. [10] The principal reason for the additional allowance is to take account of a different test of incapacity under the proposed Scheme. [11] It also allows for higher unemployment levels in New South Wales compared with New Zealand, although the gap has narrowed considerably since cost estimates were prepared for the Working Paper. The allowance was made after taking account of information from the Victorian no-fault scheme concerning rates of incapacity in that State.
>
> It was assumed that no accident victim would recover from incapacity more than five years after the accident. It was also assumed that an increase of 15 per cent would occur in the number of incapacitated people at ages 50, 55 and 60 [12] because of the gradual deterioration in work capacity that sometimes affect older people.
>
> For the purpose of financing a fully-funded scheme (paragraph 17.15), it was assumed that all compensation and the costs of the Scheme would increase at 10 per cent per annum and that investment earnings of the fund would be at 11 per cent per annum. [13]
>
> The administrative expenses of collecting revenue and processing claims were estimated at 9 per cent of total compensation paid. This accords with the experience in New Zealand and Victoria. [14]

17.9 The Government Actuary, Mr. J H Taylor, kindly agreed to examine the costings prepared by the consulting actuary. The Government Actuary states his conclusions as follows.

> We have examined the methodology and considered the applicability of the data from which the results have been derived. No independent checks on the arithmetic have been made ...
>
> To derive his estimates, Mr. Cumpston has drawn on the experience of the New Zealand accident compensation scheme and the Victorian motor accident scheme. He has also compared these schemes in order to assess the probable variability of costs. He has had to allow for significant differences between

these schemes, and between these schemes and the proposed NSW [S]cheme, and has had to take into account that the nature of a scheme affects the behaviour both of the injured and of the providers of services to the injured. Many assumptions have had to be made and these are clearly set out in the report and in the appendices to the report. These assumptions are well adduced, but there is a substantial element of conjecture. Different opinions may be held on some of the assumptions, but it is my opinion that, overall, they are not unreasonable. Their accuracy will only be determined when the data from several years of operation of the proposed [S]cheme has been accumulated. Also, I consider that the methodology is appropriate for the practical problem of deriving estimates from the available data and from the assumptions that have been made, and the estimates so obtained should be as reliable as can reasonably be expected. [15]

17.10 The consulting actuary has estimated an average cost per vehicle to cover the compensation proposed in this Report, based on motor vehicle accidents, including those involving public bus transport but excluding rail, ferry and water taxi accidents. [16] Although the Scheme covers all public transport accidents, it has been assumed, in accordance with our recommendations, [17] that the costs of rail, ferry and water taxi accidents will be met from sources other than contributions paid by motor vehicle owners. For costing purposes, “motor vehicle” has been taken to mean motor vehicle or motor cycle, excluding tractors, equipment, caravans and trailers. [18] This is the definition of vehicle used by Australian and New Zealand authorities in comparing traffic accident casualty rates. Allowance has been made in the cost estimates for the costs arising from all types of motor vehicles currently subject to compulsory third party insurance, [19] and all such vehicles will continue to pay premiums under the proposed Scheme.

17.11 Some of the costs estimated by the consulting actuary are described as “not likely to be less than $X or more than $Y”. This has been done on the basis that there is only about a 16 per cent chance that the cost is less than the lower figure and only about a 16 per cent chance that the cost is more than the higher figure. The 16 per cent chance level was used by the consulting actuary because the “normal” probability distribution is such that there is about a 16 per cent chance that random fluctuations will result in the outcome being more than one standard deviation above the mean, and an equal chance that the outcome will be more than one standard deviation below the mean. [20] The Government Actuary has commented on this approach to the “high” and “low” estimates as follows.

In addition to his ‘best’ estimate, Mr Cumpston has estimated a range within which he would expect the actual cost to lie. This range is calculated assuming an underlying statistical distribution of the derived estimates. This assumption may not be completely borne out in practice. It represents an attempt to quantify the variability likely to appear from the many factors which will affect the outworking of the scheme. [21]

B. Costing Alternatives

1. Pay-As-You-Go Scheme

17.12 A “pay-as-you-go” scheme is one in which the costs of today’s accidents are met from future contributions, as benefits become payable or are provided. The costing of the proposed scheme on a pay-as-you-go basis uses the long-term or “plateau” cost, allowing for administration costs of 9 per cent, but ignoring inflation and changes in the number of vehicles. [22] The following table indicates the estimated cost per vehicle of the proposed Scheme, broken down by type of benefit (including an allowance for safety and prevention).

Table 17.1: Estimated Costs of Transport Accidents Scheme: Pay-As-You-Go Plateau Costs

New South Wales June 1984

		Cost Per Vehicle ($)	
Type of Expenditure	**“Low” Estimate**	**“Best” Estimate**	**“High” Estimate**

Compensation for loss of earning capacity	53	66	79[b]
Rehabilitation services	4	6	8
Support services	17	24	31
Compensation for permanent disability	12	15	18
Compensation in respect of death	19	22	25
Hospital, medical and ancillary services	34	42	50
Safety	2	2	2
Total	**150**[a]	**177**	**204**[b]

(a) The “low” and “high’ estimates (paragraph 17.11) for total expenditure are not the totals of these estimates for each expenditure, as estimation errors were assumed to be only partially correlated. For example, if compensation for loss of earning capacity is higher than the “best” estimate, this will not necessarily be also true for compensation in respect of death. See Actuary’s Report, para. 10.4.

Source: Actuary’s Report, para.10.2.

17.13 The estimated cost per vehicle on hospital, medical and ancillary services is based on the assumption that all such expenses will be met by the Scheme, although it is recommended in Chapter 13, that medical and hospital services should be provided through the Medicare system. If the Commonwealth meets the costs of medical services provided through Medicare, and pays contributions to public hospitals at the levels it normally pays for non-compensable patients as recommended, [23] the cost per vehicle would be reduced by about $24 per annum. [24] The “best” estimate contribution would then be $153 per vehicle per annum. If the Commonwealth’s subsidy to the Scheme were less, the reduction in the contribution would be less.

17.14 One of the features of a pay-as-you-go scheme providing periodic compensation is that it takes a considerable time before the plateau is reached. In its early years the proposed Scheme will be very inexpensive and even after 10 years will reach only 64 per cent of the plateau cost. The build-up of payments per vehicle on a plateau cost of $177, assuming no inflation or changes in vehicle numbers from 30 June 1984, is as follows.

Table 17.2: Transport Accidents Scheme: Build-up of Pay-As-You-Go-Costs to Plateau

New South Wales 1985-2024

Year	Pay-as-you-go cost ($)	Proportion of Plateau cost
1984-85	38	21
1985-86	65	37

1986-87	83	47
1987-88	94	53
1988-89	99	56
1993-94	114	64
2003-04	134	76
2013-14	150	85
2023-24	163	92

Source: Actuary's Report, para.10.6

2. Fully Funded Scheme

17.15 In a fully funded scheme, each year's contributors meet the cost of all compensation to be paid or provided as a result of that year's accidents, after allowing for investment earnings likely to accrue before payments have to be made. Assuming 10 per cent per annum inflation and 11 per cent per annum investment earnings, the estimated average annual contribution per vehicle for the scheme on a fully funded basis, as at 30 June 1984, is $160. The "low" estimate is $135, the "high" estimate $185. [25] The fully funded estimate is lower than the equivalent pay-as-you-go plateau figure, because returns on investments can reasonably be expected to exceed the rate of inflation of compensation costs. [26]

3. The Existing System

17.16 The present third party system is using investment income from the existing fund to reduce premiums *below* a pay-as-you-go level. While this practice has enabled the Government to reduce motor vehicle third party insurance premiums [27] and will help to keep them low in the short-term, there will inevitably be a need for substantial increases in the (not too distant) future. In short, current compulsory third party premiums are unrealistically and misleadingly low. The consulting actuary has calculated the average premium per vehicle now being charged at $141. [28] This is only possible because of the use of investment income permitting an artificial reduction in premium of approximately $63 per vehicle. [29]

17.17 If the existing system was operated on a proper pay-as-you-go basis the estimated cost per vehicle is $225 per annum. [30] This compares with $177 per vehicle per annum for the proposed Scheme on the same basis (paragraph 17.14). The cost of the existing system on a fully funded basis is estimated at $235 per vehicle per annum. [31] The higher cost of the current scheme on a fully funded rather than pay-as-you-go basis reflects the assumption that the rate of inflation of common law claims will continue to exceed investment earnings as has occurred in recent years. [32] This is in contrast to the proposed Scheme, where claims inflation is assumed to be slightly lower than investment earnings, making it less expensive fully funded than on a pay-as-you-go basis (paragraph 17.8). The reason for this assumption is that the experience in New Zealand suggests that benefits under the Scheme, which are linked to AWE, will increase broadly in line with wage movements. [33]

17.18 If the present method of funding was applied to the proposed Scheme, the cost per vehicle per annum would be $114. This figure is reached by deducting from the pay-as-you-go "best" estimate of $177 the current deduction derived from investment income of $63. [34] It compares with the current average premium of $141 per vehicle per annum. We mention this merely for the purpose of comparison. We do not recommend the current method for the reasons given in paragraph 17.16 and regard the only feasible alternatives as pay-as-you-go or fully funded.

4. Dual Scheme-Limited No-Fault/Common Law

17.19 One further comparison should be made. Chapter 6 has explained the advantages of a pure no-fault scheme over a dual scheme, such as the Victorian scheme which combines a limited no-fault scheme with the common law negligence action. The reason for making a careful comparison of the two approaches was the support given to the dual scheme, particularly by professional bodies in New South Wales and Victoria. To complete the comparison an estimate was made of the cost of establishing a scheme in New South Wales which provides benefits equivalent to those available in Victoria. The consulting actuary estimates the pay-as-you-go plateau cost of such a scheme in New South Wales at $255 per vehicle per annum, while the fully funded cost would be about $285 per vehicle per annum. [35] These estimates were made on the assumption that the 5 per cent discount rate and other statutory restrictions introduced in New South Wales in 1984 [36] would not apply, since the restrictions have not been adopted in Victoria. The estimates suggest that the cost of a dual scheme would exceed that of the existing common law system and would be substantially greater than the proposed Scheme.

5. Interstate Aspects of the Scheme

17.20 The costings prepared by the consulting actuary are based on estimated annual motor vehicle accident fatalities and injuries in New South Wales. The proposed Scheme extends to death or injury outside New South Wales, where the person killed or injured is a resident of New South Wales and the death or injury is caused by or arises out of the use of a New South Wales vehicle. [37] However, some people killed or injured in motor vehicle accidents in New South Wales will not come within the Scheme, although we propose elsewhere that there should be discussions with interstate authorities to prevent anomalies arising. For example, the Scheme does not apply where the person killed or injured is not a New South Wales resident and no New South Wales vehicle is involved. Thus the cost of implementing the additional class of claimants will be offset, to a substantial extent, by savings in not compensating certain victims of accidents occurring in New South Wales. In addition, the set-off provisions of the Scheme, which will apply to interstate sources of compensation, will provide some savings for the Scheme. A further factor is that cooperative arrangements, especially with neighbouring States and the Australian Capital Territory, are likely to minimise the costs associated with accidents occurring outside the States. In the circumstances, no additional allowance has been made for the extension of the Scheme to some New South Wales residents killed or injured outside the State.

17.21 There is one cost to the Scheme, associated with interstate accidents, which is not offset by any equivalent savings. We have recommended that the owner and/or driver of a New South Wales registered vehicle, who is held liable in a common law action in another State or Territory, should be indemnified by the Corporation against the damages claim. Since this is not a cost of compensation under the Scheme it does not form part of the costing. However, it will add to the overall cost of the Scheme. The cost of indemnifying New South Wales owner/drivers against out-of-State claims is estimated by the consulting actuary at 2 per cent of the total cost of the Scheme [38] and thus might add approximately $3-$4 per vehicle per annum to the cost of the Scheme.

6. A Comparison

17.22 Table 17.3 sets out the estimates of average annual contributions or premiums required for the proposed, existing and dual schemes in New South Wales.

Table 17.3: All Schemes Cost Estimates: Cost per Vehicle per Annum

New South Wales June 1984

Type of Scheme	"Low" Estimate	"Best" Estimate	"High" Estimate
Proposed Transport Accidents Scheme[(a)]			

Pay-as-you-go	150	177	204
Funded	135	160	185
Existing Compulsory Third Party Insurance Scheme			
Pay-as-you-go	210	225	240
Funded	190	235	280
Dual Scheme-Limited No-fault/Common Law(b)			
Pay-as-you-go	235	255	275
Funded	230	285	340

(a) Account will need to be taken of the cost of providing third party coverage in respect of interstate accidents (para. 17.20). However, to the extent that the Commonwealth is prepared to meet expenses incurred through Medicare (para. 17.13), costs will be reduced.

(b) Based on benefits available in Victoria.

Source: Actuary's Report, para.1.39.

III. FULLY FUNDED OR PAY-AS-YOU-GO?

17.23 The Working Paper expressed a preference for a fully funded scheme. [39] While the choice should make little difference to the long-term cost of a compensation scheme, [40] it was suggested that payment by this year's motorists (or other contributors) of the cost of this years accidents would be more equitable than placing the costs on future generations. Regard was also had to submissions from private insurers and others contending that the Scheme should be fully funded. [41]

17.24 After further consideration, we have concluded that the Scheme should be conducted on a pay-as-you-go basis, with a reasonable reserve of, say, one year's contributions being maintained to guard against disasters or unexpected contingencies. A fully funded scheme is clearly Justified where private insurers provide cover without government support since the fund guarantees (or should guarantee) against insolvency. However, if the Scheme is publicly funded and administered, there is no compelling reason to create a fund to meet future claims. It can be assumed that future governments will provide the resources necessary for this purpose. Nor is a fully funded scheme immune from the impact of unexpected additional costs that can affect a pay-as-you-go scheme. Unexpected cost increases will require premium contribution adjustments whatever the method of funding.

17.25 The Australian Woodhouse Committee accepted that the proposed national compensation scheme should be operated on a pay-as-you-go basis. [42] More recently one commentator has noted a general trend in several countries towards pay-as-you-go funding, particularly for publicly financed schemes. [43] The recent changes in

New South Wales to the formula for setting compulsory third party insurance premiums reflect this trend. [44] These changes also presumably reflect a judgment that it is not essential for the State to have a continually growing third party fund for investment purposes. A further important consideration is that a new Transport Accidents Scheme will need to provide for the residue of claims under the compulsory third party insurance system. Since the third party fund maintained by the could be insufficient for this purpose, transitional arrangements will be very much easier to implement if the Scheme is conducted on a pay-as-you-go basis under which the costs in the early years will be relatively low (paragraph 17.14). Accordingly, **we recommend that the Scheme should be funded on a pay-as-you-go basis, with reasonable reserves set aside to guard against disaster or unexpected contingencies.**

IV. MAJOR REVENUE SOURCES

17.26 While the proposed Scheme has been costed simply on the basis of contributions from motor vehicle owners, this is not the only source of funds. This section considers the major source of reverie that should finance the Scheme and thus provide compensation for Transport Accident victims.

A. Contributions from Motor Vehicle Owners

17.27 In New South Wales, as has been seen, payments made in common law claims arising from personal injuries in motor vehicle accidents are generally funded from compulsory third party insurance premiums. Premiums collected from motorists in the State for 1983 were estimated to be $427 million. [45] The payment of premiums, which vary according to the vehicles classification and the district in which it is usually garaged, is a condition for registration. [46] It is an offence to drive a vehicle on a public street without such insurance. [47] There are few exceptions to this requirement. Even State-owned vehicles are required to comply, unless exempted by the regulations. [48] The regulations exempt only State-owned buses, [49] motorised pedal cycles [50] and visiting vehicles so long as they carry equivalent insurance in another Australian State or Territory. [51] Commonwealth-owned motor vehicles are also outside the Act.

17.28 The primary source of funds for the Scheme should be contributions of a kind similar to existing compulsory third party insurance premiums, although of course the purpose of the contributions would not be to provide coverage against possible common law claims. The collection machinery already operates effectively; the community is familiar with, and appears to accept, a levy on vehicle ownership as a means of funding the costs of motor vehicle accident compensation and the transition to a new scheme could be implemented without disruption to the present system of collecting premiums. In Chapter 14 it was suggested that “motor vehicle” should be defined, for the purposes of the Scheme, in the terms of the Motor Vehicles (Third Party Insurance) Act, 1942 (paragraph 14.4). [52] Consequently, contributions under the Scheme will be paid by the same motor vehicle owners who now pay compulsory third party insurance. If the Scheme were extended to other forms of transport, it would be necessary to develop additional procedures for assessment and collection of premiums. This would be required if, for example, the Scheme were extended to privately owned ferries and water taxis, as suggested in Chapter 14, or to other forms of transport such as bicycles. **We recommend that the primary source of funding for the Scheme should be contributions payable on registration of motor vehicles and of other forms of privately owned transport, using where appropriate the same procedures as now apply to the payment of compulsory third party motor vehicle insurance premiums.**

17.29 At present compulsory third party premiums vary according to such factors as the nature of the vehicle, whether the vehicle is used for commercial purposes and the district where the vehicle is normally garaged. Table 17.4 sets out the premium levels for selected classes of vehicles on both the current costing basis and on a pay-as-you-go basis (see paragraph 17.30). The Table also sets out estimated contributions for the proposed Scheme calculated, in each case, on a comparable basis.

Table 17.4: Motor Vehicle Accident Compensation: Premium Comparison[(a)]

New South Wales 1984

	Annual Premium on current	Annual Premium on Plateau Pay-

				Costing Basis		as-you-go Basis
Class	**Type of Vehicle**	**Premium District Where Normally Garaged**	**Existing System (Actual)**	**Proposed System (Estimate)**	**Existing System (Estimate)**	**Proposed System (Estimate)**
1	Motor Vehicle	Sydney Metropolitan and Wollongong	158	128 (b)	253 (b)	199 (b)
1	Motor Vehicle	Newcastle and Elsewhere	138	111	220	173
3	Goods Vehicle with and unladen weight of over 2 tonnes	Sydney Metropolitan and Wollongong	320	259	512	403
6	Regular omnibus seating and over 16 adults	Sydney Metropolitan and Wollongong	498	403	797	627
6	Regular omnibus seating over 16 adults	Newcastle	411	333	658	517
7	Taxi-cab	Sydney Metropolitan and Wollongong	1086	880	1739	1368
10	Motor cycle with and engine over 300 ml.	Sydney Metropolitan and Wollongong	158	128	253	199

(a) This Table compares existing and estimated premiums under the compulsory third party insurance system with equivalent estimated premiums for the motor vehicle component of the proposed Transport Accidents Scheme.

(b) According to the Actuary's Report (para.11.2), the average premium is about 89 per cent of the premium for class 1 metropolitan motor cars. The relevant estimate for a class 1 metropolitan motor car was therefore obtained by dividing the average estimate by 0.89. Other estimates were obtained by using the table in Schedule 1 of the Motor Vehicles (Third Party) Insurance Act, 1942.

Source: Columns 1-4: Motor Vehicles (Third Party Insurance) Act, 1974 - Table of Premiums, 1 July 1984. Columns 5-7: Actuary's Report, paras.10-2, 10.9 and 11.1-11.3.

17.30 Several points should be noted about Table 17.4.

> Current premiums are not the result of any recognised costing approach and have been made possible by substantial drawings on investment income (paragraph 17.16). Current premiums therefore give a misleading picture of the true cost of the existing system. The estimated cost of the proposed Scheme on the current costing is equally misleading, but the figures are included for comparative purposes.
>
> The pay-as-you-go estimates give a more realistic assessment of the cost of the respective schemes. To the extent that the proposed Scheme relies on sources of funds other than contributions from motor vehicle owners, it will be possible to reduce those contributions, although not the total revenue required.
>
> We propose later that contributions should closely reflect the risks to safety created by classes of vehicles. It is likely that the current premium classifications will be discarded if such an approach is adopted.

B. Contributions from Public Transport Authorities

17.31 Public transport in New South Wales is administered by the State Rail Authority and Urban Transit Authority. [53] These services are not covered by compulsory third party insurance and both authorities act as self-insurers. [54] It is reasonable to expect that the authorities which have provided funds to meet common law claims arising out of public transport accidents, should meet the cost of compensating the public transport accident victims under the Scheme. For this purpose, the authorities could continue to act as self-insurers. However, it would assist the orderly administration of the Scheme if the authorities were required to make a contribution to the Scheme calculated by reference to the number of public transport accidents in which the relevant authority's involved and the cost of meeting claims arising out of those accidents. Accordingly, **we recommend that the State Rail Authority and Urban Transit Authority should be required to make an annual contribution to the Scheme assessed by reference to the cost of meeting claims arising out of accidents in which each Authority is involved.** The exact level of contribution will need to be the subject of negotiations between the Government, the Corporation and the relevant Authority. The negotiations should take into account the extent to which other vehicles are involved in public transport accidents, but not so that a disproportionate burden is placed on private vehicle owners or drivers.

C. Levy on Drivers' Licences

17.32 There were 3,274,999 drivers' licences current in New South Wales on 30 June 1983. Table 17.5 shows the numbers holding each category of licence as at that date.

Table 17.5: Drivers' Licences: Number Issued

New South Wales 30 June 1983

Category of Licence	Number of Licences in Issues

Class 1: Motor car	2,478,189
Class 2: Motor car and public vehicle not registered under the Transport Act, 1930	6,493
Class 3: Includes class 1, and motor lorry in excess of 2 tonnes unladen	323,557
Class 4: Includes class 3, and public transport buses not registered under the Transport Act, 1930	43,122
Class 5: Any vehicles except those registered under the Transport Act, 1930	121,084
Motor cycle rider	282,388
Taxi-cab driver	20,166
TOTAL NUMBER OF LICENCES	**3,274,999**

Source: Commissioner for Motor Transport, *Annual Report 1982-83*, p.17

An exact figure for the amount of revenue received from licences is not readily available, because the records of the Department of Motor Transport combine licence fees, registration fees and certain other fees. We estimate the total licence revenue for 1982-83, using the figures in Table 17.5, at approximately $48.3 million.

17.33 Licence fees are not currently used as a source of finance for the compulsory third party insurance system. However, there are good reasons why such fees should be used for this purpose. A levy added to the fee payable on issue or renewal of drivers' licences would mean that the total motoring population, rather than motor vehicle owners and public transport authorities, would contribute to the Scheme. [55] At present a substantial number of drivers make no direct financial contribution to the compensation system. Moreover it would provide a basis for imposing loadings on drivers whose record is such that they pose a threat to safety. **We recommend that the Scheme should be financed, in part, by levies on the issue or renewal of drivers' licences.** We do not think it appropriate to suggest the size of the levy. Obviously, the greater the levy the less the contribution required from motor vehicle owners.

D. Fines from Motoring Offences

17.34 Substantial amounts are collected each year from fines imposed for offences involving motor vehicles. The total receipts from fines and forfeitures under the Transport and Motor Traffic Acts during 1982-83 were $65 million. [56] This may not include all revenue from fines for motor vehicle offences, since some offences are created and dealt with under other legislation One view is that the link between the compensation system and offences committed by drivers and other road users is insufficiently direct to justify a levy. An alternative view was expressed in a submission:

> ... revenue gained from traffic fines should be used to offset some of the costs of accident compensation. The reason for this proposal is that traffic fines are regarded as being an expression of the community's sanctions against driving behaviour which is perceived as posing an unacceptable risk of injury to others in the community. [57]

17.35 The financial viability of the Scheme does not depend on the imposition of a levy on fines for offences involving motor vehicles. Nonetheless such a levy would emphasise that reckless, dangerous or careless driving creates a risk of death and injury and that people guilty of such behaviour should meet a higher proportion of the cost of compensating transport accident victims. A levy on fines thus has some attractions. However, a more convenient approach would be to adjust the levy on the issue or renewal of licences to take account of the driver s record. At this stage we do not propose a levy on fines, but regard it as an option to be kept under review.

E. Motor Fuel Tax

17.36 The Working Paper raised the possibility of relying on a motor fuel tax as a source of revenue for the Scheme. During 1982-83 tax on motor fuel collected in New South Wales amounted to $166.6 million. [58] Funding from a fuel tax has the theoretical advantage that the greater the distance a person travels the larger his or her contribution to the compensation fund. Since the risk of being injured in an accident tends to increase with the distance travelled on the road, a higher contribution from such a person may be warranted. However, the use of a fuel tax for compensation purposes raises a wide range of issues, including questions of Commonwealth-State financial relationships. As there are adequate sources of revenue available, we do not think that it is necessary to propose that the fuel tax be used to finance the proposed Scheme.

F. Review of Revenue Sources

17.37 We have proposed that the sources of revenue for the Scheme should be:

contributions from motor vehicle owners;

contributions from public transport authorities; and

a levy on the issue and renewal of drivers' licences.

The mix of revenue sources may well vary over time, depending on government priorities and the financial requirements of the Scheme. **We recommend that the Corporation should keep the question of revenue for the Scheme under close review and make any proposals it considers appropriate in annual reports or reports to the Minister. Contributions to the Scheme should be set by the Government, after receiving advice from the Corporation.**

V. RISK FACTORS, SAFETY AND FUNDING

A. Introduction

17.38 Earlier Chapters have emphasised the paramount importance of accident prevention. [59] While other agencies will be responsible for specific safety programs, this emphasis is reflected in the corporation's role in collecting and analysing transport accident statistics for safety and prevention purposes and in supplementing the work of existing road safety authorities. The Scheme's commitment to safety and prevention is further demonstrated by an allowance for this purpose of $2 per vehicle per annum in the costing. On current registration figures such an allowance would yield over $5.5 million to permit the Corporation to promote safety and prevention in relation to private and public transport.

17.39 It has been argued that a justification for the common law negligence action is that it promotes safety, by imposing liability for negligent conduct causing injury. But as explained in Chapter 3, the Compulsory third party insurance system has effectively removed the deterrent effect of the threat of common law liability. In practice a driver who is "at fault" is not personally able to pay damages to the accident victim. Indeed the only financial incentive to safety in the present system, apart from the threat of criminal sanctions for careless or reckless behaviour, is the risk incurred by a careless driver that he or she will be held responsible for an accident and thus denied compensate in whole or part for any injuries he or she sustains. There is no evidence of which we are aware that this risk is more likely to motivate people to avoid accidents than the desire to avoid personal injury and the imposition of criminal sanctions.

17.40 Furthermore, under the current system compulsory third party insurance premiums are levied on a flat-rate basis, according to broad vehicle classification and place of garaging. Premiums are unrelated to the accident or safety records of individual drivers or owners and are not related systematically to the safety records of classes of vehicles. This means that a safe driver obtains no direct financial advantage in relation to third party insurance premiums, while an unsafe driver incurs no penalty or loading. An owner of a vehicle of a kind which creates a high risk of accidental death or injury generally pays no more in premiums than the owner of a low risk vehicle. Thus the assessment of premiums contains no direct financial incentive to safety and makes no systematic attempt to sheet home the cost of accidents to those drivers or motor vehicle owners who create or are exposed

to disproportionate risks. If the proposed Scheme were to adopt the same approach to the assessment of contributions, it would suffer from the same defects. In our view the funding mechanisms for the Scheme should attempt to promote safety and to reflect more accurately the risks created or borne by individuals and classes of drivers or motor vehicle owners.

B. Vehicle Risk Classifications

17.41 Accurate statistics relating to transport accidents and their consequences will show that certain types of vehicle are more likely to be involved in accidents causing death or injury than others. For example, the Tasmanian Motor Accidents Insurance Board has recorded a disproportionately high incidence of injury among motor cycle drivers and passengers. [60] It is likely that different makes of vehicle, or vehicles with different engine capacities, have varying rates of involvement in serious accidents. Sometimes this will be because the vehicle has been manufactured without sufficient regard to occupant safety or the safety of other parties involved in a potential collision. This does not necessarily mean that the drivers of these vehicles are especially unsafe drivers- the incidence of injury may reflect the particular vulnerability of one party to an accident For example, a motor cyclist is more vulnerable to injury from environmental factors, such as bad roads or oil spills on the road. Similarly, where a large truck is involved in an accident with a car, its size is likely to result in more serious injury to the car occupants than if the accident occurred between two cars. Even if a driver is very careful, the incidence of injury arising from the use of a particular type of vehicle may be higher because of factors unrelated to driver skills. A particular colour car, for example, may be more difficult to see and therefore be involved in more accidents, or a design feature may make it more likely that occupant injury will occur.

17.42 While some submissions supported reliance on the use of risk-related premiums from motor vehicle owners, [61] others criticised such an approach. [62] For example, the Motor Cycle Council of Australia stated that

> [t]he scheme pays compensation to all its participants without regard to fault Therefore, premiums should be levied in a wa which does not imply that any user group is relatively more or less “responsible” for accidents than any other user group. T assessment of premiums on a risk basis implies exactly such “responsibility” and serves to divert attention from genuine ro safety needs. [63]

However, there is nothing inconsistent with the principle of no-fault compensation in assessing contributions by reference to risk factors. Many forms of insurance, where fault is irrelevant, take precisely this approach in setting premiums. Household property insurers, for example, take into account the location of the house, since the risk of theft is greater in some areas than others. Workers’ compensation premiums, which mainly relate to no-fault benefits, are determined by reference to industry risks. Premiums in respect of comprehensive insurance coverage for motor vehicle owners vary according to a variety of factors including the make of vehicle and the age of the driver.

17.43 A compensation system, within the limits of practicability, should provide the maximum incentives to safety. A separate, although related principle, is that those undertaking high risk activities should bear a greater share of the compensation burden. These principles lead us to conclude that contributions from motor vehicle owners should reflect fairly the risk of accidental death or injury created by the use of particular classes of vehicles. Contributions should vary. for example, among different makes and kinds of vehicles according to the frequency of their involvement in accidents resulting in death or injury and the relative severity of those accidents. Adjustments of this kind are likely to have a positive, although not dramatic impact, on safety. A manufacturer whose vehicles attract heavier contributions because they are relatively unsafe may suffer a market loss to a competitor whose vehicles are safer and thus cheaper to operate. A purchaser of a motor vehicle may prefer a small car rather than a motor cycle because the former is safer to operate and attracts a lower contribution to the Scheme.

17.44 We do not suggest that the level of contributions will always be an important influence in determining insurers’ behaviour. There are clearly many factors other than contributions that are taken into account in deciding which means of transport to use. Nor will it be a simple process to set contributions, since detailed statistics must be collected to assess the risks and identify the relevant variables that should be taken into

account. Moreover not all variables can be reflected in the contributions required from motor vehicle owners. Nonetheless, the effort should be made to ensure that contributions correspond to the risk, if only to emphasise the overriding importance of safety. Accordingly, **we recommend that contributions to the Scheme from motor vehicle owners should be assessed taking into account the risk of accidental death and injury associated with the use of particular classes of vehicles.**

C. Driver Risk Ratings

17.45 We recommended earlier that a source of funds for the Scheme should be a levy on the issue or renewal of drivers' licences (paragraph 17.33). Because licences are issued to individuals, such a levy could take into account the individual driver's record. This method of funding [64] and the use of penalty ratings [65] were favoured in submissions. Such a rating need not depend solely on accident or injury experience, but could also take account of convictions for driving offences. In this way, penalty ratings could be seen as a deterrent to unsafe driving and thus as a preventive measure.

17.46 In New South Wales a person's driving record is related to his or her licence, for certain purposes, through the "points" system. [66] Points are deducted from a licence holder who is found guilty of various offences. [67] If a licence holder loses 12 points in a two year period, the Commissioner for Motor Transport cancels or suspends the licence. [68] In the case of a provisional licence holder, conviction of any offence usually leads to cancellation of this licence for a period. [69] In its recent second report, the STAYSAFE Committee of the New South Wales Parliament recommended a review of this system to ensure that

> [t]he present points system [includes] maximum demerit points for obviously safety related offences. [70]

This system may well provide a basis for penalty loadings on licences. However, it would also be necessary to take account of offences for which no points are deducted, but which involve fines or licence disqualifications. It would also be desirable to take account of a drivers accident record, although this may create greater administrative difficulties than a system concentrating on convictions for driving offences. **We recommend that levies on the issue or renewal of licences include penalty loadings to take account of driving offences committed by the licence holders or poor accident records.** Since such a system would be novel, it may not be feasible to introduce it until after the Scheme has commenced.

D. Public Transport Authorities

17.47 Public transport agencies have a substantial financial incentive to maximise safety and prevent accidental injuries and death, even under the existing system, since they operate as self-insurers. This means that they bear the costs of compensating accident victims out of their own resources. As we propose that this arrangement should continue under the Scheme the public transport authorities will retain an incentive to promote safety and minimise compensation costs.

VI. OTHER FUNDING SOURCES

A. Course of Employment and Journey Accidents

17.48 In Chapter 14 we recommended that the proposed Scheme should not affect rights under the New South Wales workers' compensation system (paragraph 14.79). We also recommended that a worker sustaining a transport accident in the course of his or her employment, or on the way to or from work (a "journey" accident), should have a right to elect whether to retain workers' compensation benefits or apply for benefits under the Scheme (paragraph 14.89). We proposed that the cost of course of employment and journey transport accidents should be shared between employers and their insurers and the proposed Scheme in roughly the proportion such claims are currently divided between the workers' compensation and compulsory third party insurance systems (paragraph 14.80).

17.49 On this approach, the cost to the Transport Accidents Scheme of course of employment and journey accidents will not depend simply on the extent to which workers elect to come under the Scheme. Rather it will depend on the terms of the cost-sharing agreement negotiated between the Corporation and workers' compensation employers and insurers. The consulting actuary has estimated the costs of the Scheme taking into

account the recommended approach for meeting the cost of compensating workers injured in course of employment or journey transport accidents. [71]

B. Interstate Accidents

17.50 A person may be injured or killed in a transport accident outside New South Wales and have rights to compensation under both the Scheme and under the law of another State or Territory. In these circumstances, as in the case of work-related injuries, we have recommended that the victim should have a right to elect between claiming compensation under the Scheme or from the alternative source. If the person claims under the Scheme, but has already recovered compensation from another source, that compensation is to be set off against benefits available under the Scheme (paragraph 14.92). We have also recommended that the Corporation should have power to enter into arrangements with authorities in other jurisdictions for the purpose of recoupment or exchange of benefits (paragraph 14.97). The set-off provisions, together with any cost-sharing arrangements entered into by the Corporation, will produce some financial benefits to the Scheme.

C. The Commonwealth

17.51 The Commonwealth has a vital role to play in the introduction and operation of the proposed Scheme. The Commonwealths involvement will be critical at two levels.

> First, the Scheme should apply to Commonwealth vehicles and Commonwealth employees involved in transport accidents.
>
> Secondly, the Commonwealth could provide financial and other support for the Scheme.

Reference has been made elsewhere to the express commitment of the Commonwealth Government to a national compensation scheme to be introduced by stages (paragraph 4.58). Clearly the active cooperation of the Commonwealth in the proposed Scheme would give effect to that commitment.

1. Commonwealth Vehicles and Employees

17.52 We have recommended that Commonwealth vehicles should be included in the Scheme. This recommendation has been made on the assumption that the Commonwealth will pay a contribution on each of its vehicles or other forms of transport (paragraph 14.15). An alternative is for the Commonwealth to meet the actual cost of paying compensation or providing benefits to persons injured or killed as the result of accidents involving Commonwealth vehicles. This alternative would put the Commonwealth in the same position as the State Rail Authority and Urban Transit Authority. It would be necessary to negotiate an agreement for the payment by the Commonwealth of a contribution reflecting the level of involvement of its vehicles in transport accidents giving rise to compensation claims under the Scheme.

17.53 Commonwealth employees are entitled to the equivalent of workers' compensation under the Compensation (Commonwealth Government Employees) Act 1971 (Cth). Under the recommendations in Chapter 14, Commonwealth employees are in the same position as other employees injured in transport accidents, in that they have the right to choose between workers' compensation benefits and benefits under the Scheme. It is therefore necessary for a cost-sharing arrangement to be made with the Commonwealth with regard to transport accidents in which Commonwealth employees are injured. The arrangement would determine the respective proportions of compensation costs to be borne by the Commonwealth under its workers' compensation legislation and by the Corporation under the Scheme.

2. Commonwealth Financial Assistance

17.54 Under the current system of compensation, which relies on the common law negligence action, a large number of transport accident victims must rely on Commonwealth social security pensions or benefits for their support. In many cases the need for social security arises because the victim is unable to establish fault or because the lump sum award is (or proves to be) inadequate. In others it is created by the absence of compensation or other support during the prolonged period between the accident and final settlement or verdict. Because the Scheme provides prompt compensation on a no-fault basis, and continues periodic earnings-related compensation during the period of incapacity, transport accident victims should no longer need to rely on social

security. The introduction of the Scheme should therefore produce substantial savings to the Commonwealth, although these will be difficult to quantify precisely.

17.55 In a common law damages award, compensation for loss or impairment of earning capacity is assessed on an after-tax basis. The lump sum award paid to the plaintiff is not taxable under the Income Tax Assessment Act 1936 (Cth), although assessable income derived from investment of the lump sum (should it be used for this purpose) is taxable. Subject to one exception in relation to death benefits, the Scheme compensates for loss of earning capacity on a periodic basis by reference to pre-tax earnings (paragraph 8.17). This form of compensation is likely to be taxable in the hands of the injured transport accident victims. The introduction of the scheme will therefore lead to a significant, although again not easily quantifiable, increase in income tax revenue for the Commonwealth.

17.56 The decrease in social security payments and increase in taxation revenue combine to confer on the Commonwealth substantial financial benefits from the introduction of the Scheme. A further advantage would follow if the Scheme met the cost of providing hospital, medical and related services to all transport accident victims, since some of these costs are now met by the Commonwealth, as is the case where the injured person has no right to compensation. The Working Paper proposed that the State should negotiate with the Commonwealth to allocate funds to the Scheme to take account of the benefits that would accrue to the Commonwealth. [72] We reaffirm this proposal, but in the context of the recommendations in Chapter 13 concerning the relationship between the general health care system (including Medicare) and the Scheme. In Chapter 13 it was suggested that the needs of transport accident victims for hospital and medical services should be met through the general health care system, rather than through a separate system as is presently the case for “compensable” motor vehicle accident victims (paragraph 13.58). This recommendation would require the Commonwealth to accept the administrative responsibility for providing hospital and medical services to transport accident victims and for ensuring that service providers are paid in accordance with the usual procedures under Medicare.

17.57 We have also suggested in Chapter 13 (paragraph 13.60) that the State and Commonwealth should enter into negotiations with a view to the Commonwealth meeting the whole or part of the cost of providing hospital and medical services to transport accident victims on the same basis as it meets the costs in relation to other sick and disabled members of the community. The justification for the Commonwealth entering into such an agreement is that the introduction of the Scheme will produce substantial savings for it and will advance the objective of moving towards a national compensation scheme. As indicated earlier, if the Commonwealth meets transport accident medical costs through Medicare and contributes to hospital costs on the basis now applied to non-compensable patients, the average annual contribution on registration of a motor vehicle would be reduced by an estimated $24, reducing it from $177 to $153. Thus, **we recommend that the State enter into negotiations with the Commonwealth with a view to securing the Commonwealth’s agreement to meet an appropriate proportion of the cost of providing medical and hospital services to transport accident victims through the Medicare system.**

VII. TRANSITIONAL ARRANGEMENTS

17.58 There are a number of reasons why the Scheme should apply only to accidents occurring after the date on which the governing legislation comes into force. For example, it would be impossible to meet the alms of prompt compensation and early rehabilitation in cases where injury or death had occurred prior to the introduction of the Scheme. In addition a retrospective effect would create anomalies and injustice. If the Scheme applied retrospectively only to those whose claim at common law was still outstanding (and to those who had no common law claim), this could work unfairly on those who had settled or already obtained an award of damages. If the Scheme was extended to those whose common law claims had already been paid, there would be insuperable problems in determining the amount of additional compensation if any, available under the Scheme. In any case, there must be an ultimate cut-off point which will operate to the same effect as the date of commencement, still leaving some transport accident victims outside the Scheme. Furthermore costing would be much more difficult if account had to be taken of people killed or injured before the Scheme came into operation. For these reasons the Scheme should not operative retrospectively. Therefore, **we recommend that the Scheme should apply only to death or bodily injury caused by or arising out of a transport accident which occurs on or after the date on which the governing legislation comes into force.**

17.59 Common law claims arising out of transport accidents in New South Wales will be abolished in respect of accidents occurring after the date the Scheme comes into effect (paragraph 14.67). However, common law claims pending at that date, or which may arise out of transport accidents occurring before that date, will have to be resolved. Thus there will be a period of some years during which the Scheme will operate alongside the residue of common law negligence actions. If, as we have recommended, the Scheme is funded on a pay-as-you-go basis, the relatively low cost in the early years would permit a large proportion of contributions to be allocated to the cost of phasing out the existing common law system. The consulting actuary estimates that if contributions are maintained at current third party premium levels and indexed in line with wage inflation, sufficient income would be generated over a period of five years, when compared with the existing third party fund, to:

meet outstanding common law claims;

finance the pay-as-you-go component of the Scheme during that period; and

establish a contingency fund for the Scheme equivalent to one year's plateau benefits. [73]

We do not think it appropriate to recommend the precise insurance contribution that should be levied on motor vehicle owners. It is enough to note the consulting actuary's suggestion that the transition from the current system to the proposed Scheme could be accomplished over a period of approximately five years by maintaining contributions at their current levels, subject to indexation in line with wages movements. Should it be considered provident to provide for a contingency fund greater than one years plateau benefits or to have relatively stable contributions during the long phasing-in period, initial contributions could be set at higher levels, although these would still be substantially below the true pay-as-you-go cost of the existing system.

17.60 If the Scheme were established on a fully funded basis, an additional levy of about $30 per vehicle would be needed to meet the estimated cost of outstanding common law claims of $330 million over five years. [74] This levy would be added to the estimated funded cost of the Scheme of $160 per vehicle per annum during the initial years of the Scheme. As explained already, the cost of outstanding common law claims could be dealt with in another way if a pay-as-you-go system of funding is adopted.

VIII. SUMMARY

Estimated Cost

17.61 The proposed Transport Accidents Scheme, like other publicly funded compensation schemes, should be financed on a pay-as-you-go basis. A pay-as-you-go system is one in which the costs of today's accidents are met from future contributions as benefits become payable or are provided under the Scheme, subject to the retention of a fund to guard against contingencies. This contrasts with a fully funded scheme under which each year's contributors meet the cost of all compensation to be paid or provided in the future as a result of that year s accidents, after allowing for investment earnings from the fund maintained by the Scheme.

17.62 The estimated "plateau" pay-as-you-go cost of the proposed Scheme, in so far as motor vehicle accidents are concerned, is $177 per vehicle per annum. The plateau cost is the long-term cost of the Scheme, after the phasing-in period has been completed and compensation pay outs have reached stable levels. The plateau pay-as-you-go cost of the current third party insurance system is estimated at $225 per vehicle per annum. The cost of a dual scheme, providing limited no-fault and common law benefits as in Victoria, is estimated u the same basis to be $255 per vehicle per annum. The cost of the proposed Scheme during the phasing in period when compensation payments are building up is lower than the plateau cost. The phasing-in period is very long; it will be about 40 years before the plateau cost is reached.

Sources of Revenue

17.63 The major sources of revenue for the Scheme should be:

contributions from owners of motor vehicles collected in much the same way as compulsory third party insurance premiums are now collected;

contributions from public transport authorities assessed by reference to the cost of meeting claims arising out of accidents in which their vehicles or forms of transport are involved; and

levies on the issue or renewal of drivers' licences.

17.64 Contributions from motor vehicle owners should be assessed taking into account the risk of accidental death and injury associated with the use of particular classes of vehicles. Levies on the issue or renewal of driver's licences should include penalty loadings to take account of driving offences committed by licence holders or their accident records.

Commonwealth Assistance

17.65 The introduction of the Scheme will produce financial benefits for the Commonwealth in the form of reduced social security payments and increased income tax collections. In view of the Commonwealth Governments commitment to a national compensation scheme, the State should negotiate with the Commonwealth to secure financial and other assistance for the Scheme. The most appropriate assistance would be for transport accident victims to receive hospital and medical services through Medicare and for the Commonwealth to bear the whole or part of the cost of providing those services.

FOOTNOTES

1. Actuary's Report.

2. *Id*., paras.4.5-4.6, 4.9-4.10, and 4.14.

3. *Id*., para.4.4.

4. *Id*., para.4.3.

5. *Id*., paras.4.8, 4.11.

6. *Id*., para.4.13.

7. *Id*., para.4.7.

8. *Id*., para.9.2.

9. *Id*., para.9.1.

10. *Id.,* paras.9.3-9.6.

11. See Chapter 7.

12. See note I above, para. 9.7.

13. *Id*., para.9.9.

14. *Id.,* para.9.10.

15. Letter from Government Actuary, 13 September 1984.

16. See note 1 above, para.2.2.

17. See paras. 14.6-14.7, 17.31.

18. See note 1 above, para.2.4.

19. See paras.14.4-14.5.

20. See note 1 above, para.2.5.

21. Letter from Government Actuary, 13 September 1984.

22. See note 1 above, para.10.3 and appendix XI.

23. See Chapter 13.

24. See note 1 above, para.10.5 and appendix X2.

25. *Id*., para.10.7 and appendix X3.

26. *Id*., para.11.18.

27. As from 1 April 1984, the premium charged for a class 1 metropolitan vehicle was reduced by 6 per cent to $158.

28. See note 1 above, para. 11.2.

29. *Id.,* para.10.8.

30. *Id.,* para.11.9.

31. *Id.,* para.11.17.

32. *Id.,* paras.9.11, 11.18.

33. *Id.,* para.9.12.

34. *Id.,* para.10.9.

35. *Id.,* paras.12.6-12.7.

36. See Motor Vehicles (Third Party Insurance) Act. 1942. part IIIA inserted by Motor Vehicles (Third Party Insurance) Amendment Act, 1984.

37. See para.14.49

38. See note 1 above, para.10.12.

39. Working Paper, paras.13.10-13.11.

40. The differences between the plateau pay-as-you-go cost and the funded cost will reflect variations in the rate of return on investments. If the rate is greater than growth in claims. a funded scheme (which derives substantial investment income) will prove a little cheaper. See para.17.15.

41. See eg. Submissions S37, p.2: S40, p.7: and S57, pp.34-37.

42. Australian Woodhouse Report, vol.1, para.13.

43. T.G. Ison, *Accident Compensation* (1980), p.115.

44. See note 1 above, para.11.1 ff.

45. Calculation derived from Actuary’s Report, para.11.2, using the GIO’s figure plus 2 per cent.

46. Motor Vehicles (Third Party Insurance) Act, 1942, s.8.

47. *Id*., s.7.

48. *Id*., s. II.

49. Motor Vehicles (Third Party Insurance) Regulations, reg.16.

50. *Id*., reg.16 A.

51. *Id*.. reg.17.

52. Motor Vehicles (Third Party Insurance) Act 1942, s.5(1); the definition of “motor vehicle” excludes “any motor vehicle which is owned by the Commonwealth of Australia or by any person or body of persons representing the Commonwealth of Australia”.

53. See Transport Authorities Act, 1980, part II. division 2: part III. division 2.

54. The Motor Vehicles (Third Party Insurance) Act 1942, s.5(1) excludes vehicles used “on railway or tramway” from the definition of motor vehicle. Public buses are excluded under the Motor Vehicles (Third Party Insurance) Regulations, reg.16.

55. As at 30 June 1983, there were 376,000 more licence holders than vehicle registrations (excluding tractors and trailers). See Commissioner for Motor Transport, *Annual Report 1982-83* (New South Wales). p 21.

56. *1982-83 Report of the Auditor-General* (New South Wales), part 1. p.36.

57. Submission S30, para.1 3-, see also Submission W34, p.1.

58. This is a fee charged fora petroleum wholesaler’s licence under the Business Franchise Licenses (Petroleum Products) Act 1982, s.18. The fee is assessed by references to the value of motor spirit or diesel fuel sold. See note 56 above, part 1, p.31.

59. Paragraphs 5.4-5.6, 15.24-15.25.

60. Motor Accidents Insurance Board, *Annual Report for the Year ended 30 June 1982*.

61. See eg. Submission W8, p.3.

62. Submissions W3; W35; and W59, p.14.

63. Submission W59, para.7.2.1.

64. See eg. Submissions W3; W23. pp.28-29; W35; W53, para. 11.5: and W89.

65. See eg. Submission W23, p.29.

66. The “points system” is an administrative tool used by the Commissioner for Motor Transport under regulation 10(1) (a) of the Motor Traffic Regulations, 1935. This section requires the Commissioner to cancel a person’s licence if the Commissioner

“is of the opinion that-

(a) having regard to such person’s record as a driver of motor vehicles or his conduct or habits, it would not be in the interests of public safety for him to hold a licence.”

The “points system” is used by the Commissioner to form his or her opinion.

67. For current list of offences and relevant points, see Leslie & Britts, *Motor Vehicle Law* (NSW) (4th ed), vol.2, para.8328.

68. A person whose licence is cancelled is notified of this and he or she is presented with three options'. application and granting immediately of a provisional licence for a 12 month period, cancellation of full licence for three months and reinstatement of full licence at the end of this period or appeal to a Court of Petty Sessions against the cancellation under s.22 of the Motor Traffic Act, 1909.

69. See especially, Motor Traffic Regulations, 1935, reg. 10(3 B).

70. Joint Standing Committee on Road Safety, Second Report, *Car Driver Licensing and Road Safety* (1984), para.6.3.4.

71. See note 1 above, appendix W.

72. Working Paper, para.14.14.

73. See note I above, para.13.7.

74. *Id*., paras 13.1-13.6. The actuary comments that there is "very great uncertainty" about the shortfall in the third party fund. The actual shortfall could be considerably more or less than the estimate of $330 million.

18. The Scheme in Context

I. INTRODUCTION

18.1 The reasons for selecting transport accidents as the subject of the Scheme proposed in this Report have been given earlier (paragraphs 1.33-1.46). They need not be repeated here. But in developing a Transport Accidents Scheme we have not lost sight of the breadth of our terms of reference, nor of the objective of a national compensation scheme, towards which no-fault compensation for transport accident victims is the first step (paragraph 4.58).

18.2 It is appropriate to conclude this Report by briefly referring to the drawbacks of a limited scheme and to the contribution the Transport Accidents Scheme can make to the broader issues posed by national compensation. Two specific questions need to be addressed.

> To what extent would a national scheme overcome unavoidable drawbacks of a limited scheme?
>
> Are the principles established for the Transport Accidents Scheme suited to compensation for disability and incapacity in areas other than transport accidents and, in particular, for a national scheme?

The answer to the first question is inherent in much of what has been said in Chapter 14 (Scope of the Scheme) and the answer to the second question has been anticipated at a number of points in the Report, especially in the discussion of policy in Chapter 5. What follows briefly brings together these observations.

II. THE DRAWBACKS OF A LIMITED SCHEME

18.3 Etiology, or aetiology, is the assignment of cause. This task is inevitably associated with a scheme which is less than comprehensive in its coverage. As demonstrated in Chapter 14, eligibility for compensation under a Transport Accidents Scheme depends upon whether the death or injury for which compensation is sought can be assigned to a transport accident For this purpose. transport accident must be defined (paragraphs 14.3-14.15) and rules developed which determine whether the necessary causal link exists between the transport accident and the incapacity or disability for which compensation is claimed (paragraphs 14.21-14.39). In borderline cases, the application of these rules and definitions may create difficulties. Of similar difficulties arise under existing compensation systems, which like the proposed Scheme, apply only to certain categories of accidents. [1] The difficulties created by the workers' compensation system have been the subject of recent critical comment.

> The whole system rests on a false assumption. It assumes the feasibility of classifying human disabilities and deaths by reference to causes. It assumes the feasibility of distinguishing those that resulted from employment from those that did not. The assumption is absurd, and yet we have persisted in retaining it with all its consequential injustices, including the denial of compensation to many workers whose disabilities probably did result from employment. [2]

18.4 The practical problem of attributing cause, with its difficulties and the risk of injustice, is not the sole, or even primary drawback of a scheme of limited coverage. The most serious deficiency in any limited compensation scheme is that, by its very nature, it fails to compensate accident victims whose injury or death lie outside its scope. Very large numbers of people are injured every year in Australia in accidents which are neither transport nor work-related. The vast majority have no entitlement to common law damages, and only a very few are entitled to any form of statutory compensation. Those with lasting incapacity are forced to rely on the social security system. [3]

18.5 The ultimate solution to the problem of etiology lies, to use the language of the Woodhouse Committee, in the basic concept of "comprehensive entitlement (which) calls for equal treatment for equal claims".

> Whatever the cause of incapacity and wherever it might occur, society must no longer tolerate the grudging and artificial discriminations that until now have blemished the distribution of public moneys supplied by the community at large. [4]

But it should be noted that only a truly comprehensive scheme, covering injury, disease and congenital abnormalities, will achieve the objectives of comprehensive entitlement and eliminate disputes over etiology. Even if a comprehensive accident compensation scheme were introduced, some of the most difficult etiological problems would remain, since it would still be necessary to distinguish between a person incapacitated by accident and one incapacitated by illness. For example, a person sustaining a stroke caused by an accidental blow to the head would be compensated, while a person sustaining the same disability as a result of a degenerative artery disease would not be covered under the Scheme. [5]

18.6 A scheme confined to one State or Territory has the disadvantage that its scope must be defined in terms of an appropriate connection, or connections, with that State or Territory (paragraphs 14.40-14.49). Whatever the precise definition employed, anomalies will be created (or preserved) which may leave a particular accident victim with no compensation (paragraph 14.46), or with rights to compensation under more than one scheme (paragraph 14.92). It is possible to overcome these anomalies by cooperation among the States and Territories although in the absence of a national scheme promoted by the Commonwealth, complete cooperation among all Australian jurisdictions for this purpose may be difficult to achieve. Clearly a national scheme is the best way of removing the disadvantages of a scheme limited to a particular geographic area.

18.7 The result is that only a national scheme, fully implementing the principle of comprehensive entitlement, can overcome the inequities created by a limited range of overlapping schemes offering different levels of compensation.

III. FROM TRANSPORT ACCIDENTS TO A COMPREHENSIVE SCHEME

18.8 The Transport Accidents Scheme proposed in this Report is capable of being implemented without changing the existing arrangements for other kinds of accidents. However, the Scheme could also be the first move towards the objective of a comprehensive, national scheme. This objective could be pursued in a number of ways. It would be within our terms of reference to examine possible extension of the Scheme to areas covered by existing but less adequate statutory schemes. These include criminal injuries (paragraphs 2.47-2.49) and sporting injuries (paragraphs 2.50-2.51). Similarly, we could consider extending the Scheme to areas which, like transport accidents, are still governed almost exclusively by the common law, such as home or school accidents or injuries caused by defective products or medical misadventure.[6] With the cooperation of the Commonwealth and other States and Territories, it would be possible to extend the Scheme "horizontally". This would involve some or all States and Territories introducing a transport accidents scheme substantially identical to that in New South Wales [7] (assuming implementation of our proposals). Cooperative action, perhaps encouraged by Commonwealth financial support, could extend the Scheme in other jurisdictions to areas other than transport accidents, thus expanding the scope of uniform compensation arrangements.

18.9 The appropriateness of the Scheme to new areas of accidental injury is thus likely to receive consideration by policy makers. In our view, the Scheme's based on sound principles and is capable of universal application. Nonetheless we recognise, as one distinguished commentator has pointed out, that there is no single solution, or set of solutions, to the policy questions posed by the preparation of a no-fault scheme. [8] Reasonable people can and do differ on the approach that should be taken to the difficult questions at stake. The reality is that every proposed scheme is, to some extent, a product of its particular time and place. For example, we have had to devote more attention than the Woodhouse

Committee to the problems presented by endemic unemployment for a compensation scheme, since the economic circumstances of the 1980s are very different from those of the early 1970s.

18.10 What the community receives from the compensation system (or systems) depends ultimately on what it is prepared to pay. The proposals for a Transport Accidents Scheme has been influenced by the fact that the community has long accepted that funds should be provided for compensating victims of transport accidents. This is an area in which the restitution principle is entrenched (albeit for a limited class of victims) and the funds currently available for compensation purposes are adequate, for example, to provide earnings-related compensation to transport accident victims. While the Scheme has not been prepared with a fixed cost in mind, we have not been faced with the difficulty of preparing proposals in areas where there is no established source of funds for compensation purposes. Nor have we had to consider classes of accidents in which compensation (to the extent it is available) has been assessed by reference to principles quite different from those applied by the common law, such as those applied under the Sporting Injuries Insurance Act, 1978 (paragraph 2.50) and similar statutory schemes.

18.11 As we have indicated, the Scheme could be extended to new areas. Certainly the principles underlying the Scheme are capable of universal application. Yet if the resources available in other areas are found to be more limited than those available for compensating transport accident victims, some modifications maybe required to enable the extensions to be made. Some might consider, for example, that it is more desirable to extend no-fault compensation to areas where few accident victims have previously been compensated, than to apply the restitution principle consistently. On this view, the priority should be to ensure that all accident victims receive compensation at a level adequate to support them, than return favoured categories of accident victims to their pre-accident position. Ultimately it may also be desirable to attempt to integrate the compensation and social security systems, so that all people who, for whatever reason, cannot support themselves receive adequate levels of support.

18.12 Considerations which do not arise in transport accidents will have to be taken into account in other areas. For example, the rape victim may suffer no permanent physical disability, yet it may be thought that the personal indignity and emotional distress sustained by the victim requires monetary compensation.

18.13 However there are some features of the proposals in this Report that we would regard as essential to any extended scheme, including a national compensation scheme. Without being exhaustive, these include:

elimination of fault as a criterion of entitlement to compensation;

positive measures to promote safety and accident prevention;

maximum incentives and aids to rehabilitation;

periodic compensation for economic losses and the matching of benefits to losses sustained by accident victims;

priority to secure and adequate compensation to those sustaining serious and long-term disability and incapacity;

adequate compensation to non-earners sustaining long-term loss of earning capacity;

the integration of the compensation and general health care systems;

administration of the scheme in accordance with the principle of entitlement with emphasis on high quality decision-making; and

in independent appeal system, providing review on the merits by a judicial tribunal.

While it is most important that these basic features be retained, the details of the Scheme are not immutable. If modifications on non-essential matters are required to achieve a national compensation scheme, they should be considered carefully. The principle of comprehensive entitlement, that is equal treatment for equal claims, is the ultimate objective. The Transport Accidents Scheme should assist in the attainment of that objective, and thereby bring about a fairer and more efficient compensation system for all Australians.

FOOTNOTES

1. The common law negligence action is not, in terms , confined to particular categories of accidents. But the problem of etiology still exists, because the plaintiff must show among other things that his or her loss was caused by the defandant's breach of duty. In addition, there is the further practical problem that a common law remedy in certain areas, such as motor vehicle accidents, is effective only because it it supported by a system of compulsory insurance with its own etiology.

2. T G Ison, "Workers' Compensation - the Canadian Experience", paper delivered at the conference entitled "Workers' Compensation - New Directions?". South Australian Ministry of Labour, (Adelaide, May 1984), p.25.

3. A recent study in England confirms this. See D Harris et al, *Compensation and Support for Illness and Injury* (1984).

4. Australian Woodhouse Report, vol.1, para.255.

5. This is the position under the New Zealand Scheme. See T G Ison, *Accident Compensation* (1980), pp.18-32; see also note 3 above, pp.327-329.

6. The Commission has received a request that priority be given to the establishment of a no-fault scheme for certain aspects of medical misadventure: letter from the Deputy Premier and Ministry for Health, the Hon. R J Mulock, MP, dated 17 August 1984.

7. The Minister for Territories and Local Governments has announced that the Commonwealth Government has agreed in principle for a no-fault transport accident compensation scheme for the Australian Capital Territory. The Minister stated the he was "particularly interested" in the proposal being developed by this Commission: the Hon. T Uren, MP, media statement, 18 June 1984.

8. G W R Palmer, *Compensation for Incapacity* (1979), appendix I.

List of Recommendations

I. COMPENSATION FOR LOSS OF EARNING CAPACITY

A. Earners

1. General

Compensation for Loss of Earning Capacity

Recommendation 1:

Earners (as defined in Recommendation 3), who are incapacitated as the result of transport accidents should receive compensation in respect of their loss (including impairment) of earning capacity.

(Paragraph 7.2)

Recommendation 2:

In general the earning capacity of an earner should be determined by reference to the amount that fairly and reasonably represents his or her normal weekly earnings at the date of the accident.

(Paragraph 7.3)

Definition of Earner

Recommendation 3:

(1) A person who is incapacitated as the result of a transport accident should be regarded as an earner if he or she was in full-time or part-time employment (whether as an employed or self-employed person):

(a) at any time during the eight weeks preceding the date of the accident;

(b) over a period or periods totalling it least 13 weeks during the 52 weeks preceding the date of the accident; or

(c) over a period or periods totalling at least 26 weeks during the 104 weeks preceding the date of the accident.

(2) Notwithstanding paragraph (1), a person who has left the workforce permanently at the date of the accident should not be regarded as an earner.

(Paragraphs 7.5-7.10)

Recommendation 4:

A person incapacitated in a transport accident should be regarded as an earner if, at the date of the accident, he or she had made firm arrangements (whether or not contractually enforceable) to undertake employment with a particular employer or to commence business at a particular time and place.

(Paragraph 7.12)

Recommendation 5:

A person incapacitated in a transport accident should be regarded as an earner if he or she, having been incapacitated for a period of not less than six months, would, in the opinion of the Corporation, have undertaken employment before the expiration of 104 weeks from the date of the accident.

(Paragraph 7.14)

2. Assessment of Earning Capacity: Employees Definition of Earnings

Recommendation 6:

(1) The earnings of an employee should include income derived from personal exertion in his or her capacity as an employee. This should include allowances provided by the employer to the employee which are not provided for the purpose of meeting expenses associated with employment.

(2) Earnings should be limited to benefits received in the form of monetary payments, except for:

(a) the value of living accommodation board and lodging or food provided by the employer without charge or at a reduced charge;

(b) the value of a car (including running expenses) provided by the employer to the extent that the car is used by the employee for private purposes.

(Paragraphs 7.17-7.22)

Normal Weekly Earnings

Recommendation 7:

In calculating the normal weekly earnings of an employee or her work history and other relevant factors. In particular, the Corporation should take into account one of the following:

(a) the earnings of the employee for the week preceding the accidents;

(b) the average weekly earnings the employee during the eight weeks preceding the accident;

(c) the average weekly earnings of the employee during the 52 weeks preceding the accident; or

(d) the average weekly earnings of the employee during the 104 weeks preceding the accident.

The Corporation should take into account the shortest applicable earnings period unless to do so would cause under or overcompensation.

(Paragraphs 7.23-7.25)

Recommendation 8:

Where a person is regarded as an earner because of events which would have occurred after the date of the accident the Corporation should determine an amount

that fairly represents that person's earning capacity as from the date he or she would have taken up employment.

(Paragraph 7.26)

Adjustment to Normal Weekly Earnings

Recommendation 9:

(1) Where the Corporation is satisfied, by reason of any of the matters referred to in clause (2), that the employee's normal weekly earnings are substantially more, or substantially less, than the employee's earning capacity would have been during the period of incapacity but for the accident, it should use a different measure to assess earning capacity.

(2) The relevant matters are:

(a) the seasonal nature of the employee's employment;

(b) firm arrangements made by the employee at the date of the accident to re-enter or leave the workforce, accept different responsibilities or new or different employment, or vary the hours of paid employment; and

(c) the employee's contractual entitlement to significant wage or salary variations (apart from indexation adjustments) arising out of his or her employment at the date of the accident

(3) Where the Corporation is so satisfied, it should determine the claimant s weekly earning capacity during the period of incapacity (or any relevant part of it), taking account of the matters in clause (2). This amount should be used in assessing compensation for loss of earning capacity in place of normal weekly earnings.

(4) This Recommendation is subject to Recommendation 25.

(Paragraphs 7.27-7.32)

3. Assessment of Earning Capacity: Self-Employed People

Basis of Assessment

Recommendation 10:

Subject to Recommendation 15, the Corporation should have power to assess compensation in respect of the loss of earning capacity sustained by a self-employed person on one or more of the following bases:

(a) the difference between that person's earning capacity at the date of the accident (generally measured by normal weekly earnings) and his or her earning capacity (if any) during the period of incapacity;

(b) the cost of providing services to replace that person in his or her business, trade or profession during the period of incapacity; or

(c) the earnings that person could have derived as an employee exercising similar skills and responsibilities to those exercised in his or her business, trade or profession.

(Paragraphs 7.37-7.38)

The Earnings Approach

Recommendation 11:

The earnings of a self-employed person should include income derived by that person for his or her own benefit, as the result of personal exertion By “income” is meant net income after expenses but before income tax.

(Paragraph 7.40)

Recommendation 12:

In calculating the normal weekly earnings of a self-employed person at the date of the accident, the Corporation should have regard to that person’s earnings before that date, his or her work history and other relevant factors. In particular, the Corporation should take into account the more appropriate of the following:

(a) the average weekly earnings of the self-employed person during the 52 weeks preceding the accident, or any part of that period; or

(b) the average weekly earnings of the self-employed person during any or all of the four completed financial years immediately preceding the date of the accident.

(Paragraph 7.41)

Recommendation 13:

(1) Where the Corporation is satisfied that, by reason of any of the matters referred to in clause (2), the self-employed person’s normal weekly earnings are significantly more, or significantly less, than that person’s earning capacity would have been during the period of incapacity but for the accident, it should use a different measure to assess earning capacity.

(2) The relevant matters are:

(a) the seasonal nature of the self-employed person’s employment;

(b) firm arrangements made by the self-employed person to re-enter or leave the workforce, undertake new or different employment or vary the hours of employment; and

(c) contractual arrangements in force at the date of the accident which would have led to significant variations in earnings.

(3) Where the Corporation is so satisfied, it should determine the claimants weekly earning capacity during the period of incapacity (or any part of it) taking account of the matters in paragraph (2). This should be used, to the extent appropriate, in assessing compensation for loss of earning capacity in place of normal weekly earnings.

(Paragraph 7.42)

The Replacement Services Approach

Recommendation 14:

Where the replacement services approach is considered appropriate, the Corporation should pay 80 per cent of the remuneration (including incidental costs of employment) provided to a person performing services to replace those of the incapacitated person in his or her business, trade or profession.

(Paragraphs 7.44-7.46)

Recommendation 15:

Where a self-employed person is incapacitated for a period which does not or, at the date of assessment, is not likely to exceed 13 weeks, the Corporation should use the replacement services approach to the assessment of compensation, unless there are good reasons for choosing another approach.

(Paragraph 7.47)

The Equivalent Employee Approach

Recommendation 16:

When the equivalent employee approach is considered appropriate, the Corporation should pay 80 per cent of the wage or salary the incapacitated person could reasonably have expected to earn as an employee performing work similar to that he or she performed as a self-employed person.

(Paragraph 7.48)

Earnings Both as Employed and Self-Employed Person

Recommendation 17:

Where a person incapacitated in a transport accident derived earnings within a period of two years preceding the accident both as an employee and as a self-employed person, the Corporation should assess his or her normal weekly earnings or earning capacity by such means, consistent with earlier Recommendations, as are appropriate.

(Paragraph 7.49)

4. Long-Term Incapacity: The Floor

Recommendation 18:

An earner who sustains long-term incapacity as the result of a transport accident should be deemed to have an earning capacity no less than the “notional earning capacity attributed to non-earners (see Recommendation 3 1). Notional earning capacity for a person who has attained the age of 21 should be set at 50 per cent of AWE (approximately $210 at June 1984). “Long term incapacity” means incapacity which continues for a period or periods totalling at least 104 weeks.

(Paragraphs 7.50-7.51)

B. Post-Accident Earning Capacity: Earners

1. The General Rule

Recommendation 19:

In general:

(a) where an injured person is employed, whether on a full-time or part-time basis, his or her post-accident earning capacity is equivalent to the earnings derived from that employment; and

(b) where an injured person is not employed, his or her post-accident earning capacity is nil.

(Paragraphs 7.52-7.58)

2. Exceptions

Recommendation 20:

The general rule Should not apply if the Corporation is satisfied:

(a) that the person is capable of undertaking employment of a kind for which he or she can reasonably be expected to apply or which is otherwise reasonably available taking into account:

(i) the nature and extent of the disability caused by the transport accident;

(ii) his or her level of education, training and language skills;

(iii) his or her work experience;

(iv) his or her place of residence; and

(v) other relevant factors, and

(b) that the person is capable of competing in the labour market for this kind of employment at no significant disadvantage by reason of the disability, when compared with non-disabled members of the Community.

In Such a case. the Corporation should determine the post-accident earning capacity of the Injured person taking account of earnings that could be derived from the employment reasonably available to him or her.

(Paragraph 7.60)

Recommendation 21:

The general rule should not apply if the Corporation is satisfied that the injured person has, without sufficient reason:

(a) refused an offer of suitable employment;

(b) made himself or herself unavailable for vocational training, rehabilitation or assessment of employment prospects;

(c) failed to take reasonable steps to secure suitable employment; or

(d) given up suitable employment.

(Paragraph 7.62)

3. Notice Required

Recommendation 22:

If the Corporation assesses the injured persons post-accident earning capacity at a higher amount than suggested by the general rule, notice of the assessment should be given to the person. Unless there are special circumstances the assessment should not take effect until the expiration of a period of eight weeks (but this Recommendation should not apply where the injured person has wholly recovered from his or her disability).

(Paragraph 7.63)

C. Potential for Advancement

1. Eligibility to Claim

Recommendation 23:

(1) An earner who has sustained long-term incapacity as the result of a transport accident should be eligible to apply for compensation to be assessed on the basis of potential for advancement.

(2) Potential for advancement means the earnings the person could reasonably have been expected to earn over the likely period of incapacity had the accident not occurred.

(Paragraphs 7.64-7.70)

Recommendation 24:

(1) An incapacitated earner should be eligible to apply for assessment on the basis of potential for advancement if and only if he or she:

> (a) has been incapacitated for a period or periods exceeding 104 weeks, but not exceeding 156 weeks;
>
> (b) has a disability, arising from the transport accident, which is likely to have a continuing effect on his or her earning capacity; and
>
> (c) has participated as far as is reasonably practicable in vocational training or rehabilitation programs provided by or through the Corporation.

(2) The Corporation should have power, in special circumstances, to accept an application after the expiration of 156 weeks.

(Paragraphs 7.71-7.72)

Recommendation 25:

The Corporation should assess compensation on the basis of potential for advancement if and only if the compensation so assessed is significantly greater than that which otherwise would have been awarded.

(Paragraph 7.73)

2. Assessment of Potential for Advancement

Recommendation 26:

Subject to Recommendation 27, in assessing compensation on the basis of potential for advancement, the Corporation should take into account:

(a) the person's age, education, training, skills, abilities and work history as at the date of the accident;

(b) the likelihood that, had the accident not occurred, the person would have undertaken training or education which would have increased his or her earning capacity;

(c) the prospects for promotion or other forms of career, business or professional advancement-whether in the same or different employment as that undertaken by the person at the date of the accident;

(d) the likelihood that, had the accident not occurred, the person would have varied the nature of his or her employment or the extent of his or her involvement in the workforce, whether temporarily or permanently; and

(e) other factors suggesting that had the accident not occurred, the person's earnings or earning capacity would have increased or decreased materially, whether temporarily or permanently.

(Paragraph 7.74)

Recommendation 27:

In assessing compensation on the basis of potential for advancement the Corporation should take account of factors or events affecting earning capacity only if they are likely to have an effect or to occur within 10 years of the date of the accident.

(Paragraph 7.76)

Recommendation 28:

Where the Corporation assesses compensation on the basis of potential for advancement it should specify the incapacitated earner's likely earnings as from the date of the application for

(a) the remainder of the calendar year in which the application is made;

(b) each succeeding calendar year for the expected period of incapacity, and should assess compensation accordingly.

(Paragraph 7.77)

D. Non-Earners

1. Definition of Non-Earner

Recommendation 29:

A non-earner is a person who sustains incapacity in a transport accident and is not within the definition of "earner" in Recommendations 3-4.

(Paragraph 7.80)

2. Compensation for Loss of Earning Capacity

Recommendation 30:

Non-earners who sustain long-term incapacity as the result of a transport accident should receive compensation in respect of their loss of earning capacity. “Long-term incapacity” means incapacity which continues for a period or periods totalling at least 104 weeks. Compensation should be available only in respect of the period of incapacity in excess of 104 weeks.

(Paragraphs 7.81-7.86)

3. Assessment of Compensation

Notional Earning Capacity

Recommendation 31:

(1) In general compensation for a non-earner’s long-term loss of earning capacity should be ascertained by reference to that person’s “notional earning capacity”. The notional earning capacity of a non-earner who has attained the age of 21 should be set at 50 per cent of AWE (approximately $210 at June 1984).

(2) Where the non-earner has not attained the age of 21, his or her notional earning capacity should be set as follows:

Age 16-17-30 per cent of AWE.

Age 18-20-40 per cent of AWE.

(Paragraphs 7.87-7.90)

Potential for Advancement

Recommendation 32:

A non-earner ho has sustained long-term incapacity should be eligible to apply for compensation for loss of earning capacity on the basis of potential for advancement. Such an application should attract, as nearly as possible, the same principles as those governing a similar application by an earner.

(Recommendations 23-28).

(Paragraph 7.91)

Post-Accident Earning Capacity

Recommendation 33:

In assessing the post accident earning capacity of a non-earner the same approach should be taken as with earners (Recommendations 19-22).

(Paragraph 7.94)

4. Short-Term Incapacity

Recommendation 34:

Non-earners who are incapacitated as the result of a transport accident fora period of less than 104 weeks should be entitled to all benefits under the Scheme other than compensation for loss of earning capacity.

(Paragraph 7.95-7.98)

E. The Form and Payment of Compensation

1. Periodic Payments

Recommendation 35:

Compensation for loss of earning capacity whether to earners or non-earners, should be paid on a periodic basis, preferably fortnightly in arrears.

(Paragraphs 8.2-8.3)

2. Redemptions

Recommendation 36:

In general, redemption of periodic compensation for loss of earning capacity or other loss should not be permitted.

(Paragraphs 8.4-8.10)

Recommendation 37:

(1) The Corporation should have power. with the consent of the injured person to redeem its liability to pay periodic compensation for loss of earning capacity to an injured person where the amounts involved are so low that the cost of providing compensation unnecessarily burdens the administration of the Scheme.

(2) Where Such a redemption takes place and subsequently the injured person's capacity for work is significantly reduced (whether from a deterioration in physical condition or otherwise), the Corporation should be required, on application, to resume appropriate periodic compensation, making allowances for the lump sum already paid.

(Paragraph 8.12)

3. Gross Earnings

Recommendation 38:

Compensation for loss of earning capacity should be assessed by reference to the pre-tax earnings of the incapacitated person.

(Paragraphs 8.13-8.17)

4. Proportion of Loss Compensated

Recommendation 39:

Subject to Recommendation 40, a person who is totally incapacitated for work as a result of a transport accident should, for the period of incapacity, receive 80 per cent of the loss of earning capacity sustained.

(Paragraphs 8.18-8.22)

Recommendation 40:

The Corporation should develop a program under which a person incapacitated in a transport accident who resumes employment for a substantial part of the working week, should receive compensation for a proportion of the loss of earning capacity sustained higher than 80 per cent.

(Paragraphs 8.23-8.24)

5. The Ceiling

Recommendation 41:

There should be a limit on the compensation payable to earners in respect of loss of earning capacity. The maximum earning capacity by reference to which compensation should be assessed should be 150 per cent of AWE ($630 at June 1984). Thus the maximum compensation actually payable should be 120 per cent of AWE ($504 at June 1984).

(Paragraphs 8.25-8.30)

Recommendation 42:

The Corporation should investigate the practicability of providing tup-up insurance for people with an earning capacity in excess of the maximum in respect of which compensation is payable.

Recommendation 43:

Where a person suffers a partial loss of earning capacity, irrespective of the amount of the person's residual capacity, he of she should be compensated for the loss sustained, subject to the overall limit on compensation payable in respect of loss of earning capacity referred to in Recommendation 41.

(Paragraphs 8.32-8.34)

6. Indexation of Compensation

Recommendation 44:

The legislation should embody the principle of automatic indexation. Accordingly. periodic compensation for loss of earning capacity should be indexed and adjusted at six-monthly intervals by reference to changes in AWE. In assessing the extent of loss of earning capacity the Corporation should make appropriate adjustments to pre-accident earnings or other standards used in the assessment to take account of movements in AWE.

(Paragraphs 8.35-8.37)

7. Assignability of Benefits

Recommendation 45:

Compensation for loss of earning capacity and other benefits under the Scheme should not be capable of assignment by the person entitled to the compensation or other benefits.

(Paragraph 8.38)

F. Commencement and Termination of Benefits

1. Commencement of Benefits

Recommendation 46:

Compensation for loss of earning capacity should not commence until an injured person under the age of 16 attains that age unless, at the date of the accident the person wis under that age but was in full-time employment.

(Paragraphs 8.39-8.40)

Recommendation 47:

Compensation for the earner's loss of earning capacity should not be paid in respect of the first five working days from the date of the accident or the first incapacity caused by the accident (whichever period expires later). The waiting period should apply only once in respect of an incapacity arising from a transport accident.

(Paragraphs 8.41-8.44)

Recommendation 48:

Where a person, although classified as an earlier, has not been in employment at any time during the eight weeks preceding the accident. compensation for the earner's loss of earning capacity should not be paid in respect of the first four weeks from the date of the accident or from the date of the first incapacity caused by the accident (whichever period expires later).

(Paragraph 8.45)

Recommendation 49:

Where a person is deemed to be an earner by reason of Recommendation 4 (arrangements to enter the work force after the date of the accident) compensation for loss of earning capacity should commence from the date on which that person, but for the accident, would have commenced employment.

(Paragraph 8.46)

2. Termination of Benefits

General

Recommendation 50:

Compensation for loss of earning capacity should cease on:

(a) the termination of the incapacity, or

(b) the death of the incapacitated person.

(Paragraph 8.47)

Age

Recommendation 51:

(1) Compensation for loss of earning capacity should in general continue until the incapacitated person attains the age of 65.

(2) Where the incapacitated person is an earner and has attained the age of 61 but not 70, when the incapacity commences, compensation for loss of earning capacity should continue for a period of four years from the commencement of the incapacity, provided that compensation should not continue beyond the age of 72.

(3) Where the incapacitated person is an earner and has attained the age of 70 when the incapacity commences, compensation should continue for a period of two years from the commencement of the incapacity.

(4) Notwithstanding paragraphs (2) and (3), where an earner who has attained the age of 61 is injured, compensation for loss of earning capacity should not be paid or continue beyond the age of 65 or beyond the age at which he or she would have left the workforce permanently had the accident not occurred (,whichever is later).

(Paragraphs 8.48-8.51)

G. Assessment of Permanent Incapacity

Recommendation 52:

Where a person has sustained a permanent disability in a transport accident and:

(a) his or her medical condition has stabilised;

(b) all practicable steps have been taken towards his or her rehabilitation;

(c) he or she has suffered a loss of earning capacity which is likely to continue indefinitely; and

(d) the extent of the loss is unlikely to vary substantially, taking into account reasonably foreseeable changes in economic conditions and employment opportunities,

the Corporation should have power, with the consent or at the request of that person, to make an assessment of his or her permanent loss of earning capacity. Such an assessment should be made in accordance with earlier Recommendations and should take account of any assessment of compensation on the basis of potential for advancement.

(Paragraphs 8.52-8.58)

Recommendation 53:

Subject to Recommendation 54 an assessment of permanent incapacity should be final and not liable to variation.

(Paragraph 8.59)

Recommendation 54:

If at any time after an assessment of permanent incapacity has been made, the earning capacity of the disabled person is substantially reduced by reason of:

(a) a deterioration in that person's physical condition; or

(b) a loss of or change in employment

and the reduction in earning capacity arises out of the disability caused by the transport accident, the Corporation should set aside the assessment The Corporation should have power to make a fresh assessment of permanent incapacity if the conditions specified in Recommendation 52 are satisfied.

(Paragraph 8.60)

II. REHABILITATION

A. Role of the Accident Compensation Corporation

1. The Right to Rehabilitation

Recommendation 55:

Transport accident victims should be granted a right by legislation to rehabilitation.

(Paragraph 9.25)

2. Ensuring the Provision of Rehabilitation Services

Recommendation 56:

Wherever practicable, the Corporation should coordinate and administer the provision of rehabilitation services through existing agencies rather than establish its own services.

(Paragraphs 9.26-9.27)

Recommendation 57:

The Corporation should have broad powers to ensure the provision of rehabilitation services and other support services, including the power:

to make financial and other arrangements with both government and private service providers to provide rehabilitation or support services to transport accident victims;

to monitor contracted service providers to ensure satisfactory standards of service; and

to provide, where necessary, services or assistance directly to transport accident victims.

(Paragraphs 9.28-9.3 1)

3. A Rehabilitation Section

Recommendation 58:

The Corporation should create a Rehabilitation Section to administer its rehabilitation functions.

(Paragraph 9.32)

B. Medical and Functional Rehabilitation

1. The Aim

Recommendation 59:

The Corporation should be under a duty to provide rehabilitation services as soon as possible after the occurrence of the injury in a transport accident.

(Paragraphs 9.35-9.36)

Recommendation 60:

The Corporation should be responsible for meeting the costs of rehabilitation services retired for transport accident victims, subject to the general arrangements made with regard to hospital and medical costs.

(Paragraphs 9.37-9.39)

Recommendation 61:

The Corporation should pav necessary travelling and accommodation expenses incurred by a claimant in obtaining rehabilitation treatment.

(Paragraph 9.40)

2. Problems Requiring Attention

Medical Training

Recommendation 62:

The Corporation should have powers to encourage and sponsor the development of rehabilitation training programs for medical practitioners and other health care professionals.

(Paragraph 9.42-9.43)

Shortage of Rehabilitation Specialists

Recommendation 63:

The Corporation should have power to support training and research in rehabilitation and to make grants to institutions and individuals for these purposes. The Corporation should also have power to support dissemination of information concerning rehabilitation to health professionals, other groups and members of the community.

(Paragraph 9.44-9.47)

Centralised Services

Recommendation 64:

The goal of decentralisation of rehabilitation facilities should, so far as practicable, be pursued by the Corporation.

(Paragraphs 9.49-9.50)

C. Medical Equipment and Mechanical Aids

1. Medical Equipment and Pharmaceutical Supplies

Recommendation 65:

The Corporation should bear the cost of necessary pharmaceutical supplies, and necessary prosthetic, orthotic and other corrective medical equipment, the need for which arises from disability suffered in a transport accident.

(Paragraph 9.52)

2. Aids and Appliances

Recommendation 66:

The Corporation should bear the cost of providing necessary aids and appliances and of altering existing equipment used by disabled transport accident victims.

(Paragraph 9.53)

Recommendation 67:

The Corporation should establish borrowing pools of equipment which can be used by disabled transport accident victims.

(Paragraph 9.54)

Recommendation 68:

The Corporation should provide replacement aids and equipment as often as is necessary and reasonable.

(Paragraph 9.55)

3. Research

Recommendation 69:

The Corporation should have power to make grants for research into the needs of transport accident victims. It should also have power to establish and develop research facilities in coordination with agencies already working in this field.

(Paragraph 9.56)

D. Workforce Rehabilitation

1. Training and Retraining

Recommendation 70:

The Corporation should make available vocational training programs for people disabled in transport accidents and for the dependent spouses of people killed in such accidents. The Corporation should meet the costs of such programs and should formulate guidelines for admission designed to maximise the opportunites for successful vocational training.

(Paragraphs 9.58-9.59)

2. Alterations to Workplace

Recommendation 71:

The Corporation should provide reasonable workplace modifications, where an employer employs or continues to employ a disabled transport accident victim and where modifications are necessary to enable the disabled transport accident victim to work in or gain access to the workplace.

(Paragraph 9.60)

Recommendation 72:

In deciding what workplace modifications are reasonable, the Corporation should have regard to:

(a) the cost of the modifications;

(b) the benefit of the modifications to the employer and other workers or customers and any contribution to the cost by the employer; and

(c) the likely duration of employment of the disabled transport accident victim.

(Paragraph 9.60)

3. Liability to Pay Workers' Compensation

Recommendation 73:

The Corporation should have power, fora specified period, to contribute to the cost of workers' compensation insurance incurred by the employer who has provided or continued employment for a person disabled in a transport accident

(Paragraphs 9.62-9.64)

4. Placement Programs

Recommendation 74:

The Corporation should promote the placement of disabled transport accident victims in employment.

(Paragraphs 9.65-9.66)

Recommendation 75:

The Corporation should have power to develop schemes providing financial incentives, for specified periods, to employers who engage or maintain disabled transport accident victims in employment.

(Paragraph 9.67)

5. Return to Work and Compensation Entitlement

Recommendation 76:

The Corporation should have power to approve the entry into or resumption of employment by a disabled transport accident victim on the basis that, if the

employment does not continue beyond a specified period, that person should be entitled to compensation for loss of earning capacity without making a fresh application.

(Paragraph 9.69)

6. Business Loans

Recommendation 77:

The Corporation should provide financial counselling if requested by any person who is entitled to or has received compensation under the Scheme.

(Paragraphs 9.70-9.72)

Recommendation 78:

The Corporation's powers in relation to a person incapacitated in a transport accident should include:

(a) continuing compensation for loss of earning capacity for a specified period during which the person commences and conducts a business venture;

(b) guaranteeing loans made to that person for business purposes; and

(c) making loans, on such terms as are appropriate, to enable that person to commence or continue a business.

(Paragraph 9.73)

E. Social Rehabilitation

Recommendation 79:

Rehabilitation programs for people disabled in transport accidents should include training for independent living, social rehabilitation and leisure counselling.

(Paragraphs 9.74-9.76)

III. SUPPORT SERVICES AND INDEPENDENT LIVING

A. Household Services

Recommendation 80:

Subject to Recommendations 81-82, a person:

(a) who suffers a disability (whether temporary or permanent) as the result of a transport accident;

(b) who, before the accident, performed substantial household services for himself or herself and/or his or her household family members; and

(c) whose capacity to perform household services has been significantly impaired by reason of the disability;

should be entitled to replacement household services, to the extent necessary for the maintenance and preservation of the household of which he or she is a member.

(Paragraphs 10.2-10.4)

Recommendation 81:

(1) In assessing the extent to which household services are necessary for the maintenance and preservation of the household, the Corporation should have regard to:

(a) the household services provided by the disabled person before the accident and the extent to which he or she can provide such services after the accident;

(b) the number of household family members, their ages and need for household services;

(c) the household services that other family members or other family members could reasonably be expected to provide after the accident; and

(d) any special factors affecting the need of the disabled person and other household family members for household services.

(2) In determining what is reasonable for the purposes of paragraph (1)(c). the Corporation should take into account:

(a) the household services provided by the other household family members or other family members before the accident;

(b) the need to avoid substantial disruption to the employment or daily lives of those household family members; and

(c) other relevant circumstances.

(Paragraph 10.5)

Recommendation 82:

In assessing the extent to which household services are to be provided after the expiration of four weeks from the date of the accident, the Corporation should have regard to the following additional criteria:

(a) the compensation and other benefits provided to the disabled person or other household family members arising out of the transport accident;

(b) the earnings and other income of the spouse of the disabled person, (being a member of the household); and

(c) the resources, financial or otherwise, available to household family members to meet the need for household services.

(Paragraph 10.6)

Recommendation 83:

(1) In general, replacement of household services should be provided through existing government or private agencies. but the cost should be met by the Scheme.

(2) The Corporation should have power when requested and where it considers it appropriate to do so, to engage a member of the disabled person’s household or family to provide household services.

(Paragraphs 10.7-10.10)

B. Attendant Care

Recommendation 84:

(1) Subject to Recommendation 85, a person who:

(a) suffers a disability as the result of a transport accident (whether temporary or permanent); and

(b) is thereby unable to provide adequately for his or her personal care;

should be entitled to receive attendant care services from the Corporation.

(2) “Attendant care services” means the services (other than medical or nursing care) required to provide for the essential regular personal care of the disabled person.

(Paragraph 10.11-10.14)

Recommendation 85:

(1) In assessing the need for attendant care services the Corporation should have regard to:

(a) the nature of the person’s disability and its effect on that person’s ability to provide for his or her personal care;

(b) the medical and nursing services received by the disabled person, to the extent they provide for his or her personal care;

(c) the wishes of the disabled person specifically his or her desire to five outside an institutional environment, to the extent that it is reasonable to attempt to meet those wishes;

(d) the extent to which attendant services are required to enable the disabled person to undertake or continue employment;

(e) any assessment made by a rehabilitation assessment team at the request of the Corporation; and

(f) the standards developed or applied by government or public agencies in Australia in determining the needs of disabled people for attendant care services.

(2) The Corporation should also take into account the attendant care services that other family members could reasonably be expected to provide to the disabled person. In determining what is reasonable the Corporation should take into account, with necessary modifications, the criteria specified in Recommendation 81(2).

(Paragraphs 10.15-10.18)

Recommendation 86:

Recommendation 83 should apply to attendant care services.

(Paragraphs 10.19-10.22)

C. Emergency Family Support

Recommendation 87:

Where it is necessary for the spouse, parent or child of a person injured in a transport accident to attend that person continuously, whether in hospital or elsewhere, the Corporation should compensate the Spouse. parent or child for the loss of earnings Caused his or her attendance. Compensation should be paid as if the spouse, parent or child had been incapacitated by an injury sustained in a transport accident, but should be payable for a maximum period of four weeks.

(Paragraphs 10.27-10.28)

Recommendation 88:

The Corporation should reimburse expenses necessarily incurred in respect of travel and accommodation within Australia I)v the spouse, parent or child of a person in injured in a transport accident for the purpose of providing care and support to that person. The Corporation should meet expenses incurred during a period of four weeks from the date of the accident, but should have power in exceptional cases to extend that period where the continuous presence of the spouse, parent or child is necessary for the recovery or well-being of the injured person.

(Paragraph 10.29)

D. Accommodation

1. Home Ownership

Recommendation 89:

The Corporation should have power to make loans to disabled transport victims, who have or would have difficulty in borrowing money from conventional sources, for the purpose of financing the purchase of a home.

(Paragraphs 10.37-10.40)

Recommendation 90:

The Corporation should have power to negotiate arrangements with the Housing Commission of New South Wales and other public authorities for the provision of housing to disabled transport accident victims.

(Paragraph 10.40)

2. Home Modifications

Recommendation 91:

(1) A person who has suffered long-term physical disability, of a kind which severely impairs his or her mobility or ability to live independently within a home or residence, should be entitled to the reasonable cost of necessary modifications to his or her home or residence.

(2) In determining whether modifications are necessary the Corporation should take into account whether modifications are necessary if they are required to enable the disabled person to:

(a) gain access to;

(b) enjoy reasonable freedom of movement within; or

(c) live independently within the home or residence.

(Paragraphs 10.41-10.44)

Recommendation 92:

The cost of modifications should be met only in relation to a home or residence in which the disabled person intends to live for a long period. However, it should not be a condition of the Corporation meeting the cost of modifications that the disabled person is the owner or tenant of the premises.

(Paragraph 10.45)

Recommendation 93:

The Corporation should have power in special circumstances. to meet the reasonable cost of necessary modifications to the home or residence of a disabled person on a second or subsequent occasion.

(Paragraph 10.46)

Recommendation 94:

Where the Corporation meets the cost of modifications which add substantially to the value of the home or residence (whether or not owned by the disabled person), it should have power to impose a condition requiring repayment of the increase in the value on the sale of the premises or in the death of the disabled person. The Corporation should also have power to waive any such requirement.

(Paragraph 10.48)

3. Institutional Accommodation

Recommendation 95:

The Corporation should meet the reasonable cost of a disabled person who is required. by reason of his or her disability, to live in an institution.

(Paragraph 10.50)

Recommendation 96:

The Corporation should prescribe a modest amount to represent the costs of the “board and lodging” element of institutional accommodation. Unless there are special circumstances this sum should be deducted from the amounts paid to the institution in respect of care and accommodation and the disabled person should pay an equivalent amount to this institution from his or her compensation for loss of earning capacity.

(Paragraph 10.52)

Recommendation 97:

The Corporation should have power to establish hostels for seriously disabled people and to contribute to the cost of new hostels.

(Paragraph 10.53)

E. Mobility

1. Vehicle Modification

Recommendation 98:

The Corporation should meet the cost of necessary modifications to a vehicle owned or regularly used by the disabled person or a member of his or her family.

(Paragraphs 10.57-10.60)

Recommendation 99:

The Corporation should have power to contribute to the cost of purchasing a motor vehicle where such a contribution is required to avoid financial hardship to the disabled person. The Corporation should have power to impose a condition requiring repayment of such contribution on the resale of the motor vehicle or on the death of the disabled person, provided that such repayment should not exceed the price obtained on resale or value on death.

(Paragraph 10.61)

2. Mobility Allowance

Recommendation 100:

The Corporation should pay a mobility allowance, equivalent to 5 per cent of AWE ($21 at June 1984 , to people who are unable to use public transport unassisted because of a disability arising out of a transport accident and who incur expenses in travelling by reason of their disability. The allowance should not be payable in respect of disability during the six months following the accident, unless the circumstances are exceptional.

(Paragraphs 10.62-10.64)

IV. COMPENSATION FOR PERMANENT DISABILITY

A. General

Recommendation 101:

Where a person suffers a permanent physical or mental disability as the result of a transport accident, he or she should receive compensation for that disability.

(Paragraphs 11.1-11.5)

Recommendation 102:

The compensation for permanent disability should be paid in a lump sum, the amount of which should be related directly to the degree of disability.

(Paragraph 11.5)

B. Compensation for Permanent Disability

1. The Meaning of Disability

Recommendation 103:

The degree of permanent disability should be 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*.

(Paragraphs 11.9-11.10)

2. The Scope of Permanent Disability

Recommendation 104:

In general the degree of permanent disability should be assessed 12 months after the date of accident However, the Corporation should have power to assess the degree of disability at an earlier time where it is satisfied that the disability is stable and permanent.

(Paragraphs 11.11-11.16)

Recommendation 105:

The Corporation should have power to make interim payments, where a disability is permanent but the final extent of the disability cannot finally be assessed.

(Paragraph 11.17)

Recommendation 106:

Where compensation has been assessed in respect of permanent disability but the person's degree of permanent disability subsequently increases, the Corporation should increase the compensation to take account of the increased degree of disability.

(Paragraph 11.18)

C. Detailed Proposals

1. The Amount of Compensation

Recommendation 107:

The maximum compensation for permanent disability should be 208 times the value of AWE at the date of payment (approximately $87.360 at June 1984).

(Paragraphs 11.43-11.44)

2. Thresholds

A. Minimum Level of Disability

Recommendation 108:

Where the assessed degree of permanent disability is 4 per cent or less, no compensation for permanent disability should be payable.

(Paragraphs 11.45-11.47)

Total Disability

Recommendation 109:

A person who reaches an assessed level of permanent disability of 90 per cent should be entitled to the maximum level of compensation for permanent disability.

(Paragraph 11.48)

3. Variations Because of Age

Recommendation 110:

In assessing compensation for permanent disability, adjustment should be made to take account of the person's age. The adjustment should take the following form:

Age of Victim at date of Accident	Percentage of Assessed Compensation Payable
0-25 years	100 per cent
26-64 years	99-61 per cent (reducing on a uniform sliding scale of 1 percent per year of age)
65 years and above	60 per cent

(Paragraph 11.49)

4. The Deceased or Unconscious Victim

The Deceased Victim

Recommendation 111:

No compensation for permanent disability should be paid where an injured person dies before assessment of the degree of disability or payment of the sum due.

(Paragraphs 11.51-11.52)

The Unconscious Victim

Recommendation 112:

Where a person **is** permanently unconscious or otherwise totally and permanently unaware of his or her disability, compensation for permanent disability should only be payable where that person has a dependent spouse and/or children.

(Paragraphs 11.53-1.56)

5. Duty to Mitigate

Recommendation 113:

In assessing the degree of permanent disability, the Corporation should have regard to any unreasonable refusal by an injured person to participate in a rehabilitation program or to undergo medical treatment where these may have reduced the degree of permanent disability.

V. COMPENSATION IN RESPECT OF DEATH

A. Introduction

I. The Need for Provision of Death Benefits

Recommendation 114:

Compensation in respect of death should be provided to the spouse, children and other dependent family members of people killed in transport accidents, provided that the death is caused by or arises out of a transport accident.

(Paragraphs 12.1-12.8)

2. Eligible Claimants and Recommended Benefits

Dependant

Recommendation 115:

A dependent should be defined as a person who, at the date of the accident resulting in the deceased's death was dependent upon, or interdependent with, the deceased.

(Paragraphs 12.17-12.18)

Spouse

Recommendation 116:

"Spouse" should include a de facto partner of the deceased who is living with the deceased, at the date of death. A de facto relationship is one between a man and a woman who, although not married to each other, late together as husband and wife on a bona fide domestic basis.

(Paragraph 12.21)

Child

Recommendation 117:

"Child" should be defined to include a child in relation to whom the deceased stood in *loco parentis.*

(Paragraph 12.24)

Recommendation 118:

For the purpose of a child's eligibility to benefits on the death of a parent "child" should mean a child who has not attained the age of 16 years or, where the child is a full-time student or physically or mentally handicapped, 21 years, at the date of death. The term should not, however, include a child who is married or is living in a de facto relationship.

(Paragraph 12.25)

Recommendation 119:

Where the child who is eligible as a child member of the deceased's household at the date of death, dependence of that child on the deceased should be conlusively presumed.

(Paragraph 12.26)

Other Family Member

Recommendation 120:

"Member of the family" should mean "spouse, father, mother, grandfather, grandmother, step-father, step-mother, son, daughter, grandson, grand-daughter, step-son, step-daughter, brother, sister, half-brother, half-sister".

(Paragraph 12.28)

B. Lump Sum Payment

1. General

Recommendation 121:

Subject to the recommendations concerning apportionment of the lump sum, the dependent spouse, children and other dependent members of the family of the deceased should be eligible to claim a lump sum payment to a maximum of 130 times AWE (approximately $54,600 at June 1984). This should be so whether the deceased was an earner or non-earner.

(Paragraphs 12.30-12.32)

2. Surviving Spouse and/or Children

Recommendation 122:

Where the deceased is survived by a dependent spouse and/or children, but no other family dependents, the survivors should be entitled to claim the maximum lump sum. If there is more than one claimant, the Corporation should apportion the lump sum among them having regard to the degree of dependence.

(Paragraph 12.33)

3. Surviving Spouse and/or Children and Other Dependent Family Members

Recommendation 123:

Where the deceased is survived by a dependent spouse and/or children and one or more other members of the deceased's family who were dependent on the deceased, those other members of the family should be entitled to claim a share of the lump sum. The share should be determined by the Corporation taking into account the degree of dependence, but should not exceed one-third of the lump sum unless the circumstances are exceptional.

(Paragraph 12.35)

4. Surviving Dependent Family Members Other Than Spouse and/or Children

Recommendation 124:

Where the deceased is survived by neither a spouse nor children but one or more dependent family members, those dependents should be entitled to claim the whole or part of the lump sum depending on the degree of dependence. Where there is more than one such dependent, each dependants share should be determined by the Corporation, taking into account their relative degrees of dependence.

(Paragraph 12.36)

C. Periodic Compensation for Children

Recommendation 125:

A child of the deceased who was dependent on the deceased should be entitled to periodic compensation at the rate of 8 per cent of AWE ($33.60 at June 1984). This Recommendation applies whether the deceased was an earner or non-earner.

(Paragraph 12.37)

Recommendation 126:

Periodic compensation to the child should continue until he or she:

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

(b) marries or enters a de facto relationship; or

(c) becomes self-supporting.

(Paragraph 12.38)

Recommendation 127:

The entitlement of a child to periodic compensation should not be affected by his or her earnings from part-time employment.

(Paragraph 12.40)

Recommendation 128:

Periodic compensation to a child should continue. notwithstanding the marriage or entry into a de facto relationship by the surviving parent who his the care and control of the child.

(Paragraph 12.41)

D. Additional Compensation for the Spouse of an Earner

1. Spouse of Earner with Child-Care Responsibilities

Recommendation 129:

Where the deceased was an earner and the Surviving Spouse:

(a) was a dependent of the deceased; and

(b) his the care and control of a child,

that Spouse should be entitled to claim compensation by way of periodic payments in his or her own right for the loss of support regardless of his or her earnings.

(Paragraph 12.44)

Recommendation 130:

Periodic benefits to a surviving spouse should be paid by instalments at the rate of 50 per cent of the net (after tax) earning capacity of the deceased up to a maximum of 75 per cent of the after tax equivalent of AWE for a period of five years from the date of the deceased's death or until the youngest child in the claimant s care and control attains 16, whichever occurs earlier.

(Paragraph 12.47)

2. Surviving Spouse of an Earner with Long-Term Child-Care Responsibilities

Recommendation 131:

If, after five years from the death of the deceased the surviving spouse:

(a) has the care and control of a child;

(b) has a combined and unused income and earning capacity less than 50 per cent of the earnings of the deceased (as indexed) or 50 per cent of AWE, whichever is less;

periodic compensation should be paid to that spouse. The compensation should supplement the combined income and unused earning capacity (if any) of the spouse to bring it to 50 per cent of the earnings of the deceased, subject to a maximum of 50 per cent of the AWE ($210 at June 1984).

(Paragraph 12.48)

Recommendation 132:

Additional compensation after the first five years could cease when the youngest child in the care and control of the spouse attains 16 years or where the spouse ceases permanently to have the care and control of a child, whichever is the earlier.

(Paragraph 12.49)

3. Surviving Spouse of an Earner where the Earning Capacity of the Spouse is Impaired for Reasons other than Child-Care Responsibilities

Recommendation 133:

Where a surviving spouse was dependent on the deceased earner and the earning capacity and/or income of the surviving spouse is substantially impaired due to:

(a) poor health (including mental and physical disability), where the condition was evident at the date of death or within six months of the date;

(b) the fact that he or she is over 50 years of age and lacks relevant work skills; or

(c) the need to care for an aged or impaired member of his or her family or of the deceased's family, where such care was undertaken at the date of the death of the deceased,

periodic compensation should be paid to that spouse.

(Paragraph 12.50)

Recommendation 134:

The compensation paid should supplement the combined income and earning capacity (if any) of the surviving spouse to bring him or her to 50 percent of the earnings of the deceased, subject to a maximum of 50 per cent of AWE ($210 at June 1984). We further recommend that this compensation should cease at the expiration of five years from the date of the deceased's death or the cessation of the impairment of his or her earning capacity whichever is the earlier. Where the impairment temporarily ceases, compensation should be suspended but should resume if the impairment returns within the five year period.

(Paragraph 12.51)

4. Assessment of Earning Capacity

Recommendation 135:

In assessing the earning capacity of a surviving Spouse. the Corporation should apply the principles with any necessary modifications, applied to the assessment of the post-earning capacity of an injured person.

(Paragraph 12.53)

E. Replacement Household Services

Recommendation 136:

Subject to the assessment of need, dependent family members of a person:

(a) who is killed in a transport accident; and

(b) who, before the accident performed substantial household services for members of his or her household;

should be entitled to replacement services, to the extent necessary for the maintenance and preservation of the household of which the deceased was a member.

(Paragraph 12.54)

Recommendation 137:

In assessing the extent to which replacement household services are necessary, the Corporation should have regard to:

(a) the household services provided by the deceased before the accident;

(b) the number of defendants, their ages, and need for household services;

(c) the household services that other family members could reasonably be expected to provide after the death of the person;

(d) any new relationship formed by a surviving spouse of the deceased; and

(e) any special factors affecting the need of the dependents for household services.

in determining what is reasonable for the purposes of paragraph (c), the same criteria should apply as in the case of a disabled service provider.

(Paragraph 12.55)

Recommendation 138:

In assessing the extent to which replacement household services are necessary after the expiration of four weeks from the date of death, the corporation should have regard to the following additional criteria:

(a) the compensation and other benefits provided to household family members arising out of the transport accident;

(b) the earnings and other income of the spouse of the deceased; and

(c) the resources, financial or otherwise, available to household family members to meet the need for household services.

Except in cases of special hardship, replacement household services should not be provided after two years from the date of death.

(Paragraph 12.56)

Recommendation 139:

Where it would cause special hardship to terminate the provision of household services at the expiration of-two years, the Corporation should have power to continue such services for a further period not exceeding three years.

(Paragraph 12.57)

F. Limits of Benefits

1. General Limits

Time Between Accident and Death

Recommendation 140:

Where death caused by or arising out of a transport accident occurs:

(a) within two years of the accident, the benefits paid or provided to the accident victim prior to death should not be set off against benefits available on death; or

(b) five years or more after the accident no further benefits should be payable.

(Paragraphs 12.58-12.59)

Deaths in Rapid Succession

Recommendation 141:

A person otherwise eligible to claim compensation for the death of another person should not be entitled to such compensation unless he or she survives the deceased for a period of not less than 30 days.

(Paragraph 12.60)

2. Limits on Periodic Payments to Spouse and Children

Recommendation 142:

Where compensation by way of periodic benefits is paid to a surviving spouse with the care and control of children during the first five years after the death of an earner-spouse, total weekly payments to spouse and children should not exceed 65 per cent of the earnings of the deceased, subject also to a ceiling on the earnings of the deceased of 150 per cent of AWE ($630 at June 1984).

(Paragraph 12.62)

Recommendation 143:

Where compensation by way of periodic benefits is paid to a surviving spouse:

(a) with the care and control of children during a period after five years from the death of an earner-spouse; or

(b) in other cases where the earning capacity of the surviving spouse has been substantially impaired during the first five years after the death of an earner-spouse,

total weekly payments to spouse and children should not exceed 65 percent of the earnings of the deceased or 65 per cent of AWE, whichever is the lesser.

(Paragraph 12.63)

Recommendation 144:

The Corporation should have the power to determine how any reduction in the compensation that otherwise would have been payable should be apportioned between the spouse and children.

(Paragraph 12.64)

Recommendation 145:

Where periodic compensation is payable to children only, the total weekly compensation paid to all dependent children should not exceed 32 per cent of AWE.

(Paragraph 12.65)

3. Death of Spouse or Child

Recommendation 146:

Periodic compensation payable to a spouse or child should cease on the death of that spouse or child.

(Paragraph 12.66)

4. Remarriage of Spouse

Recommendation 147:

Compensation by way of periodic benefit to a surviving spouse should cease on the remarriage of the spouse.

(Paragraph 12.67)

Recommendation 148:

When a surviving spouse who is receiving periodic compensation remarries within four years of the deceased's death, or up to one year before his or her youngest child attains 16, he or she should receive a lump sum payment equivalent to one years instalments of compensation. If the remarriage occurs in the fifth year after the death or within one year of the youngest child attaining 16, the spouse should receive a lump sum payment equivalent to the remaining compensation which would have been paid by way of periodic benefit had the marriage not occurred.

(Paragraph 12.68)

G. Funeral Expenses

Recommendation 149:

The reasonable funeral expenses of people killed in transport accidents should be met by the Corporation.

(Paragraph 12.69)

H. Solatium

Recommendation 150:

No compensation should be paid as consolation for grief and bereavement (solatium) to a surviving spouse, children or other dependents of the deceased.

(Paragraph 12.71)

1. Administrative Matters

1. Interim Payments

Recommendation 151:

The Corporation should have power to make interim payments pending determination of claims (including claims for apportionment of a lump sum).

(Paragraph 12.72)

2. Establishing Eligibility

Recommendation 152:

The Corporation should develop procedures to ensure discovery of the identity of all persons eligible to claim the lump sum.

(Paragraph 12.73)

VI. MEDICAL, HOSPITAL AND RELATED SERVICES

A. General Principle

Recommendation 153:

Necessary and reasonable medical, hospital and related services should be provided to all people injured in transport accidents.

(Paragraph 13.4)

B. Hospital and Medical Services

1. Provision of Services

Recommendation 154:

Transport accident victims should be entitled to receive hospital and medical services through the general health care system on the same basis as other sick and disabled members of the community.

(Paragraphs 13.57-13.58)

Recommendation 155:

The application of general health care arrangements to transport accident victims should be the subject of negotiations between the State and the Commonwealth.

(Paragraph 13.60)

2. Cost

Recommendation 156:

The cost implications of extending general health care arrangements to transport accident victims should be the subject of negotiations between the State and the Commonwealth.

(Paragraph 13.68)

C. Ancillary Services and Home Nursing

Recommendation 157:

Where ancillary services are not available through Medicare, the Corporation should arrange the provision of ancillary services and home nursing reasonably required by transport accident victims.

(Paragraphs 13.69-13.70)

D. Nursing Home and Institutional Care

Recommendation 158:

The cost of providing nursing home accommodation to transport accident victims should be the subject of negotiations between the State and the Commonwealth.

(Paragraph 13.71)

VII. SCOPE OF THE SCHEME

A. Preliminary

1. Definitions

Recommendation 159:

A " transport accident" should be defined as one caused by or arising out of the use of:

(a) a motor vehicle, except a motor vehicle being used for the purpose of organized motor sport, provided that where the accident occurs otherwise than on a public street the motor vehicle is registered under the law of New South Wales;

(b) an omnibus, taxi-cab, railway train water taxi, water ferry or other form of public transport, whether the accident occurs on land or water or on private or public property; and

(c) any other class of vehicle or form of transport included in the Scheme from time to time.

(Paragraphs 14.3-14.14)

2. Commonwealth Vehicles

Recommendation 160:

Motor vehicles and any forms of public transport owned or operated by the Commonwealth in New South Wales should be included in the Scheme.

(Paragraph 14.15)

B. Death or Bodily Injury

1. General

Recommendation 161:

The Scheme should apply to death or bodily injury caused by or arising out of a transport accident.

(Paragraph 14.16)

2. Pre-natal Injury

Recommendation 162:

Pre-natal injury should be included in the definition of bodily injury.

(Paragraph 14.17)

3. Nervous Shock

Recommendation 163:

Injury or incapacity resulting from nervous shock should be included in the definition of bodily injury.

(Paragraphs 14.18-14.19)

4. Artificial Members and Aids

Recommendation 164:

Bodily injury should be defined to include damage to artificial members, eyes or teeth, crutches or other artificial aids or spectacle glasses.

(Paragraph 14.20)

C. Problems of Causation

1. Pre-Accident Conditions

Recommendation 165:

In determining whether an incapacity or disability was caused by or arose out of a transport accident, no regard should be had to any latent condition existing at the time of the accident, but not then productive of disability or incapacity. This should be so notwithstanding that the latent condition would or may have resulted in or contributed to a later disability or incapacity.

(Paragraphs 14.27-14.32)

2. Post-Accident Aggravation of Injury

Recommendation 166:

A person entitled to benefits under the Scheme should not have those benefits reduced or terminated by reason of an event, not caused by or arising out of the transport accident, which causes further disability or incapacity to that person or which would have resulted in the same disability or incapacity. In such circumstances benefits should continue at the same level and for the same period as if the event had not occurred.

(Paragraphs 14.34-14.39)

D. Coverage of the Scheme

1. Geographical Scope

Recommendation 167:

The Scheme should apply to, and only to, death or bodily injury suffered by:

(a) a resident of New South Wales, whose death was, or injuries were, caused by or arose out of a transport accident in New South Wales;

(b) a person not resident in New South Wales (but resident in Australia) whose death was, or injuries were, caused by or arose out of a transport accident in

New South Wales, provided that a motor vehicle or other form of transport involved in the accident, was registered or required to be registered in New South Wales, or was operated by the Urban Transit Authority of New South Wales or State Rail Authority of New South Wales.

(c) a person not resident in New South Wales (but resident in Australia) whose death was, or injuries were, caused by or arose out of a motor vehicle accident in New South Wales in which the identity of the motor vehicle which caused the accident cannot be established; and

(d) a person resident of New South Wales, whose death was, or injuries were, caused by or arose out of a transport accident occurring in Australia but outside New South Wales, provided that a motor vehicle or other form of transport involved in the accident was registered, or required to be registered in New South Wales, or was operated by the Urban Transit Authority of New South Wales or State Rail Authority of New South Wales.

Further, a motor vehicle or other form of transport capable of registration in New South Wales, which is registered in another State or Territory, should be deemed to be registered in New South Wales for the purposes of the Scheme on payment of such levy as is prescribed.

(Paragraphs 14.40-14.49)

2. Residents and Non-Residents

Definition of Resident

Recommendation 168:

A person should be regarded as resident in Australia, or in any State or Territory of Australia, where that person had at the time of the transport accident his or her principal place of residence there, or intended, within six months of that accident, to establish his or her principal place of residence there.

(Paragraph 14.50)

Australian Citizens

Recommendation 169:

An Australian citizen who is killed or injured in a transport accident in New South Wales and whose principal place of residence at that date is outside. Australia should be deemed to be resident in the State or Territory in which he or she had his or her last principal place of residence in Australia.

(Paragraph 14.51)

Overseas Residents

Recommendation 170:

Benefits under the Scheme, other than those payable in respect of death. should not be payable or provided to persons not resident in Australia at the date of the accident.

(Paragraphs 14.52-14.53)

Beneficiary Takes Up Residence Overseas Recommendation 171:

(1) If a person who is injured in a transport accident and is entitled to continuing compensation or benefits under the Scheme takes up residence outside Australia after the date of the accident:

(a) the Corporation should continue to pay compensation for loss of earning capacity to the extent it considers appropriate having regard to the circumstances of the person, the general levels of earnings in the country of residence or proposed residence and the opportunities to verify the extent of the person's continuing incapacity, provided that if there has been an assessment of permanent incapacity, compensation should be paid in accordance with the assessment;

(b) the Corporation should continue to meet the cost of rehabilitation services to the extent it considers appropriate, having regard to the needs and circumstances of the person, the comparative cost of the services, the person's eligibility for benefits in the country of residence or proposed residence and the opportunities to verify the persons continuing need for such services; and

(c) the provision of homemaker and attendant care services and other continuing benefits and allowances should be terminated.

(2) Needs-based periodic compensation in respect of death, payable pursuant to Recommendations 131 and 133, should not be available to a surviving spouse who is not resident in Australia.

(Paragraphs 14.55-14.56)

E. Abolition of Other Rights to Compensation

Recommendation 172:

Subject to the special provisions made with regard to work-related injuries, all rights, whether under common law or statute, to compensation for death or bodily injury caused by or arising out of a transport accident should be abolished, except for compensation payable or benefits provided under this Scheme.

(Paragraphs 14.57-14.67)

F. Indemnification of New South Wales Owner/Driver

Recommendation 173:

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

(Paragraph 14.68)

G. Work- Related Accidents

I. Workers' Compensation System

Recommendation 174:

Notwithstanding the abolition generally of rights to compensation (other than rights under the Scheme) for death or injury caused by or arising out of a transport

accident, rights to compensation under the Workers' Compensation Act, 1926, and any similar rights under an industrial agreement, award or statutory scheme under a law in force in New South Wales, should not be affected, except to the extent specifically provided in this Scheme.

(Paragraphs 14.69-14.79)

Recommendation 175:

The cost of meeting claims by workers arising out of transport accidents occurring in the course of employment or on the way to or from work should be met by employers and their insurers on the one hand, and by the Corporation on the other, in roughly the proportion such claims are currently divulged between the workers' compensation system and the compulsory third party insurance system. This recommendation should be implemented by negotiated agreements between the Corporation and employers and insurers, using past guide. The agreements should provide for block payments or adjustments experience pursuant to an appropriate formula.

(Paragraph 14.80)

2. Common Law Actions and Work-Related Accidents

Recommendation 176:

The action for damages at common law or under the Compensation to Relatives Act, 1897 against an employer should not be abolished where death or injury to a workers arose out of or in the course of his or her employment notwithstanding that it was caused by or arose out of a transport accident.

(Paragraphs 14.81-14.83)

H. Double Compensation

1. Election and Alternative Sources of Compensation

Recommendation 177:

Where a person is entitled to benefits under the Scheme in respect of death or bodily injury and is also entitled to compensation or damages under a law in force in New South Wales or under the laws of the Commonwealth or of another State or Territory in respect of the same death or bodily injury, such person should be given a period of three months from the date of the accident or from the onset of symptoms (whichever is later) to elect between the Scheme and other source of compensation. Such an election should be permitted within the three month period whether or not any other claim for compensation is made during that time, except that if an amount by way of a lump sum in redemption of entitlement to periodic payments or in final settlement of the claim (but not a payment under section 16 of the Workers' Compensation Act 1926, or any similar payment) has been recovered in respect of the death or injury, no claim under the Scheme should be permitted.

(Paragraphs 14.84-14.89)

Recommendation 178:

The Corporation should have power to extend the period of three months, where undue hardship to the claimant would otherwise be caused. In particular, if a claim or proceedings other than a claim under the Scheme is concluded by a bona fide determination that the claimant has no right to compensation and no compensation

has been received by the claimant the period of three months should be extended to permit a claim to be made under the Scheme.

(Paragraph 14.90)

2. Avoiding Double Compensation

General Principles

Recommendation 179:

Where a person, who elects to claim under the Scheme, has already been paid or has recovered compensation under a law in force in New South Wales or under the laws of the Commonwealth or of another State or Territory in respect of the same death or bodily injury for which the claim is made, such compensation should be set-off against benefits otherwise payable or available under the Scheme.

(Paragraph 14.92)

Recommendation 180:

Where a person elects to claim benefits under the Scheme and the compensation previously paid or provided under a law in force in New South Wales or under the laws of the Commonwealth or of another State or Territory is greater than that available under the Scheme to the date of election, appropriate adjustments should be made to future benefits under the Scheme until the excess is absorbed.

(Paragraph 14.93)

Special Provision for Work- Related Injury

Recommendation 181:

Notwithstanding the general provisions for set-off, compensation or damages received prior to lodgement of a claim under the Scheme under the Workers' Compensation Act, 1926, or similar legislation in force in New South Wales for loss of earnings:

(a) for the first five working days of incapacity; and

(b) for any other period, to the extent that such compensation exceeds the amount payable under the Scheme for loss of earning capacity in equivalent circumstances,

should not be set off against benefits otherwise payable or available under the Scheme.

(Paragraph 14.94)

Forfeiture and Assignment of Rights

Recommendation 182:

Once a person has made a claim under the Scheme that person:

(a) should not be permitted to enforce any other entitlement to, or accept payment of, compensation in respect of the same death or bodily injury for which the claim is made; and

(b) should be disqualified from further entitlement to benefits under the Scheme and liable to repay benefits under the Scheme if the other entitlement is enforced or payment accepted in breach of this prohibition.

(Paragraph 14.95)

Recommendation 183:

Where a claimant is entitled to compensation otherwise than under the Scheme in respect of death or bodily injury for which compensation is payable under the Scheme, any such entitlement should, to the extent possible, be assigned by operation of law to the Corporation.

(Paragraph 14.96)

Recommendation 184:

The Corporation should have the power to enter into arrangements with any body exercising similar functions in any other State or Territory, for the purpose of recoupment or exchange of benefits or for any other form of co-operation necessary for the efficient administration of the Scheme.

(Paragraph 14.97)

3. Collateral Benefits

Recommendation 185:

A claimant who is entitled to sick pay or holiday pay in respect of a period of incapacity should be able to elect whether to take such pay or claim compensation for loss of earning capacity for that period. If the claimant elects to take such pay, the amount received should be set-off against the compensation otherwise payable for loss of earning capacity, except that there should be no set off:

(a) for the first five working days of incapacity; or

(b) for any other period, to the extent that the sick pay or holiday pay exceeds the compensation under the Scheme for loss of earning capacity for that period.

(Paragraphs 14.98-14.102)

Recommendation 186:

Benefits available to a claimant under the Scheme should not be reduced or otherwise affected by the payment of, or entitlement to *ex gratia* payments, accident insurance payments, retirement pensions, superannuation and similar benefits, or pensions or benefits under Commonwealth legislation.

(Paragraph 14.104)

I. Exclusion

1. Self-Inflicted Injury

Recommendation 187:

Benefits under the Scheme should not be available in respect of intentionally self-inflicted death or bodily injury.

(Paragraphs 14.106-14.116)

2. Crimes of Violence

Recommendation 188:

Benefits should not be available under the Scheme in respect of bodily injury or death sustained by a person in furtherance of or incidental to the commission of a crime involving an intention to inflict serious violence or substantial damage to property, for which he or she is convicted or against whom the offence is proven.

(Paragraph 14.117)

3. Driving Offences

Recommendation 189:

There should be no further exclusions from the Scheme on public policy grounds. However, consideration should be given to revising sentencing procedures to empower or require judges and magistrates to take into account entitlements to benefits under the Scheme when sentencing for offences related to transport accidents and to establish mechanisms for the enforcement of penalties against entitlements under the Scheme.

(Paragraphs 14.118-14.122)

4. Imprisonment

Recommendation 190:

All benefits under the Scheme should be suspended while a person otherwise eligible for benefits is imprisoned pursuant to conviction or sentence for any crime.

(Paragraph 14.123)

VIII. ADMINISTRATION OF THE SCHEME

A. Principles of Administration

Recommendation 191:

The administration of the Transport Accidents Scheme should be founded upon five basic principles:

- entitlement;
- independence;
- flexibility;
- high quality decision-making; and
- speed in decision-making and in providing compensation.

(Paragraphs 15.6-15.13)

B. Administrative Functions

Recommendation 192:

The body administering the Scheme should be responsible for the following general functions:

- promotion of the Scheme, dissemination of information concerning entitlements and assistance to people claiming or entitled to benefits;
- policy formulation for the purposes of administration and advice to government;
- assessment of claims and of continuing entitlement to benefits, payment of monetary compensation and the provision of other benefits;
- coordination of the delivery of services to transport accident victims;
- research; and
- promotion of accident prevention and safety.

(Paragraphs 15.14-15.26)

C. The Accident Compensation Corporation

Recommendation 193:

The legislation establishing the Transport Accidents Scheme should create a new authority to be known as the Accident Compensation Corporation of New South Wales. The Corporation should be responsible for the administration of the Scheme.

(Paragraphs 15.27-15.38)

D. Structure of the Accident Compensation Corporation

1. Accountability

Recommendation 194:

The Corporation should be required to submit a report on its activities to Parliament annually and its accounts should be audited by the Auditor General.

(Paragraph 15.40)

Recommendation 195:

The Corporation should not be subject to Ministerial direction or control in the administration of the Scheme.

(Paragraph 15.41)

2. Management

Recommendation 196:

The overall policy formulation and management of the Corporation should be the responsibility of a Board consisting predominantly of part-time members.

(Paragraph 15.42)

Recommendation 197:

The day-to-day administration of the Scheme, subject to the direction of the Board, should be the responsibility of the Corporation's full-time Chief Executive. The Chief Executive should be a member of the Board and should be known as Managing Director.

(Paragraph 15.44)

3. Staff Structure

Recommendation 198:

The staff of the Corporation should not be subject to the Public Service Act, 1979. The Corporation should be empowered specifically to engage consultants on a part-time, casual or sessional basis.

(Paragraphs 15.45-15.46)

Recommendation 199:

Careful attention should be paid to selecting and training the staff. especially assessing officers who will be responsible for deciding claims.

(Paragraph 15.48)

4. Decentralisation

Recommendation 200:

To the maximum extent practicable, the administration of the Scheme, including the assessment and determination of claims, should be decentralised. For this purpose the Corporation should be empowered to establish regional offices.

(Paragraphs 15.49-15.50)

Recommendation 201:

The Corporation should be empowered to establish appropriate agency arrangements, but these should not extend to the determination and assessment of claims.

(Paragraph 15.51)

5. Investment of Funds

Recommendation 202:

The GIO should be responsible for the investment and management of the funds generated by the Transport Accidents Scheme, to the extent that they are not required by the Corporation to meet its liabilities.

(Paragraphs 15.52-15.53)

E. Policy Review

Recommendation 203:

The legislation should establish an independent body to be known as the Accident Compensation Policy Review Committee. The Committee should be under a duty to report annually to Parliament on t he operations of the Scheme and should be empowered to recommend changes to legislation and to the practices of the Corporation. The Committee should be empowered to require the Corporation to provide information relating to the Scheme and to the processing and determination of individual claims.

(Paragraphs 15.56-15.60)

Recommendation 204:

The Minister should have power to require the Corporation to respond in writing to a report of the Policy Review Committee within a specified period.

(Paragraph 15.61)

IX. DECISION-MAKING: ASSESSMENT AND APPEAL

A. Decision-Making within the Corporation

1. Powers of the Corporation

Recommendation 205:

The Corporation should have power to assess and investigate claims for compensation under the Scheme, including the continuing entitlement of claimants to compensation and the extent of that entitlement. The Corporation should have power to require claimants and employers, or former employers, of claimants to provide information reasonably required to assess claims.

(Paragraphs 16.9-16.13)

2. Advice and Assistance to Claimants

Recommendation 206:

The Corporation should provide assistance to accident victims and their families in preparing claims, presenting supporting material and maintaining continuing entitlement to compensation. In addition, the Corporation should provide funds to enable organisations to engage claimant representatives. These representatives should provide advice and assistance to claimants, and should act on behalf of claimants seeking review of Corporation decisions.

(Paragraph 16.14)

3. Assessing Officers

Recommendation 207:

The assessment of each claim and of a person’s continuing entitlement to compensation should be the responsibility of a single assessing officer. This officer should coordinate the collection of the information required for the purposes of assessment and should also co-ordinate the provision of services to claimants. The Corporation should ensure that assessing officers have authority to make the necessary investigations and decisions in relation to claims and continuing entitlements.

(Paragraphs 16.16-16.19)

4. Medical Assessment

Recommendation 208:

The Corporation should have power to require a claimant to undergo reasonable medical examination by a doctor (or panel of doctors) nominated by the Corporation. The Corporation should take the resulting report into account in reaching a decision but, if the decision is unfavourable, should make the report available to the claimant.

(Paragraphs 16.20-16.22)

5. Claims Manual

Recommendation 209:

The Corporation should prepare and publish a detailed claims manual.

(Paragraphs 16.23-16.24)

6. Interim Assessment

Recommendation 210:

The Corporation should have power to make an interim assessment of compensation under the Scheme and to act on such an assessment. Where the interim assessment results in the claimant being under-compensated or over-compensated, the Corporation should make the necessary adjustments to remedy the position. However, the Corporation should have power to waive the requirement that the claimant refund over-compensation if he or she has acted in good faith has complied with the reasonable requests of the Corporation, and would suffer hardship if the requirement were to be enforced.

(Paragraphs 16.25-16.26)

7. Notification of Adverse Decisions

Recommendation 211:

Where the Corporation has made what it considers to be an adverse decision on a claim, the claimant should be notified to that effect within 14 days of the making of the decision, by a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

(Paragraph 16.27)

8. Time Limits

Recommendation 212:

A claim for compensation under the Scheme should be lodged within one year of the date of the accident or the onset of symptoms, whichever is later. A claim outside this period should be entertained if the claimant has a reasonable excuse for failing to lodge the claim within the period. However, no claim should be entertained if made more than three years from the date of the accident or of the onset of symptoms, whichever is later.

(Paragraph 16.28)

9. Secrecy and Protection from Defamation

Recommendation 213:

The governing legislation should impose secrecy requirements on the Corporation concerning information supplied in relation to individual claims and should extend appropriate protection against defamation to officers of the Corporation, medical practitioners and others required to supply such information.

(Paragraph 16.29)

B. The First Stage: Compensation Review Panels

1. General

The Appeal

Recommendation 214:

A person aggrieved by a decision of the Corporation or by its failure to make a decision within a reasonable period, should be entitled to appeal to an independent Compensation Review Panel.

(Paragraphs 16.30-16.39)

Limitation Period

Recommendation 215:

An appeal to a Compensation Review Panel should be lodged within 56 days of the claimant or other aggrieved person being notified by the Corporation of an adverse decision. The Panel should have power to extend the period when there are good reasons for doing so.

(Paragraph 16.40)

Parties

Recommendation 216:

The Corporation should not be a party to proceedings before a Compensation Review Panel.

(Paragraph 16.41)

2. Decision-Making Powers of the Panels

Recommendation 217:

Compensation Review Panels should have power to reverse, affirm or vary the decision under review, to substitute their own decision or to remit the matter to the Corporation with or without directions. The Panels should have all the powers and discretions conferred on the Corporation and should not be bound by the policies of the Corporation.

(Paragraph 16.42)

3. Constitution of the Panels

Recommendation 218:

Each Compensation Review Panel should be constituted by three members appointed by the Minister. The Chairperson should be legally qualified, while the other two members should be people with skills or expertise in other relevant disciplines.

(Paragraph 16.43)

Recommendation 219:

Officers of the Corporation should not be members of Compensation Review Panels.

(Paragraph 16.44)

4. Procedures

Informality and the Rules of Evidence

Recommendation 220:

Proceedings before Compensation Review Panels should be conducted with as little formality and technicality, and with as much expedition as fairness to the appellant, the requirements of the legislation and a proper consideration of the subject under review permit. Other than this requirement, the procedures of the Panels should be within their discretion. Furthermore, the Panels should not be bound by the rules of evidence, but should be empowered to inform themselves on any matter in such manner as they think appropriate.

(Paragraph 16.45)

The Corporation's File

Recommendation 221:

Within 14 days of an appeal being lodged, the Corporation should forward the file to the Compensation Review Panel. Unless there are special circumstances, a copy of the file should be made available to the appellant Sensitive medical information should be forwarded to a medical practitioner nominated by the appellant.

(Paragraph 16.47)

Public Hearings

Recommendation 222:

Proceedings before a Compensation Review Panel should be open to the public unless a Panel, on the request of the appellant, orders otherwise.

(Paragraph 16.48)

Powers of the Compensation Review Panels

Recommendation 223:

The Compensation Review Panels should have power:

(a) to stay or qualify the suspension reduction or cancellation of compensation and to order the Corporation to accede, wholly or in part, to a claim pending determination of an appeal;

(b) to require the Corporation to provide information relevant to an appeal and to invite the Corporation to present argument or material to the Panels; and

(c) to require an appellant to submit to reasonable examination by a nominated doctor or panel of doctors, or by other nominated professional persons.

(Paragraph 16.49)

Representation

Recommendation 224:

In proceedings before a Compensation Review Panel an appellant should be entitled to be represented by a person of his or her choice, whether or not legally qualified.

(Paragraphs 16.50-16.52)

Expenses

Recommendation 225:

An appellant should not be liable to meet the costs of the Corporation relating to proceedings before a Compensation Review Panel. A successful appellant should ordinarily be reimbursed for the reasonable expenses of the appeal. The Panels should have power in exceptional circumstances to order the Corporation to reimburse the expenses of an unsuccessful appellant.

(Paragraph 16.54)

Costs

Recommendation 226:

Where a legally represented appellant succeeds, he or she should be awarded costs in accordance with a modest fixed scale which recognises the informal and expeditious nature of proceedings before the Compensation Review Panels. In exceptional circumstances, the Panels should be able to award such costs to an unsuccessful appellant.

(Paragraph 16.55)

Reasons for Decision

Recommendation 227:

Compensation Review Panels should be required to give decisions in writing and to provide statements of their findings on material facts and reasons for their decisions. A statement should be reduced to writing within 14 days of a request to that effect by an appellant or by the Corporation.

(Paragraph 16.56)

C. The Second Stage: Accident Compensation Appeal Tribunal

1. The Appeal

Recommendation 228:

An appeal from the decision of a Compensation Review Panel should lie to the Accident Compensation Appeal Tribunal. Both an appellant in proceedings before the Panel and the Corporation should have the right to appeal. The Corporation should be a party to the proceedings before the Tribunal. An appeal should be instituted within three months of the Panels decision unless the Tribunal extends the time for appeal.

(Paragraphs 16.57-16.59)

2. Powers of the Accident Compensation Appeal Tribunal

Recommendation 229:

The Accident Compensation Appeal Tribunal should have power to reverse, affirm or vary the decision under review, to substitute its own decision or to remit the matter to the Corporation. The Tribunal should have all the powers and discretions conferred on the Corporation and should not be bound by the policies of the Corporation.

(Paragraphs 16.60-16.62)

3. Constitution of the Tribunal

Recommendation 230:

The Accident Compensation Appeal Tribunal should generally be constituted by a Judge of the status of a District Court Judge, sitting with two non-judicial members. In cases raising issues of law only, the Tribunal should be constituted by a Judge sitting alone.

(Paragraphs 16.63-16.64)

Recommendation 231:

Non-judicial members should be selected from a panel of people with skills or expertise in relevant disciplines. They should serve on a part-time or full-time basis for terms of up to seven years and should be eligible for re-appointment. The non-judicial members should have the same vote as the judicial member, except that questions of law should be decided in accordance with the opinion of the judicial member.

(Paragraph 16.65)

4. Procedures of the Tribunal

Informality

Recommendation 232:

Proceedings before the Accident Compensation Appeal Tribunal should be conducted with as little formality and technicality, and with as much expedition, as fairness to the parties, the requirements of the legislation and a proper consideration of the matters before it permit. Other than this requirement the procedures of the Tribunal should be within its discretion.

(Paragraphs 16.66-16.67)

Rules of Evidence

Recommendation 233:

The Accident Compensation Appeal Tribunal should not be bound by the rules of evidence but should be empowered to inform itself on any matter in such manner as it thinks appropriate.

(Paragraph 16.70)

Recommendation 234:

Evidence of statements made orally to a Compensation Review Panel should not be admissible in proceedings before the Accident Compensation Appeal Tribunal, unless the parties consent.

(Paragraph 16.72)

5. Proceedings Before the Tribunal

Open Hearings

Recommendation 235:

Proceedings before the Accident Compensation Appeal Tribunal should be open to members of the public unless the Tribunal orders otherwise.

(Paragraph 16.74)

Suspension of Decision Appealed From

Recommendation 236:

The Accident Compensation Appeal Tribunal should have all the powers of the Compensation Review Panels to prevent a party suffering hardship pending determination of the appeal and in obtaining information required to dispose of the appeal.

(Paragraph 16.75)

Representation

Recommendation 237:

A party to proceedings before the Accident Compensation Appeal Tribunal should be entitled to be represented by any person whether or not legally qualified.

(Paragraph 16.76)

Witnesses

Recommendation 238:

The Accident Compensation Appeal Tribunal should have power to summon witnesses, take evidence on oath and require the production of documents.

(Paragraph 16.77)

Costs

Recommendation 239:

The Accident Compensation Appeal Tribunal should have power to award costs, but an award of costs should not be made in favour of the Corporation unless the circumstances are exceptional. In exceptional circumstances the Tribunal should be able to award costs in favour of an unsuccessful appellant. Costs of legal representation should be awarded in accordance with a scale approved by the Tribunal.

(Paragraph 16.78)

Reasons for Decision

Recommendation 240:

The Accident Compensation Appeal Tribunal should be required to give its decision in writing and to give a statement of the reasons for the decision. At the request of a party the reasons should be reduced to writing within 14 days.

(Paragraph 16.79)

The Forum

Recommendation 241:

Ideally, the role and functions of the Accident Compensation Appeal Tribunal should be performed by a general Administrative Appeals Tribunal established under State law.

(Paragraphs 16.80-16.81)

Recommendation 242:

By a majority, pending the establishment of a general Administrative Appeals Tribunal under State law, the Accident Compensation Appeal Tribunal should be created as a separate body. Membership of the Tribunal should include a small group of Judges of District Court status, serving full-time. Nominated judges of the District Court or Compensation Court should be eligible to serve as members on a part-time basis. In accordance with Recommendation 231, membership will include non-lawyers.

(Paragraph 16.86)

D. Further Appeal

Recommendation 243:

An appeal should be available on issues of law from the Accident Compensation Appeal Tribunal to the Court of Appeal of the Supreme Court of New South Wales, and that the Tribunal should itself have the power to refer a question of law to the Supreme Court.

(Paragraph 16.87)

X. FINANCIAL ASPECTS

A. Funding of Scheme

Recommendation 244:

The Scheme should be funded on a pay-as-you-go basis, with reasonable reserves set aside to guard against disaster or unexpected contingencies.

(Paragraphs 17.23-17.25)

B. Major Revenue Sources

1. Contributions from Motor Vehicle Owners

Recommendation 245:

The primary source of funding for the Scheme should be contributions payable on registration of motor vehicles and of other forms of privately owned transport, using where appropriate the same procedures as now apply to the payment of compulsory third party motor vehicle premiums.

(Paragraph 17.28)

2. Contributions from Public Transport Authorities

Recommendation 246:

The State Rail Authority and Urban Transit Authority should be required to make an annual contribution to the Scheme assessed by reference to the cost of meeting claims arising out of accidents in which each Authority is involved.

(Paragraph 17.31)

3. Levy on Driving Licences

Recommendation 247:

The Scheme should be financed, in part by levies on the issue or renewal of drivers licences.

(Paragraphs 17.32-17.33)

4. Review of Revenue Sources

Recommendation 248:

The Corporation should keep the question of revenue for the Scheme under close review and make any proposals it considers appropriate in annual reports or reports to the Minister. Contributions to the Scheme should be set by the Government, after receiving advice from the Corporation.

(Paragraph 17.37)

C. Risk Factors, Safety and Funding

1. Vehicle Risk Classifications

Recommendation 249:

Contributions to the Scheme from motor vehicle owners should be assessed taking into account the risk of accidental death and injury associated with the use of particular classes of vehicles.

(Paragraphs 17.41-17.44)

2. Driver Risk Ratings

Recommendation 250:

Levies on the issue or renewal of licences should include penalty loadings to take account of driving offences committed by the licence holders or poor accident records.

(Paragraphs 17.45-17.46)

D. Other Funding Sources

Recommendation 251:

The State should enter into negotiation with the Commonwealth with a view to securing the Commonwealth's agreement to meet an appropriate proportion of the cost of providing medical and hospital services to transport accident victims through the Medicare system.

(Paragraphs 17.54-17.57)

E. Transitional Arrangements

Recommendation 252:

The Scheme should apply to death or bodily injury caused by or arising out of a transport accident which occurs on or after the date on which the governing legislation comes into effect.

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

Transport Accidents Compensation Bill, 1984

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TRANSPORT ACCIDENTS COMPENSATION BILL, 1984

A BILL FOR

An Act to enable the provision of be nef its to a person who suffers bodily injury which is caused by or arises out of a transport accident and to the dependents of a person whose death is caused by or arises out of a transport accident.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

PART I. - PRELIMINARY.

Short title.

1. This Act may be cited as the "Transport Accidents Compensation Act, 1984".

Commencement.

2. (1) Sections I and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such a day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Report to be an aid to interpretation.

3. (1) It is the intention of Parliament that this Act and the regulations are to give effect to recommendations made in a report of the Law Reform Commission laid before each House of Parliament, being the report on a Transport Accidents Scheme for New South Wales, and accordingly, in the interpretation of this Act and the regulations, regard may be had to that report, including the draft legislation set out in that report.

(2) Subsection (1) does not prevent regard being had, in the interpretation of this Act and the regulations, to any matter to which regard might have been had if that subsection had not been enacted.

Interpretation.

4. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires -

"appointed day" means the day appointed and notified under section 2(2);

"average weekly earnings" means -

(a) in respect of any day occurring on or after the appointed day and before the date of the first determination under section 15 is made by the Corporation - the amount prescribed to be the amount of average weekly earnings for the purposes of this definition; and

(b) in respect of any day occurring on or after the date of the making of a determination under section 15 by the Corporation - the amount determined under and applicable in accordance with that section in respect of that day;

"bodily injury" includes -

(a) pre-natal injury;

(b) injury resulting from nervous shock; and

(c) damage to artificial members, eyes or teeth, crutches or other aids or spectacle glasses;

“Chief Executive” means the Chief Executive of the Corporation;

“claimant” means a person by or on whose behalf a claim for benefits under this act is made;

“Corporation” means the Accident Compensation Corporation of New South Wales constituted under this Act;

“de facto partner” means -

(a) in relation to a man -

(i) a woman who is living with the man as his wife on a bona fide domestic basis although not married to him; or

(ii) where the man’s death is caused by or arises out of a transport accident, a woman who, immediately before the date of the man’s death was living with the man as his wife on a bona fide domestic basis although not married to him; and

(b) in relation to a woman -

(i) a man who is living with the woman as her husband on a bona fide domestic basis although not married to her; or

(ii) where the woman’s death is caused by or arises out of a transport accident, a man who, immediately before the date of the woman’s death, was living with the woman as her husband on a bona fide domestic basis although not married to her;

“deceased person” means a person whose death is caused by or arises out of a transport accident;

“dependant”, in relation to a deceased person, means a person who, as at the date of death of the deceased person, was financially, or through the provision of household services, or in some other significant and continuing way, dependent upon, or interdependent with the deceased person in whole or in part;

“financial year” means year ending on 30th June;

“household family member”, in relation to an injured person or a deceased person, means a member of the family of the injured person or the deceased person who is a member of the same household as the injured person or was a member of the same household as the deceased person, as the case may require;

“incapacity” means incapacity for work;

“injured person” means a person who suffers a bodily injury which is caused by or arises out of a transport accident;

“long-term incapacity”, in relation to a person who is incapacitated as the result of a transport accident, means total or partial incapacity for the whole or any part of each of not less than 104 weeks, whether consecutive or not, after the date of the accident;

“member of the family”, in relation to an injured person or a deceased person means the spouse, father, mother, grandfather, grandmother, step-father, step-mother, son, daughter, grandson, granddaughter, step-son, step-daughter, brother, sister, half-brother or half-sister of the injured person or the deceased person;

“motor vehicle” means a motor car, motor carriage, motor cycle or other vehicle propelled wholly or partly by any volatile spirit, steam gas, oil or electricity, or by any means other than human or animal power, and includes -

(a) any such vehicle which is owned by the Commonwealth or by a person representing the Commonwealth; and

(b) a trailer,

but does not include a vehicle used on a railway or tramway;

“Panel” means a Compensation Review Panel established under section 161 and, in relation to an appeal under section 163, means the Panel hearing and determining the appeal;

“Permanent disability”, in relation to a person, means any reduction of the person’s unaided functional capability, considered as a whole, by reason of a medical condition, whether of a physical or psychological character and whether of traumatic origin or of gradual onset, being a reduction that is not likely to abate with the passage of time;

“Policy Review Committee” means the Accident Compensation Policy Review Committee constituted under this Act’

“potential for advancement”, in relation to a person who is incapacitated as the result of a transport accident, means the earnings the person could reasonably have expected to have earned over the period, or the likely period, of the person’s incapacity had the accident not occurred;

“public street” his the same meaning as in the Motor Traffic Act, 1909;

“regulations” means regulations made under this Act;

“rehabilitation”, in relation to in injured person, means the process of restoring or attempting to restore the person, through the combined and coordinated use of medical, social, educational and vocational measures, to the maximum level of function of which the person is capable or which the person wishes to achieve and includes placement in employment and all forms of social rehabilitation such as family counselling, leisure counselling and training for independent living;

“self-employed person” includes -

(a) a person -

(i) who practices a profession; or

(ii) who carries on or engages in a business or other remunerative activity,

whether alone or as a partner with another person and whether on a full-time, part-time or casual basis; and

(b) a person of a class or description of persons prescribed to be self-employed persons for the purposes of this definition;

“spouse” includes a de facto partner;

“State” means a State of the Commonwealth and includes a Territory of the Commonwealth;

“the Fund” means the Transport Accidents Compensation Fund established under section 22;

“Tribunal” means the Accident Compensation Review Tribunal constituted under this Act and, in relation to any proceedings of the Tribunal, means the Tribunal as constituted in accordance with this Act for the purposes of those proceedings;

“unaided functional capacity”, in relation to a person, includes so much of the unaided person’s functional capability as may have been gained by surgery or other medical treatment or by pharmaceutical treatment or other treatment which the person has undergone or is undergoing, but does not include any capability gained by

the provision of a wheelchair or crutches or any prosthetic or other aid or appliance to the person or by modifications to the person's environment or otherwise.

(2) A reference in this Act to loss of earning capacity includes a reference to impairment of earning capacity.

(3) A reference in this Act (Division 2 of Part V excepted) to compensation for loss of earning capacity includes a reference to compensation assessed on the basis of potential for advancement.

(4) In this Act -

(a) a reference to a function includes a reference to a power, authority and duty; and

(b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

Transport accidents

5. (1) In this Act, a reference to a transport accident is a reference to an accident caused by or arising out of the use of -

(a) a motor vehicle which is registered, or required to be registered, under the Motor Traffic Act, 1909, the Transport Act, 1930, or the Recreation Vehicles Act, 1983, not being a motor vehicle engaged, at the time of the accident, in a sporting activity conducted otherwise than on a public street on which, at the time of conduct of the activity, other motor vehicles, not so engaged, were being driven;

(b) a motor vehicle which is not registered as referred to in paragraph (a) (whether or not it is required to be so registered) on a public street in New South Wales, not being a motor vehicle engaged, at the time of the accident, in a sporting activity conducted otherwise than on a public street on which, at the time of conduct of the activity, other motor vehicles, not so engaged, were being driven;

(c) a motor vehicle on a public street in New South Wales the identity of which motor vehicle cannot, after due inquiry and search, be established;

(d) any form of transportation or conveyance operated by the Urban Transit Authority or the State Rail Authority; or

(e) a water ferry or water taxi or any form of public transport not including air transport;

and includes a reference to an accident of a class or description of accidents prescribed to be a transport accident for the purposes of this subsection, but does not include a reference to an accident of a class or description of accidents prescribed not to be a transport accident for the purposes of this subsection.

(2) The inquiry and search referred to in subsection (1) (c) may be proved orally or by the statutory declaration of the person who made the inquiry and search.

(3) In this Act, a reference to a transport accident, in relation to a person, is a reference to the transport accident which caused or out of which arose the bodily injury suffered by the person.

Persons deemed to be employees.

6. (1) For the purposes of this Act, "employee" includes -

(a) a Minister of State of the Commonwealth, of a State or of another country;

(b) a member of the Parliament of the Commonwealth or of a State or of the legislature of a Territory or of another country;

(c) a person holding office (including Judicial office) under, or employed by, the Commonwealth, a State, the administration of a Territory or the government of another country, not being an office declared by the regulations to be an office in relation to which this Act does not apply;

(d) a member of a police force;

(e) a member of the Defence Force; and

(f) director of a company.

(2) For the purposes of this Act, a person referred to in the definition of “employee” in subsection (1) shall -

(a) if he is a Minister of State of the Commonwealth;

(b) if he is a member of the Parliament of the Commonwealth;

(c) if he is a member of the Commonwealth Police Force or the Police Force of a

Territory;

(d) if he is a member of the Defence Force; or

(e) if he holds office under the Commonwealth, be deemed to be in the employment of the Commonwealth.

(3) For the purposes of this Act, a person referred to in the definition of “employee” in subsection (1) (not being a person referred to in subsection (2) or (4)) shall be deemed to be in the employment of, or of the government or administration of, the State, Territory or country concerned.

(4) For the purposes of this Act, a director of a company shall be deemed to be in the employment of the company.

(5) For the purposes of the definition of “employee” in subsection (1), a member of a Parliament or of a legislature shall be deemed not to have ceased to be such a member while the member continues to be entitled to any remuneration or allowance payable to the member as such a member.

Earners.

7. (1) Except as provided by subsection (2), a person is an earner for the purposes of this Act if the person is a person -

(a) who was in full-time employment or part-time employment (whether as an employee or a self-employed person);

(i) at any time during the period of 8 weeks immediately preceding the date of the transport accident;

(ii) for the whole or any part of any of not less than 13 weeks during the period of 52 weeks immediately preceding the date of the accident; or

(iii) for the whole or any part of any of not less than 26 weeks during the period of 104 weeks immediately preceding the date of the accident;

(b) who had, on or before the date of the accident, made firm arrangements (whether or not those arrangements comprised an enforceable contract) to enter into employment on or after the date of the accident as an employee with a particular employer or as a self- employed person in a profession business or other remunerative activity commencing at a particular time and place; or

(c) who -

(i) has been incapacitated as the result of the accident for the whole or any part of not less than 24 weeks, whether consecutive or not, after the date of the accident; and

(ii) would have been likely, but for the accident, to have entered into employment before the expiration of the period of 2 years after the date of the accident.

(2) A person is not an earner for the purposes of this Act if the person had, at the date of the transport accident, ceased permanently to be an employee or a self-employed person or both, as the case may require.

Non-earners.

8. A person is a non-earner for the purposes of this Act if -

(a) the person is a person to whom section 7(2) applies; or

(b) the person is otherwise not an earner for the purposes of this Act.

Construction of certain references - earners referred to in s.7 (1) (b) and (c).

9. A reference in this Act to the date of a transport accident as the result of which a person is incapacitated for work shall -

(a) in determining the earning capacity of an earner to whom section 7(l) (b) applies - be read and construed as a reference to the date upon which the earner would, but for the accidents have entered into employment in accordance with the firm arrangements referred to in that paragraph; and

(b) in determining the earning capacity of an earner to whom section 7(l)(c) applies - be read and construed as a reference to the date on which the earner would, but for the accident, have been likely to have entered into employment.

Earnings.

10. (1) In this Act, a reference to earnings in relation to -

(a) an employee, is a reference to income derived from personal exertion in the capacity of an employee, and includes a reference to an allowance received by the employee from his or her employer, except in so far as it is provided for the purpose of meeting expenses associated with employment, but does not include a reference to benefits not in the form of monetary payments, other than -

(i) the value to the employee of living accommodation provided by the employer without charge or at a reduced charge;

(ii) the value to the employee of food so provided; and

(iii) the value to the employee of a car, including running expenses, provided by the employer in so far as the car is used by the employee for private purposes; and

(b) a self-employed person. includes a reference to the net income derived from personal exertion by the person for his or her benefit after payment of expenses necessarily incurred in deriving that income.

(2) In subsection (1), a reference to income is a reference to income before payment of income tax.

Act to bind Crown.

11. This Act binds the Crown, not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

PART II - THE ACCIDENT COMPENSATION CORPORATION OF NEW SOUTH WALES.

Constitution of the Corporation.

12. (1) There is hereby constituted a corporation under the corporate name of the “Accident Compensation Corporation of New South Wales.

(2) In the exercise of its functions, the Corporation shall not be subject to the control or direction of the Minister.

(3) The Corporation shall for the purposes of any Act, be deemed to be a statutory body representing the Crown.

Membership and procedure of the Corporation.

13. (1) The Corporation shall consist of 5 members who shall be appointed by the Governor.

(2) Of the members of the Corporation -

(a) 1 shall, in and by the instrument by which the member is appointed, be appointed as Chief Executive of the Corporation; and

(b) 4 shall, in and by the instruments by which the members are appointed, be appointed as part-time members.

(3) Schedule 1 has effect with respect to the members and procedure of the Corporation.

Functions of the Corporation.

14. (1) The Corporation shall have and may exercise the functions conferred or imposed on it by or under this or any other Act.

(2) The Corporation shall -

(a) publicise, disseminate information concerning and otherwise promote the provisions of the scheme for transport accident compensation embodied in this Act;

(b) ensure that advice and assistance is given to persons claiming or entitled to benefits under this Act;

(c) formulate and review policies for the implementation and administration of this Act and the scheme referred to in paragraph (a);

(d) advise the Minister as to the administration, efficiency and effectiveness of the scheme referred to in paragraph (a);

(e) receive and assess claims for benefits under this Act;

(f) administer the provision of benefits under this Act;

(g) review the continuing entitlement of persons to benefits under this Act;

(h) where benefits under this Act are provided by persons other than the Corporation, liaise with those persons and co-ordinate the provision of those benefits by those persons;

(i) conduct and make arrangements for the conduct by other persons of research and the collection of statistics and other information of relevance to the administration of this Act and the scheme referred to in paragraph (a); and

(j) publicise, disseminate information concerning and otherwise promote matters relating to accident prevention and safety.

(3) The Corporation may do all such supplemental incidental and consequential acts as may be necessary or expedient for the exercise of its functions.

(4) A function of the Corporation relating to the provision to a person of a benefit under this Act (other than the payment of compensation) may be exercised by the Corporation in any of the following ways:-

(a) by the provision of the benefit by the Corporation;

(b) by the provision of the benefit partly by the Corporation and partly by another person or persons;

(c) by the provision of the benefit by another person or persons at the cost or partly at the cost of the Corporation or in accordance with other arrangements made between the other person or persons and the Corporation;

(d) by the payment of money to or on behalf of the person in order to enable the person to meet the cost of the provision of the benefit by another person or persons.

(5) In the exercise of a function referred to in subsection (4), the Corporation -

(a) may liaise and co-operate with and negotiate and enter into agreements with persons or bodies involved in the provision or financing, or both of benefits of the same or a similar nature to the benefits under this Act; and

(b) may specify the principles or standards, or both, in accordance with which any such benefit is to be provided.

(6) In the exercise of its functions, the Corporation shall have regard to the report referred to in section 3(1).

Determination of average weekly earnings.

15. (1) The Corporation shall make a determination of the amount of average weekly earnings for the purposes of this Act as at 30th April and 31st October in each year and may make such a determination as at any other date.

(2) In making a determination of the amount of average weekly earnings as at a particular date, the Corporation shall have regard to -

(a) the amount estimated not more than 3 months before that date by the Australian Statistician as the average weekly total earnings of full-time adult males in Australia; or

(b) where an amount has not been estimated as referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

(3) A determination of the amount of average weekly earnings under this section shall apply in respect of each day within the period commencing on the day as at which the determination is made and ending on the day immediately preceding the day as at which the next subsequent determination is made.

Functions of Chief Executive.

16. The Chief Executive -

(a) is responsible for the management of the affairs of the Corporation subject to and in accordance with any directions of the Corporation; and

(b) shall have and may exercise such other functions as are conferred or imposed on the Chief Executive by or under this or any other Act.

Appointment of officers and employees of the Corporation.

17. (1) The Corporation may appoint and employ such officers and employees as are necessary to enable it to exercise its functions under this or any other Act.

(2) Every officer and employee of the Corporation shall subject to the terms of appointment of the officer or employee, continue in the service of the Corporation at the will of the Corporation only.

(3) All officers and employees of the Corporation shall be subject to the sole control and governance of the Corporation which may, where their remuneration or conditions of employment are not fixed in accordance with the provisions of any other Act or law, fix the salary or wages payable to those officers and employees and the conditions of their employment.

(4) Regulations may be made under section 196 for or with respect to the conditions of employment of persons in the service of the Corporation.

(5) The regulations made for the purposes of subsection (4) -

(a) shall have effect subject to any award by which the Corporation is bound made by a court of competent jurisdiction and to any industrial agreement to which the Corporation is a party; and

(b) shall have effect notwithstanding subsection (3).

(6) An officer or employee of the Corporation shall not, in respect of the same period of service, be entitled to claim, under this Act and under another Act, a benefit relating to a condition of employment.

(7) The Corporation may, with the approval of the Minister administering a government department or administrative office, arrange for the use of the services of any staff or facilities of the department or office.

(8) The Corporation may, for the purpose of exercising any of its functions, appoint, employ or engage any person considered by the Corporation capable of supplying or providing goods, services, information or advice.

Delegation.

18. (1) The Corporation may, by instrument in writing, delegate to -

(a) the Chief Executive;

(b) a committee comprised of members of the Corporation, including the Chief Executive ora member of the Corporation nominated by the Chief Executive;

(c) an officer or employee of the Corporation;

(d) a person for the time being holding or acting in a specified position in the staff establishment of the Corporation; or

(e) where the regulations so provide - any person of whose services the Corporation makes use pursuant to this or any other Act,

the exercise of such of the functions of the Corporation (other than this power of delegation) as are specified in the instrument.

(2) A function the exercise of which has been delegated under this section may, while the delegation remains unrevoked, be exercised from time to time by the delegate in accordance with the terms of the delegation.

(3) Without limiting the operation of subsection (2), a function the exercise of which has been delegated under this section to the Chief Executive may, while the delegation remains unrevoked, be exercised from time to time in accordance with the terms of the delegation by-

(a) an officer or employee of the Corporation;

(b) a person for the time being holding or acting in a specified position in the staff establishment of the Corporation; or

(c) where the regulations so provide - any person of whose services the Corporation makes use pursuant to this or any other Act;

as authorised by instrument in writing by the Chief Executive in that behalf either generally or in a particular case or class of cases.

(4) A delegation or authorisation under this section may be made subject to such conditions or limitations as to the exercise of any function the subject thereof, or as to time or circumstances, as may be specified in the instrument of delegation or authorisation.

(5) Notwithstanding any delegation under this section, the Corporation may continue to exercise any function delegated.

(6) Any act or thing done or suffered by a delegate acting in the exercise of a delegation under this section, or by a person duly authorised in that behalf by the Chief Executive under this section, has the same force and effect as it would have if it had been done or suffered by the Corporation and shall be deemed to have been done or suffered by the Corporation.

(7) The Corporation may, by instrument in writing, revoke wholly or in part any delegation under this section, and the Chief Executive may, by instrument in writing, revoke wholly or in part any authorisation under this section.

(8) An instrument purporting to have been signed by a person in his or her capacity as a delegate of the Corporation, or as a person authorised under this section, shall in all courts and before all persons acting judicially be received in evidence as if it were an instrument duly executed by the Corporation and shall until the contrary is proved, be deemed to be an instrument signed by a delegate of the Corporation or by a person duly authorised under this section, as the case may be.

(9) In subsection (8), a reference to a delegate includes a reference to the chairperson of a committee to which the exercise of a function has been delegated under subsection (1).

Financial year.

19. The financial year of the Corporation shall be the year commencing on 1st July.

Annual report.

20. The Corporation shall prepare an annual report in accordance with the Annual Reports (Statutory Bodies) Act, 1984.

Shortened references to the Corporation.

21. In any other Act in any instrument made under any act or in any other instrument of any kind, except in so far as the context or subject-matter otherwise indicates or requires, a reference to the “Accident Compensation Corporation” shall be read and construed as a reference to the Accident Compensation Corporation of New South Wales constituted under this Act.

PART III - THE TRANSPORT ACCIDENTS COMPENSATION FUND.

DIVISION 1. - *General.*

Transport Accidents Compensation Fund.

22. The Corporation shall estiblish and subject to section 25, administer a fund, to be called the “Transport Accidents Compensation Fund”.

Payments into the Fund.

23. (1) There shall be paid into the Fund -

(a) amounts paid to the Corporation under section 27 or 28 or such regulations as may be made for the purposes of section 29;

(b) amounts paid to the Corporation by or on behalf of the Commonwealth;

(c) any money appropriated by Parliament for the purposes of the Fund;

(d) penalties recovered pursuant to this Act;

(e) the interest from time to time accruing from the investment of the Fund; and

(f) such other amounts, if any, as may be prescribed.

(2) There may be paid into the Fund money, other than money referred to in subsection (1), which may lawfully be paid into the Fund.

Payments out of the Fund.

24. There may be paid out of the Fund -

(a) benefits payable under this Act;

(b) all charges, costs and expenses incurred by the Corporation in the exercise of its functions under this Act;

(c) all charges, costs and expenses incurred by any person in providing, at the request of the Corporation, any benefit under this Act; and

(d) all other amounts required or authorised by this Act or the regulations to be paid out of the Fund.

Investment.

25. (1) The investment of money in the Fund shall be undertaken by -

(a) where no public authority is prescribed for the purposes of this subsection, the Government Insurance Office of New South Wales; or

(b) such public authority as many be prescribed for the purposes of this subsection.

(2) Any money in the Fund which is not immediately required for the purposes of the Fund may be invested -

(a) in any manner in which trustees are for the time being authorised to invest trust funds; or

(b) in any securities approved by the Treasurer on the recommendation of the Minister.

DIVISION 2. - *Payment of contribution.*

Contributions in respect of motor vehicles.

26. (1) A person who applies for the registration or the renewal of registration of a motor vehicle shall at the time at which the application is made, pav to the Commissioner for Motor Transport the prescribed amount by way of contribution to the Fund.

(2) A person who applies for the issue of a traders plate shall, at the time at which the application is made, pay to the Commissioner for Motor Transport the prescribed amount by way of contribution to the Fund.

(3) A person who applies for the issue, grant or renewal of a licence, permit or other authority which is prescribed for the purposes of this subsection shall, at the time at which the application is made, pay to the person so prescribed in relation to the licence, permit or other authority the prescribed amount by way of contribution to the Fund.

(4) The registration or the renewal of registration of a motor vehicle shall not be granted and a trader s plate shall not be issued by the Commissioner for Motor Transport until the prescribed amount under subsection (1) or (2), as the case may require, has been paid.

(5) A licence, permit or other authority which is prescribed for the purposes of subsection (3) shall not be issued, granted or renewed by the person so prescribed in relation to the licence, permit or other authority until the prescribed amount under subsection (3) has been paid.

(6) In this section -

“registration”, in relation to a motor vehicle, means registration under the Motor Traffic Act, 1909, the Transport Act, 1930, or the Recreation Vehicles Act, 1983,

“trader s plate” means a special number plate issued to a manufacturer or repairer of or dealer in motor vehicles in accordance with the regulations under the Motor Traffic Act 1909.

Payment of contributions in respect of motor vehicles, etc., to the Corporation.

27. (1) The Commissioner for Motor Transport shalt at such time or times as may be agreed upon by the Commissioner and the Corporation, pay to the Corporation amounts received by the Commissioner under section 26(l) or (2).

(2) A person prescribed for the purposes of section 26(3) shall, at such time or times as may be agreed upon by the person and the Corporation, pay to the Corporation amounts received by the person under that subsection.

Contributions from public authorities.

28. (1) A public authority shall, at such time or times as may be determined by the Governor, pay to the Corporation by way of contribution to the Fund such amounts as may be so determined.

(2) In subsection (1), “public authority” means -

(a) the State Rail Authority;

(b) the Urban Transit Authority; or

(c) a public or local authority constituted by or under any Act, a government department or a statutory body representing the Crown, or a person exercising functions on behalf of that authority, department or body, which is prescribed to be a public authority for the purposes of this section.

Other contributions.

29. The regulations -

(a) may require the payment of amounts by way of contribution to the Fund by persons and public authorities who own or operate, or register or license or otherwise control or regulate the use of, vehicles or other forms of transportation or conveyance, not being persons or public authorities referred to in section 26 or 28;

(b) may specify the circumstances in which those amounts shall be paid;

(c) may determine, by reference to such matters, if any, as may be prescribed, the amount of those contributions;

(d) may provide for the payment or remission of those amounts to the Corporation; and

(e) may provide for the granting of exemptions from the payment of those amounts.

PART IV - ELIGIBILITY FOR BENEFITS.

DIVISION 1. - *General.*

Injured person's benefits - generally.

30. Subject to this Act, an injured person is entitled to benefits under this Act.

Dependant's benefits - generally.

31. Subject to this Act the dependant of a person, being a person whose death is caused by or arises out of a transport accident, is entitled to benefits under this Act.

Persons in respect of whom benefits are payable.

32. (1) A benefit under this Act is payable only in respect of the death of or bodily injury to-

(a) a person resident in New South Wales whose death or injury was caused by or arose out of a transport accident in New South Wales;

(b) a person not resident in New South Wales whose death or injury was caused by or arose out of a transport accident in New South Wales, being a transport accident caused by or arising out of the use of a vehicle or other form of transportation or conveyance to which section 5(1) (a), (c), (d) or (e) applies;

(c) a person resident in New South Wales whose death or Injury was caused by or arose out of a transport accident occurring in Australia, but outside New South Wales, being a transport accident caused by or arising out of the use of a vehicle or other form of transportation or conveyance to which section 5(1) (a) or (d) applies; or

(d) person of a class of persons prescribed for the purposes of this subsection.

(2) For the purposes of subsection (1), a person whose death or bodily injury was caused by or arose out of a transport accident shall be treated as being resident in New South Wales if, as at the date of the accident, the person -

(a) had his or her principal place of residence in New South Wales; or

(b) hadintendedtoestablisKwithin6monthsafterthatdate,hisorherprincipal place of residence in New South Wales.

(3) For the purposes of subsection (1), an Australian citizen whose death or bodily injury was caused by or arose out of a transport accident and whose principal place of residence as at the date of the accident was outside Australia shall be treated as being resident -

(a) in the State in which he or she had his or her last principal place of residence; or

(b) if, in the case of a child, there is no State in which he or she had his or her last principal place of residence, in the State in which the parent or parents with whom the child ordinarily resided or resides had his, her or their last principal place of residence.

(4) Except as provided by subsections (2) and (3), a benefit under this Act, other than a benefit payable in respect of the death of a person which was caused by or arose out of a transport accident, shall not be payable to a person who was not resident in Australia as at the date of the accident.

Exclusions from benefits.

33. (1) A benefit under this Act shall not be payable in respect of -

(a) the suicide of a person;

(b) a bodily injury which is self inflicted; or

(c) the death of or bodily injury to a person which is sustained in the commission of a crime involving an intention to inflict serious violence or substantial damage to property and for which the person is convicted or against whom the offence is proven.

(2) A benefit under this Act shall not be payable to the dependent of a person whose death or bodily injury was caused by or arose out of a transport accident where the person's death or bodily injury was wilfully caused by the dependent.

Suspension of benefits - prisoners.

34. A benefit under this Act to which a person would otherwise be entitled shall not be payable to or paid to a person during any period for which the person is imprisoned pursuant to a conviction or sentence for a crime.

DIVISION 2. - *Relationships to other benefits.*

Abolition of certain rights to damages or compensation.

35. (1) On and from the appointed day, no right to or claim for damages or compensation shall lie, otherwise than under this Act, against any person for or in respect of the death of or bodily injury to a person caused by or arising out of a transport accident.

(2) Nothing in subsection (1) applies to or in respect of a right to or claim for damages or compensation under -

(a) the Workers' Compensation Act 1926;

(b) an award or industrial agreement within the meaning of the Industrial Arbitration Act, 1940;

(c) the common law or the Compensation to Relatives Act of 1897, in respect of the death of or bodily injury to a person caused by or arising out of a transport accident for which the employer of the person -

(i) is liable for failure to provide a safe vehicle or a safe system of work or for breach of a statutory duty; or

(ii) is vicariously liable for the negligence of a co-worker of the person; or

(d) a scheme which is, or the provisions of an instrument which are, prescribed to the purposes of the subsection.

Election between alternative sources of compensation.

36. (1) Subject to subsection (2), a person is not precluded from making a claim for benefits under this act by reason of the fact that the person is entitled to make, or has made, a claim for damages or compensation under any other Act or law (including a law of another State).

(2) Where a person is entitled to damages or compensation under any other Act or law (including a law of another State) in respect of the death of or bodily injury to a person caused by or arising out of a transport accident, the person shall not, except as provided by subsections (3) and (4), be entitled to make a claim for any benefits under this Act in respect of that death or bodily injury -

(a) after the recovery under any other such Act or law of a lump sum awarded by way of verdict, by way of redemption of entitlement to periodic payments or by way of final settlement of a claim (not including an amount under section 16 of the Workers' Compensation Act, 1926, or a similar amount under any other such Act or law); or

(b) after the expiration of a period of 3 months from -

(i) the date of the accident; or

(ii) where the onset of symptoms relating to the bodily injury suffered by the deceased person or the injured person as a result of the accident is first observed by a medical practitioner after the date of the accident, the date of the first such observation of the symptoms,

whichever first occurs.

(3) A person who has not recovered a lump sum as referred to in subsection (2) (a) may apply to the Corporation at any time for an extension of the period referred to in subsection (2) (b).

(4) Where an application is made to the Corporation under subsection (3), the Corporation -

(a) shall grant the application if a competent tribunal has determined that the applicant is not entitled to a lump sum referred to in subsection (2) (a) and no such lump sum has been awarded to the applicant, and

(b) may grant the application if, in the opinion of the Corporation, refusal to grant the application would cause the applicant undue hardship.

Forfeiture and assignment of certain rights.

37. (1) A person who has made a claim for benefits under this Act in respect of the death of or bodily injury to a person caused by or arising out of a transport accident -

(a) shall not enforce or attempt to enforce any other right or entitlement to, or accept any payment of, damages or compensation in respect of that death or bodily injury;

(b) shall be deemed to have assigned to the Corporation a right or entitlement referred to in paragraph (a); and

(c) shall, in the event that the first mentioned person enforces or attempts to enforce a right or entitlement referred to in paragraph (a) or accepts any payment of damages or compensation so referred to, be disqualified from any right or entitlement or further right or entitlement to those benefits.

(2) The Corporation may do all such things as may be necessary to enforce or attempt to enforce a right or entitlement which is deemed to have been assigned to the Corporation as referred to in subsection (1) (b).

Indemnification of certain owners and drivers.

38. The Corporation shall indemnify the owner or driver, or both, as the case may require, of -

(a) a motor vehicle to which section 5(i) (a) applies;

(b) a form of transportation or conveyance to which section 5(l) (d) applies; or

(c) a vehicle of a class or description of vehicles, transportation of a class or description of transportation or a conveyance of a class or description of conveyances, prescribed for the purposes of this section,

against any liability arising under the law of another State in respect of the death of or bodily injury to any other person caused by or arising out of the use of the motor vehicle, vehicle or form of transportation or conveyance.

Set-off in event of double compensation.

39. (1) Where a person who is entitled to benefits under this Act in respect of the death of or bodily injury to a person caused by or arising out of a transport accident has recovered or has been paid damages or compensation under any other Act or law (including a law of another State) in respect of that death or bodily injury, the amount of those damages or of that compensation shall be set off against the amount of those benefits.

(2) Where an amount of damages or compensation to be set off under subsection (1) in relation to a person is greater than the amount of benefits under this Act to which the person is entitled as at the date on which the

application for those benefits was made, the Corporation shall set off the amount of the damages or compensation in such a way as to avoid unnecessary hardship to the person.

(3) An amount of damages or compensation to be set off under subsection (1) shall not include damages or compensation for loss of earnings in respect of -

(a) any period for which compensation for loss of earning capacity is not payable under this Act; or

(b) any other period, to the extent to which those damages exceed or that compensation exceeds compensation for loss of earning capacity payable under this Act for the same period.

Set-off of benefits in respect of sick leave and other leave.

40. (1) Where a person who is entitled to compensation for loss of earning capacity under this Act elects to take sick leave or other leave during the whole or any part of the period of incapacity, any amount received in respect of that leave shall be set off against the amount of that compensation.

(2) An amount received in respect of sick leave or other leave to be set off under subsection (1) shall not include an amount in respect of -

(a) any period for which compensation for loss of earning capacity is not payable under this Act, or

(b) any other period, to the extent to which the amount exceeds compensation for loss of earning capacity payable under this Act for the same period.

Certain payments not to affect benefits under this Act.

41. The benefits under this Act to which a person may be entitled shall not be reduced or otherwise affected by any entitlement to or payment of -

(a) an ex gratia payment;

(b) an accident insurance payment;

(c) a retirement benefit or superannuation or similar benefit;

(d) a pension or benefit payable under an Act of the Commonwealth; or

(e) an amount, payment or benefit of a class or description of amounts, payments or benefits prescribed for the purposes of this section.

PART V - NATURE OF BENEFITS.

DIVISION 1. - *Hospital, medical and associated services and pharmaceutical supplies.*

Provision of hospital, medical and associated services.

42. (1) The Corporation shall do all such things as may be necessary to ensure the proper provision of hospital medical and associated services to injured persons.

(2) Without limiting the generality of subsection (1), the Corporation -

(a) may negotiate and enter into agreements with the Health Insurance Commission established under the Health Insurance Commission Act 1973 of the Commonwealth and other persons or bodies involved in the provision or financing, or both, of hospital medical and associated services; and

(b) may make payments from the Fund to the Health Insurance Commission or those other persons or bodies pursuant to any such agreement.

(3) In this section, “associated services” includes physiotherapy, occupational therapy, home nursing, chiropractic services and speech therapy.

Pharmaceutical supplies.

43. An injured person is entitled to be provided by the Corporation with, or paid by the Corporation the cost of, any necessary pharmaceutical supplies required by the person as a result of the transport accident.

DIVISION 2. - *Compensation for loss of earning capacity.*

Subdivision 1. - Entitlement to compensation.

Entitlement to compensation for loss of earning capacity - earners.

44. Subject to this Act, an earner who is incapacitated as the result of a transport accident is entitled to compensation determined in accordance with this Act- for loss of earning capacity.

Entitlement to compensation for loss of earning capacity - non-earners.

45. Subject to this Act, a non-earner -

(a) who is incapacitated as the result of a transport accident; and

(b) whose incapacity is long-term incapacity,

is entitled to compensation, determined in accordance with this Act, for loss of earning capacity for such period of incapacity as occurs after the person’s incapacity becomes long-term incapacity and is not otherwise entitled to compensation for loss of earning capacity.

Subdivision 2. - Assessment of loss of earning capacity - earners.

Loss of earning capacity - employees.

46. The Corporation shall determine the loss of earning capacity of an employee who is incapacitated as the result of a transport accident by determining the difference between the employee’s earning capacity as at the date of the accident and the employee’s earning capacity after the date of the accident and during the period of incapacity.

Normal weekly earnings - employees.

47. (1) Except as provided by section 48, the earning capacity of an employee as at the date of a transport accident is the amount which fairly and reasonably represents the employee’s normal weekly earnings as at the date of the accident.

(2) In determining the amount referred to in subsection (1), the Corporation shall take into consideration -

(a) having regard to the period of employment of the employee before the date of the accident -

(i) the earnings of the employee for the week preceding that date;

(ii) the weekly earnings of the employee during the period of 8 weeks preceding that date;

(iii) the weekly earnings of the employee during the period of 52 weeks preceding that date; or

(iv) the weekly earnings of the employee during the period of 104 weeks preceding that date;

as the case may require,

(b) the employee's work history; and

(c) such other matters as the Corporation considers relevant.

Assumed weekly earnings - employees.

48. Where, in relation to an employee who is incapacitated as the result of a transport accident, it is apparent, having regard to any one or more of the following, namely:-

(a) the seasonal nature of the employee's employment;

(b) the making, on or before the date, of firm arrangements (whether or not those arrangements comprised an enforceable contract) to enter into employment, to leave employment, to undertake new or different employment or to vary the hours of employment;

(c) a contractual entitlement, as at the date of the accident, of the employee to significant wage or salary variations (other than normal variations designed to take account of wage or salary movements or changes in the cost of living) payable on or after the date of the accident in respect of his or her employment,

that the amount which in accordance with section 47, would fairly and reasonably represent the employee's normal weekly earnings as at the date of the accident is substantially more or substantially less than the employee's earning capacity would have been during the period of incapacity but for the accident, the earning capacity of the employee as at the date of the accident shall be the amount which fairly and reasonably represents what the employee's weekly earnings would have been during the period of incapacity but for the accident.

Loss of earning capacity - self-employed persons.

49. (1) Subject to subsection (2), the Corporation shall determine the loss of earning capacity of a self- employed person who is incapacitated as the result of a transport accident in accordance with such one or more of the following bases as is appropriate in the circumstances, namely:-

(a) the difference between the self-employed person's earning capacity as at the date of the accident and the self-employed person's earning capacity after the date of the accident and during the period of incapacity for work;

(b) the weekly cost of providing services to replace the self-employed person in his or her employment during the period of incapacity;

(c) the weekly earnings that the self-employed person could, but for the accident, have derived if, during the period of incapacity, the person exercised similar skills and responsibilities, as an employee, to those which he or she exercised as a self-employed person.

(2) Where the self-employed person is incapacitated for a period which does not exceed 13 weeks or, at the date on which the Corporation makes its determination under subsection (1), is not likely to exceed 13 weeks, the Corporation shall make its determination in accordance with the basis set out in paragraph (b) of that subsection unless there are good reasons for making its determination on another basis set out in that subsection.

Normal weekly earnings - self-employed persons.

50. (1) Except as provided by section 5 1, the earning capacity of a self-employed person as at the date of a transport accident is the amount which fairly and reasonably represents the self-employed person's normal weekly earnings as at the date of the accident.

(2) In determining the amount referred to in subsection (1), the Corporation shall take into consideration -

(a) having regard to the period of self-employment of the person before the date of the accident -

(i) the weekly earnings of the self-employed person during the period of 52 weeks preceding the accident or, where that period of self-employment is less than 52 weeks, the lesser period; or

(ii) the weeklv earnings of the self-employed person during any one or more of the 4 financial years completed before the date of the accident;

as the case may require,

(b) the self-employed person's work history, and

(c) such other matters as the Corporation considers relevant.

Assumed weekly earnings - self-employed persons.

51. Where, in relation to a self-employed person who is incapacitated as the result of a transport accident, it is apparent, having regard to any one or more of the following, namely.-

(a) the seasonal nature of the self-employed person's employment;

(b) the making, on or before the date of the accident, of firm arrangements (whether or not those arrangements comprised an enforceable contract) to enter into employment, to leave employment, to undertake new or different employment or to vary the hours of employment; and

(c) a contractual arrangement, in force as at the date of the accident, which, but for the accident, would have resulted in significant variations in earnings on or after the date of the accident;

that the amount which in accordance with section 50, would fairly and reasonably represent the self-employed person's normal weekly earnings as at the date of the accident is significantly more or significantly less than the self-employed person's earning capacity would have been during the period of incapacity but for the accident, the earning capacity of the self-employed person as at the date of the accident shall be the amount which fairly and reasonably represents what the self-employed person's weekly earnings would have been during the period of incapacity but for the accident.

Amount of earnings during period of incapacity.

52. Except as provided by section 50, the earning capacity of an earner during the period of incapacity is -

(a) where, during that period, the earner is not in receipt of earnings -nil; or

(b) where, during that period, the earner is in receipt of earnings - the actual earnings of the earner assessed from time to time during that period on a weekly basis.

Assumed earnings during period of incapacity.

53. Where -

(a) an earner who is incapacitated as the result of a transport accident -

(i) is capable of undertaking employment of a kind for which the earner could reasonably be expected to apply and which is reasonably available to the earner having regard to the nature and extent of the disability caused by the accident, the earner's level of education, training and language skills, the earner's place of residence and any other relevant matters; and

(ii) is capable of competing. at no significant disadvantage by reason of the disability, for employment of such a kind with people who do not have a disability, or

(b) an earner, without sufficient reason -

(i) has declined to undertake vocational training or rehabilitation or to enable an assessment to be made of his or her employment prospects;

(ii) has failed to take reasonable measures to obtain employment of a kind which is reasonably available to the earner having regard to the matters referred to in paragraph (a)(i); or

(iii) has refused an offer of Suitable employment;

the earning capacity of the earner during the period of incapacity shall be the amount which fairly represents the earnings which could be derived by the earner, assessed from time to time during that period on a weekly basis.

Notice and effect of certain determinations under s. 5 3.

54. (1) Where an amount determined under section 53 in relation to an earner is greater than the amount determined under section 52 in relation to the earner, the Corporation shall give notice to the earner of the amount determined under section 53.

(2) Any amount determined under section 53 in relation to an earner of which notice has been given to the earner under subsection (1) shall except as provided by subsection (3), be used, after the expiration of 8 weeks from the date of the notice, to the exclusion of any other amount in determining the loss of earning capacity of the earner.

(3) The Corporation may specify, in a notice to an earner under subsection (1), that an amount determined under section 53 in relation to the earner shall be used -

(a) where the earner has furnished information to the Corporation knowing it to be false in any material particular or has acted fraudulently- immediately, or

(b) where there are other special circumstances - after the expiration of 1 week from the date of the notice;

to the exclusion of any other amount, in determining the loss of earning capacity of the earner, and the amount so determined shall be used accordingly.

(4) A notice to which subsection (3) applies shall include the reasons which Justify the use of the amount determined under section 53 before the expiration of 8 weeks from the date of the notice.

Loss of earning capacity - earnings derived as employee and self-employed person.

55. The Corporation, in relation to an earner who is incapacitated as the result of a transport accident, being an earner who, at any time within the period of 2 years preceding the date of the accident, derived earnings as an employee and as a self-employed person, shall determine the earner's; loss of earning capacity in accordance with such of the provisions of this Division as may be appropriate.

Long-term incapacity - earners.

56. (1) The Corporation, as soon as practicable after the date on which an earner s incapacity becomes long-term incapacity, shall -

(a) where, before that date, the earner had not suffered a loss of earning capacity as a result of the transport accident determine the earner s loss of earning capacity; or

(b) where, before that date, the earner had suffered a loss of earning capacity as a result of the transport accident redetermine the earner's loss of earning capacity,

as at that date.

(2) For the purpose of determining or redetermining an earner's loss of earning capacity under subsection (1) as at the date on which the earner's incapacity becomes long-term incapacity -

(a) the earning capacity of the earner shall be not less than where, as at that date, the earner is aged -

(i) 16-17 years - 30 percent;

(ii) 18, 19 or 20 years - 40 per cent; or

(iii) 21 years or more - 50 per cent,

of average weekly earnings as at that date; and

(b) the earning capacity of the earner after that date and during the period of incapacity for work shall be determined in accordance with section 52 or 53 as if the references in those sections to the date of the transport accident were references to the date on which the earner's incapacity becomes long-term incapacity.

(3) Without limiting section 156, where, as at the date at which an earner's incapacity becomes long-term incapacity, the earner has not attained the age of 21 years, the corporation shall during the continued incapacity of the earner, make a determination or re-determination, as the case may require, of the earner's loss of earning capacity on each anniversary of that date until the earner attains the age of 21 years.

(4) Compensation in respect of a determination or re-determination of an earner's loss of earning capacity under this section shall not be payable in respect of any period occurring before the date to which the determination or re-determination applies.

Application for assessment of compensation on basis of potential for advancement.

57. (1) An earner -

(a) who has sustained long-term incapacity as the result of a transport accident;

(b) who has a disability, arising from the accident, which has, or is likely to have, a continuing effect on his or her earning capacity; and

(c) who has, so far as is reasonably practicable, participated in vocational training or rehabilitation programmes provided by or through the Corporation;

may, before the expiration of 3 years after the date of the accident or before the expiration of 1 year after the date on which the earner's incapacity becomes long-term incapacity, whichever is the later, make an application to the Corporation for an assessment of compensation on the basis of potential for advancement.

(2) An earner to whom subsection (1) applies may make an application to the Corporation for an assessment of compensation on the basis of potential for advancement after the expiration of the period referred to in that subsection where there are special circumstances relating to the earner which justify the making of the application.

Circumstances in which assessment may be made.

58. The Corporation shall not make an assessment of compensation on the basis of potential for advancement in respect of an application made to it under section 57 by an earner unless the compensation so assessed is likely to be significantly greater for any one or more of the years of the earner s likely incapacity than that assessed for loss of the earners earning capacity.

Basis of assessment.

59. (1) In making an assessment of compensation on the basis of potential for advancement in respect of an earner who is incapacitated as the result of a transport accident, the Corporation shall take into consideration -

(a) the earner's age, education training, skills and abilities as at the date of the accident;

(b) the earner's work history as at that date;

(c) the likelihood that, had the accident not occurred, the earner would have undertaken training or education which would have increased his or her earning capacity;

(d) the earner's prospects for promotion or other forms of career, business or professional advancement, whether in the same employment as, or different employment from, that engaged in by the earner as at that date;

(e) the likelihood that, had the accident not occurred, the earner would have varied the nature of his or her employment or the extent of his or her involvement in the workforce, whether temporarily or permanently, and other matters indicating or tending to indicate that, had the accident not occurred, the earner s earnings or earning capacity would have increased or decreased materially, whether temporarily or permanently.

(2) The Corporation shall take the matters referred to in subsection (1) (c), (d), (e) and into consideration only if they are likely to have an effect or to occur within the period of 10 years after the date of the accident.

Making of assessment.

60. Where the Corporation assesses an amount by way of compensation on the basis of potential for advancement in respect of an earner, the Corporation shall specify, in its assessment, the likely earnings of the earner as from the date of the application for -

(a) the balance of the calendar year in which the application is made; and

(b) each succeeding calendar year during the likely period of incapacity.

Effect of assessment.

61. Where the Corporation assesses an amount by way of compensation on the basis of potential for advancement in respect of an earner, the amount so assessed shall be used on and from the date of the assessment in place of any other basis provided for by this Division for determining the earner's loss of earning capacity and compensation for loss of earning capacity shall be payable to the earner accordingly.

Subdivision 3. - Assessment of loss of earning capacity - non-earners.

Loss of earning capacity - non-earners.

62. The Corporation in relation to a non-earner-

(a) who is incapacitated as the result of a transport accident; and

(b) whose incapacity is long-term incapacity;

shall determine the non-earner's loss of earning capacity by determining the difference between the non-earner's notional earning capacity as at the date in relation to which an assessment of compensation for loss of earning capacity is made and the non-earners earning capacity after that date and during the period of incapacity.

Notional earning capacity - non-earners.

63. The notional earning capacity of a non-earner is, where, as at the date in relation to which an assessment of compensation for loss of earning capacity is made, the non- earner is aged-

(a) 16 or 17 years - 30 per cent;

(b) 18, 19 or 20 years - 40 per cent; or

(c) 21 years or more - 50 per cent of average weekly earnings as at that date.

Amount of earnings during period of incapacity.

64. Except as provided by section 65, the earning capacity of a non-earner during the period of incapacity is -

(a) where, during that period, the non-earner is not in receipt of earnings-nil; or

(b) where, during that period, the non-earner is in receipt of earnings- the actual earnings of the non-earner assessed from time to time during that period on a weekly basis.

Assumed earnings during period of incapacity.

65. Where -

(a) a non- earner who is incapacitated as the result of a transport accident -

(i) is capable of undertaking employment of a kind for which the non-earner could reasonably be expected to apply and which is reasonably available to the non- earner having regard to the nature and extent of the disability caused by the accident, the non-earner's level of education training and language skills, the non-earner's place of residence and any other matters which the Corporation considers relevant, and

(ii) is capable of competing, at no significant disadvantage by reason of the disability, for employment of such a kind with people who do not have a disability, or

(b) a non-earner, without sufficient reason -

(i) has declined to undertake vocational training or rehabilitation or to enable an assessment to be made of his or her employment prospects;

(ii) has failed to take reasonable measures to obtain employment of a kind which is reasonably available to the non-earner having regard to the matters referred to in paragraph (a)(i); or

(iii) has refused an offer of suitable employment;

the earning capacity of the non-earner during the period of incapacity shall be the amount which fairly represents the earnings which could be derived by the non- earner, assessed from time to time during that period on a weekly basis.

Notice and effect of certain determinations under s. 65.

66. (1) Where an amount determined under section 65 in relation to a non-earner is greater than the amount determined under section 64 in relation to the non-earner, the Corporation shall give notice to the non-earner of the amount determined under section 65.

(2) An amount determined under section 65 in relation to a non-earner of which notice has been given to the non-earner under subsection (1) shall, except as provided by subsection (1), be used, after the expiration of 8 weeks from the date of the notice, to the exclusion of any other amount in determining the loss of earning capacity of the non-earner.

(3) The Corporation may specify, in a notice to a non-earner under subsection (1), that an amount determined under section 65 in relation to the non-earner shall be used -

(a) where the non-earner has furnished information to the Corporation knowing it to be false in any material particular or has acted fraudulently immediately; or

(b) where there are other special circumstances - after the expiration of 1 week from the date of the notice;

to the exclusion of any other amount in determining the loss of earning capacity of the non-earner, and the amount so determined shall be used accordingly.

(4) A notice to which subsection (3) applies shall include the reasons which justify the use of the amount determined under section 65 before the expiration of 8 weeks from the date of the notice.

Further assessment of loss of earning capacity - non- earners.

67. (1) Without limiting section 156, where, as at the date at which a non- earner's incapacity becomes long-term incapacity, the non-earner has not attained the age of 21 years, the Corporation shall during the continued incapacity of the non- earner, make a determination or redetermination, as the case may require, of the non-earner's loss of earning capacity on each anniversary of that date until the non-earner attains the age of 21 years.

(2) Compensation in respect of a determination or redetermination of a non-earner's loss of earning capacity under this section shall not be payable in respect of any period occurring before the date to which the determination or redetermination applies.

Application for assessment of compensation on basis of potential for advancement.

68. (1) A non-earner-

(a) who has sustained long-term incapacity as the result of a transport accident;

(b) who has a disability, arising from the accident, which has, or is likely to have, a continuing effect on his or her earning capacity; and

(c) who has, so far-as is reasonably practicable, participated in vocational training or rehabilitation programmes provided by or through the Corporation;

may, before the expiration of 3 years after the date of the accident or before the expiration of I year after the date on which the non-earner s incapacity becomes long-term incapacity, make an application to the Corporation for an assessment of compensation on the basis of potential for advancement.

(2) A non-earner to whom subsection (1) applies may make an application to the Corporation for an assessment of compensation on the basis of potential for advancement after the expiration of the time prescribed by that subsection where there are special circumstances relating to the non-earner which justify the making of the application.

Circumstances in which assessment may be made.

69. The Corporation shall not make an assessment of compensation on the basis of potential for advancement in respect of an application made to it under section 68 by a non-earner unless the compensation so assessed is likely to be significantly greater for any one or more of the years of the non- earner s likely incapacity than that assessed for loss of the non-earner's earning capacity.

Basis of assessment.

70. (1) In making an assessment of compensation on the basis of potential for advancement in respect of a non-earner who is incapacitated as the result of a transport accident, the Corporation shall take into consideration -

(a) the non-earner's age, education training, skills and abilities as at the date of the accident;

(b) the non-earner's work history, if any, as at that date;

(c) the likelihood that, had the accident not occurred, the non-earner would have undertaken training or education which would have increased his or her earning capacity;

(d) the non-earner's prospects for promotion or other forms of career, business or professional advancement; and

(e) other matters indicating or tending to indicate that, had the accident not occurred, the non-earner's earning capacity would have increased or decreased materially, whether temporarily or permanently.

(2) The Corporation shall take the matters referred to in subsection (1) (c), (d) and (e) consideration only if they would have been likely to have had an effect or have occurred within the period of 10 years after the date of the accident.

Making of assessment.

71. Where the Corporation assesses an amount by way of compensation on the basis of potential for advancement in respect of a non-earner, the Corporation shall specify, in its assessment, the likely earnings of the non- earner as from the date of the application for -

(a) the balance of the calendar year in which the application is made; and

(b) each succeeding calendar year during the likely period of incapacity.

Effect of assessment.

72. Where the Corporation assesses an amount by way of compensation on the basis of potential for advancement in respect of a non-earner, the amount so assessed shall be used on and from the date of the assessment in place of any other basis provided for by this Division for determining the non-earner's loss of earning capacity and compensation for loss of earning capacity shall be payable to the non-earner accordingly.

Certain determinations expressed as percentage of average weekly earnings.

73. (1) The Corporation shall express its determination of the earning capacity of an earner as at the date of a transport accident as a percentage of the amount of average weekly earnings applicable as at that date.

(2) The Corporation shall express its determination of the loss of earning capacity of an earner or a non-earner as a percentage of the amount of average weekly earnings applicable as at the day to which the determination relates.

Subdivision 4. - Amount and payment *of compensation.*

Amount of compensation - loss of earning capacity.

74. Except as provided by sections 75 and 76, the amount of compensation to which a person who is incapacitated as the result of a transport accident is entitled during the period of incapacity is an amount equal to 80 per cent of the person's loss of earning capacity, as determined from time to time.

Amount of compensation - replacement services.

75. Where, in respect of a self-employed person who is incapacitated as the result of a transport accident, the Corporation has determined the person's loss of earning capacity in accordance with the basis set out in section 49(1) (b), the amount of compensation to which the person is entitled during the period of incapacity is an amount equal to 80 per cent of the weekly cost (including incidental costs) of providing services to replace the self-employed person in his or her employment, as determined from time to time.

Amount of compensation - equivalent earnings as an employee.

76. Where, in respect of a self-employed person who is incapacitated as the result of a transport accident, the Corporation has determined the person's loss of earning capacity in accordance with the basis set out in section 49 (1) (c), the amount of compensation to which the person is entitled during the period of incapacity is an amount equal to 80 per cent of the weekly earnings that the self-employed person could, but for the accident, have derived if, during the period of incapacity, the person exercised similar skills and responsibilities, as an employee, to those which he or she exercised as a self-employed person, as determined from time to time.

Maximum amount of compensation.

77. Notwithstanding sections 74, 75 and /-6, the maximum loss of earning incapacity for which compensation is payable is a loss equivalent to 150 per cent of average weekly earnings per week during the period of incapacity.

Periods for which compensation is not payable.

78. (1) Compensation for loss of earning capacity of an earner who is incapacitated as the result of a transport accident and who was, at any time during the period of 8 weeks preceding the date of the accident, engaged in employment shall not be paid or payable to the earner in respect of -

(a) where there is only one period of incapacity-the first 5 working days of that period; or

(b) where there is more than one period of incapacity - the first 5 working days of the first such period.

(2) Compensation for loss of earning capacity of an earner who is incapacitated as the result of a transport accident and who was not at any time during the period of 8 weeks preceding the date of the accident, engaged in employment shall not be paid or payable to the earner in respect of -

(a) where there is only one period of incapacity-the first 4 weeks of that period; or

(b) where there is more than one period of incapacity-the first 4 weeks of the first Such period.

(3) Notwithstanding subsections (1) and (2), where -

(a) an earner who is incapacitated as the result of a transport accident is an earner to whom section 7(l) (b) or (c) applies; and

(b) the earner would have entered into employment after the date on which compensation for loss of earning capacity would, but for this subsection, be payable;

that compensation shall not be paid or payable to the earner before the first 5 working days after the day on which the earner would have entered, or would have been likely to have entered, into employment.

Payment of compensation to persons under 16 years of age.

79. (1) Compensation for loss of earning capacity of a person who has not attained the age of 16 years as at the date of a transport accident shall not be payable until the person attains the age of 16 years.

(2) Nothing in subsection (1) prevents the payment of compensation to a person referred to in that subsection where, as at the date of the transport accident as a result of which the person was incapacitated, the person was engaged in full-time employment.

Payment of compensation - unconscious persons.

80. (1) Where an injured person -

(a) is permanently unconscious or otherwise totally and permanently unaware of the bodily injury suffered as a result of the transport accident; and

(b) does not have a dependent spouse or a dependent child or children;

compensation for loss of earning capacity shall not be paid or payable to the person or any other person on behalf of the person.

(2) Where an injured person -

(a) is permanently unconscious or otherwise totally and permanently unaware of the bodily injury suffered as a result of the transport accident; and

(b) has a dependent spouse or a dependent child or children, or both,

compensation payable for loss of earning capacity shall be paid to a per ‘ son as trustee for the injured person and may, at the sole discretion of the trustee, having regard to any possibility that the injured person will recover consciousness or develop awareness, be applied to the support and maintenance of the spouse, child or children, as the case may be.

Termination of payments.

81. (1) Payments by way of compensation for loss of earning capacity shall cease to be paid by the Corporation to a person -

(a) on the termination of the person’s incapacity;

(b) on the death of the person;

(c) in the case of a non-earner- upon the non-earner’s attaining the age of 65 years; or

(d) in the case of an earner -

(i) who had not attained the age of 61 years when the incapacity in respect of which the compensation is payable commenced - upon the earner’s attaining the age of 65 years;

(ii) who had attained the age of 61 years but who had not attained the age of 68 years when the incapacity in respect of which the compensation is payable commenced - on the expiration of a period of 4 years after the commencement of the Incapacity;

(iii) who had attained the age of 68 years but who had not attained the age of 70 years when the incapacity in respect of which the compensation is payable commenced - upon the earner’s attaining the age of 72 years; or

(iv) who had attained the age of 70 years when the incapacity in respect of which the compensation is payable commenced - on the expiration of a period of 2 years after the commencement of the incapacity,

whichever first occurs.

(2) Where, in relation to an earner to whom subsection (1) (d) (ii) or (iii) applies, there is evidence to establish that the earner would, but for the transport accident have left the workforce permanently at an earlier time than that determined in accordance with subsection (1), nothing in that subsection prevents the Corporation from ceasing to make payments by way of compensation for loss of earning capacity to the earner at that earlier time.

Subdivision 5. - Permanent incapacity.

Assessment of permanent incapacity.

82. (1) Where -

(a) a person has sustained a permanent disability as the result of a transport accident; (b) the person’s medical condition in relation to the disability has stabilised;

(c) all practicable steps have been taken towards the person’s rehabilitation;

(d) the person has suffered a loss of earning capacity which is likely to continue indefinitely; and

(e) the extent of the loss of earning capacity is unlikely to vary substantially having regard to such changes in economic conditions and employment opportunities as are reasonably foreseeable,

the Corporation may, at the request or with the consent of the person, make an assessment, in accordance with this Division, of the person's permanent loss of earning capacity and compensation in respect of the loss so assessed shall be payable to the person accordingly.

(2) Except as provided by subsections (3) and (4), an assessment under subsection (1) is final and may not be varied.

(3) Where, at any time after an assessment of a person's permanent loss of earning capacity has been made under subsection (1) -

(a) the person's earning capacity is significantly reduced by reason of -

(i) a deterioration in the person's physical condition; or

(ii) the loss of or a change in the person's employment; and

(b) the substantial reduction in earning capacity occurs as the consequence of a disability caused by or arising out of the transport accident as a result of which the person was incapacitated,

the Corporation shall set aside the assessment and make a further assessment- in accordance with this Division, of the person's loss of earning capacity.

(4) Where the Corporation has, under subsection (3), set aside an assessment in respect of a person, it may, at anytime, make a further assessment under subsection (1) of the person's permanent loss of earning capacity.

Subdivision 6. - Miscellaneous.

Postponement of assessment of certain claims.

83. (1) Where, with the approval of the Corporation, a person in respect of whom a claim for compensation for loss of earning capacity has been made enters into or resumes employment, the Corporation may postpone assessment of the claim.

(2) Where the period of employment of a person referred to in subsection (1) does not exceed the period prescribed for the purposes of this subsection, the Corporation shall on the termination of the person's employment, assess and determine the claim referred to in that subsection.

Continuance of compensation after commencement of certain business undertakings.

84. Where a person to whom compensation for loss of earning capacity is payable commences and conducts, with the approval of the Corporation, a business undertaking, that compensation shall continue to be payable after the date on which the person commences the business undertaking for the period prescribed for the purposes of this section.

DIVISION 3. - *Rehabilitation.*

Right to rehabilitation.

85. The Corporation shall do all such things as may be necessary to provide for and to meet the cost of providing for the rehabilitation of injured persons, including the necessary and reasonable costs and expenses of travel and accommodation incurred by those persons in order to obtain rehabilitation services.

Rehabilitation services to be provided promptly.

86. The Corporation shall so far as is practicable, ensure that rehabilitation services are provided to an injured person as soon as possible after the date of the transport accident.

Functions of the Corporation relating to rehabilitation - generally.

87. (1) The Corporation may employ or provide funds for the employment of rehabilitation counsellors.

(2) The Corporation may distribute information to and provide courses of instruction and training for medical practitioners and other persons associated with the rehabilitation of injured persons.

(3) The Corporation may give assistance or make grants to persons or bodies to undertake research into or promote training in rehabilitation and to enable the provision of rehabilitation services.

(4) The Corporation shall develop and implement policies and practices that will enable the decentralisation of rehabilitation services.

Prosthetic, etc., devices and aids and appliances.

88. (1) The Corporation shall provide such prosthetic or other devices and such crutches, wheelchairs or other aids or appliances as may be necessary to an injured person and shall service and otherwise maintain, and from time to time replace, any such device, aid or appliance to such extent as may be necessary and reasonable in the circumstances.

(2) The Corporation may approve the provision servicing, maintenance or replacement, by a person other than the Corporation, of a device, aid or appliance referred to in subsection (1) to or in respect of an injured person.

Vocational training and retraining.

89. The Corporation shall so far as it is practicable to do so, provide a course of vocational training or instruction to an injured person, or to a spouse who was substantially dependent upon a person whose death has been caused by or has arisen out of a transport accident, for the purpose of enabling the person for whom the course is provided to undertake employment whether as an employee or as a self-employed person.

Modifications to places of work.

90. (1) Where an injured person is employed after the date of the transport accident or continues in, or resumes, employment after that date, the Corporation shall, having regard to the resources available to the Corporation approve of reasonable modifications to the person's place of work for the purpose of enabling the person to gain access to the place of work or facilitating the performance by the person of work or for other purposes.

(2) In determining what modifications are reasonable for the purposes of subsection (1), the Corporation shall have regard to -

(a) the cost of the modifications;

(b) the benefit of the modifications to the employer and other persons employed by the employer;

(c) the likely duration of the employment by the employer of the injured person;

(d) any modifications the employer is prepared to make at the employees own cost; and

(e) any other matters it considers relevant.

(3) The Corporation may, on such terms and conditions as may be agreed between the Corporation and the employer, meet the whole or part of the cost of any modifications approved under subsection (1).

Placement programmes.

91. (1) The Corporation shall develop programmes and practices to encourage the employment, resumption of employment or continued employment of injured persons.

(2) Without limiting the generality of subsection (1), the Corporation may -

(a) provide financial and other incentives to encourage the employment, resumption of employment or continued employment of injured persons;

(b) indemnify an employer in respect of the whole or part of the premiums payable under any contract of insurance undertaken by the employer in pursuance of the Workers' Compensation Act, 1926; or

(c) where an employer is a self-insurer within the meaning of that act, make such undertakings in relation to any liability or any contingent liability of the employer under that Act as the Corporation thinks fit.

Advice and assistance.

92. (1) The Corporation shall at the request of a person who has received benefits under this Act, provide the person or arrange for the person to be provided with advice, including financial advice, and assistance in order to facilitate the persot@ s rehabilitation.

(2) Where an injured person has, as a consequence of the transport accident, no reasonable expectation of being able to obtain finance, or to make satisfactory financial arrangements, for the conduct or proposed conduct of a business undertaking, the Corporation may, on such terms and conditions as it thinks fit, lend money for, or guarantee any loan for, the conduct or proposed conduct of the business.

DIVISION 4. - *Support services and independent living.*

Corporation to promote support services, etc.

93. Subject to this Division, the Corporation shall do all such things as may be necessary to provide and to meet the cost of providing household services, attendant care and other benefits to which this Division applies to injured persons and to the household family members of those persons.

Provision of household services - generally.

94. (1) Where -

(a) an injured person performed, before the date of the transport accident, substantial household services -

(i) for himself or herself; or

(ii) for his or her household family members, or both; and

(b) the capacity of the person to perform after the date of the accident, any such household services has been significantly impaired by reason of the accident,

the Corporation shall where the performance of any such household services by another person is necessary for the maintenance and preservation of the household, approve of the performance of those services by another person.

(2) In determining, for the purposes of subsection (1), the extent to which the provision of household services is necessary for the maintenance and preservation of the household of an injured person, the Corporation shall have regard to -

(a) the extent to which household services were provided by the person before the date of the transport accident and the extent to which the person is able to provide those services after that date;

(b) the number of household family members, their ages and their need for household services;

(c) the extent to which household services were provided by other household family members before the date of the accident;

(d) the extent to which other household family members or other family members might reasonably be expected to provide household services for themselves and for the person after the date of the accident;

(e) the need to avoid substantial disruption to the employment or other activities of the household family members; and

(f) such other matters as the Corporation considers relevant.

(3) Nothing in subsection (2) shall be construed as preventing the Corporation from approving, under subsection (1), of the performance of household services by a household family member of the injured person or the making of such payments in relation to the performance of those services as may be appropriate.

(4) Where any household services have been performed on a voluntary basis and the performance of those services has, after the date on which those services have been performed, been approved under subsection (1), the Corporation shall pay to the person who performed those services such amount as may be determined by the Corporation in respect thereof.

Provision of household services after 4 weeks from date of accident.

95. The Corporation shall after the expiration of a period of 4 weeks from the date of a transport accident review an approval given under section 94 in respect of the injured person and any payments made by the Corporation in consequence of the approval having regard to-

(a) the nature and extent of any benefit provided under this Act or any other act or law to the injured person or to any other person by reason of the accident;

(b) where the injured person's spouse is a member of that person's household, the earnings and any other income of the spouse;

(c) the financial and other resources available to household family members to meet their need for household services; and

(d) such other matters as the Corporation considers relevant.

Provision of attendant care services.

96. (1) In this section, "attendant care services", in relation to an injured person, means services (other than medical services or nursing care) which are required to provide for the essential and regular personal care of the person.

(2) The Corporation shall where an injured person, by reason of the transport accident, is unable to provide adequately for his or her personal care, approve of the provision to the person of attendant care services.

(3) In determining, for the purposes of subsection (2), whether attendant care services should be provided to a person, the Corporation shall have regard to -

(a) the nature and extent of the person's injury and the degree to which that injury impairs the person's ability to provide for his or her personal care;

(b) the extent to which such medical services and nursing care as may be received by the person provide for the essential and regular personal care of the person;

(c) where the person so desires, the extent to which it is reasonable to meet the person's desire to live outside an institutional environment;

(d) the extent to which attendant care services are necessary to enable the person to undertake or continue employment;

(e) any assessment made, at the request of the Corporation, by persons having expertise in the rehabilitation of injured persons;

(f) any standard developed or applied by any government department or public authority in respect of the need of disabled persons for attendant care services;

(g) the extent to which any relative of the person might reasonably be expected to provide attendant care services to the person; and

(h) such other matters as the Corporation considers relevant.

(4) Nothing in subsection (3) shall be construed as preventing the Corporation from approving, under subsection (2), of the provision of attendant care services by a household family member of the injured person or by a relative of the injured person or the making of such payments in relation to the performance of those services as may be appropriate.

(5) Where any attendant care services have been provided on a voluntary basis and the performance of those services has, after the date on which those services have been provided, been approved under subsection (2), the Corporation shall pay to the person who provided those services such amount as may be determined by the Corporation in respect thereof.

Compensation for loss of earning capacity - emergency family support.

97. Where it is necessary for the spouse or a parent or child of an injured person to attend the person continuously, whether in a hospital or elsewhere, the spouse, parent or child, as the case may be, shall be entitled to compensation for loss of earning capacity for the period of the attendance, but not exceeding a period of 4 weeks, assessed as if the spouse, parent or child had been incapacitated as a result of the accident.

Travelling and accommodation expenses - emergency family support.

98. (1) Where expenses have necessarily been incurred by the spouse or a parent or child of an injured person in respect of travel and accommodation within Australia for the purpose of attending the person to provide care and support the spouse, parent or child, as the case may be, shall be entitled to reimbursement of such of those expenses as have been incurred, except as provided by subsection (2), during the period of 4 weeks from the date of the transport accident.

(2) The Corporation may, where there are exceptional circumstances and the continued presence of the spouse, parent or child is necessary for the recovery or well-being of the injured person, extend the period referred to in subsection (1).

Acquisition of a home.

99. Where an injured person has, as a result of the transport accident, no reasonable expectation of being able to obtain finance, or to make satisfactory financial arrangements, for the purchase of a home, or of a home suitable to the person’s needs, the Corporation may, having regard to the resources available to the Corporation, on such terms and conditions as it thinks fit, lend money for, or guarantee any loan for, any such purchase.

Modifications to the home.

100. (1) The Corporation shall, in respect of a person who has suffered a permanent or long-term physical disability as the result of a transport accident of a kind which severely impairs his or her mobility or ability to live independently within a home, approve of reasonable and necessary modifications to the persons home.

(2) In determining, for the purposes of subsection (1), whether any modifications to the home of an injured person are reasonable and necessary, the Corporation shall have regard to -

(a) the cost of any such modifications;

(b) any difficulty faced by the person -

(i) in gaining access to;

(ii) in enjoying reasonable freedom of movement within; or

(iii) in living independently within,

the person's home,

(c) the likely duration of the persons residence in the home; and

(d) such other matters as the Corporation considers relevant.

(3) The Corporation may, under subsection (1), approve of modifications to a person's home notwithstanding that the person is not the owner or sole or absolute owner of the home, but no such approval shall be given without the consent of the owner or any joint owner, mortgagee or other interested person as the case may require.

(4) The Corporation may, on such terms and conditions as may be agreed between the Corporation and the injured person and, as the case may require, the owner, a joint owner, a mortgagee or any other interested person meet the cost of any modifications approved under subsection (1) or such part of the cost as it thinks fit.

(5) Without limiting the generality of subsection (4), terms and conditions referred to in that Subsection -

(a) may include undertakings by the injured person or, as the case may require, by the owner, a joint owner, a mortgagee or another interested person -

(i) with respect to the duration of residence of the injured person in the home;

(ii) for repayment of the cost of any modifications or such part thereof as may have been met by the Corporation, in the event of a breach of an undertaking with respect to the matter referred to in subparagraph (i) or in the event of any other specified contingency; and

(b) may provide for the giving of security, whether by way of a charge on the land in or upon which the home exists or otherwise, to the Corporation in respect of the performance of any such undertaking.

(6) The Corporation may, where there are special circumstances, give a second or subsequent approval under this section in respect of the same home or give an approval under this section In respect of the second or Subsequent home of the same person.

Provision of public housing.

101. The Corporation may negotiate and enter into agreements with the Housing Commission of New South Wales and other public authorities for the provision of housing to injured persons.

Institutional accommodation.

102. (1) Where it is reasonably necessary, due to the injuries sustained by a person as the result of transport accident, for the person to be provided, during a particular period or for an indefinite period, with appropriate institutional accommodation (apart from accommodation and hospital), the Corporation shall provide accommodation of that nature to the person.

(2) A person who is provided with institutional accommodation under this section, other than a person of a prescribed class or description shall pay such amount as may be prescribed as fairly represents the element of board.

Hostels.

103. The Corporation may establish and maintain hostels for persons who are seriously disabled as the result of transport accidents or contribute to the cost of establishing and maintaining any such hostels.

Purchase of vehicle.

104. Where an injured person has, as a consequence of the transport accident no reasonable expectation of being able to obtain finance, or to make satisfactory financial arrangements, for the purchase of a motor vehicle, or of a motor vehicle suitable to the person's needs, the Corporation may, having regard to the resources available to the Corporation, on such terms and conditions as it thinks fit, lend money for, or guarantee any loan for, the purchase of, or meet the whole or part of the cost of, a suitable motor vehicle.

Modifications to vehicle.

105. (1) The Corporation shall approve of reasonable and necessary modifications to a motor vehicle used or to be used by an injured person for the purpose of adapting the vehicle to the functional capability of the person.

(2) In determining, for the purposes of subsection (1), whether any modifications to a motor vehicle used or to be used by an injured person are reasonable and necessary, the Corporation may have regard to -

(a) the cost of any such modifications;

(b) any difficulty faced by the person -

(i) in driving or operating;

(ii) in gaining access to; or

(iii) in enjoying reasonable freedom and safety of movement within the vehicle;

(c) any alternative means of transport available to the person; and

(d) such other matters as the Corporation considers relevant.

(3) The Corporation may, under subsection (1), approve of modifications to a motor vehicle used or to be used by an injured person notwithstanding that the person is not the owner or sole or absolute owner of the vehicle, but no such approval shall be given without the consent of the owner or any joint owner or other interested person, as the case may require.

(4) The Corporation may, where there are special circumstances, give a second or subsequent approval under this section in respect of the same vehicle or give an approval under this section in respect of the second or subsequent vehicle of the same person.

Mobility allowance.

106. (1) Where an injured person is unable, by reason of the transport accident, to use public transport without the assistance of another person, the person is entitled to payment by the Corporation of a mobility allowance of an amount equal to 5 per cent of average weekly earnings per week.

(2) An injured person is not entitled to payment of a mobility allowance under subsection (1) during the period of 6 months after the date of the transport accident unless there are exceptional circumstances which justify the making of the payment.

DIVISION 5. - *Compensation for permanent disability.*

Entitlement to compensation for permanent disability.

107. Subject to this Act, a person who suffers a permanent disability as the result of a transport accident is entitled to compensation by way of a lump sum payment, determined in accordance with this Act, in respect of the disability.

Duty to mitigate.

108. The Corporation in assessing the degree of permanent disability of a person, shall have regard to any unreasonable refusal by the person to undertake rehabilitation or to undergo medical treatment where the undertaking of rehabilitation or the undergoing of medical treatment by the person may have reduced the degree of permanent disability.

Amount of compensation.

109. (1) In this section -

“assessed amount of compensation”, in relation to a person who suffers a permanent disability as the result of a transport accident, means the amount payable to the person under subsection (2);

“prescribed amount of compensation”, in relation to a person who suffers a permanent disability as the result of a transport accident, means the amount of average weekly earnings as at the date of assessment of the disability multiplied by 208.

(2) Subject to subsection (3), the amount of compensation payable to a person who suffers a permanent disability as the result of a transport accident is such percentage of the prescribed amount of compensation as is equal to the degree of permanent disability of the person assessed by the Corporation.

(3) The amount of compensation payable to a person who suffers a permanent disability as the result of a transport accident is, where, as at the date of the accident, the age of the person was -

(a) 25 years or less - 100 per cent of the assessed amount of compensation;

(b) more than 25 years but less than 65 years-100 per cent, less 1 per cent for each year by which the age of the person exceeded 25 years as at that date, of the assessed amount of compensation; and

(c) 65 years or more - 60 per cent of the assessed amount of compensation.

Assessment of degree of permanent disability.

110. (1) The regulations may make provision for or with respect to the basis on which the degree of a permanent disability shall be assesses.

(2) Regulations made for the purposes of subsection (1) may provide for the adoption, wholly or in part and with or without modification of -

(a) the publication entitled “Guides to the Evaluation of Permanent Impairment” published by the American Medical Association;

(b) any adaptation of the publication referred to in paragraph (a) by any government department or instrumentality within Australia; or

(c) any other standard or set of criteria for assessing the degree of a permanent disability published by any person other than the Corporation.

Minimum level of disability.

111. Notwithstanding section 109, where the Corporation assesses the degree of permanent disability of a person as being 4 per cent or less, no compensation in respect of the disability shall be payable to the person.

Total disability.

112. Notwithstanding section 109, where the Corporation assesses the degree of permanent disability of a person as being 90 per cent or more, the person shall be entitled to the Maximum amount of compensation payable under that section in respect of that person.

Time at which determination may be made.

113. (1) Except as provided by subsections (2) and (3), the Corporation shall not make an assessment of the degree of permanent disability of an injured person before the expiration of period of 12 months from the date of the transport accident.

(2) The Corporation shall make an assessment of permanent disability in respect of a person before the expiration of the period referred to in subsection (1) where, before the expiration of that period, the person's disability is stable and permanent.

(3) Where -

(a) a claim for compensation in respect of a permanent disability is made by or on behalf of an injured person;

(b) the person has Suffered a permanent disability as a result of the transport accident; and

(c) the Corporation IS unable, at the time at which the claim is made, to make a final assessment of the degree of the disability,

the Corporation shall make an interim assessment of the degree of the disability and an interim payment of compensation in respect of the disability.

Increase in degree of disability after assessment.

114. Where, after an assessment of the degree of permanent disability of a person has been made by the Corporation under section 113, the degree of permanent disability of the person increases, the Corporation shall make a further assessment of the degree of permanent disability and, in the event that the Corporation determines that there has been such an increase, the person shall be entitled to further compensation, determined in accordance with this Act, in respect of the increase.

Payment of compensation - deceased and unconscious persons.

115. (1) Compensation in respect of a permanent disability suffered by a person as the result of a transport accident shall not be paid or payable -

(a) where the person dies before the person's degree of permanent disability has been assessed by the Corporation or before an amount determined as compensation in respect of the disability has been paid - to any other person; or

(b) where the person -

(i) is permanently unconscious or otherwise totally and permanently unaware of his or her disability; and

(ii) does not have a dependent spouse or a dependent child or children to the person or any other person on behalf of the person.

(2) Where a person who has suffered a permanent disability as the result of a transport accident

(a) is permanently unconscious or otherwise totally and permanently unaware of his or her disability; and

(b) has a dependent spouse or a dependent child or children, or both,

compensation payable in respect of the disability shall be paid to a person as trustee for the disabled person and many at the sole discretion of the trustee, having regard to any possibility that the disabled person will recover consciousness or develop awareness, be applied to the support and maintenance of the spouse, child or children, as the case may be.

DIVISION 6. - *Compensation in respect of death.*

Subdivision 1. - Preliminary

Interpretation.

116. In this Division -

“earning capacity”, in relation to the surviving spouse of a deceased person, means the earning capacity of that surviving spouse determined in accordance with Subdivision 2:

“prescribed child”, in relation to a deceased person, means -

(a) for the purpose of determining the entitlement to compensation under this Division in respect of a child - a child of the deceased person or a child in relation to whom the deceased person stood in loco parentis and -

(i) who, except as provided by subparagraph (ii), had not attained the age of 16 years as at the date of death of the deceased person; or

(ii) who, where the child, as at the date of death of the deceased person, was a full-time student or is physically handicapped or mentally handicapped, had not attained the age of 21 years as at that date,

but does not include such a child who, as at that date, was married or was the de facto partner of another person; and

(b) for the purpose of determining the entitlement to compensation under this Division in respect of a spouse - a child of the deceased person to whom paragraph (a), subparagraph (ii) excepted, applies.

Presumption as to dependence of children.

117. Where a prescribed child was a member of the household of a deceased person as at the date of death of the deceased person, the dependence of the child on the deceased person shall, for the purposes of this Division be conclusively presumed.

Subdivision 2. - Earning capacity of surviving spouse.

Determination of earning capacity.

118. The Corporation shall determine the earning capacity of the surviving spouse of a deceased person in accordance with section 119 or 120.

Actual earnings of surviving spouse.

119. Except as provided by section 120, the earning capacity of the surviving spouse of a deceased person is-

(a) where the surviving spouse is not in receipt of earnings - nil; or

(b) where the surviving spouse is in receipt of earnings-the actual earnings of the surviving spouse assessed from time to time on a weekly basis.

Assumed earnings of surviving spouse.

120. Where -

(a) the surviving spouse of a deceased person is capable of undertaking employment of a kind for which the surviving spouse could reasonably be expected to apply and which is reasonably available to the surviving spouse having regard to the surviving spouse's level of education training and language skills, the surviving spouse's place of residence, whether or not the surviving spouse has the care and control of a prescribed child, whether or not the surviving spouse cares for an aged or disabled member of his or her family or of the deceased person's family, where that care was undertaken as at the date of death of the deceased person, and any relevant matters; or

(b) the surviving spouse -

(i) has declined to undertake vocational training or to enable an assessment to be made of his or her employment prospects;

(ii) has failed to take reasonable measures to obtain employment of a kind which is reasonably available to the surviving spouse having regard to the matters referred to in paragraph (a); or

(iii) has refused an offer of suitable employment;

the earning capacity of the surviving spouse shall be the amount which fairly represents the weekly earnings which could be derived by the surviving spouse.

Notice and effect of certain determinations under s. 120.

121. (1) Where an amount determined under section 120 in relation to the surviving spouse of a deceased person is greater than the amount determined under section 119 in relation to the surviving spouse, the Corporation shall give notice to the surviving spouse of the amount determined under section 120.

(2) An amount determined under section 120 in relation to a surviving spouse of which notice has been given to the surviving spouse under subsection (1) shall, except as provided by subsection (3), be used, after the expiration of 8 weeks from the date of the notice, to the exclusion of any other amount, in determining the earning capacity of the surviving spouse.

(3) The Corporation may specify, in a notice to a surviving spouse under subsection (1), that an amount determined under section 120 in relation to the surviving spouse shall be used -

(a) where the surviving spouse has furnished information to the Corporation knowing it to be false in any material particular or has acted fraudulently immediately; or

(b) where there are other special circumstances - after the expiration of 1 week from the date of the notice,

to the exclusion of any other amount, in determining the earning capacity of the surviving spouse, and the amount so determined shall be used accordingly.

(4) A notice to which subsection (3) applies shall include the reasons which justify the use of the amount determined under section 120 before the expiration of 8 weeks from the date of the notice.

Subdivision 3. - Amount and *payment of compensation.*

Lump sum payment.

122. (1) Subject to subsections (5) and (6), the persons who, as at the date of death of a deceased person, were the dependent members of the family of the deceased person shall be entitled to claim payment from the Corporation of a lump sum to be apportioned between them, which shall not exceed the amount of average weekly earnings as at the date of death of the deceased person multiplied by 130.

(2) The amount of the lump sum payable by the Corporation shall where the claimant is or the claimants include the dependent spouse of the deceased person or a prescribed child of the deceased person who was dependent on the deceased person, be the maximum amount payable under that subsection.

(3) Where there is more than one claimant under subsection (1), the Corporation shall, subject to subsections (4) and (6), apportion the lump sum between the claimants having regard to the degree of dependence upon, or interdependence with, the deceased person on the part of each claimant as at the date of death of the deceased person.

(4) Where the deceased person is survived by-

(a) a dependent spouse or prescribed children who were dependent on the deceased person, or both; and

(b) other dependent members of the family of the deceased person,

the portion of the lump sum payable to the members referred to in paragraph (b) shall not exceed one-third unless, in the opinion of the Corporation, there are exceptional circumstances which Justify payment of a higher proportion.

(5) Where the deceased person is not survived by a dependent spouse or prescribed children who were dependent on the deceased person, or both, but is survived by another dependent member of the family of the deceased person, that member shall not be entitled to payment of any amount by the Corporation unless the Corporation is satisfied that there was a substantial degree of dependence upon, or interdependence with the deceased person on the part of that member.

(6) Where there is more than one dependent member to whom subsection (5) applies, the Corporation shall apportion any amount payable by the Corporation between the members having regard to the degree of dependence upon, or interdependence with the deceased person on the part of each member as at the date of death of the deceased person.

Periodic compensation for prescribed children.

123. (1) Subject to subsection (2) and section 127, a prescribed child of a deceased person who wis dependent on the deceased person shall be entitled to compensation at the rate of 8 per cent of average weekly earnings per week.

(2) Where compensation under this Division is payable only to the prescribed children of i deceased person, the maximum amount of compensation payable to those children shall not exceed 32 per cent of average weekly earnings per week and shall, except in so far as the Corporation otherwise determines, be apportioned equally between those children.

(3) Compensation payable under subsection (1) to a prescribed child shall continue to be so payable until the child -

(a) attains the age of -

(i) in the case of a child other than a child to whom subparagraph (ii) applies - 16 years; or

(ii) in the case of a child who, as at the date of death of the deceased person, was a full-time student or is physically handicapped or mentally handicapped - 21 years;

(b) marries or enters into a de facto relationship;

(c) becomes self-supporting; or

(d) dies,

whichever first occurs.

(4) The entitlement of a prescribed child to compensation payable under subsection (1) shall not be affected by -

(a) any earnings of the child from part-time employment; or

(b) the marriage of or entry into a de facto relationship by the surviving parent of the child who has the care and control of the child.

Periodic compensation for spouses of earners - generally.

124. (1) The surviving spouse of a deceased person who was an earner, being a surviving spouse who -

(a) was a dependent of the deceased person; and

(b) has the care and control of a prescribed child,

shall, irrespective of any earnings of the surviving spouse but subject to section 127, be entitled to compensation at the rate of -

(c) 50 per cent of the earning capacity (after payment of income tax) of the deceased person as at the date of the transport accident, determined in accordance with section 47,48, 50 or 5 1, as the case may require, per week; or

(d) 75 per cent of the equivalent (after payment of income tax) of average weekly earnings per week,

whichever is the lesser.

(2) Compensation payable under subsection (1) to a surviving spouse shall continue to be so payable until -

(a) the expiration of the period of 5 years after the date of death of the deceased person;

(b) the youngest prescribed child in the care and control of the surviving spouse attains the age of 16 years; or

(c) the surviving spouse does not have the care and control of a prescribed child, whichever first occurs.

Periodic compensation for spouses of earners - long-term child-care.

125. (1) Where, at anytime after the expiration of the period of 5 years from the date of death of a deceased person who was an earner, a surviving spouse of the deceased person, being a surviving spouse who was a dependent of the deceased person -

(a) has the care and control of a prescribed child; and

(b) has, at that time, a combined income (not including earnings) and earning capacity (if any) (the resulting amount in this section being referred to as “the prescribed amount”) which is less than the lesser of -

(i) 50 per cent of the earning capacity of the deceased person as at the date of the transport accident determined in accordance with section 47,48, 50, or 51, as the case may require, (as adjusted in accordance with the regulations) per week; or

(ii) 50 per cent of average weekly earnings per week,

the spouse shall, subject to section 127, be entitled to compensation of such amount per week as is equal to -

(c) the difference between the prescribed amount and the amount determined in accordance with paragraph (b)(i); or

(d) 50 per cent of average weekly earnings, whichever is the lesser.

(2) Compensation payable under subsection (1) to a surviving spouse shall continue to be so payable until -

(a) the youngest prescribed child in the care and control of the surviving spouse attains the age of 16 years; or

(b) the surviving spouse does not have the care and control of a prescribed child, whichever first occurs.

Periodic compensation for spouses of earners - health, age, etc., factors.

126. Where, at any time before the expiration of the period of 5 years from the date of death of a deceased person who was an earner -

(a) the earning capacity of a surviving spouse of the deceased person being a surviving spouse who was a dependent of the deceased person, is substantially impaired -

(i) by reason of the poor health, including any physical or mental disability, of the spouse, where that poor health was evident as at that date or within the period of 6 months after that date;

(ii) by reason that the spouse has attained the age of 50 years and lacks marketable work skills; or

(iii) by reason of the need to care for an aged or disabled member of his or her family or of the deceased person's family, where that care was undertaken as at that date; and

(b) the spouse has, at that time, a combined income (not including earnings) and earning capacity (if any) (the resulting amount in this section being referred to as "the prescribed amount") which is less than the lesser of -

(i) 50 per cent of the earning capacity of the deceased as at the date of the transport accident, determined in accordance with section 47, 48, 50 or 51, as the case may require, (as adjusted in accordance with the regulations) per week; or

(ii) 50 per cent of average weekly earnings per week,

the spouse shall subject to section 127, be entitled to compensation of such amount per week as is equal to -

(c) the difference between the prescribed amount and the amount determined in accordance with paragraph (b)(i); or

(d) 50 per cent of average weekly earnings,

whichever is the lesser.

Limitations on amount of compensation.

127. (1) Where compensation under this Division is payable to the surviving spouse of a deceased person in accordance with section 124 and to one or more prescribed children of the deceased person who was or were dependent on the deceased person in accordance with section 123, the maximum amount of compensation payable to the spouse and the child or those children shall not exceed -

(a) 65 per cent of the earning capacity of the deceased person as at the date of the accident, determined in accordance with section 47, 48, 50 or 51, as the case may require, per week; or

(b) 97.5 per cent of average weekly earnings per week,

whichever is the lesser.

(2) Where compensation under this Division is payable to the surviving spouse of a deceased person in accordance with section 125 or 126 and to one or more prescribed children of the deceased person who was or were dependent on the deceased person in accordance with section 123, the maximum amount of compensation payable to the spouse and those children, if any, shall not exceed -

(a) 65 per cent of the earning capacity of the deceased person as at the date of the accident, determined in accordance with section 47, 48, 50 or 5 1, as the case may require, per week; or

(b) 65 per cent of average weekly earnings per week,

whichever is the lesser.

(3) Where the amount of compensation which would otherwise be payable under this Division to the dependents of a deceased person is reduced in accordance with this section, the Corporation shall determine the extent to which the reduction shall be apportioned between those dependents.

Replacement household services.

128. (1) The dependent household family members of a deceased person who, before the may require, per week, or date of the transport accident, performed substantial household services for those members as household family members shall, to such extent if any, as the Corporation shall determine to be necessary for the maintenance and preservation of the household, be entitled to replacement household services.

(2) In making a determination for the purposes of subsection (1) in respect of any period, the Corporation shall have regard to -

(a) the nature and extent of the household services provided by the deceased person before the date of the transport accident;

(b) the number of dependent household family members of the deceased person the ages of those members and their need for household services;

(c) the extent to which other household family members of the deceased person whether dependent members or not, or other persons have provided or could reasonably be expected to provide household services after that date;

(d) any relationship formed with another person by the surviving spouse of the deceased person after the date of death of the deceased person; and

(e) any special factors affecting the need of the dependent household family members of the deceased person for household services.

(3) In making a determination for the purposes of subsection (1) in respect of a period which occurs after the expiration of 4 weeks from the date of death of the deceased person the Corporation, in addition to the matters specified in subsection (2), shall have regard to -

(a) the benefits provided under this Act to household family members of the deceased person as a consequence of the death of the deceased person;

(b) the earnings and other income of the surviving spouse of the deceased person; and

(c) the resources, financial or otherwise, available to the household family members of the deceased person to meet the need for household services.

(4) Except as provided by subsection (5), replacement household services shall not be provided to the dependent household family members of a deceased person after the expiration of the period of 2 years from the date of death of the deceased person

(5) Where replacement household services have been provided under this section to the surviving spouse of a deceased person at any time within the period of 2 years from the date of death of the deceased person and the termination of those household services on the expiration of that period would cause special hardship to the surviving spouse, the Corporation may continue to provide replacement household services for a further period not exceeding 3 years.

Limitation of benefits - time between accident and death.

129. (1) Where the death of a person caused by or arising out of a transport accident occurs within the period of 5 years after the date of the accident, the benefits provided under this Act to the deceased person shall not be set off against any benefits which may be provided under this Act to the dependents of the deceased person.

(2) Where the death of a person caused by or arising out of a transport accident occurs after the expiration of the period of 5 years from the date of the accident no benefits shall be provided under this Act to the dependents of the deceased person.

Deaths in rapid succession.

130. A person who would, but for this section, be entitled to benefits under this Act in respect of the death of a person caused by or arising out of a transport accident shall not be entitled to any such benefits unless the person survives the deceased person for a period of not less than 30 days.

Termination of payments.

131. Compensation payable under this Division to the surviving spouse of a deceased person shall cease to be paid by the Corporation to the surviving spouse -

(a) on the marriage or remarriage of the surviving spouse;

(b) on the entry into a de facto relationship by the surviving spouse; or

(c) on the death of the surviving spouse,

whichever first occurs.

Lump sum payment on remarriage, etc., of surviving spouse.

132. (1) Where the surviving spouse of a deceased person to whom compensation under this Division is being paid marries, remarries or enters into a de facto relationship -

(a) within 4 years of the date of death of the deceased person; or

(b) more than 1 year before the youngest prescribed child of whom the surviving spouse has the care and control attains the age of 16 years,

the surviving spouse shall be entitled to a lump sum payment equal to 12 months instalments of the compensation which the surviving spouse could have expected to have received under this Division had he or she not married, remarried or entered into a de facto relationship.

(2) Where the surviving spouse of a deceased person to whom compensation under this Division is being paid marries, remarries or enters into a de facto relationship -

(a) within the fifth year after the date of death of the deceased person; or

(b) within 1 year before the youngest prescribed child of whom the surviving spouse has the care and control attains the age of 16 years,

the surviving spouse shall be entitled to a lump sum payment equal to the compensation which the surviving spouse could have expected to have received under this Division had he or she not married, remarried or entered into a de facto relationship.

Funeral expenses.

133. The Corporation shall pay the reasonable funeral expenses of a person whose death is caused by or arises out of a transport accident.

DIVISION 7. - *Miscellaneous.*

Non-assignability of benefits.

134. A benefit to which a person is entitled under this act may not be assigned by that person or on that person's behalf to another person.

Effect of pre-accident disability.

135. The amount of a benefit payable under this Act to a person who is incapacitated as the result of a transport accident and who had, before the date of the accident, a disability which did not substantially affect the earning capacity of the person as at that date shall not be reduced by reason of the fact that the disability, but for the accident would or would have been likely to have affected the earning capacity or earning potential of the person after that date.

Effect of post- accident disability.

136. The amount of a benefit payable under this Act to a person who is incapacitated as the result of a transport accident shall not be reduced and payment of the benefit shall not be terminated by reason of the occurrence of an event not caused by or arising out of the accident, which causes further disability or incapacity to the person.

Effect of overseas residence - incapacitated persons.

137. Where a person who is incapacitated as the result of a transport accident takes up residence outside Australia -

(a) any compensation for loss of earning capacity payable to the person in accordance with an assessment under section 84 of permanent incapacity shall continue to be paid by the Corporation in accordance with the assessment;

(b) any compensation for loss of earning capacity (other than compensation referred to in paragraph (a)) payable to the person shall continue to be paid by the Corporation only to such extent as it considers appropriate having regard to -

(i) the person's circumstances;

(ii) the general levels of earnings in the country of residence or proposed residence, and

(iii) the opportunities to verify the continuing extent of the person's loss of earning capacity;

(c) any costs incurred in the provision of rehabilitation services shall continue to be met by the Corporation only to such extent as it considers appropriate having regard to -

(i) the person's needs and circumstances;

(ii) the comparative cost of those services in the country of residence or proposed residence; and

(iii) the opportunities to verify the continuing need of the person for those services; and

(d) the provision of any other benefits under this Act to the person shall be terminated.

Effect of overseas residence - dependents of deceased persons.

138. Where a dependent of a deceased person is resident as at the date of death of the deceased person, or takes up residence after that date, outside Australia -

(a) the residence of the dependent outside Australia shall not affect the payment to the dependent of any amount under section 122, 123 or 124; and

(b) the dependent shall not be entitled to the payment or further payment, as the case may require, of any amount under section 125 or 126.

PART VI - MAKING AND ASSESSMENT OF CLAIMS FOR BENEFITS AND ADMINISTRATION OF PROVISION OF BENEFITS.

Interpretation.

139. In this Part, a reference to a claim for benefits under this Act includes, in relation to a person who is in receipt of benefits under this Act, a reference to a claim for an increase in or variation of those benefits or for additional benefits under this Act.

Making of claims - generally.

140. (1) A person who is entitled to or who is in receipt of benefits under this Act, the Corporation on behalf of such a person, or, subject to the regulations, any other person on behalf of such a person, may make a claim for benefits under this Act.

(2) It shall not be necessary in a claim for benefits under this Act to quantify the amount of benefits sought.

(3) Where a claim is made by or on behalf of a person who is in receipt of benefits under this Act for an increase in or variation of those benefits or for additional benefits under this Act, the claim shall not affect the payment or provision of the benefits received by the person before the making of the claim.

(4) The regulations may make provision for or with respect to the form and manner in which claims may be made.

Time for making of claims.

141. (1) Except as provided by subsections (2) and (3), a claim for benefits under this Act shall be made within 1 year after -

(a) except as provided by paragraph (b) -

(i) the date of the transport accident to which the claim relates; or

(ii) where the onset of symptoms relating to the bodily injury suffered by the injured person as a result of the accident is first observed by a medical practitioner after the date of the accident, the date of the first such observation of the symptoms; or

(b) where the claim is made in respect of the death of a person the date of death.

(2) A claim may, with the leave of the Corporation be made at any time before the expiration of 3 years after the date determined under subsection (1) where the claimant has a reasonable excuse for failing to make the claim within the period referred to in that subsection.

(3) Where, within the period determined under subsection (1) or (2), a claim has been made for benefits under this Act by or on behalf of a person as the result of a transport accident, a claim by or on behalf of the person for an increase in or reduction or variation of those benefits or for any other benefits under this Act to which the person may be entitled as a result of the accident may be made at -any time.

Advice and assistance to claimants.

142. (1) The Corporation shall advise and assist persons in the preparation and making of claims for benefits under this Act and shall endeavour to ensure that those persons are informed of and receive their full entitlement to all benefits under this Act to which they may from time to time be entitled.

(2) Without limiting the generality of subsection (1), the Corporation may pay money out of the Fund to meet the costs and expenses of persons and bodies, approved by the Corporation who act, or who engage persons to act,

as the agents or representatives of persons claiming benefits under this Act and who furnish advice and assistance to those persons.

Investigation and assessment of claims.

143. (1) On receipt of a claim for benefits under this Act, the Corporation -

(a) shall so far as is practicable, arrange for the investigation and assessment of the claim by a sole assessing officer who, subject to the regulations, may do all such things as are necessary to investigate, assess and determine the claim; and

(b) shall ensure that the claim is not dealt with in an adversary manner.

(2) Without limiting the generality of subsection (1)(a), the Corporation or an assessing officer referred to in that paragraph may require the claimant to furnish such information in addition to the information furnished in or with the claim, or to produce such books, documents or records as the Corporation or the assessing officer, as the case may, specifies, or to do both.

Employment information.

144. (1) The Corporation or an assessing officer referred to in section 143 (1) (a) may, by notice in writing, require the employer, or a person who at any time has been the employer, of a claimant to furnish within such period after the date of the notice as is specified in the notice, being a period of not less than 7 days, such information relating to the employment of the claimant with the employer as is specified in the notice, or to produce such books, documents or records relating to the claimant as are so specified, or to do both.

(2) A person who receives a notice under subsection (1) shall comply with the notice within the period specified in the notice.

Medical assessment.

145. (1) The Corporation may require a person by or on whose behalf a claim for benefits under this Act has been made to undergo a medical examination by one or more medical practitioners nominated by the Corporation.

(2) The Corporation may not require a person referred to in subsection (1) to undergo a medical examination that is unreasonable, unnecessarily repetitious or dangerous.

(3) Where the Corporation, as a consequence or partly as a consequence of a medical examination under this section of a person, is of the opinion that the person is not entitled to the benefits under this Act which have been claimed by or on behalf of the person or is entitled to lesser benefits than those which have been claimed or that the benefits received by a person should be reduced or terminated, the Corporation shall furnish to the person a copy of the report of the medical examination.

Determination of claims.

146. The Corporation. in relation to a claim, shall determine -

(a) the extent of entitlement to benefits under this Act; or

(b) in the case of a claim for a variation in the benefits under this Act received by a person whether the variation should be allowed, unconditionally or subject to conditions, or refused.

Payment of periodic compensation.

147. Where a person is entitled to periodic payments of compensation under this Act, the Corporation shall mike those payments to the person -

(a) except where the Corporation has made a determination under paragraph (b), fortnight in arrears; or

(b) at Such periodic intervals as may be determined by the Corporation in any particular case or class of cases.

Payment of lump sums.

148. (1) Where the Corporation determines that a person is entitled to the payment of a lump sum under this Act, the lump sum shall be paid to the person within 30 days after the date of the determination or the date of any assessment required to be made as a consequence of the determination, whichever is the later.

(2) Where a lump Sum referred to in subsection (1) is not paid within the period so referred to, interest shall, on and from the expiration of that period until the date of payment be payable on the lump sum at such rate as may be prescribed for the purposes of this subsection.

Payment or provision of other benefits.

149. Subject to sections 147 and 148, where the Corporation determines that a person is entitled to benefits under this Act or to an increase in or variation of those benefits or to additional benefits under this Act, those benefits or that increase or variation shall as soon as practicable after the determination, be paid or provided to or varied in respect of the person by or on whose behalf the claim was made in accordance with the determination.

Payment of benefits in respect of minors.

150. Where a person to whom a benefit under this Act is to be paid is, at the time at which the payment is to be made, a minor, the payment shall be made to a person as trustee for the minor and may, at the sole discretion of the trustee, be applied to the maintenance, education or advancement in life of the minor.

Effect of failure or refusal to make determination.

151. Where the Corporation has failed or refused to determine -

(a) the entitlement of a claimant to benefits under this Act; or

(b) in the case of a claim for a variation in benefits under this Act, whether the variation should be allowed, unconditionally or subject to conditions, or refused,

within such period after the date on which the claim was made as is prescribed for the purposes of this section, the Corporation shall, for the purposes of section 146, be deemed to have determined, as at the expiration of that period, that the claimant is not entitled to any benefits under this Act or that the variation be refused, as the case may require.

Notice of determination.

156. (1) The Corporation shall give notice of a determination under section 146 to the claimant in respect of whose claim the determination was made within 14 days after the date of the determination.

(2) Where a claim has been allowed in part or has not been allowed or a claim for a variation has not been approved in the terms sought by the claimant, the Corporation shall include in the notice given under subsection (1) of a determination -

(a) a statement setting out its findings on material questions of fact;

(b) a summary of the evidence on which those findings were based; and

(c) the reasons for the determination.

Interim determinations.

153. (1) The Corporation may make an interim determination in respect of a claim for benefits under this Act and may pay or provide those benefits to the person by or on whose behalf the claim was made in accordance with the interim determination.

(2) Where the amount of benefits paid to a person pursuant to an interim determination is greater than or less than the amount of those benefits payable in accordance with a determination under section 146, the Corporation shall make such adjustments as are necessary to give effect to its determination or shall take such steps as may be necessary to recover the amount of any overpayment, as the case may require.

(3) Nothing in subsection (2) requires the Corporation to take steps to recover the amount of any overpayment referred to in that subsection where the person to whom the amount has been paid -

(a) has acted in good faith;

(b) has complied with all such reasonable requirements as may have been made of the person by the Corporation; and

(c) would suffer hardship if he or she were required to repay that amount.

Claims manual.

154. The Corporation shall prepare and publish a detailed claims manual for use by its staff and by members of the public.

False application.

155. A person shall not make a claim for benefits under this act knowing that it is false in any material particular.

Periodic review of benefits.

156. (1) The Corporation shall, in relation to each person who is in receipt of benefits under this Act, review, for the purpose of ensuring that the person receives the full extent of the person's entitlement to benefits under this Act, at such intervals as may be determined by the Corporation, all matters relating to the continuation, increase, reduction or variation of those benefits and the extent of the entitlement to and provision to the person of any other benefits under this Act.

(2) In the exercise of its functions under subsection (1), the Corporation shall have and may exercise in relation to a person who is in receipt of benefits under this Act the same functions as are conferred on the Corporation in relation to a person by or on whose behalf a claim for benefits under this Act is made.

(3) Where -

(a) in the exercise of its functions under subsection (1) the Corporation determines that a person has been paid compensation in excess of that to which the person is entitled; and

(b) the person is entitled to further payments of compensation after the date of the determination,

the Corporation may make such adjustments to those further payments as may be necessary to recover the amount of the excess compensation and as will cause the person to suffer as little hardship as possible in the circumstances of the case.

Redemptions.

157. (1) The Corporation shall not be entitled to redeem, wholly or in part, by the payment of a lump sum, any liability to make periodic payments in respect of benefits under this Act, except in accordance with this section.

(2) Where the Corporation is of the opinion that the amount of the periodic payments it is liable to make to a person in respect of benefits under this Act is so small as to inconvenience unnecessarily or burden the due

administration of the Fund, the Corporation may, with the consent of the person, redeem, by payment of a lump sum its liability to make those periodic payments.

(3) Where -

(a) a person has been paid a lump sum under subsection (2) in respect of compensation for loss of earning capacity; and

(b) the person's capacity for work is, after the date of the payment, significantly reduced,

the person shall be entitled to make an application in accordance with this Act for payment of compensation for loss of earning capacity in respect of the period during which the person's capacity for work is significantly reduced.

(4) The Corporation, in determining an application from a person referred to in subsection (3), shall deduct from any compensation to be paid to the person an amount or amounts which mike appropriate allowance in respect of the lump sum paid to the person.

Notification of change in circumstances.

158. (1) A person who is in receipt of benefits under this Act shall, as soon as practicable after the Occurrence of any change in the person's circumstance s which affects the amount, nature or extent of the benefits under this Act to which the person is entitled or otherwise affects the person's entitlement to benefits under this Act- notify the Corporation of the change.

(2) Where a person to whom subsection (1) applies fails to notify the Corporation as referred to in that subsection, the Corporation may, by notice in writing given to the person, call upon the person to show cause, within 7 days after the date of the notice, why the payment or proposal of benefits under this Act should not be Suspended or terminated in whole or in part.

(3) Where a person to whom a notice is given under subsection (2) fails to show cause as referred to in that subsection, the Corporation may suspend or terminate the payment or provision of benefits under this Act to the person in whole or in part.

Termination of benefits.

159. Where a person who is In receipt of benefits under this Act ceases to be entitled to those benefits, the Corporation shall thereupon terminate the provision of those benefits to the person.

PART VII - APPEALS.

DIVISION 1. - *Compensation Review Panels.*

Interpretation.

160. In this Division, "appeal" means an appeal under section 163.

Establishment of Compensation Review Panels.

161. The Minister may establish one or more Compensation Review Panels.

Members.

162. (1) A Panel shall consist of 3 members appointed by the Minister.

(2) A person appointed under subsection (1) may be appointed as a full-time member or as a part-time member.

(3) Schedule 2 has effect with respect to the members of a Panel.

Appeals.

163. A person who is aggrieved by a determination of the Corporation, or a failure or refusal of the Corporation to make such a determination, which affects the amount, nature or extent of the benefits under this Act to which the person is entitled or otherwise affects the person's entitlement to benefits under this Act, may, in the prescribed manner and form, appeal to a Panel.

Time for making appeals.

164. (1) Except as provided by subsection (2), an appeal against a determination of the Corporation shall be made within the period of 56 days after the date on which notification of the determination is given to the person aggrieved by the determination.

(2) Subject to subsection (3), an appeal may, with the leave of a Panel, be made at any time after the expiration of the period referred to in subsection (1), where the Panel is of the that there are sufficient grounds for allowing the appeal to be so made.

(3) Where the Corporation falls to give notification of a determination of the Corporation to a person affected by the determination, the person may appeal against the determination at any time.

Hearing of appeals.

165. (1) An appeal shall be conducted with as little formality and technicality, and with as much expedition, as fairness to the parties to the appeal, the requirements of this Act and the regulations and the proper consideration of the appeal permit.

(2) In determining an appeal, a Panel is not bound by the rules of evidence but may inform itself of any matter in such manner as it thinks appropriate.

(3) At the hearing of an appeal -

(a) the appellant may appear in person or by a representative (whether or not a legally qualified representative) and has a right to be heard in person or through such a representative;

(b) an officer of the Corporation may, with the leave of the Panel, be heard; and

(c) except where the Panel, with the consent of the appellant otherwise orders, any other person may be present.

(4) Subject to this Division and the regulations, the procedure for the conduct of an appeal shall be as determined by the Panel.

Determination of appeals.

166. (1) A Panel -

(a) where it finds that the Corporation has failed or refused to make, within the time prescribed for the purposes of section 151, a determination under section 146 with respect to an appellant's claim - may determine an appeal by remitting any matter to the Corporation for determination; or

(b) may in any case determine an appeal by making any determination the Corporation might have made under section 146 in respect of the appellants claim for compensation that was the subject of the appeal.

(2) A Panel may, in determining an appeal in the manner provided by subsection (1) (a) -

(a) give such directions, if any, as it thinks fit to the Corporation; and

(b) if it thinks fit, make any determination which the Corporation might have made under section 153.

(3) A Panel shall, within 14 days after the receipt of a request from a party to an appeal which it has determined, provide to the party a written notice of its determination of the appeal and shall include in the notice -

(a) a statement setting out its findings on material questions of fact;

(b) a summary of evidence on which those findings were based; and

(c) the reasons for the determination.

Other powers of Panels.

167. A Panel -

(a) before or during the hearing of an appeal may require the Corporation to produce documents or information which the Panel considers relevant to the appeal;

(b) before determining an appeal, may require the appellant to undergo any medical examination which the Corporation might have required under section 145; and

(c) where it is satisfied in special circumstances that such a determination is

warranted, may, during the hearing of an appeal make any determination the Corporation might have made under section 153.

Costs.

168. (1) The Corporation shall pay -

(a) to a successful appellant; and

(b) to an unsuccessful appellant, where the Panel in special circumstances, being of the opinion that it is just, so orders,

the reasonable costs and expenses incurred by the appellant in bringing the appeal.

(2) The panel shall, subject to the regulations, assess reasonable costs and expenses for the purposes of subsection (1).

(3) The regulations may prescribe maximum amounts of costs payable under subsection (1) in respect of representation by a barrister or solicitor or of costs and expenses so payable in respect of any other matter.

Determinations, etc., of Panels.

169. (1) The Corporation shall do all such matters and things as are necessary to comply with or give effect to any determination direction, requirement or order made or given under this Division by a Panel.

(2) A determination or requirement made under this Division by a Panel, being a determination or requirement of a kind which the Corporation might have made under Part VI, shall, for the purposes of that Part operate as a determination or requirement made under that Part by the Corporation.

(3) Subject to Division 2, a determination made under this Division by a Panel shall be final.

DIVISION 2. - *The Accident Compensation Review Tribunal.*

Interpretation.

170. In this Division -

“appeal” means an appeal under section 172;

“judicial member”, in relation to the Tribunal, means a person appointed in accordance with this Act as a judicial member of the Tribunal and, in relation to the Tribunal as constituted for the purposes of any proceedings, means the judicial member of the Tribunal as so constituted.

The Accident Compensation Review Tribunal.

171. (1) There shall be an Accident Compensation Review Tribunal consisting of -

(a) Judicial members, who may be full-time members or part-time members; and

appointed by the Governor.

(b) non-judicial members, who shall be part-time members,

(2) Schedule 3 has effect with respect to the members of the Tribunal.

Appeals.

172. A person who is aggrieved by a determination under section 166 of a Panel or the Corporation where so aggrieved, may, in the prescribed manner and form, appeal to the Tribunal.

Time for making appeals.

173. (1) Except as provided by subsection (2), an appeal against a determination under section 166 of a Panel shall be made within the period of 90 days after the date on which the determination was made.

(2) An appeal may, with the leave of the Tribunal, be made at any time after the expiration of the period referred to in subsection (1), where the tribunal is of the opinion that there are sufficient grounds for allowing the appeal to be so made.

Hearing of appeals.

174. (1) An appeal shall be conducted with as little formality and technicality, and with as Much expedition. as fairness to the parties to the appeal the requirements bf this Act and the regulations and is the proper consideration of the appeal permit

(2) In determining an appeal, the Tribunal is not bound by the rules of evidence but may inform itself of any matter in such manner as it thinks appropriate.

(3) At the hearing of an appeal -

(a) party to the appeal -

(i) not being the Corporation may appear in person; or

(ii) may in any case appear by a representative (whether or not a legally qualified representative);

and has a right to be heard in person or through such a representative, as the case may be; and

(b) except where the Tribunal otherwise orders, any other person may be present.

(4) Subject to section 175, the decision of the majority of the members constituting the Tribunal for the purpose of hearing an appeal shall be the decision of the Tribunal.

(5) Subject to this Division and the regulations, the procedure for the conduct of an shall be as determined by the Tribunal.

Reference of questions of procedure and law to the Supreme Court, etc.

175. (1) Any question with respect to procedure that arises in proceedings before the Tribunal shall be decided by the judicial member.

(2) Where, in proceedings before the Tribunal, a question arises with respect to a matter of law, the judicial member may decide the question or may refer it to the Supreme Court for decision.

(3) Where a question with respect to a matter of law is referred to the Supreme Court under subsection (2) -

(a) the Tribunal shall not make an order or decision to which the question is relevant until the Supreme Court has decided the question;

(b) upon deciding the question the Supreme Court shall remit its decision to the Tribunal; and

(c) the Tribunal shall not proceed in a manner, or make an order or decision, that is inconsistent with the decision of the Supreme Court.

(4) Where, in proceedings before the Tribunal, the judicial member decides a question with respect to a matter of law, a party to the proceedings who is dissatisfied with the decision may appeal to the Court of Appeal against the decision of the judicial member.

(5) After deciding the question the subject of an appeal under subsection (4), the Court of Appeal may, unless it affirms the decision of the judicial member on the question -

(a) make such order in relation to the proceedings in which the question arose as, in its opinion should have been made by the Tribunal; or

(b) remit its decision on the question to the Tribunal and order a re- hearing of the proceedings before the Tribunal.

(6) Where a re-hearing is held pursuant to an order under subsection (5)(b), the Tribunal shall not proceed in a manner, or make an order or decision, that is inconsistent with the decision of the Court of Appeal remitted to the Tribunal.

(7) Where a party to proceedings before the Tribunal has appealed to the Court of Appeal under subsection (4) against a decision of the judicial member, either the Tribunal or the Court may suspend, until the appeal is determined, the operation of any order or decision made in the proceedings.

(8) Where, under subsection (7), the Tribunal suspends the operation of an order or decision, the Tribunal or the Court of Appeal may terminate the suspension or, where the Court has suspended the operation of an order or decision, the Court may terminate the suspension.

(9) For the purposes of this section, a reference to a matter of law includes a reference to a matter relating to the jurisdiction of the Tribunal and to a matter as to the admission or rejection of evidence.

(10) A reference or appeal under this section shall be made in accordance with rules of the Supreme Court or the Court of Appeal, as the case may require.

Determination of appeals.

176. (1) The Tribunal -

(a) where it finds that the Corporation has failed or refused to make, within the time prescribed for the purposes of section 151, a determination under section 146 with respect to a claim for compensation made by the other party to the appeal - may determine an appeal by remitting any matter to the Corporation for determination, or

(b) may in any case determine an appeal by making any determination the Corporation might have made under section 146 in respect of a claim for compensation that was the subject of the appeal.

(2) The Tribunal may, in determining an appeal in the manner provided by subsection (1)(a) -

(a) give such directions, if any, as it thinks fit to the Corporation; and

(b) if it thinks fit, make any determination which the Corporation might have made under section 153.

(3) The Tribunal shall, within 14 days after the receipt of a request from a party to an appeal which it has determined, provide to the party a written notice of its determination of the appeal and shall include in the notice -

(a) a statement setting out its findings on material questions of fact;

(b) a summary of the evidence on which those findings were based; and

(c) the reasons for the determination.

Power to compel evidence.

177. (1) The Tribunal may of its own motion or on the application of either party to an appeal issue a subpoena under the hand of the judicial member in or to the effect of the prescribed form -

(a) requiring the person to whom the subpoena is addressed to attend as a witness at the appeal; or

(b) requiring the person to whom the subpoena is addressed to attend at the appeal and to produce any documents in the possession or under the control of the person relating to the appeal and specified in the subpoena.

(2) The regulations may make provision for or with respect to authorising compliance with a subpoena to attend and produce documents by the production of the documents at. a place specified in the subpoena at any time before the hearing of the appeal at which the documents are required to be produced.

(3) The judicial member of the Tribunal may administer an oath to any person appearing as a witness before the Tribunal, whether or not in answer to a subpoena, and allow the witness to be examined and cross-examined on oath.

(4) Except with the consent of the person who made the statement, evidence of any statement made, otherwise than in writing, to a Panel shall not be admissible in proceedings before the Tribunal.

(5) Subsection (4) has effect notwithstanding that the statement is included in any written record of a determination of a Panel.

(6) A witness summoned to attend or appearing before the Tribunal has the same protection and, without affecting any penalty that may be imposed pursuant to this Act, is subject to the same liabilities as a witness would have or to which a witness would be subject in proceedings before the District Court.

(7) A person to whom a subpoena is addressed is entitled to receive -

(a) where the subpoena was issued by the Tribunal of its own motion, from the Tribunal; or

(b) where the subpoena was issued by the Tribunal on the application of a person having any matter before the Tribunal, from the person,

his or her reasonable costs, including any loss of earnings, incurred by the person in obeying the subpoena, calculated in accordance with the scales relating to subpoenas issued out of the District Court

(8) A person -

(a) who is served with a subpoena addressed to the person pursuant to subsection (1);

(b) to whom, at the time of service, is tendered an amount that is sufficient to cover the person's travelling and other out-of-pocket expenses in attending the hearing of the Tribunal specified in the subpoena and producing anything required by the subpoena to be produced; and

(c) who, without cause, falls or refuses to obey the subpoena,

is guilty of an offence against this Act.

Other powers of Tribunal.

178. The Tribunal -

(a) before or during the hearing of an appeal may require the Corporation to produce documents or information which the Tribunal considers relevant to the appeal;

(b) before determining an appeal may require a party to the appeal whose claim for compensation is the subject of the appeal to undergo any medical examination which the Corporation might have required under section 145; and

(c) where it is satisfied in special circumstances that such a determination is warranted, may, during the hearing of an appeal make any determination the Corporation might have made under section 153.

Costs.

179. (1) Subject to subsection (2), the Tribunal may make such order as to the payment of costs as it thinks just and may assess the amount of those costs.

(2) The Tribunal shall not order the payment of the Corporation's costs by the other party to an appeal unless it is satisfied that -

(a) the appeal, being an appeal brought by that party, or

(b) that party's claim for compensation which was the subject of the appeal being an appeal brought by the Corporation, was frivolous or vexatious or was made fraudulently or without proper justification.

(3) The Tribunal may from time to time approve, for the purposes of this section, of a scale of costs in respect of representation by a barrister or solicitor or of costs and expenses in respect of any other matter.

Orders, etc., of the Tribunal.

180. (1) The Corporation shall do all such matters and things as are necessary to comply with or give effect to any order, determination, direction or requirement made or given under this Division by the Tribunal.

(2) A determination or requirement made under this Division by the TribunaL being a determination or requirement which the Corporation might have made under Part VI, shall for the purpose of that Part, operate as a determination or requirement made under that Part by the Corporation.

PART VIII - ACCIDENT COMPENSATION POLICY REVIEW COMMITTEE.

Constitution of the Policy Review Committee.

181. (1) There shall be a committee, to be known as the "Accident Compensation Policy Review Committee", which shall consist of persons appointed by the Minister.

(2) Schedule 4 has effect in relation to the constitution and procedure of the Policy Review Committee.

Functions and powers of the Policy Review Committee.

182. (1) The function of the Policy Review Committee shall be to advise the Minister concerning any matter relating to accident compensation.

(2) The Policy Review Committee may investigate, and make recommendations to the Minister concerning -

(a) the operation of this Act and any other legislation;

(b) the general efficiency of the Corporation in dealing with claims made under this act by injured persons and others and with entitlements to benefits under this Act;

(c) the content, manner of formulation and execution of the policy of the Corporation with respect to -

(i) the assessment and payment of claims;

(ii) the periodic or other review of the entitlements of claimants, or the benefits afforded to persons, under this Act; or

(iii) administrative practices or staffing matters or any other matters.

(3) It shall be the duty of the Corporation and the officers and employees of the Corporation fully to co-operate with and to provide every reasonable assistance to, the Policy Review Committee in the exercise of the Committee's functions and, without limiting the generality of the foregoing, to provide such information, and afford such access to claims records or other documents, as the Committee or any member thereof may in that behalf reasonably require.

(4) Any advice or recommendation of the Policy Review Committee under this section shall be reduced to writing and may be tendered to the Minister at any time.

Annual report of the Policy Review Committee.

183. The Policy Review Committee shall prepare an annual report in accordance with the Annual Reports (Statutory Bodies) Act, 1984.

PART IX - MISCELLANEOUS.

Miscellaneous functions of the Corporation.

184. The Corporation -

(a) may devise and, where practicable, institute schemes whereby a person who is incapacitated as the result of a transport accident and whose loss of earning capacity exceeds 150 per cent of average weekly earnings as at the date of the accident may be further compensated;

(b) may devise and, where practicable, institute schemes whereby a person who is incapacitated as the result of a transport accident and who resumes employment for a substantial part of the working week is entitled to receive compensation of an amount in excess of 80 per cent of the person's loss of earning capacity during the period of incapacity;

(c) may negotiate and enter into agreements with employers and insurers and their organisations and representatives with respect to the payment of claims from workers relating to transport accidents arising out of or in the course of workers' employment; and

(d) may negotiate and enter into agreements with persons or bodies exercising similar functions to those of the Corporation in another State -

(i) for the purpose of recoupment or exchange of benefits; or

(ii) in order to give effect to any other form of co-operation necessary for the efficient administration of this Act.

Provision of interpreters.

185. (1) A person who is unable to communicate adequately in English but who is able to communicate adequately in another language shall in relation to any matter before the Corporation, a Panel or the Tribunal, be entitled to be assisted by a competent interpreter.

(2) The cost of any assistance provided under subsection (1) shall be met by the Corporation.

Driving of certain motor vehicles on public streets, etc., prohibited.

186. (1) A person shall not use or cause, or permit or suffer any other person to use, a motor vehicle upon a public street, being a motor vehicle in respect of which the prescribed amount by way of contribution to the Fund has not been paid to the Commissioner for Motor Transport.

(2) A person shall not exercise any function under a licence, permit or other authority which is prescribed for the purposes of section 26(3) unless there has been paid to the person so prescribed in relation to the licence, permit or other authority the prescribed amount by way of contribution to the Fund.

(3) It shall be a sufficient defence in any proceedings for a contravention of subsection (1) if the defendant proves to the satisfaction of the court that at the time the motor vehicle was used upon the public street the defendant had reasonable grounds for believing and did in fact believe that the prescribed amount by way of contribution to the Fund had been paid to the Commissioner for Motor Transport.

(4) It shall be a sufficient defence in any proceedings for a contravention of subsection (2) if the defendant proves to the satisfaction of the court that at the time the function under the licence, permit or other authority was exercised the defendant had reasonable grounds for believing and did in fact believe that there had been paid to the person prescribed for the purposes of section 26(3) in relation to the licence, permit or other authority the prescribed amount by way of contribution to the Fund.

Disclosure of information.

187. A person shall not disclose any information obtained in connection with the administration or execution of this Act (or any other act conferring or imposing functions on the Corporation) unless that disclosure is made -

(a) with the consent of the person from whom the information was obtained;

(b) in connection with the administration or execution of this Act (or any such other Act);

(c) for the purposes of an legal proceedings arising out of this Act (or any such other Act) or of any report of any such proceedings;

(d) in accordance with a requirement imposed under the Ombudsman Act, 1974; or

(e) with other lawful excuse.

Service of documents on the Corporation.

188. (1) A document may be served on the Corporation by leaving it at, or by sending it by post to -

(a) the office of the Corporation; or

(b) if it has more than one office - such of its offices as may be prescribed with respect to the document.

(2) Nothing in subsection (1) affects the operation of any provision of a law or of the rules of a court authorising a document to be served on the Corporation in a manner not provided for by subsection (1).

Service of documents on other persons.

189. (1) Where by or under this Act a notice or other document is required to be, or may be, given to or served on a person other than the Corporation, that notice or other document may be given to or served on -

(a) an individual -

(i) by delivering it to the individual personally;

(ii) by leaving it at the individual's place of residence last known to the person who issued the notice or other document with a person who apparently resides there, being a person who has or apparently has attained the age of 16 years; or

(iii) by sending it by prepaid post addressed to the individual at that place of residence; or

(b) a corporation -

(i) by delivering it to a person who is or apparently is concerned in the management of the corporation;

(ii) by leaving it at the registered office of the corporation with a person apparently employed at that office, being a person who has or apparently has attained the age of 16 years; or

(iii) by sending it by prepaid post addressed to the corporation at that registered office.

(2) A notice or other document that is delivered, left or sent by post in accordance with subsection (1) shall be deemed to have been given or served on its being so delivered or left or, if it is sent by post, shall in the absence of evidence to the contrary, be prima facie deemed to have been given or served when it would have been delivered in the ordinary course of post.

Authentication of certain documents.

190. Every summons, process, demand, order, notice, statement, direction or document requiring authentication by the Corporation may be sufficiently authenticated without the seal of the Corporation if signed by the Chief Executive or by any officer or employee of the Corporation authorised to do so by the Chief Executive.

Proof of certain matters not required.

191. In any legal proceedings, no proof shall be required (until evidence is given to the contrary) of -

(a) the constitution of the Corporation;

(b) any resolution of the Corporation;

(c) the appointment of, or the holding of office by, any member of the Corporation; or

(d) the presence or nature of a quorum at any meeting of the Corporation.

Offences and penalty.

192. (1) A person who contravenes or fails to comply with a provision of this Act is guilty of an offence against this Act.

(2) Any person who is guilty of an offence against this Act for which no penalty is otherwise expressly provided is liable to a penalty not exceeding $2,000.

Proceedings.

193. All proceedings for offences against this Act or the regulations shall be disposed of summarily before a Local Court constituted by a Magistrate sitting alone.

Offences by corporations.

194. (1) Where a corporation contravenes, whether by act of omission, any provision of this Act or the regulations, each person, being a director of the corporation or a person concerned in the management of the corporation shall be deemed to have contravened the same provision unless the person satisfies the court that -

(a) the corporation contravened the provision without the person s knowledge;

(b) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or

(c) the person, being in such a position, used all due diligence to prevent the contravention by the corporation.

(2) A person may be proceeded against and convicted pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted.

(3) Nothing in subsection (1) prejudices or affects any liability imposed by a provision of this Act or the regulations on any corporation by which an offence is actually committed.

Liability.

195. No proceedings shall lie or be allowed by or in favour of any person against -

(a) the Crown, the Minister, the Corporation, a member of the Corporation, a member of the staff of the Corporation, a member of a Panel or a member of the Tribunal; or

(b) any person acting under the direction of the Minister, the Corporation, a Panel or the Tribunal,

in the execution or intended execution of this Act in respect of anything done bona fide under and for the purposes of this Act.

Regulations.

196. (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A regulation may impose a penalty not exceeding $1,000.

(3) A provision of a regulation may-

(a) apply generally or be limited in its application by reference to specified exceptions or factors;

(b) apply differently according to different factors of a specified kind; or

(c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body;

or may do any combination of those things.

SCHEDULE 1.

(Sec 13(3).)

PROVISIONS RELATING TO THE MEMBERS AND PROCEDURE OF THE CORPORATION.

PART 1 - THE MEMBERS OF THE CORPORATION.

Interpretation.

1. In this Schedule -

“Chairperson” means the Chairperson of the Corporation;

“member” means a member of the Corporation;

“part-time member” means a member referred to in section 13(2)(b).

Age of members.

2. (1) A person of or above the age of 65 years is not eligible to be appointed as Chief Executive or to act in the office of Chief Executive.

(2) A person of or above the age of 70 years is not eligible to be appointed as a part-time member or to act in the office of a part-time member.

Chairperson of the Corporation.

3. (1) Of the part-time members, one shall, in and by the relevant instrument of appointment as such a member, or by another instrument executed by the Governor, be appointed as Chairperson of the Corporation.

(2) The Governor may remove a part-time member from the office of Chairperson.

(3) A person who is a part-time member and Chairperson shall be deemed to have vacated office as Chairperson if the person -

(a) is removed from that office by the Governor under subclause (2);

(b) resigns that office by instrument in writing addressed to the Governor; or

(c) ceases to be a part-time member.

Acting members and acting Chairperson.

4. (1) The Governor may, from time to time, appoint a person to act in the office of a member during the illness or absence of the member, and the person, while so acting, shall have and may exercise all the functions of the member.

(2) The Governor may, from time to time, appoint a part-time member to act in the office of Chairperson during the illness or absence of the Chairperson, and the part-time member, while so acting, shall have and may exercise all the functions of the Chairperson.

(3) The Governor may remove any person from any office to which the person was appointed under subclause (1) or (2).

(4) A person while acting in the office of a member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the person.

(5) For the purposes of this clause -

(a) a vacancy in the office of a member or the Chairperson shall be deemed to be an absence from office of the member or Chairperson, as the case may be; and

(b) a member shall be deemed to be absent from office as a member during any period when the member acts in the office of the Chief Executive pursuant to an appointment under subclause (1).

(6) In clause 11 and Part 2 -

(a) a reference to a member includes a reference to a person acting in the office of a member;

(b) a reference to the appointment of a member includes a reference to the appointment of a person to act in the office of a member; and

(c) a reference to the office of a member includes a reference to the office of a person appointed to act in the office of a member.

Terms of office.

5. Subject to this Schedule, a member shall hold office for such period not exceeding 5 years as may be specified in the instrument of appointment of the member, but is eligible (if otherwise qualified for re-appointment.

Chief Executive to be full-time member.

6. The Chief Executive shall devote the whole of his or her time to the duties of the office of Chief Executive, except as permitted by this Act.

Remuneration.

7. (1) The Chief Executive is entitled to be paid -

(a) remuneration in accordance with the Statutory and Other Offices Remuneration Act, 1975; and

(b) such travelling and Subsistence allowances as the Minister may from time to time determine in respect of the Chief Executive.

(2) A part-time member is entitled to be paid Such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the part-time member.

Filling of vacancy in office of member.

8. In the event of the office of any member becoming vacant a person shall subject to this Act, be appointed to fill the vacancy.

Casual vacancies.

9. (1) A member shall be deemed to have vacated office if the member -

(a) dies;

(b) being Chief Executive, absents himself or herself from duty for 14 days (whether or not wholly or partly consecutive) in any period of 12 months, except on leave granted by the Minister (which leave the Minister is hereby authorised to grant), unless the absence is occasioned by illness or other unavoidable cause;

(c) being a part-time member, absents himself or herself from 4 consecutive meetings of the Corporation of which reasonable notice has been given to the member personally or in the ordinary course of post, except on leave granted by the Minister (which leave the Minister is hereby authorised to grant) or unless, before the expiration of 4 weeks after the last of those meetings, the member is excused by the Minister for being absent from those meetings;

(d) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;

(e) becomes a temporary patient a continued treatment patient a protected person or in incapable person within the meaning of the Mental Health Act, 1958, or a person under detention under Part VII of that Act;

(f) is convicted in New South Wales of an offence which is punishable by imprisonment for 12 months or upwards, or is convicted elsewhere than in New South Wales of an offence which if committed in New South Wales would be an offence so punishable;

(g) being Chief Executive engages in any paid employment outside the duties of the office of Chief Executive, except with the consent of the Minister (which consent the Minister is hereby authorised to give);

(h) resigns the office by instrument in writing addressed to the Governor;

(i) being -

(i) Chief Executive, attains the age of 65 years; or

(ii) a part-time member, attains the age of 70 years;

(j) is retired from office by the Governor under subclause (2); or

(k) is removed from office by the Governor under subclause (3), (4) or (5).

(2) The Chief Executive may, after attaining the age of 60 years and before attaining the age of 65 years, be retired from office by the Governor and, if so retired, is entitled to such compensation (if any) as the Statutory and Other Offices Remuneration Tribunal determines.

(3) The Governor may remove the Chief Executive from office for incapacity, incompetence or misbehaviour.

(4) The Governor may remove a part-time member from office.

(5) Without affecting the generality of subclauses (3) and (4), the Governor may remove from office a member who contravenes the provisions of clause 10.

Disclosure of pecuniary interests.

10. (1) A member who has a direct or indirect pecuniary interest -

(a) in a matter that is being considered, or is about to be considered, at a meeting of the Corporation; or

(b) in a thing being done or about to be done by the Corporation;

shall, as soon as possible after the relevant facts have come to the members knowledge, disclose the nature of the interest at a meeting of the Corporation.

(2) A disclosure by a member at a meeting of the Corporation that the member -

(a) is a member, or is in the employment, of a specified company or other body;

(b) is a partner or is in the employment of a specified person; or

(c) has some other specified interest relating to a specified company or other body or a specified person,

shall be deemed to be a sufficient disclosure of the nature of the interest in any matter or thing relating to that company or other body or to that person which may arise after the date of the disclosure.

(3) The Corporation shall cause particulars of any disclosure made under subclause (1) or (2) to be recorded in a book kept for the purpose and that book shall be open at all reasonable hours to the inspection of any person on payment of such fee as may be determined by the Corporation from time to time.

(4) After a member has, or is deemed to have, disclosed the nature of an interest in any matter or thing pursuant to subclause (1) or (2), the member shall not, unless the Minister otherwise determines -

(a) be present during any deliberation of the Corporation, or take part in any decision of the Corporation, with respect to that matter, or

(b) exercise any functions under this Act with respect to that thing, as the case may require.

(5) Notwithstanding that a member contravenes the provisions of this clause, that contravention does not invalidate any decision of the Corporation or the exercise of any function under this Act.

(6) Nothing in this clause applies to or in respect of an interest of a member in a matter or thing which arises by reason only that the member has a prescribed qualification or occupies a prescribed position.

(7) A reference in this clause to a meeting of the Corporation includes a reference to a meeting of a committee of the Corporation.

Effect of certain other Acts.

11. (1) The Public Service Act, 1979, does not apply to or in respect of the appointment of a member and a member is not, as a member, subject to that Act.

(2) Where by or under any other Act provision is made requiring a person who is the holder of an office specified therein to devote the whole of his or her time to the duties of that office, or prohibiting the person from engaging in employment outside the duties of that office, that provision shall not operate to disqualify the person from holding that office and also the office of a part-time member or from accepting and retaining any remuneration payable to the person under this Act as a part-time member.

Preservation of rights of Chief Executive previously public servant, etc.

12. (1) In this clause -

“statutory body” means any body declared under clause 14 to be a statutory body for the purposes of this Schedule,

“superannuation scheme” means a scheme, fund or arrangement under which any superannuation or retirement benefits are provided and which is established by or under any Act.

(2) Subject to subclause (3) and to the terms of appointment, where the Chief Executive was, immediately before being appointed as Chief Executive -

(a) an officer of the Public Service or a Teaching Service;

(b) a contributor to a superannuation scheme;

(c) an officer employed by a statutory body, or

(d) a person in respect of whom provision was made by any act for the retention of any rights accrued or accruing to the person as an officer or employee,

he or she -

(e) shall retain any rights accrued or accruing to him or her as such an officer, contributor or person,

(f) may continue to contribute to any superannuation scheme. to which he or she was a contributor immediately before being appointed as Chief Executive; and

(g) shall be entitled to receive any deferred or extended leave and any payment, pension or gratuity,

as if he or she had continued to be such an officer, contributor or person during his or her service as chief Executive and -

(h) his or her service as Chief Executive shall be deemed to be service as an officer or employee for the purpose of any law under which those rights accrued or were accruing, under which he or she continues to contribute or by which that entitlement is conferred; and

(i) he or she shall be deemed to be an officer or employee, and the Corporation shall be deemed to be the employer, for the purposes of the superannuation scheme to which he or she is entitled to contribute under this clause.

(3) If the Chief Executive would, but for this subclause, be entitled under subclause (2) to contribute to a Superannuation scheme or to receive any payment, pension or gratuity under the scheme, he or she shall not be so entitled upon becoming (whether upon appointment as Chief Executive or at any later time while holding office as Chief Executive) a contributor to any other superannuation scheme, and the provisions of subclause (2) (i) cease to apply to or in respect of him or her and the Corporation in any case where he or she becomes a contributor to and such other Superannuation scheme.

(4) Subclause (3) does not prevent the payment to the Chief Executive upon his or her ceasing to be a contributor to a superannuation scheme of such amount as would have been payable to him or her if he or she had ceased, by reason of resignation, to be an officer or employee for the purposes of the scheme.

(5) The Chief Executive shall not, in respect of the same period of service, be entitled to claim benefit under this Act and another Act.

Chief Executive entitled to re-appointment to former employment in certain cases.

13. (1) In this clause, “statutory body” means any body declared under clause 14 to be a statutory body for the purposes of this Schedule.

(2) A person who -

(a) ceases to be Chief Executive by reason of the expiration of the period for which the person was appointed or by reason of resignation;

(b) was, immediately before being appointed as Chief Executive -

(i) an officer of the Public Service or a Teaching Service; or

(ii) an officer or employee of a statutory body; and

(c) has not attained the age at which the person would have been entitled to retire had the person continued to be such an officer or employee,

shall be entitled to be appointed to some position in the Public Service, the Teaching Service or the service of that statutory body, as the case may be, not lower in classification and salary than that which the person held immediately before being appointed as Chief Executive.

(3) Where subclause (2) does not apply to a person who -

(a) was,immediatelybeforebeingappointedtoafull-timeofficeconstitutedby an Act, an officer or employee referred to in subclause (2) (b); and

(b) is after that appointment appointed as Chief Executive,

the person shall have such rights (if any) to appointment as such an officer or employee, in the event of ceasing to be Chief Executive, as are specified in the instrument of appointment as Chief Executive or as are agreed upon by the person and by or on behalf of the Government.

Declaration of statutory bodies.

14. The Governor may, by proclamation published in the Gazette, declare any body constituted by or under any Act to be a statutory body for the purposes of this Schedule.

PART 2 - THE PROCEDURE OF THE CORPORATION.

General procedure.

15. The procedure for the calling of meetings of the Corporation and for the conduct of business at those meetings shall, subject to this Part, be as determined by the Corporation.

Quorum.

16. Three members, of whom one shall be the Chief Executive, shall form a quorum and any duly convened meeting of the Corporation at which a quorum is present shall be competent to transact any business of the Corporation and shall have and may exercise all the functions of the Corporation.

Presiding member.

17. (1) The Chairperson or, in the absence of the Chairperson, another part-time member elected as Chairperson for the meeting by the members present shall preside at a meeting of the Corporation.

(2) The person acting as Chairperson at any meeting of the Corporation shall have a deliberative vote and, in the event of an equality of votes, shall have a second or casting vote.

Voting.

18. A decision supported by a majority of the votes cast at a meeting of the Corporation at which a quorum is present shall be the decision of the Corporation.

Minutes.

19. The Corporation shall cause full and accurate minutes to be kept of the proceedings of each meeting of the Corporation.

First meeting of Corporation.

20. The Minister shall call the first meeting of the Corporation in such manner as the Minister thinks fit.

SCHEDULE 2.

(Sec. 162(3).)

PROVISIONS RELATING TO THE MEMBERS OF A PANEL

Interpretation.

1. In this Schedule, “member” means a member of a Panel.

Age of members.

2. A person of or above the age of 70 years is not eligible for appointment as a member.

Qualifications.

3. (1) Of the members -

(a) one shall be a barrister admitted by the Supreme Court or a solicitor of that Court and shall, in and by the instrument by which the member is appointed, be appointed as Chairperson of the Panel; and

(b) the other 2 shall be persons having, in the opinion of the Minister, suitable qualifications or experience.

(2) A member or an officer of the Corporation shall not be eligible for appointment as a member.

Acting members and acting Chairperson.

4. (1) The Minister may, from time to time, appoint a person to act in the office of a member during the illness or absence of the member, and the person, while so acting, shall have and may exercise all the functions of the member.

(2) The Minister may, from time to time, appoint a person qualified for appointment as Chairperson of a Panel to act in the office of Chairperson of a Panel during the illness or absence of such a Chairperson, and the member, while so acting, shall have and may exercise all the functions of the Chairperson.

(3) The Minister may remove any person from any office to which the person was appointed under subclause (1) or (2).

(4) A person while acting in the office of a member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the person.

(5) For the purposes of this clause, a vacancy in the office of a member or the chairperson of a Panel shall be deemed to be an absence from office of the member or chairperson, as the case may be.

Term of office.

5. Subject to this Schedule, a member shall hold office for such period not exceeding 5 years as may be specified in the instrument of appointment of the member, but is eligible (if otherwise qualified) for re-appointment.

Remuneration.

6. A member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

Filling of vacancy in office of member.

7. In the event of the office of any member becoming vacant a person shall subject to this Act, be appointed to fill the vacancy.

Casual vacancies.

8. (1) A member shall be deemed to have vacated office if the member -

(a) dies;

(b) being a full-time member, absents himself or herself from duty for 14 days (whether or not wholly or partly consecutive) in any period of 12 months, except on leave granted by the Minister (which leave the Minister is hereby authorised to grant), unless the absence is occasioned by illness or other unavoidable cause;

(c) becomes bankrupt, applies. to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;

(d) becomes a temporary patient, a continued treatment patient, a protected person or an incapable person within the meaning of the Mental Health Act, 1958, or a person under detention under Part VII of that Act;

(e) is convicted in New South Wales of an offence which is punishable by imprisonment for 12 months or upwards, or is convicted elsewhere than in New South Wales of an offence which if committed in New South Wales would be an offence so punishable;

(f) resigns the office by instrument in writing addressed to the Minister;

(g) attains the age of 70 years; or

(h) is removed from office by the Minister under subclause (2).

(2) The Minister may at any time, for such reason as appears to the Minister sufficient, remove a member from office.

Effect of certain other Acts.

9. (1) The Public Service Act, 1979, does not apply to or in respect of the appointment of a member and a member is not, as a member, subject to that Act.

(2) The office of a member shall for the purposes of any act be deemed not to be an office or place of profit under the Crown.

Liability of members, etc.

10. No matter or thing done by a Panel, and no matter or thing done by any member or by any person acting under the direction of the Panel shall, if the matter or thing was done bona fide for the purpose of executing this or any other Act, subject a member or a person so acting personally to any action, liability, claim or demand whatever.

SCHEDULE 3.

(Sec. 171(2).)

PROVISIONS RELATING TO THE MEMBERS OF THE TRIBUNAL

Interpretation.

1. In this Schedule -

“judicial member” means a judicial member of the Tribunal and includes the senior judicial member;

“member” means a judicial member or other member of the Tribunal;

“senior judicial member” means the senior judicial member of the Tribunal.

Age of members.

2. A person of or above the age of 70 years is not eligible to be appointed as a member or to act in the office of a member.

Term of office.

3. Subject to this Schedule, a member shall hold office for such period not exceeding 7 years as may be specified in the instrument of appointment of the member, but is eligible (if otherwise qualified) for re-appointment.

Eligibility of appointment to Tribunal.

4. (1) A judicial member shall be or shall have been a judge of the District Court of New South Wales or a person holding a judicial office having the status of a judge of that Court.

(2) Where, upon the appointment of a person as a part-time judicial member, the person is a judge, or the holder of an office, referred to in subclause (1), the appointment shall not, nor shall the person's service as a part-time judicial member, affect the person's tenure of office as such a judge or as the holder of any such office or any rank, title, status, precedence, salary or other rights or privileges of the person by reason of being such a judge or the holder of such an office.

(3) A person who is -

(a) a member of the Legislative Council or the Legislative Assembly or a member of a House of Parliament of another State or of the Commonwealth;

(b) a member or officer of the Corporation; or

(c) a member of a Panel,

is not eligible to be a member.

Senior judicial member.

5. One of the judicial members shall in and by the instrument of the member's appointment or by another instrument executed by the Governor, be appointed as the senior judicial member.

Acting member.

6. (1) The Minister may at any time appoint a person qualified for appointment as a judicial member -

(a) to act as the senior judicial member; or

(b) to act as a judicial member other than the senior judicial member;

during the absence or illness of the senior judicial member, as the case may be.

(2) The Minister may at any time appoint a person qualified for appointment as a member to act as a member, not being a Judicial member.

(3) Where a judicial member is appointed, under subclause (1), to act as the senior judicial member, the member so acting shall be deemed, for the purposes of that subclause, to be absent while so acting.

(4) A person appointed under this section shall have and may exercise, while acting under the appointment, the functions of the member for whom the person is acting.

(5) A person appointed under this section is entitled to such remuneration, including travelling and subsistence allowances (in addition to that, if any, to which the person is otherwise entitled under this or any other Act), for so acting as the Minister may determine in respect of the person.

Remuneration.

7. (1) A full-time member is entitled to be paid -

(a) remuneration in accordance with the Statutory and Other Offices Remuneration Act, 1975; and

(b) such travelling and subsistence allowances as the Minister may from time to time determine in respect of the member.

(2) A part-time member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

Filling of vacancy in office of member.

8. In the event of the office of any member becoming vacant a person shalt subject to this Act, be appointed to fill the vacancy.

Casual vacancies.

9. (1) A member shall be deemed to have vacated office if the member -

(a) dies;

(b) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;

(c) becomes a temporary patient, a continued treatment patient, a protected person or an incapable person within the meaning of the Mental Health Act, 1958, or a person under detention under Part VII of that Act;

(d) is unavailable for duty for a period exceeding 28 days except on leave granted, by the Minister(which leave the Minister is hereby authorised to grant), unless the member's unavailability is occasioned by illness or other unavoidable cause;

(e) is nominated for election as a member of the Legislative Council or the Legislative Assembly or a member of a House of Parliament of another State or of the Commonwealth;

(f) is convicted in New South Wales of an offence which is punishable by imprisonment for 12 months or upwards, or is convicted elsewhere than in New South Wales of an offence which if committed in New South Wales would be an offence so punishable;

(g) attains the age of 70 years;

(h) resigns the office in writing addressed to the Governor; or

(i) is removed from office under subclause (2) or (3).

(2) A judicial member may be removed from office in the same manner as a judge of the District Court may be removed from office.

(3) The Governor may for any reason which to the Governor seems sufficient remove any non-judicial member from office.

Constitution of the Tribunal.

10. (1) The Tribunal shall for the purposes of any proceedings before it, be constituted by 3 members comprising -

(a) a judicial member, who shall preside at the proceedings; and

(b) 2 members, being non-judicial members;

selected by the senior judicial member.

(2) In proceedings by or against the Tribunal, no proof shall be required (until evidence is given to the contrary) of -

(a) the constitution of the Tribunal; or

(b) the selection of any member of the Tribunal.

Effect of certain other Acts.

11. (1) The Public Service Act, 1979, does not apply to or in respect of the appointment of a member and a member is not, as a member, subject to that Act.

(2) Where by or under any other Act provision is made requiring a person who is the holder of an office specified therein to devote the whole of his or her time to the duties of that office, or prohibiting the person from engaging in employment outside the duties of that office, that provision shall not operate to disqualify the person from holding that office and also the office of a part-time member or from accepting and retaining any remuneration payable to the person under this Act as a part-time member.

Liability of members, etc.

12. No matter or thing done by the Tribunal, and no matter or thing done by any member or by any person acting under the direction of the Tribunal shall if the matter or thing was done bona fide for the purpose of executing this or any other Act, subject a member or a person so acting personally to any action, liability claim or demand whatever.

SCHEDULE 4.

(Sec 181(2).)

PROVISIONS RELATING TO THE CONSTITUTION AND PROCEDURE OF THE POLICY REVIEW COMMITTEE.

Members of Policy Review Committee.

1. (1) The Policy Review Committee shall consist of such number of part-time members as shall be determined by the Minister.

(2) The members of the Policy Committee shall be appointed by the Minister and shall comprise experts in the field of accident compensation and representatives from groups or organisations with a recognised interest in that field.

Procedure at meetings of Policy Review Committee.

2. (1) The procedure for the calling of meetings of the Policy Review Committee and for the conduct of business at those meetings shall subject to this Schedule, be as determined by the Policy Review Committee.

(2) The Minister shall call the first meeting of the Policy Review Committee in such manner as the Minister thinks fit.

(3) One half of the members of the Policy Review Committee for the time being shall constitute a quorum for the purpose of meetings of the Policy Review Committee.

(4) The person acting as Chairperson at any meeting of the Policy Review Committee shall, in the event of an equality of votes, have in addition to a deliberative vote a second or casting vote.

(5) A decision supported by a majority of the votes cast at a meeting of the Policy Review Committee at which a quorum is present shall be the decision of the Policy Review Committee.

Chairperson of the Policy Review Committee.

3. (1) Of the members, one shall, in and by the relevant instrument of appointment as such a member, or by another instrument executed by the Minister, be appointed as Chairperson of the Policy Review Committee.

(2) The Minister may at any time remove a member from the office of Chairperson.

(3) A person who is a member and Chairperson shall be deemed to have vacated office as Chairperson if the person -

(a) is removed from that office by the Minister under subclause (2);

(b) resigns that office by instrument in writing addressed to the Minister; or

(c) ceases to be a member.

Acting members and acting Chairperson.

4. (1) The Minister may, from time to time, appoint a person to act in the office of a member during illness or absence of the member, and the person, while so acting, shall have and may exercise ill the functions of the member.

(2) The Minister may, from time to time, appoint a member to act in the office of the Chairperson during illness or absence of the Chairperson, and the member, while so acting, shall have and may exercise all the functions of the Chairperson.

(3) The Minister may remove any person from any office to which the person was appointed under Subclause (1) or (2).

(4) A person while acting in the office of a member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the person.

(5) For the purposes of this clause, a vacancy in the office of a member or the Chairperson shall be deemed to be an absence from office of the member or Chairperson, as the case may be.

Remuneration.

5. A member is entitled to be paid such remuneration (including traveling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

Filling of vacancy in office of Chairperson or member.

6. In the event of the office of the Chairperson or any member becoming vacant a person shall, subject to this Act, be appointed to fill the vacancy.

Casual vacancies.

7. (1) A member shall be deemed to have vacated office if the member -

(a) dies;

(b) absents himself or herself from 4 consecutive meetings of the Policy Review Committee of which reasonable notice has been given to the member personally or in the ordinary course of post, except on leave granted by the Minister (which leave the Minister is hereby authorised to grant) or unless, before the expiration of 4 weeks after the last of those meetings, the member is excused by the Minister for being absent from those meetings;

(c) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefits;

(d) becomes a temporary patient, a continued treatment patient, a protected person or an incapable person within the meaning of the Mental Health Act, 1958, or a person under detention under Part VII of that Act;

(e) is convicted in New South Wales of an offence which is punishable by imprisonment for 12 months or upwards, or is convicted elsewhere than in New South Wales of an offence which if committed in New South Wales would be an offence so punishable;

(f) resigns the office by instrument in writing addressed to the Minister; or

(g) is removed from office by the Minister under subclause (2).

(2) The Minister may remove a member from office.

NOTE

The enactment of this Bill will necessitate -

(a) the consequential amendment of various Acts such as the Annual Reports (Statutory Bodies) Act, 1984, the Government Insurance Act, 1927, the Motor Vehicles (Third Party Insurance) Act, 1942, the Public Finance and Audit Act, 1983, and the Statutory and Other Offices Remuneration Act, 1975; and

(b) the enactment of appropriate savings and transitional provisions.

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

Appendix A - The New South Wales Community and Transport Accident Victims - Some Statistics

I. INTRODUCTION

A.1 In Chapter 1, we outlined three Commission case study projects, which provided information on the current compensation system for transport accident victims. [1] While these were very useful, we required further statistical information to formulate new compensation directions. In this Appendix, we present some of the information on the New South Wales community, which has assisted us in making recommendations for a Transport Accidents Scheme for New South Wales. We also examine some of the statistical material available on a transport accident victims, particularly in New South Wales. Other information is presented in the appendices to the Actuary's Report, which can be obtained separately from the Commission.

II. THE NEW SOUTH WALES COMMUNITY

A.2 The nationwide Census carried out on 30 June 1981 produced information concerning the population of New South Wales. Table A.1 summarises basic information on the Population of New South Wales at the Census date.

Table A.1: Population Census: Age and Gender

New South Wales 1981

Age Group	Males	Females	% of Persons
0-14	641,621	613,099	24.5
15-19	220,763	220,243	8.4
20-24	218,159	213,776	8.4
25-34	414,169	411,857	16.1
35-44	126,803	313,826	12.5
45-54	273,236	261,347	10.4
55-64	238,286	250,237	9.5
65 and Over	215,747	303,848	10.1
TOTAL	**2,548,984**	**2,577,23 3**	**100.0**

Source: Australian Bureau of Statistics, 1981 *Census of Population and Housing-Census Statement* (4 October 1982), p.2, table 7.

A.3 The Census also emphasised the multicultural nature of the New South Wales community, a factor of some significance to the administrators of a new compensation scheme. Approximately 20 per cent of the population was born overseas. [2] While many of these people came from English speaking countries, [3] a substantial proportion used other languages. [4] Of those people aged five years or more who were born overseas, more than 10 per cent did not speak English well or at all. [5]

A.4 The Census also collected information on both families and households. While families could consist of one person, [6] they are generally

> ... defined on the basis of blood and marriage (including *de facto)* relationship, and are largely based on the nuclear (immediate) family. [7]

Households [8] can consist of one person or several individuals who are not a family, one or more families or one family and non-family members (who are at least 16 years of age). [9] More than one household can live in one house. [10] There was no separate category for de facto relationships. Their classification as a family or not depended upon the stated relationship between the partners. [11]

A.5 The following Table shows the family types of the New South Wales population on 30 June 1981. In the calculation of families in each group, we have excluded single people and non- family groups. [12]

Table A.2: Population Census: Family Type

New South Wales 1981

Family Type	% of Population	% of Families
Head, Spouse and Dependants	38.1	36.3
Head and Spouse only	14.8	28.9
Head and Dependants only	4.8	6.8
Other Family Groups	26.7	28.0
		100.0
Head only	8.0	
Non-Family Groups	7.6	
	100.0	

Source: Australian Bureau of Statistics, *1981 Census of Population and Housing - Census Statement* 4 (October 1982), sheet 2, table 9.

A.6 The vast majority of households in New South Wales consisted of only one family (97 per cent). [13] In the context of the Census, of course, the term “family” includes those living alone. A more conventional definition of “family” was used in a special survey into the labour force status and other characteristics of families. [14] This showed that of all people aged 15 years or more in New South Wales, [15] 85 per cent lived as family members, 12 per cent lived alone while the remaining 3 per cent did not live alone or in a family. [16] Of those people who were either spouses or unmarried family heads almost 53 per cent had dependent children present. [17]

A.7 Table A.3 gives the marital status at the date of Census of the New South Wales population aged 15 years or over.

Table A.3: Population Census: Marital Status

New South Wales 1981

Marital Status and Gender		15-19	20-24	25-64	65 +	All ages
				Percentage in each age group		
Never Married	M	99.4	78.8	14.9	7.3	31.2
	F	95.9	55.9	8.3	8.1	22.8
Now Married	M	0.5	19.8	75.9	71.5	60.3
	F	3.9	40.2	76.2	35.9	58.3
Separated but not divorced	M	0	0.9	3.0	2.2	2.3
	F	0.1	2.4	3.5	1.4	2.7
Divorced	M		0.4	4.9	2.9	3.6
	F		1.4	6.3	2.5	4.5
Widowed	M			1.3	16.1	2.7
	F		0.2	5.7	52.0	11.6

Indicates less than 0.1 per cent after rounding.

Source: Australian Bureau of Statistics, *Census 81 - Cross-classified Characteristics of Persons and Dwellings,* 15 August 1983, Cat. No. 2444.0, p.81, table 43.

When we examine age and gender of transport accident victims, particularly those who are killed, the figures in Table A.3 shed light on their likely marital status and, therefore, financial interdependence with others.

A.8 Rates of marriage of widowed people are also relevant in considering the approach to compensation in respect of death.

Table A.4: Widowed People: Rates of Marriage

New South Wales 1981

Age Group	Male	Female
	per thousand widowed people	
15-19	0	28
20-24	38	76
25-34	124	84
35-44	89	42

45-54	64	19
55-64	36	7
65 +	9	1
ALL AGES	**22**	**6**

Source: Collation of data from Australian Bureau of Statistics, *Marriages, New South Wales* 1981, Cat No. 3305.1, p.5, table 6 and Australian Bureau of Statistics, 1981 *Census of Population and Housing - Cross-Classified Characteristics of Persons and Dwellings,* 15 August 1983, Cat No. 2444.0, p.81, table 43.

It can be seen from this Table that young widows have a relatively high rate of remarriage, but generally the widows' rate of remarriage is considerably lower than that of the widowers. Overall the remarriage rate of widowers is more than three times that of widows.

III. TRENDS IN THE LABOUR FORCE

A. Introduction

A.9 Because the Transport Accidents Scheme selects an earnings-related base for Compensation in respect of lost earning capacity, information on the workforce status and income of the New South Wales population is important. The concept of workforce attachment for compensation purposes should also adequately reflect the reality of people's working lives. This means among other things, taking account of rates of unemployment, duration of unemployment and the extent to which people move in and out of the labour force. Longer-term trends in labour force participation and in lifetime patterns of work are also important.

A.10 A useful starting point is the labour force status of the New South Wales population. [18] Less than half of the population is in the labour force, with the largest proportion of these being wage and salary earners (81 per cent of the labour force). While a significant proportion of the population is aged 15 years or more and is not in the labour force, quite a number of these are likely to be students, either still at school or in tertiary education.

Table A.5: Population Census: Labour Force Status

New South Wales 1981

Labour Force Status	**Percentage of Population**
Wage or salary earner	37.4
Self-employed	3.6
Employer	2.1
Unpaid Family Helper	0.4
Unemployed	2.6
TOTAL LABOUR FORCE	**46.2**
Under 15, not in labour force	24.5

15 and over, not in labour force	29.4
TOTAL NOT IN LABOUR FORCE	**53.8**

Source: Australian Bureau of Statistics, *1981 Census of Population and Housing-Census Statement* 4 (October 1982), sheet 5, table 19.

A.11 The Census also collected information from all people aged 15 years or more on their income. [19] "Income" for the purposes of the Census was income from all sources including wages, or similar earnings, welfare benefits, family allowances, tips, gratuities and superannuation. It was also intended to be a gross figure, with tax, superannuation and health insurance not being deducted. [20] Of those responding to the income question [21] 14 per cent stated they had no income. Nearly 85 per cent [22] of those who stated they had some income received total income of less than the 1981 equivalent of AWE. [23]

A.12 At the time of the 1981 Census, only 4 per cent [24] of the New South Wales population who disclosed any income would have received income above the proposed new ceiling of the scheme of 150 per cent of AWE. The accuracy of this estimate is, of course, subject to several limitations. A significant proportion of the population aged 15 years or more did not state any income. While the Bureau-of Statistics stated that it was likely from previous Census Content Checks that non- respondents were low income earners, there may still be a number of high income earners in this pool who are not included in these figures. [25] The Census Content Checks had also revealed that a significant proportion of people had disclosed their net income rather than gross, [26] so that a larger proportion of the population would fall outside the ceiling using gross income figures. There is also the possibility of deliberate under-reporting of income for other reasons, such as fear of disclosure to taxation agencies. To be weighed against these possibilities for under-recording of income levels, is the fact that it includes income from all sources, not just earnings in the sense relevant for receipt of compensation.

B. Composition of the Labour Force

A.13 Table A.6 gives more detailed information on the labour force.

Table A.6: Labour Force[(a)]: Gender and Status New South Wales March 1984

Labour Force Status	Male ('000)	Female ('000)	Persons ('000)
Employed			
- Full time (F/T)	1,313.4	563.9	1,877.3
- Part-time (P/T)	85.7	287.6	373.3
- TOTAL	1,399.1	851.5	2,250.6
Unemployed			
- Looking for F/T work	143.8	80.2	224.0
- Looking for P/T work	8.0	28.0	36.0
- TOTAL	151.8	108.2	260.1
TOTAL LABOUR FORCE	**1,550.9**	**959.7**	**2,510.6**

Participation Rate	76.9%	45.9%	61.1%
Unemployment Rate	9.8%	11.3%	10.4%

(a) The labour force consists of those members of the civilian population aged 15 years or more who are either employed or unemployed at the time of survey.

Source: Australian Bureau of Statistics, *The Labour Force Australia, March 1984 (Preliminary Estimates),* Cat. No. 6202.0, p.6, table 3.

The composition of the labour force has undergone considerable changes over the past few decades. Participation rates of married women, particularly those with dependents, have increased markedly. Changes have also occurred over the last decade in relation to unemployment rates, the duration of unemployment, the relative proportion of full and part-time workers, the hours worked and other aspects of labour force experience. We explore some of these more recent trends as well as examining some of the changes of workforce participation in families.

1. Women and Employment Patterns

A.14 During this century [27] there has been a steady increase in the labour force participation rates of women particularly married women. The following graph illustrates this trend over the past 20 years and compares it with the trend for males over this same period. It is interesting to note that there has been a similar reverse pattern among men.

Table A.7: Civilian Population aged 15 years and Over: Labour Force Participation Rates

Source: Collation of Australian Bureau of Statistics, *The Labour Force Australia 1978 (Including Revised Estimates* from August *1966),* Cat.No.62040, p.11, table 1 and p.13, table 2 and *The Labour Force Australia, February* 1984, Cat. No.6302.0.

A.15 There are many complex social reasons for this increased participation. An important factor is the change in the pattern of women's lives. Whereas, for many, the pattern early this century was perhaps a short period of work, followed by marriage, and a large number of children spread over much of her lifetime, the widespread availability and acceptability of effective birth control has changed this pattern.

> Women are having fewer children and most have completed child-bearing by the time they are 31 years old, leaving many years in which to participate in the labour force while their children are at school. [28]

The labour force participation rate among women in married couple families with dependent children in 1982 was 46 per cent. [29] Where women have dependent children present they are more likely to work part-time than if there are no dependent children. [30] In married couple families, where the husband is employed, the proportion of women in the labour force increases as the age of the youngest dependent child increases. The proportion of women in the labour force increases from about one third, where the youngest dependent child is under five to almost 60 per cent where the child is 15 or over. [31]

A.16 There are various other features of women in the labour force, which are dealt with under the general headings applicable to the whole labour force. This includes the patterns of part-time work and unemployment, which in most cases are higher than the equivalent figures for males of the same age group.

2. Unemployment

A.17 The rate of unemployment in Australia has risen markedly in the period from 1972 to 1984. From a low in 1973 of 2 per cent the rate increased to 6 per cent in 1978. [32] The rate of unemployment remained relatively consistent until late 1982, when it rose sharply topping almost 11 per cent in early 1983. [33] The rate since then has fallen slightly, though there have been some small rises over the period. [34]

A.18 Even more striking than the overall trends in unemployment have been the patterns in different age groups. Young people between the ages of 15 and 19 years have been particularly affected. The unemployment rate in 1972 for young people was 6 per cent. By 1982 the male rate was 16 per cent, while the female rate, having reached 20 per cent in 1979, was sitting at 17 per cent. [35] Rates were also higher than average in the 20-24 year age group. [36] With the rapid increase in unemployment in late 1982, the unemployment rate for young people aged 15-19 reached over 30 per cent in January 1984. [37] This increase was partly due to the influx of school leavers into the labour market but, notwithstanding fluctuations throughout the year, the rate remained around 25 per cent for most of 1983. In March 1984, it was 26 per cent. [38]

A.19 While the rate of unemployment in older age groups has not increased as much as among young workers, the duration of their unemployment has risen more dramatically. In 1972 the average duration of unemployment in Australia was almost 10 weeks, while by 1982 the mean duration was 33 weeks. [39] In that same period the average duration of unemployment for those aged 35 and over rose from about 13 weeks in 1972 to about 46 weeks in 1982, reaching a maximum of over 50 weeks in 1981. [40] For most of the decade the duration of unemployment in this age group was somewhat longer than in all other age groups, but in the period after 1978 the duration of unemployment in this group was significantly longer. The current average duration of unemployment over all age groups in February 1984 was 41 weeks, while the median duration was 19 weeks. [41]

3. Full and Part-time Work

A.20 Over this same ten year period, between 1972 and 1982, there has been an increasing number of workers, both male and female, who have moved into part-time work. The following Table illustrates this trend.

Table A.8: Employed People: Full and Part-Time Status

Australia 1972-1982

August	Male (000)		Female (000)		Persons (000)
	Full-Time	Part-Time	Full-Time	Part-Time	
1972	3,632.3	125.4	1,356.1	496.0	5,609.9
1974	3,710.9	136.2	1,416.9	591.2	5,855.2
1976	3,665.6	170.7	1,371.3	690.2	5,897.8
1978	3,626.0	206.3	1,392.1	745.2	5,969.6
1980	3,762.9	208.0	1,461.8	814.0	6,246.7
1982	3,775.5	241.0	1,487.8	843.3	6,347.6
Percentage increase between 1972-1982	3.9	92.2	9.7	70.0	13.1

Source: Australian Bureau of Statistics, *Labour Statistics Australia 1982,* Cat No. 6101.0, p.24, table 3.4.

While the overall number of employed people has increased by 13 per cent much larger percentage increases have occurred in male and female part-time work. There has also been a larger percentage increase in the number of females compared to males working full-time over the ten year period. Most of the increase in the male labour force has been through population growth while much of the increase in the female labour force has been through greater labour force participation. [42]

A.21 The increased incidence of part-time work is not spread evenly over the population. In all age groups in August 1982, more men worked full-time than part-time, [43] although the proportion of part-time to full-time workers was greatest in the 15-19 years and 65 years and over groups. Similarly for all female workers, except the 65 years and over age group, there were more full-time workers than part-time, though the proportion of part-time workers was much higher. [44] In the case of married women, the ratio of part-time to full-time workers was much higher, with the numbers of part-time workers exceeding that of full-time workers in the 35-44 year age group, as well as in the over 65 years group. [45]

A.22 The experience of part-time work is not always the choice of the worker. In August 1982, a survey of part-time workers revealed that 16 per cent of them would have preferred to work more hours, while 5 per cent had actively looked for full-time work over the four weeks prior to the survey. This pattern was somewhat stronger in relation to male workers than to female workers. [46]

4. Labour Force Experience Generally

A.23 A person's labour force attachment (or non-attachment) at any one time does not necessarily reflect his or her labour force experience over a longer period. Nor does it necessarily indicate a permanent intention to be in or out of the labour force. In Table A.5 above, we examined the communities labour force status as reported in the 1981 Census. In March 1984, the participation rate in New South Wales of all males 15 years or over was 77 per cent and 46 per cent for all such females. [47] However, the following Table shows that the participation rate over an annual period is considerably higher.

Table A.9: Labour Force Experience: Gender and Marital Status and Age

Australia 1982-1983

								Percentage in each age group
	15-19	**20-24**	**25-34**	**35-44**	**45-54**	**55-59**	**60-64**	**65 +**
Married Males		99.4	99.0	97.8	95.3	86.3	60.7	13.5
Married Females	73.4	69.6	63.2	67.0	53.7	34.2	15.8	4.4
All Males	75.8	97.6	98.4	97.1	94.0	84.1	59.4	12.9
All Females	72.4	81.7	66.8	67.7	54.7	36.0	16.7	3.8
Persons	74.1	89.7	82.5	82.7	74.9	59.9	37.2	7.8

Source: Australian Bureau of Statistics, *Labour Force Experience Australia* during *the Year ending February 1983* (Preliminary), 9 September 1983, Cat No. 6205.0, p.4, table 2.

The overall rates were 83 per cent for married males, 52 per cent for married females, 82 per cent for all males and 54 per cent [48] for all females. However, in the under 45 age groups, the participation rates are considerably higher, particularly in the case of female workers. This, to some extent, probably reflects the different work expectations between older and younger women.

A.24 Table A.10 shows the proportion of time spent by the non-institutionalised civilian population in the labour force during the year February 1981 to February 1982.

Table A.10: Civil Population: Time in Labour Force by Gender

Australia 1981-1982

Time in Labour Force in Weeks		**Percentage**
	Males	**Females**
Nil	17.2	45.9
1 to less than 4	0.8	1.8
4 to less than 13	2.4	3.9
13 to less than 26	1.7	3.2
26 to less than 52	9.9	11.2

Whole period	68.0	34.0
TOTAL	**100.0**	**100.0**

Source: Australian Bureau of Statistics, *Labour Force Experience Australia During the Period February 1981 to February* 1982, 23 September 1983, Cat No. 6206.0, p.8, table 4.

A.25 One general trend overtime has been that the percentage of people in older age groups who are working has declined, both among men and women. Table A.11 illustrates the changing pattern in those aged 45 years and over.

Table A.11: Labour Force Participation Rates: Population aged 45 years or more

Australia 1972-1982

		Percentage in Each Age Group			
	Year	**45-54**	**55-59**	**60-64**	**65 +**
All Males	1972	95.6	90.6	76.5	22.3
	1975	93.9	87.8	68.8	16.7
	1979	91.2	81.9	53.5	11.5
	1982	90.0	79.1	47.7	9.2
All Females	1972	45.4	31.3	17.1	3.8
	1975	46.3	31.2	15.6	3.9
	1979	46.8	26.1	13.2	2.4
	1982	49.6	25.9	9.8	2.5

Source: Australian Bureau of Statistics, *Labour Statistics Australia* 1982, Cat No. 6101.0, p.12, table 2.3.

A more detailed breakdown of all females in the 45 to 54 year age group reveals that the increase there is a consequence of increased labour force participation by married women. [49] All other groups in both sexes show falls- some quite marked over that 10 year period. With the increased push to early retirement, these figures may further decrease.

A.26 A person who is not in employment or self-employment at any one time may be looking for work, not actively seeking work but wishing to gain employment or not wishing to work at the time. A survey, [50] conducted in July 1983 by the Australian Bureau of Statistics, showed that 87 per cent of those looking for full-time work registered with the Commonwealth Employment Service, while only 28 per cent of those looking for part-time work were registered. Most people searching for part-time work contacted employers directly. [51] The percentage of women who did not register with the Commonwealth Employment Service was greater, both in relation to full and part-time work than the percentage of men. [52] The longer a person was unemployed, the more likely she or he was to become registered at the Commonwealth Employment Service. [53] However, it would seem that registration at the Service is only one possible indicator that a person is actually seeking work.

A.27 Besides those classified as in the labour force who are unemployed and actively seeking work, there are those outside of the labour force who may wish to find a job. In March 1983, approximately one million people in New South Wales were not in the labour force [54] and just under a quarter of these people wanted a job, though they were not actively seeking work. [55] Discouraged job seekers are defined by the Australian Bureau of Statistics as those who wanted a job but were not actively seeking work because they believed that they could not find a job for any of the following reasons:

considered to be too old or too young by employers;

language or racial difficulties;

lack of necessary training, skills or experience; orno jobs in locality or area of work.[56]

About 85 percent of discouraged job seekers in New South Wales at that time were women, as were 79 percent of those who wanted a job. [57] About 70 percent of those who wanted a job said they could start work immediately. [58]

A.28 Where a person is outside the labour force but would like to work, he or she may have spent some time out of the labour force. Table A.12 gives some indication of the likely period since their last job. Among these people, 70 per cent of men and 27 per cent of women [59] reported that their main reason for not actively seeking work, though they wanted jobs, was personal considerations, such as ill-health disability, pregnancy or studies. [60] Almost 15 per cent of men and 19 per cent of women [61] outside the labour force who wanted jobs were discouraged job seekers. For women, the largest single reason given for not actively seeking work [62] was family considerations, which included ill-health of another person, inability to find child-care and other reasons associated with children. [63]

Table A.12: People outside the Labour Force who want a job: Time since last job (a)

New South Wales March 1983

Time since last job	**Percentage of all who wanted a job**
Less than 1 year	21.8
1 to less than 3 years	19.7
3 to less than 5 years	12.0
5 to less than 10 years	16.4
1 0 to less than 20 years	11.4
Over 20 years	4.2
Never worked	14.4

(a) “job” means paid employment for two weeks or more in any job or business.

Source: Australian Bureau Of Statistics, *Persons not in the Labour Force Australia (including discouraged job seekers) March* 1983, 9 August 1983, Cit No. 6220.0, p.10, table 5.

A.29 Where people were outside the labour force at any time, it is useful to examine what activities they pursued. These will undoubtedly vary with the age of the person concerned and with their gender. In Australia in the year between February 1981 and February 1982, approximately four million females and two million males were out of

the labour force at some time during the period. [64] Table A. 13 shows their major activities while outside the labour force.

Table A.13: People Outside the Labour Force: [(a)]

Major Activity Australia 1981-1982

(a) Those outside the labour force at some time during the year February 1981-1982.

Source: Australian Bureau of Statistics, Labour Force Experience Australia During *the period February 1981 to February 1982,* 23 September 1983, Cat. No. 6206.0, p.5, diagram 5.

C. Income of the Labour Force

1. Average Weekly Earnings

A.30 In this Report, average weekly earnings figures are used as a basis for many of the benefits offered under the Transport Accidents Scheme. We selected the figure of full-time adult male weekly total earnings for the reasons outlined in paragraph 8.28. Our intention was to cover the lost earnings of the majority of earners, both employed and self-employed. The current level of AWE in M arch 1984 for Australia was $400.70 [65] or $20,836.40 on an annual basis. Our chosen ceiling for relevant earnings of 150 per cent AWE are figures of $601.05 weekly or $31,254.60 annually for the same March quarter. [66]

A.31 Table A.14 shows the relative levels of other measures of average weekly earnings in comparison with our chosen index.

Table A.14: Average Weekly Earnings of Employees: Various Indices of Weekly Earnings

Australia March Quarter 1984

Weekly Earnings Index	$	% of AWE
Full-time adult male total	400.70	100
Full-time adult male ordinary time	376.20	94
All male total	370.60	92

Full-time adult female total	311.00	78
Full-time adult female ordinary time	304.10	76
All female total	246.50	62
Full-time adult persons total	371.90	93
Full-time adult person ordinary	353.10	88
All person total	321.30	80

(a) AWE as defined in the Glossary above, as full-time adult male weekly total earnings for Australia.

Source: Australian Bureau of Statistics, *Average Weekly Earnings States and Australia, March Quarter 1984*, 12 July 1984, Cat.No.6302.0, p.4, table 1.

It should be noted that these figures are not measures of the average weekly earnings of the self-employed, only of employees.

2. The Spread of Earnings

A.32 Once the level of AWE at anytime is ascertained it is useful to know the distribution of incomes, so that we can estimate the proportion of earners who fall within the earnings limits of the proposed Transport Accidents Scheme. We discussed in paragraphs A.1 -A.12, income data from the Census and noted that this information had certain limitations which might affect the accuracy of our predictions. Unfortunately this is also true for most other sources of data on the spread of incomes.

Weekly Earnings of Employees

A.33 Annually the Australian Bureau of Statistics surveys income distribution, by part-time and full-time status, among employees in August. [67] In August 1983 the level of AWE in Australia was about $380, [68] and thus, the earnings ceiling for periodic compensation purposes would have been $570.

Table A.15: Weekly Earnings of Employees: Distribution

New South Wales August 1983

Type of Employee	% below $570 (a)	% at/above $570 (a)
Male Full-time	93.8	6.2
Female Full-time	98.9	1.1
All employees	96.0	4.0
Part-time employees	99.2	0.8

(a) The Australian Bureau of Statistics table from which this was collated lists an income group $520 - $580. To calculate the proportion of employees with earnings over $570, one-sixth of the number in this group was used. This assumes an even spread of income recipients in this group. It is more likely that a larger number occur in the lower ranges, thus the estimates for those earning over $570 may be over-estimates.

Source: Australian Bureau of Statistics, *Weekly Earnings of Employees (Distribution) Australia, August* 1983, pp.9-10, table 3.

A.34 One of the possible limitations of these figures is that they do not include earnings of the self-employed or employers. We compare in paragraph A.39 the earnings of the self-employed with the earnings of employees. The figures in Table A.15 have an advantage over Census figures in that they refer to earnings and not total income, which is, therefore, closer to the proposed concept of earnings from personal exertion for compensation purposes. The Bureau of Statistics noted that there was a possibility that the respondents under-reported the level of earnings in the household survey from which the results were drawn [69] and this may also limit the accuracy of our assessments.

Income and Housing Survey

A.35 A household survey was conducted bv the Australian Bureau of Statistics between September and November 1982, to collect information, among other things, on the total annual income received in the 1981-82 financial year. Using the figure for AWE in September 1982. we obtained a ceiling on weekly incomes at that time of about $537 for compensation purposes. [70] The survey collected information on total income, including income, government cash benefits, workers compensation or traffic accident compensation, interest, rent, dividends. maintenance or income from a trust or will. [71] It therefore again underestimates the numbers of people whose earnings fall below the ceiling, in much the same way as the Census. However it does not have many of the other difficulties of the Census since it was administered by trained interviewers who could probe people's responses for accuracy.

A.36 The Commission requested from the Australian Bureau of Statistics the production of a special cross-tabulation for New South Wales, the results of which appear in Table A.16. This classifies income recipients by their labour force attachment

Table A.16: Income Recipients in the Labour Force: Distribution

New South Wales 1981-1982

Labour Force Status	% above 150% AWE	$ below 150% AWE
Male - Full time employed (a)	12.2	87.8
- Self-employed	10.1	89.9
- Total earners (b)	11.7	88.3
Female - Full time employed (a)	2.1	97.9
- Self employed	3.9	96.1
- Total earners (b)	2.1	97.9

Persons - Total earners	8.1	91.9

(a) These were full-time wage and salary earners

(b) This includes both full and part-time wage and salary earners and the self-employed.

Source: Special tabulation by the Australian Bureau of Statistics.

The figures in this table are somewhat higher than those from both the Census and the employee's earning surveys. While the Census figures were also for total income, the incidence of under-reporting, especially through providing net, rather than gross figures, may well explain the difference. The inclusion of all forms of income, not just earnings, explains to some extent the difference between this and the other survey on weekly earnings of employees.

3. The Self-Employed

A.37 In the 1981 Census, 13 percent of the New South Wales labour force was recorded either as self-employed or as an employer. [72] In the Income and Housing Survey those recorded as self-employed in New South Wales consisted of 12 percent of the labour force. [73] This section of the labour force is not included in average weekly earnings calculations, which are derived from surveys of employee's earnings completed by employers. It is interesting, therefore to observe what differences there are between the composition of the employed labour force and the self-employed.

A.38 The following Table compares the ages of these two groups in the labour force.

Table A.17: Labour Force: Age and Employment Status

Australia 1982

	Male			Female		
Age Group		**Wage and Salary Earner**	**Self Employed**		**Wage and Salary Earner**	**Self Employed**
	FT %	**PT %**	**%**	**FT %**	**PT %**	**%**
15-19	7.6	16.0	0.4	14.2	4.9	0.6
20-24	14.5	23.7	5.0	24.7	10.4	5.5
25-34	27.7	19.5	25.6	25.6	30.1	28.1
35-44	22.4	10.1	27.6	17.0	29.8	30.9
45-54	16.7	7.2	22.7	12.9	17.4	22.8
55-64	10.7	13.1	14.1	5.6	6.4	9.0
65 +	0.3	10.5	4.4	•	1.0	3.0

TOTAL	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

• Subject to sampling variability, too high for most purposes.

Source: Australian Bureau of Statistics, *Income and Housing Survey - Income of Individuals, Australia 1981-82 (Preliminary),* 16 September 1983, Cat. No. 6501.0, p.13, table 9.

The Table indicates that for both sexes, the self-employed person is likely to be older. A large proportion of part-time male workers were young, possibly suggesting the influence of studies and such activities. The largest proportion of part-time female workers appeared in the child-rearing age groups between 25 and 45.

A.39 It is also interesting to compare the earnings of these two groups. It is easiest to use average earnings figures, to give some indication of the comparative levels. If a more detailed examination of the average incomes of these groups is made, it can be seen that in virtually every age group the average earnings of the employed are greater than those of the self employed. [74]

Table A.18: Labour Force: Mean Income and Employment Status

Australia 1982

Employment Status	**Male $**	**Female $**	**Person $**
Full-time employed	341	256	315
Part-time employed	202	154	162
Self-employed	260	166	230
Self employed income, Full-time employed income	76%	65%	73%

Source: Australian Bureau of Statistics, Income *and Housing Survey - Income of Individuals, Australia 1981-82* (Preliminary) 16 September 1983, Cat. No. 6501.0, p.13, table 9.

4. Non-Wage Benefits

A.40 In addition to wages and salaries, some employees enjoy non-wage benefits. We discuss their relevance for compensation in Chapter 7. An Australian Bureau of Statistics survey conducted between February and May 1979 estimated that there were some four million. [75] Australian employees who enjoyed some type of non-wage benefits.

Table A.19: Employees[(a)]: Non Wage Benefits

Australia 1979

Non-Wage Benefits	**Percentage of all employees who receive non-wage benefits**
Holiday Costs	6.3
Low-Interest Finance	5.9

Goods and Services	36.7
Housing	5.4
Electricity etc.	2.7
Telephone	7.9
Transport	7.7
Medical	4.9
Union dues	2.1
Club fees	2.1
Entertainment Allowance	4.2
Shares etc.	1.3
Study Leave	2.3
Superannuation	42.2 (b)

(a) Survey included employees who usually worked 20 hours or more a week.

(b) Total exceeds 100 per cent because some employees receive more than one benefit.

Source: Australian Bureau of Statistics, *Labour Statistics, Australia* 1982, Cat No. 6101.0, p.78, table 7.1.

The survey also showed that the vast majority of employees who received non-wage benefits were full-time employees, rather than part-time (93 per cent to 7 per cent). [76] The largest numbers came from the occupation group of tradesmen and production workers, followed by clerical workers and then professional or technical workers. [77]

D. Families and the Labour Force

A.41 We examined in section A the position of women in the workforce. It is interesting to examine further the position of families in relation to labour force participation. Traditionally, it was assumed and is often still assumed that in the majority of families where children are present the mother stays at home and the father goes out to work. In the Australian Bureau of Statistics survey into the labour force status and other characteristics of families conducted in July 1982, 87 per cent of all families included a married couple. [78] This term includes de facto partners. Of those families with dependent children present, 45 per cent had both parents in the labour force. [79] In 3 per cent of these families, neither parent was in the labour force. In 51 per cent of married couples with dependent children the husband was in the labour force and the wife was not, while in 1 per cent of such families the wife was in the labour force and the husband was not. [80]

Table A.20: Australian Families: Type and Labour Force Status

Australia July 1982

Labour Force and Family Status	Percentage of all families

	Dependent Children	No Dependent Children
Married Couple Families		
- Both spouses in labour force	21.0	14.7
- Husband only in labour force	23.6	10.4
- Wife only in labour force	0.4	0.9
- Neither spouse in labour force	1.6	14.1
Head only Families		
- Male head in labour force	0.9	1.0
- Male head not in labour force	0.2	0.5
- Female head in labour force	2.6	1.2
- Female head not in labour force	4.0	3.0
ALL FAMILIES	**54.2**	**45.8**

Source: Australian Bureau of Statistics, *Labour Force Status and Other Characteristics of Families*, Australia, July 1982, 7 June 1983, Cat No.62240, collation from table 23, p.37 and table 29, p.40.

A.42 Table A.20 gives an overall picture of the composition and labour force position of families.

A.43 Where the youngest dependent child in a married couple family is four years of age or less, and the husband is in the labour force, the wife is almost twice as likely not to be in the labour force, as to be in the labour force. However, where the youngest child is older, the wife is more likely to be in the labour force than not even in the five to nine year age group. The importance of the age of children to workforce participation by both parents can be seen from the following table.

Table A.21: Australian Married Couple Families: [a] Two Parents in the Labour Force

Australia July 1982

Age of Children	Number of Married Couple Families		Percentage Where both in Labour Force
	Both in Labour Force	Total	
0-4 only	112.6	402.8	28.0
5-9 only	94.3	174.3	54.1

0-4 and 5-9	86.8	264.3	32.8
0-4 and 10-14	15.5	39.5	39.2
5-9 and 10-14	123.0	232.2	53.0
0-4, 5-9 and 10-14	20.6	67.2	30.7
10-14 and 15-20	98.2	161.0	61.0
10-14 only	155.9	268.2	58.1
15-20 only	88.5	165.6	53.4

(a) Includes “de facto” couples.

Source: Australian Bureau of Statistics, Labour *Force Status and* Other *Characteristics of Families Australia, July 1983,* 7 June 1982, Cat No. 6224.0, collation of table 23, p.37 and table 25, p.38.

Table A.21 shows that the older the dependent children, the more likely it is that both parents will be in the labour force.

A.44 Another factor which is of relevance in workforce participation where dependent children are present, as well as generally, is the age of the parent. As we discussed earlier, it is a very common pattern for women to take a period of paid work during child-bearing years and then resume paid work when children reach school age, [81] whereas in older generations the cessation of paid work either at marriage or child-birth was more likely to be permanent. Table A.22 shows the labour force participation rates of male and female spouses and family heads in different age groups, where there are dependent children present.

Table A.22: Australian Families with dependent children: Type, Age and Gender

Australia July 1982

Labour force (a) and Family Status	**No. in Age Group (‘000)**						
	15-19	**20-24**	**25-34**	**35-44**	**45-54**	**55-64**	**65 +**
Husband							
In lf	•	56.9	609.6	720.3	326.2	72.1	•
No in lf	•	•	13.4	18.5	22.9	17.3	4.8
Male Family Head (b)							
In lf	-	4.7	6.5 +	11.9	8.2	•	•
Not in lf	-	0.5	1.5	1.4	1.8	•	•

Wife							
In lf	•	31.3	312.0	376.7	102.4	6.1 +	•
Not in lf	11.5	99.3	453.4	279.9	119.8	19.5 +	•
Female Family Head (b)							
In lf	•	7.0	18.0	37.8	11.7 +	•	•
Not in lf	5.3	24.7	59.8	43.5	17.9	5.0	•

(a) “Labour Force” abbreviated as “lf” in Table A.22.

(b) “Family Head” relates to single parent families.

• Means subject to sampling variability, too high for most practical uses.

+ Means that a somewhat higher figure, which is unable to be calculated from the source is appropriate.

Source: Australian Bureau of Statistics, *Labour Force Status and Other Characteristics of Families, Australia* July *1982,* 7 June 198 3, Cat No. 6224.0, pp.14-15, table 6.

A.45 This Table shows that even where families have dependent children, the labour force participation of women increases in the post-35 year age group, so that there are more women with dependent children in the labour force at that time, than not. This probably reflects the growing trend for women to return to the labour force, even if they leave to have children, at least once these children reach school age. It appears the person most likely not to be in the labour force where dependent children are present is the female unmarried family head. This is consistent with figures which show that in June 1981, approximately 84 per cent of single female parents were in receipt of income support in comparison with only 18 per cent of single male parents. [82]

IV. TRAFFIC ACCIDENTS IN NEW SOUTH WALES

A. Introduction

A.46 In 1983, 966 people were killed in New South Wales in traffic accidents. [83] This was a fall of 23 per cent from the figure of 1,253 fatalities recorded in 1982. [84] One reason for this decrease was alleged to be the initial impact of random breath testing, though its long-term effects are less certain Table A.23 shows fatality rates in the States and Territories of Australia for 1983.

Table A.23: Motor Vehicle Accidents: Fatality Rates

States and Territories 1983

Jurisdictions	**Traffic deaths per 100 million vehicle kilometres**

New South Wales	2.2
Victoria	2.0
Queensland	2.3
South Australia	2.5
Western Australia	1.6
Tasmania	1.9
Northern Territory	5.2
ACT	1.9

Source: Traffic Authority of New South Wales, *Road Traffic Crashes in New South Wales, Statistical Statement Year ended December 31st, 1983,* p.7.

A.47 The total number of people injured in 1983 was 33,978. [85] This is a slight fall from the 1982 total of 34,553. [86] Of the persons injured in 1983, 28 per cent were admitted to hospital, 65 per cent were treated but not admitted to hospital and 7 per cent [87] appeared to require no treatment The limitation of this breakdown is that the recording of injury and degree of injury relies on reports made to police and their observations. [88]

B. The Victims

1. Those Killed

A.48 In 1983, 30 percent of those killed were car drivers,(the largest single group), 5 percent were truck drivers, 25 percent were vehicle passengers, 15 percent were motor cyclists, 1 percent were motorcycle passengers, 22 per cent were pedestrians and 3 per cent were pedal cyclists or pedal cycle passengers. [89] The following table gives an age and gender breakdown of the people killed.

Table A.24: Motor Vehicle Accidents Fatalities: Age & Gender

New South Wales 1983

Age Group	Male	Female	Persons
0 - 14	51	44	95
15 - 19	154	35	189
20 - 24	134	31	165
25 - 29	75	22	97
30 - 39	82	20	102
40 - 49	55	17	72

50 - 59	46	18	64
60 +	97	82	179
Unknown	1	2	3
TOTAL	**695**	**271**	**966**

Source: Traffic Authority of New South Wales, *Road Traffic Crashes in New South Wales, Statistical Statement Year ended December 31st, 1983,* pp.11-12.

A.49 This Table illustrates the large number of deaths occurring among young people in motor vehicle accidents. Over half (57 per cent) of those killed are under the age of 30. Forty-three per cent of those killed are young men under 30, while overall, males account for almost three- quarters of all deaths in motor vehicle accidents. Perhaps an even more striking statistic is the fact that in 1982, 58 per cent of all deaths among young males and 52 per cent of all deaths among young women aged between 15 and 19 years were as the result of motor vehicle accidents. [90] In the 20 to 24 year age group, 52 per cent of all male deaths and 37 per cent of all female deaths arise from motor vehicle accidents. [91]

A.50 In framing proposals for compensation in respect of death caused by a transport accident, it is helpful to know the marital status of people killed in motor vehicle accidents, and, if possible, the number of dependent children who are likely to be entitled to compensation. Table A.25 shows the marital status of different age groups of motor vehicle accident fatalities. [92] Comparing Table A.24 with Table A.25, it appears that males and females who have never married have higher death rates in traffic accidents than those who have married, and this is consistent with the concentration in deaths among young people.

Table A.25: Motor Vehicle Traffic Accident Fatalities: Marital Status

New South Wales 1982

Age Groups	**Married**		**Widowed or Divorced**		**Never Married**		**Total (a)**	
	M	**F**	**M**	**F**	**M**	**F**	**M**	**F**
Under 15	0	0	0	0	56	55	56	55
15 - 19	2	1	0	0	180	54	182	55
20 - 24	26	10	0	1	182	27	208	38
25 - 29	46	11	9	2	60	13	115	26
30 - 34	50	7	6	4	22	4	79	15
35 - 44	53	22	9	4	14	3	76	29
45 - 54	43	14	13	8	9	3	65	25
55 - 64	36	24	12	15	11	2	60	41

65 +	43	21	31	42	12	8	87	71
TOTAL	**299**	**110**	**36**	**76**	**546**	**169**	**928**	**355**

(a) Includes those whose marital status was not known.

Source: Special tables provided by Australian Bureau of Statistics.

A.51 The number of surviving dependent children of deceased traffic accidents victims is more difficult to ascertain The Australian Bureau of Statistics has produced a table for the “issue” of males and females who had ever married and who died in a motor vehicle traffic accident. This, of course, does not tell us if the children were dependent, though it is possible to make assumptions about the dependent status of the children of people in particular age groups. For example, if a person under 30 died leaving children, it may be appropriate to assume these children had been dependent upon the deceased.

Table A.26: Motor Vehicle Traffic Accident Fatalities: Average Issue of Married People (a)

New South Wales 1982

Age at Death (years)	Male MVA Death	Female MVA Death
15 - 19	1.00	1.00
20 - 24	1.04	0.82
25- 29	1.25	1.54
30 - 34	1.70	1.91
35 - 44	2.65	2.62
45 - 54	3.00	3.05
55 - 64	2.68	3.03
65 +	2.70	2.00

(a) Includes widowed and divorced females.

Source: Special advance tables provided by Australian Bureau of Statistics, from the forthcoming publication *Deaths, New South Wales 1982,* Cat. No. 3307.1.

2. Those Injured

A.52 Of the 33,978 people reported injured in traffic accidents, 61 percent were male and 39 per cent were female. [93] These percentages are somewhat different from the proportions in fatal accidents, where 72 per cent were male and 28 per cent were female. [94] The following table provides an age profile equivalent to Table A.24, for injured people.

Table A.27: Motor Accident Injuries: Age and Gender

New South Wales 1983

Age Group	Male	Female	Persons
0 - 14	2,601	1,702	4,321
15 - 19	4,396	2,095	6,501
20 - 24	4,559	2,126	6,696
25 - 29	2,352	1,299	3,656
30 - 39	2,653	1,792	4,451
40 - 49	1,467	1,272	2,746
50 - 59	1,162	1,106	2,278
60 +	1,332	1,460	2,794
Unknown	265	260	535
TOTAL	**20,787**	**13,112**	**33,978**

(a) Several persons of unknown gender are included in this column.

Source: Traffic Authority of New South Wales, *Road Traffic Crashes in New South Wales, Statistical Statement Year ended December 31st 1983,* pp.21-22.

A.53 From this Table, we see that 62 percent of all people injured in motor vehicle accidents are under 30 years of age. Forty-one per cent are young males under 30. Of those young men injured between the ages of 15 and 29, 66 per cent are either car drivers or motor cycle riders.

A.54 Some further information on people injured in motor vehicle accidents is available from the statistical collection of the Department of Health. These figures only apply to people admitted to private or public hospitals as the result of motor vehicle accidents. Table A.28 refers to separations, which occur when an admitted hospital patient is discharged, transfers to another institution or dies. Therefore, if one traffic accident victim transfers from one or more hospital to another, he or she is recorded several times as a separation. It also lists the average number of beds occupied each day and the average duration of stay of motor vehicle accident victims. To give some comparison there were 28,000 public hospital beds and 6,300 private hospital beds in New South Wales in 1983.

Table A.28: Motor Vehicle Accident Patients(a) **Public and Private Hospitals**

New South Wales 1981

Hospital type and Location	Separations	Average No. of Beds per Day	Average Stay (days)
Public Hospitals			
Metropolitan	10,136	300	10.8
Country	9,119	204	8.2

TOTAL	19,255	504	9.6
Private Hospital			
Metropolitan	1,014	16	5.8
Country	164	4	7.9
TOTAL	1,178	20	6.1

(a) For details of compensable status, see Table 13.3.

Source: Department of Health (New South Wales).

The Department of Health statistics also revealed that some 191,130 bed days were used by motor vehicle accident victims, and that over half of all hospitalised accident victims of both sexes were under 30 years of age. This is consistent with all other data on the incidence of injury among different age groups. Another interesting fact is that about 75 per cent of all motor vehicle accident in- patients in 1981 were treated at hospitals located within the same Health Region as they lived.

A.55 Little information is available from other sources on the seriousness of injuries suffered in transport accidents. It is almost impossible, for example, to find out how long a transport accident victim is incapacitated for work or how many suffer permanent incapacities. We discuss later comparative data from the Adelaide In-Depth Accident-Survey, which gives some information on this question. However, Table A.28 lists the nature of injuries of those people who “separated” from hospitals in New South Wales in 1981.

Table A.29: Motor Vehicle Accident Patients: Nature of Injury

New South Wales 1981

Nature of Injury	**All Separations**		**Deaths (in hospital)**		**% of total bed days**
	No.	**%**	**No.**	**%**	
Fracture of skull	1,200	5.9	36	15.7	6.5
Fracture of spinal trunk	1,749	8.6	22	9.6	15.0
Arm fracture	1,655	8.1	5	2.2	6.5
Leg fracture	3,013	14.7	20	8.7	34.7
Dislocation	401	2.0	0	-	2.0
Sprain or strain	615	3.0	0	-	1.3
Intracranial injury	2,694	13.2	64	27.9	9.9
Internal injury of chest, abdomen or pelvis	635	3.1	33	14.4	4.1

Open wound	2,604	12.7	7	3.1	5.8
Superficial injury	558	2.7	1	0.4	0.8
Contusions	1,014	5.0	1	0.4	1.7
Injury to nerves or spinal cord	95	0.5	4	1.7	0.4
Other injury	824	4.0	6	2.6	2.3
Observation	3.48	1.7	0	-	0.3
Other condition(a) (ie. not an injury)	3,028	14.8	30	13.1	8.8
TOTAL	**20,433**	**100.0**	**229**	**100.0**	**100.0**

(a) Includes readmissions for continuing treatment.

Source: Department of Health (New South Wales)

A.56 It can be seen from Table A.29 that the majority of motor vehicle accident patients separating from (and therefore admitted at some time to) hospital in 1981 suffered some form of fracture. Injuries which caused the largest single number of deaths were head injuries, though relative to the number of people separating from hospital having suffered these injuries, the number of deaths is only just over 2 per cent. The largest proportion of separations by death occurs with internal injuries of chest, abdomen or pelvis. The largest single reason for occupation of beds was leg fractures.

3. The Location

A.57 For the administration of a Transport Accidents Scheme, it is important to know the location of accidents and the place of residence of accident victims. We know from the Health Department data that 75 per cent of motor accident victims are admitted to hospitals in the same health region as they live. [95] There appears to be no better data available about the residence of motor accident victims in New South Wales. However, there is information available about the location of motor traffic accidents, as the Traffic Accident Research Unit collects such information for all the Statistical Divisions of New South Wales. These do not correspond with Health Regions, but give some idea of the incidence of accidents in different areas of New South Wales.

A.58 The following Table divides the numbers of people killed and injured into their various accident locations.

Table A.30: Motor Traffic Accidents: Location

New South Wales 1983

		Deaths		**Injuries**
Statistical Division	**Number Killed**	**Rate per 100,000 Population (a)**	**Number Injured**	**Rate per 100,000 Population (a)**
Sydney	447	13	20,060	602

Hunter	94	19	3,165	644
Illawarra	49	15	1,969	622
Richmond-Tweed	33	23	958	663
Mid-North Coast	68	35	1,595	831
Northern	51	28	1,153	644
North-Western	44	40	749	678
Central Western	43	26	1,192	715
South-Eastern	62	43	1,354	939
Murrumbidgee	32	22	882	608
Murray	36	35	681	660
Far Western	7	22	220	689
TOTAL	**966**	**18**	**33,978**	**634**

(a) Australian Bureau of Statistics, *Estimated Resident Population of Local Government Areas New South Wales,* at 30 June 1983, Cat. No.3206.1

Source: As above and Traffic Authority of New South Wales, *Road Traffic Crashes in New South Wales, Statistical Statement Year ended December 31st*, *1983,* pp.37-46.

In general while the number of deaths and injuries in the Sydney Statistical Division is high, the rate of death and injury is lower than that in any other statistical division The South Eastern Statistical Division, [96] has the highest rate of injury and the highest rate of deaths.

C. Alcohol and Road Accidents

A.59 The Traffic Authority of New South Wales states that there are three main sources of information on alcohol involvement in traffic accidents: [97]

blood tests taken at post-mortem examination of those killed in traffic cases;

blood tests taken in hospitals for people injured in traffic crashes; [98] and

breath tests of drivers and motor cycle riders involved in traffic accidents. [99]

Table A.31:, Alcohol Blood Tests: Motor Vehicle Accident Victims Attending Hospital

New South Wales 1983

Blood Alcohol Level (g/100 ml)	**No.**	**Percentage of Total**
Nil	16,533	76.2

less than .050	1,649	7.6
0.050-0.079	382	1.8
0.080-0.149	1,157	5.3
0.150 and over	1,859	8.6
Unsatisfactory samples	104	0.5
TOTAL	**21,684**	**100.0**

Source: Traffic Authority of New South Wales, *Road ,Traffic Crashes in New South Wales, Statistical Statement Year ended December 31st 1983,* p.33.

While the majority of those tested had no alcohol in their blood, almost 16 per cent were over the legal limit A large proportion of those were over 0.15.

A.60 Of those who were tested at post-mortem examinations, [100] 73 percent of pedestrians tested did not have any alcohol in their bloodstream while 57 per cent of motor cycle riders and 57 per cent of drivers also had no alcohol in their bloodstream. However 38 per cent of drivers tested had blood alcohol content of over the legal limit of 0.05. The vast majority of these were over 0.08, with 67 per cent of those over the legal limit, being over 0. 15. In the case of motor cycle riders, 33 per cent were over the legal limit, with 63 per cent of those over the legal limit being over 0.15. Twenty-six per cent of pedestrians had blood alcohol contents of over 0.05, with 94 per cent of those over the legal limit being over 0. 15. [101] Higher proportions of males killed were affected by alcohol. Seventy-three per cent of female and 55 per cent of males had a nil blood alcohol reading, while 39 per cent of males and 20 per cent of females were over the legal limit. The age group with the highest proportion over the legal limit was the 20-24 year age group (48 per cent). In all other age groups, from 15 to 49, between 34 and 42 per cent were over the legal limit, while in the over 50 age groups, the percentages were smaller. [102]

A.61 Since December 1982 [103] there has been a legal requirement that certain people, who attend or who are admitted to hospital following a motor vehicle accident, are-blood tested. [104] These are drivers, motor cycle riders and pedestrians [105] who are 15 years or over. [106] Table A.31 shows the results of these tests, as recorded by the Department of Health. [107]

A.62 It is police practice to require a driver or motor cycle rider to undergo a breath test if she or he is involved in a traffic accident. Understandably, a large proportion of those who are killed in fatal crashes are not tested. [108] Table A.32 provides a summary-of breath test results for others involved in traffic crashes where death or injuries occur.

Table A.32: Alcohol Breath Tests: Drivers and Riders in Injury or Fatal Crashes(a)

New South Wales 1983

Breath Test Results	**Survivors of Fatal Crashes**		**Injury Crashes**		**Total %**
	Drivers	**Riders**	**Drivers**	**Riders**	
Positive	49	3	1,880	376	5.9

Negative	515	9	19,844	2,049	57.6
Not tested	193	8	10,877	2,753	35.6
Unknown if tested	9	1	283	38	0.8
TOTAL	**764**	**21**	**32,884**	**5,216**	**100.0**

(a) Excludes those who were killed in fatal crashes.

Source: Traffic Authority of New South Wales, *Road Traffic Crashes in New South Wales, Statistical Statement Year ended December 31st 1983,* p.33.

While a significant proportion were not tested, of those who were, the vast majority (91 per cent) had a negative result.

A.63 While not related to the number of accidents and resulting personal injury, the New South Wales Bureau of Crime Statistics and Research publishes detailed statistics on drink/driving offences. In 1981, for example, there were 25,995 appearances in court on drink/driving offences. Ninety- seven per cent were found guilty. The following table shows a breakdown of offenders by age and gender, in comparison to the number of licence holders.

Table A.33: Drink/Drive offenders: Age and Gender

New South Wales 1981

	Males		**Females**	
Age	**% of those found guilty**	**% of licence holders**	**% of those found guilty**	**% of licence holders**
17-19	13.0	5.7	10.2	5.5
20-24	29.9	13.2	28.4	14.0
25-29	17.5	13.6	17.2	14.6
30-34	12.5	13.4	14.8	14.5
35-39	8.6	1.0	10.8	12.0
40+	18.5	43.1	18.6	39.4
TOTAL NUMBER	**23,834**	**1,926,051**	**1,045**(a)	**1,225,565**

Ages of 382 offenders not known. Gender not known in one case.

Source: Department of Attorney General and of Justice, New South Wales Bureau of Crime Statistics and Research, *Court Statistics* 1981, p.28, table 3.5.

The Bureau figures also show that while females hold 39 per cent of all licences, they account for only 4 percent of all convicted drink/drive offenders. Young males under 25 account for 42 percent of the convicted drink/drivers but only 12 percent of licence holders. [109]

D. The Missing Information

A.64 There is a great deal of relevant statistical information on traffic accident victims which is not collected in New South Wales or in other Australian jurisdictions. The following are some examples where there is no data or inadequate data:

duration of incapacity for work;

incidence of permanent incapacity;

seriousness of permanent incapacity;

number of injured people convicted of certain offences in relation to their injuries; and

occupation status or income level of road accident victims.

Some of these are very important for the proposed Transport Accidents Scheme, and it should be a central function of any new authority to collect this information. For the purposes of costing the proposed Scheme, the Actuary was forced to make assumptions from the information available, including that from overseas.

A.65 There are some potential sources of data. For example, the Workers' Compensation Commission keeps detailed records of work accidents, including "journey accidents" and "course of employment motor vehicle injuries". However, it is currently impossible to obtain the relevant information for these classes of workers' compensation cases. Looking overseas, the New Zealand accident compensation scheme may be able to provide some of this data, [110] but much of it cannot readily be obtained in a form which could answer these questions.

A.66 One survey which has attempted to obtain data on some of these questions was conducted by the Road Accident Research Unit of the University of Adelaide. It was based on a random sample of 304 accidents which occurred in the central part of the Adelaide metropolitan area and to which an ambulance was called, during the twelve months from 23 March 1976. According to the report these accidents represent 8 per cent of the total number of accidents to which an ambulance was called throughout the state. The survey involved in-depth follow-up of the survey sample, including questions on the period of restriction of normal activities, permanent disability and degree of severity of injury. Involved in the 304 accidents there were 921 people, 527 of whom were classified as "active participants" because they were in control of a vehicle or were pedestrians. Comparison of death and injury rates in the survey and in South Australian road accident statistics generally and between South Australia and New South Wales, reveal that this information could be useful for New South Wales, at least within similar road user groups.

A.67 Table A34 gives an overall picture of the severity of injury suffered by each type of road user in the survey.

A.68 In general terms, the Table shows that pedestrians, pedal cyclists and motor cyclists were the most likely to be injured, while pedestrians tended to be the most seriously injured. This is consistent with other information which showed that pedestrians [112] and pedal cyclists, [113] were the types of road users most frequently admitted to hospital, while pedestrians tended to be in hospital the longest. [114] This is also reinforced in Table A.35 which gives the period of restriction of normal activities. It can be seen that pedestrians and pedal cyclists were most often restricted, about one-third being restricted for three months or more. Twenty per cent of motor cyclists were restricted for three months or more. The Table also shows that car and truck occupants are the least likely to suffer restriction of their normal activities.

Table A.34: Road Accident Survey: Injury Severity

Adelaide 1976

Type of Road User	Nil	Minor	Moderate	Severe	Serious	Critical	Fatal	Percentage of each type of road user Total Number
Pedestrian	2.3	25.0	20.5	29.5	11.4	4.5	6.8	44
Pedal Cyclist	4.3	21.7	39.1	21.7	8.7	4.3	-	23
Motor Cyclist	3.7	37.5	30.0	16.2	7.5	-	5.0	80
Car Occupant	52.0	32.9	11.0	2.1	1.1	0.8	0.1	727
Occupant of Light Commercial Vehicle	53.3	20.0	26.7	-	-	-	-	15
Occupant of Heavier Commercial Vehicle	81.0	14.3	4.8	-	-	-	-	21
Bus Occupant	18.2	72.7	9.1	-	-	-	-	11
ALL ROAD USERS	**44.5**	**32.5**	**13.9**	**5.0**	**2.3**	**1.0**	**0.9**	**921**

Source: University of Adelaide Road Accident Research Units, *Adelaide In-Depth Accident Study* 1975-1979, Part 1, p.37, table 16.

The survey stated that the severity of bus occupant injury was higher than was actually the case, because in one accident the bus was carrying a large number of passengers, possibly up to sixty and almost all these people transferred to another bus within a minute or so before they could be counted and included. It was also noted that 10 car occupants, the a majority of who were almost certainly not injured, were not graded because the team was unable to examine them after the accident. [111]

Table A.35: Road Accident Survey: Period of Restriction of Normal Activities

Adelaide 1976

	Pedestrain (a)		Pedal Cyclists (b)		Motor Cyclists (c)		Car Occupants (d)		Truck Occupants (e)	
	No.	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**
Not restricted	6	(15.8)	5	(22.7)	13	(17.6)	499	(76.1)	37	(84.4)
Up to 1 week	9	(23.7)	3	(13.6)	10	(13.5)	85	(13.0)	5	(11.4)
1 week-3 months	8	(21.1)	6	(27.3)	32	(43.2)	58	(8.8)	2	(4.5)
3 months or more	12	(31.6)	8	(36.4)	5	(20.3)	13	(2.0)	0	-
Fatally injured	3	(7.9)	0	-	4	(5.4)	1	(0.2)	0	-
Not known	6	(13.6)	1	(4.3)	6	(7.5)	81	(11.0)	3	(6.4)
TOTAL	**44**	**(100.0)**	**23**	**(100.0)**	**80**	**(100.0)**	**737**	**(100.0)**	**47**	**(100.0)**

Source: University of Adelaide Road Accident Research Unit, *Adelaide In-Depth Accident Study* 1975-1979.

(a) Part 2, p.44, table 18.

(b) Derived from discussion, part 3, p.25.

(c) Part 4, p.71, table 51.

(d) Part 6, p.143, table 5.6.

(e) Derived from discussion, part 5, p.18.

A.69 The survey also ascertained the incidence and severity of permanent physical disabilities. In addition to the eight people killed, at least 68 were left with some form of permanent physical disability. [115]

Table A.36: Road Accident Survey: Resulting Permanent Disability

Adelaide 1976

Period of Restricti	Pedestrians	Pedal Cyclis	Motor Cyclis	Car Occupants	Truck Occupants

on		(a)		ts (b)		ts (c)		(d)		(e)
	No.	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**
None	23	(57.5)	15	(65.2)	48	(68.6)	680	(96.2)	47	(100.0)
Minor	2	(5.0)	7	(30.4)	16	(22.9)	23	(3.3)	-	-
Major	12	(30.0)	1	(4.3)	4	(5.7)	3	(0.4)	-	-
Fatal	3	(7.5)	-	-	4	(5.7)	1	(0.1)	-	-
Unknown	4	(9.1)	-	8	(10.0)	30	(4.1)	-	-	
TOTAL	**44**	**(100.0)**	**23**	**(100.0)**	**80**	**(100.0)**	**737**	**(100.0)**	**47**	**(100.0)**

Sources: University of Adelaide Road Accident Research Unit, *Adelaide In-Depth Accident Study 1975-1979.*

(a) Derived from discussion, part 2, p.44.

(b) Derived from discussion part 3, p.25.

(c) Derived from discussion part 4, p.71.

(d) Part 6, table 5.7, p. 143.

(e) Derived from discussion, part 5, p.18.

This Table shows that about one-third of pedestrians suffered major permanent disabilities, while a substantial proportion of both pedal cyclists and motor cyclists experienced minor permanent disabilities. In total 10 of the people were severely disabled, while one infant was totally incapacitated. [116]

A.70 Blood alcohol levels of the active participants in these accidents were collected. These showed that in 19 per cent of pedestrian accidents, either the driver or pedestrian had a blood alcohol content over the legal limit in South Australia of 0.08. Fifteen per cent of drivers in multi-vehicle crashes were over the legal limit. [117] In single vehicle accidents, where a vehicle collides with a parked car, tree or utility pole, 50 per cent of the drivers had a blood alcohol content over 0.08. Fifty- five per cent were over the New South Wales limit of 0.05, while 33 per cent were over 0.15. The report stated that:

> These accidents tend to occur late at night, at times when drivers are most likely to have been drinking. Because a collision with a utility pole or tree is often very severe even at normal traffic speeds in the metropolitan area, these drivers and their passengers are often very badly injured and so a close association is found between the severity of the crash measured in terms of the injuries sustained by the persons involved and the [blood alcohol] level of the driver. [118]

In the case of motor cycle accidents, 19 per cent of the riders were above 0.08, and 12 per cent above 0.15. The two highest readings were 0.22, and in both these accidents the rider was killed in the accident. [119]

A.71 Some information was available on the occupational status and educational attainment of people involved in the survey accidents. Contrary to the view expressed in some submissions, [120] there was generally no “bias towards an over-representation of unskilled, semi-skilled and skilled workers,” [121] except in the areas of motor cycle accidents. I n this area, unskilled, semi-skilled or skilled workers accounted for about 75 per cent of the riders, compared to 50 per cent of the employed population. [122] One possible explanation given for this over-representation is that it reflects

> ... a preference of young, unskilled, semi-skilled, or skilled males for motor cycles, either as a comparatively cheap form of transport or as a way of expressing themselves. [123]

No conclusions were made on this question, though inquiries indicated that economic considerations were not of primary significance. [124]

A.72 There was also some information available on driving offences committed by active participants in the surveyed accidents. In the case of motor cyclists, there were 26 motor cyclists who survived the accident and were considered by the research team to have committed a violation, in relation to either a traffic control device or some other traffic rule prior to the accident. Only 50 per cent of these were charged, which means only 20 per cent of the motor cyclists in the survey sample were prosecuted for a violation arising from the accident. [125] In relation to car drivers, 202 were assessed by the research team as having disobeyed a traffic control or as having breached some other traffic rule before the accident just over half of these people were prosecuted, which means overall, only 26 per cent of car drivers were penalised for a violation arising from the accident. [126]

V. OTHER TRANSPORT ACCIDENT VICTIMS

A.73 Very little information about public transport accidents, other than numbers of people killed or injured, is available in New South Wales. In 1983, five people were killed and 752 people injured in Urban Transit Authority bus accidents (other than Urban Transit Authority employees). These include passengers in buses and people hit by buses. [127] The State Rail Authority advised [128] that in the year ended 30 June 1983, the following numbers of deaths and injuries occurred.

Table A.37: Railway Accidents: Deaths and Injuries[(a)]

New South Wales 1982-1983

		Number of People
Type of Accident	**Killed**	**Injured**
Train Accidents	0	66
Accidents to trespassers involving train movements	28	69
Accidents at Level Crossings	8	37
Other Accidents(b)	7	198
TOTAL	**43**	**370**

(a) Excluding accidental deaths and injuries of employees.

(b) Represents those injured or killed when failing out of or within train in motion, when on platforms and coming in contact with a moving train. and falling when boarding or alighting from a stationary train.

Source: State Rail Authority of New South Wales

No comparable information is available on accidents involving public or private ferry services.

FOOTNOTES

1. Traffic Accident Study, Lump Sum Survey and Case Study Program: see paras.1.8-1.12.

2. Australia Bureau of Statistics. 1981 *Census of Population and Housing - Census Statement 4* (October 1982), sheet 3, table 11.

3. *Ibid*., over 40 per cent of people born overseas came from either England, Ireland, Canada. USA or New Zealand. Also table 13, p.4 shows that of those aged five years or more who were born overseas over 52 per cent use English only.

4. *Id*., sheet 4. table 13. Over 457,000 people (or 44.5 per cent) of the population who were five years or more and were born overseas used languages other than English.

5. *Ibid.*

6. Australian Bureau of Statistics, *Dwelling, Household, Family - Census 81 Information Paper,* Cat. No. 2150.0, p.1.

7. *Id.,* p.13.

8. *Id.,* p.1.

9. *Id.,* pp.10, 13.

10. *Id.,* p.10.

11. *Id.,* p.13.

12. People in non-family groups were those who lived in non-private dwellings at the time of the Census. It included inmates, employees or customers who live in places such as hospitals, nursing homes, prisons, welfare institutions, hotels, motels, boarding houses, convents, caravan parks and boarding schools.

13. Australian Bureau of Statistics, *Census 81 - Summary Characteristics of persons and Dwellings (New South Wales),* Cat No. 2435.0, p.14, table 18.

14. For the purposes of this survey “family” was defined as two or more related persons usually resident in the same household. It could comprise a married (including de facto) couple or a family head together with children or specified relatives. For more details, see Australian Bureau of Statistics, Labour *Force Status and Other Characteristics of Families Australia,* July 1982, Cat No. 6224.0, pp.2-3, paras.22-25.

15. This survey excluded, among others, people who lived in institutions: *id*., p.1, para-4.

16. *Id., p.* 10, table 4.

17. *Ibid*: “dependent children” includes children under 15 years of age and family members aged between 15 and 20 years who are full-time students.

18. While Australian Bureau of Statistics labour force data is more current, it includes only people aged 15 or more. Even though Census data is not as current, it includes the whole population.

19. See note 13 above, p.16, table 21.

20. Australian Bureau of Statistics, *Census 81 - Income Information Paper*, Cat. No. 2151.0, p.1.

21. This includes only those who did state an income or indicated their income as “none”. Those who did not state an income (some 5.4 per cent of all people aged 15 years or more) were excluded from the following calculations.

22. An actual figure for full-time adult male weekly total earnings for Australia was not available for the date of Census. For the September quarter 1981 the average weekly earnings per employed male unit on a seasonally adjusted basis were $301.10, while full-time adult male weekly total earnings for Australia were $311.20: Australian Bureau of Statistics, *Average Weekly Earnings, States and Australia, December Quarter* 1982, Cat No.6302.0, pp.3-4, table 1. The figure for full-time adult male weekly total earnings for Australia on 30 June 1981 was estimated by averaging the Australian seasonally adjusted average weekly earnings per employed male unit for the June and September quarters of 1981, and multiplying by 311.20/301.10. This gives a figure of about $307,70.

23. The estimate of AWE in footnote 22 gives annual earnings of approximately $16,000. Because table 21 (see note 19) breaks down income only by the grouping “$15,001-$18,000”, the number of people falling below the annual figure was proportioned directly as if the spread of people on specific incomes was equal across the range. If anything this would mean an under estimation of the numbers below AWE, because the spread of income tends to be heavier at the bottom ends of ranges.

24. The estimate of AWE in footnote 22 gives a ceiling of 150 per cent of relevant AWE of approximately $24,000. Because table 21 (see note 19) breaks income only into the broad grouping “$22,001-$26,000”, the number of people falling over that level was proportioned directly as if the spread of people was equal across the range of incomes.

25. See note 20 above, p.1.

26. *Ibid.*

27. Department of Labour and National Service, Women *in the Workforce Facts and Figures, No. 6,* (Commonwealth, December 1968): see especially p.45, appendix table III.

28. Department of Employment and Industrial Relations, Women’s Bureau, *Facts on Women at Work in Australia 1982*, (Commonwealth 1983), p.6.

29. Australian Bureau of Statistics, Labour *Statistics Australia, 1982,* Cat No. 6101.0, p.19, table 2.12.

30. See note 28 above, p.41.

31. See Australian Bureau of Statistics, note 14 above, p.38, table 24.

32. See note 29 above, p.38, table 4.2.

33. Australian Bureau of Statistics, *The Labour Force Australia, June 1983,* Cat. No. 6203.0, p.11, table 1.

34. Australian Bureau of Statistics, *The Labour Force Australia, March 1984 (Preliminary Estimates),* Cat No.6202.0. p.4, table 1.

35. See note 29 above, p.38, table 4.1.

36. *Ibid.*

37. See note 34 above, p.7, table 4.

38. *Ibid.*

39. See note 29 above, p.39, table 34.

40. *Id*., p.39, chart 4.4.

41. Australian Bureau of Statistics, *The Labour Force Australia* (February 1984), Cat No. 6203.0, table 34, p.31.

42. See note 29 above, p.13, table 2.5.

43 *Id*., p.25, table 3.5.

44. *Ibid.*

45. *Ibid.*

46. *Id*., p.26, table 3.7.

47. See note 34 above, p.6, table 3.

48. Australian Bureau of Statistics, *Labour Force Experience Australia during the year ending February 1983* (Preliminary) (September 1983), Cat. No. 6205.0, p.4, table 2.

49. See note 29 above, p.12, table 2.3.

50. Australian Bureau of Statistics, *Characteristics of Persons Looking for Work Australia, July* 1983, Cat. No.6222.0.

51. *Id.,* p.15, table 15.

52. *Ibid.*

53. *Id*, p.17, table 16.

54. Australian Bureau of Statistics, *Persons not in the Labour Force Australia (including discouraged job seekers)* March 1983, No. 6220.0, p.10, table 5.

55. *Ibid*. The figure is 242,100.

56. *Id*., p.1, table 10.

57. *Id*., p.8, table 3.

58. *Ibid.*

59. See note 54 above, p.13, table 11.

60. *Id.,* p.1, para.9.

61. *Id*., p.13, table 11.

62. *Ibid.,* The proportion in New South Wales was 44.2 per cent.

63. *Id.,* p.1, para.9.

64. Australian Bureau of Statistics. *Labour Force Experience Australia During the Period February* 1981 to *February 1982,* Cat. No. 6206.0, p.5.

65. Australian Bureau of Statistics, *Average Weekly Earnings States and Australia, March Quarter* 1984, 12 July 1984, Cat No.6302.0. p.4, table 1.

66. The figures of $420 for AWE and $630 for the ceiling used elsewhere in this Report are estimates for these figures at 30 June 1984, made by the consulting actuary.

67. See eg. Australian Bureau of Statistics, *Weekly Earnings of Employees (Distribution) Australia, August* 1983. Cat. No.6310.0.

68. See note 65 above, p.4, table 1.

69. See note 67 above, p.3. para.13(b).

70. This is using a figure of $357.90 for AWE, as revised in note 65 above, p.4, table 1.

71. Australian Bureau of Statistics, Income *and Housing Survey, Income of Individuals Australia 1981-82* (Preliminary), Cat No.6501.0. p.2, para.9.

72. See note 2 above, sheet 5, table 19.

73. Special tabulation provided by the Australian Bureau of Statistics, 16 April 1984.

74. See note 71 above, p.13, table 9. In the 18-19 year male self-employed age group the average is higher than for the same age of employed males. However. the figure is said to be Subject to a sampling variability too high for most practical uses.

75. See note 29 above. p.78, table 7.1.

76. *Id*., p.79, table 7.2.

77. Each of these groups respectively, made up 34 per cent, 20 per cent and 16 per cent of all employees who received non-wage benefits.

78. See Australian Bureau of Statistics. note 14 above, p.4.

79. *Id*., p.37, table 23. This includes those married couple families where either or both parents were unemployed. as well as those where both were employed.

80. *Ibid.*

81. See paras.A.14-A.15 above. See also Department of Employment and Industrial Relations, Women's Bureau *Facts* on Women at Work in *Australia 1982,* (Commonwealth. 1983), pp.6, 7.

82. B Cass and M O'Loughlin, *Social Policies for Single Parent Families in Australia* (Social Welfare Research Centre, Report No. 40), March 1984, p.10, table 3.

83. Traffic Authority of New South Wales, *Road Traffic Crashes in New South Wales.* Statistical Statement Year ended December 31st 1983, p.ii.

84. *Ibid*. The definition of " fatality" in this report is when a person dies within 30 days of being injured in a traffic crash and the death is directly attributable to the injuries sustained during that crash: see p.5.

85. *Ibid.*

86. *Ibid.*

87. *Id*., p. 19.

88. *Ibid.*

89. *Id.,* pp.11-12.

90. Australian Bureau of Statistics, *Causes of Death New South Wales 1982,* Cat. No.3302.1, table 5, pp.23, 56.

91. *Ibid.*

92. The difference between the numbers of deaths in Tables A.24 and A.23 arises because of different definitions of death in a motor vehicle accident Death statistics are recorded by cause of death, in this case “Motor Vehicle Traffic Accidents”. while the Traffic Authority statistics restrict the definition to death within 30 days of the accident. Death statistics also contain some 23 male deaths and one female death from motor vehicle non-traffic accidents and four male and one female death from other road vehicle accidents: Australian Bureau of Statistics. note 90 above. p.56, table 5.

93. See note 83 above, p.22.

94. *Id.,* p. 1 2.

95. See para. A-54.

96. This Division includes the areas of Goulburn City, Queanbeyan City and the Shires of Bega Valley, Bombala, Boorowa, Cooma-Monaro, Crookwell, Eurobodalla, Gunning. Harden, Mulwaree, Snowy River, Tallaganda, Yarrowlumla, Yass and Young.

97. See note 83 above, p.31.

98. Motor Traffic Act 1909. s.4 F.

99. *Id*., s.4E(2)(c).

100. Seventy- eight per cent of drivers, 80 percent of motor cycle riders and 57 percent of pedestrians killed were blood tested: see note 83, p.32.

101. *Ibid.*

102 *Ibid.*

103. Motor Traffic (Road Safety) Amendment Act 1982, commenced 11 December 1982.

104. Motor Traffic Act. 1909, s.4F.

105. *Id*., s.4F(2).

106. *Id*., s.4F(1).

107. The Department of Health figures do not necessarily correlate with those of the Traffic Authority. For example, the Traffic Authority’s figures show 9.402 people were admitted to hospital and 22,104 were treated but not admitted. This would indicate a significant shortfall in the number of samples taken. even though they are compulsory: see note 83 above. pp.19-33.

108. Ninety-eight per cent of drivers killed and 99 per cent of motor cycle riders killed were not breath tested: see note 83 above. p.33.

109. Bureau of Crime Statistics, *Court Statistics 1981,* p.28.

110. For example, the New Zealand Accident Compensation Corporation has some data on permanent disabilities and permanent incapacity for work.

111. University of Adelaide Road Accident Research Unit, *Adelaide In-Depth Accident Survey* 1975-1979, part 1, p.37, note to table 16.

112. *Id.*, part 2, p.42.

113. *Id*., part 3, p.25.

114. *Id.*, part 2, p.42. Forty-six per cent of pedestrians admitted to hospital were there for longer than one week.

115. See note 111, part 1, p.36.

116. *Ibid.*

117. *Id*., part 1, p.26.

118. *Id*., part 1, pp.26, 31.

119. *Ibid.*

120. See Submission W23, p.6; see also Submission W60, p.7.

121. See note 111, part 6, p.5, para.3.1. See also part 2, p. 17, para.3.1.

122. *Id*., part 4, p.11, para.3.1.

123. *Ibid.*

124. *Ibid.*

125. *Id*., part 4, p.40, para.3.8.

126. *Id*., part 6, p.35, para.3.8.3.

127. Information supplied by the Bus Claims section, Urban Transit Authority of New South Wales.

128. Information supplied by Mr R C Ford, Secretary of the State Rail Authority of New South Wales, letter dated 1 June 1984.

Appendix B - Submissions Received Prior to Release of Working Paper I in May 1983

S1. Compensation Reform Action Group - No. 1.
S2. Wardle, Ms. S.

S3. Confidential.

S4. Confidential.

S5. Compensation Reform Action Group - No.2.

S6. Women's Co-ordination Unit (New South Wales Government).

S7. Confidential.

S8. Injured Workers' Association - No.1.

S9. GIO - No.1.

S10. NRMA Insurance Ltd. - No.1.

S11. Confidential.

S12. Confidential.

S13. National Safety Council of Australia, New South Wales Division.

S14. Porter, Mr. R. M.

S15. Police Association of New South Wales.

S16. Walker, Mr. W.

S17. Sharrod, Dr. F. J.

S18. The Association of Employers of Waterside Labour.

S19. NRMA Insurance Ltd. - No.2.

S20. Australian Orthopaedic Association.

S21. NADOW Australia.

S22. Wright, Mr. G. W.

S23. Australian Casualty Company Ltd.

S24. Association of Self Help Organisations and Groups.

S25. Barbour, Mrs. N.

S26. His Hon Judge Richard Barbour, QC (District Court of New South Wales).

S27. New South Wales Workers' Compensation Self Insurers Association.

S28. Master Builders' Association of New South Wales.

S29. Injured Workers' Association - No.2.

S30. Motor Cycle Council of New South Wales.

S31. Metal Trades Industry Association of Australia.

S3 2. Labor Council of New South Wales.

S33. Tym, Dr. R.

S34. Edward Lumley (Australia) Pty. Ltd.

S35. Insurance Council of Australia Ltd. - No.1.

S36. National Roads and Motorists' Association (NRMA).

S37. NRMA Insurance Ltd. - No.3.

S38. Gandevia, Dr. B. (The Prince of Wales Hospital).

S39. Herbert Mr. D. C.

S40. The Law Society of New South Wales.

S41. American International Underwriters (Australia) Pty. Ltd.

S42. Building and Construction Council, New South Wales.

S43. CSR Ltd - No.1.

S44. National Insurance Brokers Association of Australia Ltd.

S45. O'Neill, G.A.

S46. Manufacturers' Mutual Insurance Ltd.

S47. Australian Council for Rehabilitation of Disabled.

S48. John H. Howard and Co. (Solicitors).

S49. Frost, Dr. G. W. (Sydney Hospital).

S50. Hearing Preservation Committee of the Australian Medical Association (New South Wales).

S51. G.I.O. - No.2.

S52. Council of Social Service of New South Wales.

S53. Page, Mr. E. T.

S54. Orthopaedic Group of the Australian Medical Association (New South Wales) No.1.

S55. Bloch, Dr. B.

S56. Virgona, Mr. B.

S57. Insurance Council of Australia Ltd. - No.2.

S58. Rout, Dr. P.

S59. Grandjean, Ms. S.

S60. Lebanese Social and Cultural Association.

S61. Accident Compensation Corporation of New Zealand.

S62. Compensation Reform Action Group Greek Community Project- No.1.

S63. Law Council of Australia.

S64. Department of Motor Transport and the State Rail Authority (New South Wales).

S65. Women's Legal Resources Centre - No.1.

S66. Australian College of Rehabilitation Medicine.

S67. Bludzius, Mr. F.

S68. Combined Pensioners' Association of New South Wales.

S69. The Hon. Mr. Justice Ronald Cross (Supreme Court of New South Wales).

S70. Australian Council of Social Service Inc.

S71. Compensation Reform Action Group - No.3.

S72. Campbell, Mr I B (Massey University, New Zealand) - No.1.

S73. Women's Legal Resources Centre - No.2.

S74. Tenosynovitis Association.

S75. Marrickville Legal Centre.

S76. Compensation Reform Action Group Greek Community Project - No.2.

S77. Centre for Human Services.

S78. Australian Physiotherapy Association (New South Wales Branch).

S79. Blanks, P. A.

S80. Touriki, A., Samardzic, B. and Bargashoun, S.

S81. The Mile End Industrial Injury Clinic.

S82. Workers' Health Centre.

S83. Migrant Resource Centre (St. George District).

S84. Rea, Dr. D.

S85. Campbell, Mr. I. B. (Massey University, New Zealand) - No.2.

S86. Grant, Dr. J. M. F.

S87. Johnson, Mr. R.

S88. New South Wales Bar Association.

S89. Douglas, Mrs. R.

S90. Bullen, Mr. R. J.

S91. Surf Life Saving Association of Australia (New South Wales State Centre).

S92. Speirs, Ms. G.

S93. The Society of Rehabilitation Counsellors.

S94. Orthopaedic Group of the Australian Medical Association New South Wales - No.2.

Appendix C - Submissions Received Following Release of Working Paper I

W1. Women's Co-ordination Unit (New South Wales Government) - No.1.
W2. Morrison, Mr. A. R. G. - No.1.

W3. Miners, Mr. K.

W4. Halligan, Mr. H. J.

W5. Millman, C.

W6. Tenosynovitis Association.

W7. Williams, Dr. D. J.

W8. Chirgwin, Mr. G. J. - No.1.

W9. J. R. Wilson (Barrister & Solicitor, New Zealand).

W10. Hackney, A.

W11. Cook, Mr. K.

W12. Scrimshaw, Mr.

W13. Walsh, Mr. J.

W14. Handicapped and Disabled Person's Association.

W15. Hyde, Mr. E.

W16. Green, Dr. Z. E.

W17. GIO.

W18. Power, Mr. F. R.

W19. Macrossan Douglas (Solicitors).

W20. Albury and Border District Trades and Labor Council.

W21. Kessey, Ms. W.

W22. Roper, Ms. V. and Coiling, Ms. J. (Social Workers, Spinal Unit Royal North Shore Hospital).

W23. Jones, Associate Professor R. F.

W24. Wing, Dr. M. N.

W25. Orthopaedic Group of the Australian Medical Association New South Wales.

W26. Angelo, A. H. (Victoria University, New Zealand).

W27. His Hon Judge Michael Campbell, QC (Workers' Compensation Commission of New South Wales).

W28. The Law Society of New South Wales.

W29. Royal Australian Nursing Federation, New South Wales Branch.

W30. Hunt and Hunt (Solicitors).

W31. Women's Co-ordination Unit (New South Wales Government) - No.2.

W32. Bowman, Mr. D., M.P.

W33. Transport Workers' Union of Australia (New South Wales Branch).

W34. Chirgwin, Mr. G. J. - No.2.

W35. Crace, Mr. E. J. L

W36. McClellands (Solicitors).

W37. Simpson. P. C.

W38. Harrison, Ms. M.

W39. Harrison, Ms. R. J.

W40. New South Wales Rugby Football League.

W41. Ministry of Transport (New South Wales Government).

W42. Royal South Sydney Hospital.

W43. Morrison, Mr. A. R. G. - No.2.

W44. Kerr, Mr. D. and Ms. S.

W45. Yeo, Dr. J. D. (Director of the Spinal Unit, Royal North Shore Hospital).

W46. Federated Municipal and Shire Council Employees' Union of Australia and New South Wales Division.

W47. Davis, B. J.

W48. Law Institute of Victoria.

W49. Feminist Legal Action Group.

W50. Rank, Sir Benjamin.

W51. New South Wales Association of Occupational Therapists.

W52. NRMA Insurance Ltd.

W53. New South Wales Society of Labor Lawyers.

W54. Thomson, Mr. A.

W55. Girl Guides Association (New South Wales).

W56. Building and Construction Council New South Wales.

W57. New South Wales Forest Products Association Ltd.

W58. Mak, Mr. P.

W59. Motor Cycle Council of New South Wales.

W60. The New South Wales Branch of the Australian Medical Association.

W61. Confidential.

W62. Hardwick, G. A.

W63. Asquith, A.A., J.P.

W64. Goulburn Bourbong Rotaract Club.

W65. Chandler, Mr. J. B.

W66. Ewing, Mr. K.

W67. Bludzius, Mr. F.

W68. Darcy, L

W69. Kenny, Dr. B.

W70. Newcastle Law Society.

W71. Insurance Council of Australia Ltd.

W72. Walne, Ms. H.

W73. Keeler, Mr. J.

W74. The Paraplegic and Quadriplegic Association of New South Wales (Newcastle Branch).

W75. The New South Wales Bar Association.

W76. The Law Society of New South Wales (No-Fault Liability Committee).

W77. Bell, Dr. D. S.

W78. The Society of Rehabilitation Counsellors.

W79. Davidson, H. A.

W80. Podesta, Mr. F. A.

W81. Actors Equity of Australia.

W82. Victorian Bar Council.

W83. The Nambucca Welfare Committee.

W84. Higgins, Ms. S. A.

W85. The Paraplegic and Quadriplegic Association of New South Wales.

W86. The Private Hospitals and Nursing Homes' Association of Australia Ltd.

W87. New South Wales Retired Teachers Association.

W88. The Riverina Law Society.

W89. Country Women's Association of New South Wales.

W90. Cross, Mr. D.

W91. Carozzi, Mr. R.

W92. Royal Australasian College of Physicians, New South Wales State Committee.

Appendix D - Public Consultation

I. CONSULTATIONS ON SUBMISSIONS

S5 and S71	Compensation Reform Action Group	12 August 1982
S6, W1 and W31	Women's Co-ordination Unit (New South Wales Government)	15 June 1983
S15	Police Association of New South Wales	13 July 1983
S27	New South Wales Workers' Compensation Self-Insurers' Association	13 December 1982
S32	Labor Council of New South Wales	22 June 1983
	Shop, Distributive and Allied Employees' Association	19 July 1983
	Australian Tramway and Motor Omnibus Employees' Association Trade Union	19 July 1983
	Health and Research Employees' Association of Australia	19 July 1983
	Public Service Association of New South Wales	20 July 1983
	Printing and Kindred Industries Union New South Wales Branch	20 July 1983
	Federated Storemen and Packers Union of Australia	21 July 1983
	Federated Engine Drivers and Firemen's Association of Australia	25 July 1983
	Federated Clerks' Union	26 July 1983
	Federated Municipal and Shire Council Employees Union of Australia (New South Wales Division)	26 July 1983
	Australian Railways Union	9 August 1983
	Building Workers' Industrial Union	1 December 1983
S35, S57 and W71	Insurance Council of Australia Ltd.	28 February 1983, 29 July 1983, 30

		November 1983
S36	National Roads and Motorists' Association	27 June 1983
S40 and W28	The Law Society of New South Wales	9 December 1982, 27 October 1983
S47	Australian Council for Rehabilitation of Disabled	21 July 1983
S52	Council of Social Service of New South Wales	15 June 1983
S66	Australian College of Rehabilitation Medicine	14 September 1983
W27	His Hon Judge Michael Campbell, QC, Workers' Compensation Commission of New South Wales	23 November 1982
W33	Transport Workers' Union of Australia (New South Wales Branch)	8 July 1983
W40	New South Wales Rugby Football League	10 May 1983
W42	Royal South Sydney Hospital	16 November 1983
W45	Dr. J. D. Yeo, (Director of the Spinal Unit, Royal North Shore Hospital	19 March 1982, 26 June 1984
W53	New South Wales Society of Labor Lawyers	12 December 1983
W59	Motor Cycle Council of New South Wales	6 August 1983
W85	The Paraplegic and Quadriplegic Association of New South Wales	28 May 1984

W87	New South Wales Retired Teachers Association	9 May 1984

II. OTHER CONSULTATIONS

Australian Medical Association, New South Wales Branch	19 April 1982
Australian Quadriplegics' Association	15 June 1983
Injured Workers' Association	17 August 1983
His Hon Judge Frank McGrath, Chairman, Workers' Compensation Commission of New South Wales	29 October 1982, 12 May 1983
QBE Insurance Ltd	23 February 1983
Sutherland Shire Clerk	8 March 1983

Appendix E - Meetings and Seminars Attended in the Course of the Reference

21 July 1981	An introductory seminar was held at the Commission's offices to discuss a paper by Professor Harold Luntz of the University of Melbourne.
24 February 1982	The Chairman addressed the annual conference of the Institute of Engineers on Accident Compensation.
12 May 1982	The Chairman addressed the Insurance Institute of New South Wales on the reference.
26 August 1982	Mr Wood and Ms Neave met with the New South Wales Federation of Democratic Turkish Associations to discuss the reference.
28 September 1982	The Chairman and Ms Tito addressed a seminar entitled "Women and Accident Compensation" organised by the Feminist Legal Action Group and Lidcombe Workers' Health Centre.
29 September 1982	Ms. Neave, Mr. Wood and Ms. McDonald (legal officer) attended a meeting of community and welfare workers held at the offices of the Council of Social Service of New South Wales to discuss the reference.
21 October 1982	The Chairman and Ms. Neave attended a meeting of railway workers at the Chippendale Information Centre to discuss the reference.
18 November 1982	Ms. Smith attended a meeting at the Marrickville Information Centre to discuss the reference.
30 November 1982	The Chairman addressed a seminar an Occupational Safety and Health organised by the National Safety

	Council of Australia.
2 June 1983	Ms. Tito presented a seminar on Workers' Compensation at the Trade Union Training Centre for the Australian Trade Union Training Authority.
27 June 1983	Ms. Neave and Ms. Tito visited Ashton House, Maroubra, to discuss the reference with quadriplegic residents.
29 June 1983	Mr. Wood attended a seminar on Workers' Compensation at Westmead Hospital.
13 July 1983	Members of the Commission visited the Rehabilitation Centre at Royal South Sydney Hospital to discuss the proposed Transport Accidents Scheme and its ramifications for rehabilitation.
21 July 1983	Mr. Wood and Ms. Tito addressed a meeting of the Australian Council for the Rehabilitation of the Disabled on the reference.
4 August 1983	Commissioners and staff addressed a seminar jointly organised by the Commission and the University of New South Wales entitled "Accident Compensation - The Prospects for Reform".
12 August 1983	The Chairman addressed a meeting of the New South Wales Society of Labor Lawyers on the proposed Scheme.
17 August 1983	The Chairman addressed a seminar organised by the Council of Social Service of New South Wales to explain and discuss the proposed Scheme.
25 August 1983	Mr. Wood and Ms. Tito visited the Illawarra Rehabilitation Centre and the Illawarra Handicapped Persons' Trust to discuss the proposed Scheme and rehabilitation.

7 September 1983	The Chairman addressed a meeting of the Association of Risk and Insurance Managers of Australia New South Wales Chapter on the proposed Scheme.
7 October 1983	The Chairman and Ms. Tito attended a seminar on rehabilitation concepts and services for ethnic health, welfare and community workers, entitled “Rehabilitation in a Multicultural Society’. This seminar, organised by the society of Rehabilitation Counsellors and the Ethnic Affairs Commission of New South Wales was held at the Queen Elizabeth II Rehabilitation Centre.
11 October 1983	The Chairman, Mr. Wood and Ms. Tito attended a meeting with Dr. John Voss and others at the Queen Elizabeth 11 Rehabilitation Centre.
19 October 1983	The Chairman addressed a seminar organised by the Work Health Co. entitled “The Billion Dollar Question: Workers’ Compensation or Common Law?”
21 October 1983	The Chairman addressed a conference organised by the Law Institute of Victoria entitled “The Compensation of Motor Accident Victims in Victoria - A Model for Australia?”
25 October 1983	The Chairman addressed a meeting of the Reinsurance Discussion Group of New South Wales on the proposed Scheme.
4 November 1983	Miss O’Connor addressed a meeting of the Wollongong Branch of the Law Society of New South Wales on the proposed Scheme.
10 November 1983	The Chairman addressed the Australian College of Rehabilitation Medicine on the proposed Scheme.
17 November 1983	The Chairman and Ms. Tito addressed a seminar in Newcastle on the proposed Scheme.

26 November 1983	The Chairman addressed the Law Society of South Australia on the proposed Scheme.
28 November 1983	The Chairman addressed a seminar organised by the New South Wales Branch of the Metal Trades Industry Association of Australia on the subject of Workers' Compensation and Accident Prevention.
3 February 1984	Mr Sperling addressed a conference on pain and litigation organised by the Australasian Chapter of the International Association f or the Study of Pain.
8 February 1984	The Chairman addressed a meeting of the Amenities and Safety Committee of the Public Service Association of New South Wales on the proposed Scheme.
12 March 1984	The Chairman and Miss O'Connor addressed the Central Council of the Public Service Association on the proposed Scheme.
June 1984	The Chairman addressed a conference in Adelaide entitled "Workers' Compensation New Directions?" organised by the South Australian Department of Labour.
6 June 1984	The Chairman addressed a seminar in Perth on Workers' Compensation, organised by the Confederation of Western Australian Industry.
2 July 1984	Justice Wood presented a paper called "Compensation - The Indiscriminate Lottery" at a medico-legal conference held in Fiji. (This seminar was held after Justice Wood had retired as a full-time member of the Commission).
7 August 1984	The Chairman addressed a meeting of the Teachers Federation on the proposed Scheme.
15 August 1984	The Chairman addressed a meeting of the Building Workers' Industrial Union on the proposed Scheme.

19 August 1984	The Chairman Addressed a seminar in Canberra entitled “Accident Compensation” organised by the Australian National University.

Appendix F - Responses to the Commission's Work

D. Smith, “Disabled Survey Shows Urgent Need for Help”, *The National Times,* 6-12 December 1981, p.53.
M. Walsh, “A legal gravy train falters”, The Bulletin, 23 February 1982.

“The legal minefield of ‘no-fault’ compensation”, *The Australian,* 28 May 1982, p.9.

R Ackland, “Accident Compensation: The Options”, *Australian Law News,* June 1982, p.8.

“Accident Compensation Inquiry”, (1982) 3 *Independence (Journal of the Self-Help Association for Multiple Sclerosis and Allied Disorders)*, p.51.

“The Options for Accident Compensation”, (1982) 25 *Justinian 10.*

“The tangled compensation web”, *The Australian,* 14 December 1982.

“Shaping a better deal for accident victims”, *The Newcastle Herald,* 14 February 1983.

“Accident Compensation - Recent Developments”, G. Murphy, address to Law Summer School, 1983.

“Compo Law Inquiry”, Maritime Worker, March 1983, p.21.

“Accident Compensation Reform is Long Overdue”, Choice, April 1983, p.38.

Seminar on Accident Compensation, 30 April 1983, organised by Compensation Reform Action Group.

“Weekly Pay for Smash Victims”, *Daily Telegraph,* 28 May 1983, p.l.

“A Realistic View of Accident Compensation”, (1983) 21 *Law Society Journal* 76.

“The Public Must Retain Recourse to the Courts”, Law Society of New South Wales news release, 27 May 1983.

“Transport Accidents Scheme for New South Wales”, New South Wales Bar Association, press release, 27 May 1983.

“Reform body supports no-fault accident compo”, *The Weekend Australian,* 28-29 May 1983, p.5.

“No-Fault Compo”, *The Sun-Herald,* 29 May 1983, p.13.

“Luck on the Road’, Editorial, *The Sun*, 30 May 1983, p.4.

“Fairer Compensation”, Editorial, *The Sydney Morning Herald,* 31 May 1983, p.6.

“Non-Earners Miss Out Again!”, Council of Social Service of New South Wales press release, 31 May 1983.

A Bowne,” Road Victims may pay a high price”, *Business Review Weekly*, June 4-10 1983, p.48.

“No-fault accidents: the principles come first’, *The Sydney Morning Herald,* 11 June 1983, p.13.

President’s Message on Accident Compensation, (1983) 21 *Law Society Journal* 263.

“No Fault Insurance for New South Wales?”, Motor Cycle Council of New South Wales.

G. Murphy, “The Law Council Speaks Out On Accident Compensation Proposal”, (1983) 18 *Australian Law News* 18.

“Compensation for Injury”, Editorial, *The Canberra Times,* 5 July 1983.

“No-Fault- what will it mean for riders?” *Motorcycle News,* July 29 - 11 August 1983, p.23.

“No-Fault Compensation”, President’s Message, Newsletter No.90 of Law Society of the Australian Capital Territory, July-August 1983.

Case Studies on Accident Compensation. Law Society of New South Wales August 1983.

“No-fault plan seen as threat to democracy”’, *The Australian,* 8 September 1983, p.4.

“Law Society says Majority of Seriously Disabled want Right to Sue”, Law Society of New South Wales news release, 29 September 1983.

“NSW searches for a faultless no-fault insurance system”, *The Australian Financial Review,* 14 September 1983, p.12.

“No-Fault’ Compo Scheme is Full of Faults”, *The Metal Worker*, September 1983, p.18.

“Lawyers argue over new NSW compo scheme”, *Business Review Weekly,* October 1-7 1983, p.6.

M. Tubbs, “No fault or no rights?”, (1983) 8 *Legal Service Bulletin* 209.

D. McLachlan, “Law Reform from the Perspective of the Practising Lawyer: Personal Injury”, address to Law Reform Workshop, 10 October 1983.

“Transport Accidents Compensation Scheme proposed by NSW Law Reform Commission”, (1983) 57 *Australian Law Journal* 490.

“The No-Fault Accident Compensation Debate”, special issue of *Quad Wrangle,* December 1983.

“Bulletin contributor faulted on’no fault”’, commentaries by H. Luntz and M. Chesterman, (1983) 8 *Legal Service Bulletin* 280.

“Consensus on compensation”, Editorial, *The Sydney Morning Herald,* 9 April 1984, p.8.

“Compo Scheme -’no fault or faulty?”, *The Metal Worker,* February 1984, p.16.

“Compo change upsets disabled”, *Daily Telegraph, 10* May 1984, p.10.

“Court accident payouts: Landa acts to end ’Lottery’”, *The Sydney Morning Herald,* 12 June 1984, p.1.

"Getting the lawyers off compo", *The Sydney Morning Herald*, 13 June 1984, p.8.

"Uren backs no-fault vehicle insurance scheme for Canberra", *The Canberra Times*, 19 June 1984, p.1.

"The hidden dangers of Lump Sum Compensation" *The Australian*, 12 June 1984, p.13.

"Law Society: Keep lump sum payments: *The Sydney Morning Herald*, 13 June 1984, p.13.

"It is your right to have a transport injury compensation scheme that is fair and affordable! ... or is this about to be denied?" Law Society of New South Wales advertisement in *The Sydney Morning Herald*, 18 June 1984, p.11.

Table of Statutes

Commonwealth

Administrative Appeals Tribunal Act 1975	16.27, 16.33, 16.45, 16.47, 16.64, 16.65, 16.67
Aged or Disabled Persons Homes Act 1954	13.37, 13.39, 13.53
Bank Accounts Debit Tax Administration Act 1982	15.54
Commonwealth Employment Service Act 1978	5.64
Commonwealth Motor Vehicles (Liability) Act 1959-1973	14.15
Compensation (Commonwealth Government Employees) Act 1971	15.28, 17.53
Family Law Act 1975	2.10
Handicapped Persons Assistance Act 1974	13.37-13.39, 13.53
Health Insurance Act 1973	5.64, 13.21, 13.27, 13.41, 13.44, 13.60
Health Legislation Amendment Act (No.2) 1983	13.30
Home Nursing Subsidy Act 1956	13.32-13.34
Income Tax Assessment Act 1936	8.16, 8.17, 12.39, 12.46, 15.54, 17.55
Income Tax Rates Act 1982	12.39
Invalid and Old-Age Pensions Act 1941	9.9
National Compensation Bill 1974	4.54-4.56, 4.61, 4.73
National Health Act 1953	5.64, 13.30, 13.31, 13.36, 13.50, 13.51
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National Rehabilitation and Compensation Bill 1977	4.57, 4.58, 7.20, 8.5, 15.28
Nursing Homes Assistance Act 1974	13.30, 13.31
Nursing Homes Assistance Regulations	13.29, 13.52
Repatriation Act 1920	9.58

Sales Tax (Exemptions and Classifications) Act 1935-1973	15.55
Social Security Act 1947	2.54-2.56, 2.58-2.61, 2.63, 5.32, 5.64, 8.39, 9.10, 9.71, 10.63, 12.25, 14.104, 16.33
Social Security and Repatriation (Budget Measures and Assets Test) Bill 1984	2.55
Social Services Consolidation Act (No.2) 1948	9.9
Student Assistance Regulations	12.25
Trade Practices Act 1974	14.59, 14.62, 14.63, 14.85

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Adoption of Children Act, 1965	16.84
Anti- Discrimination Act, 1977	9.24, 9.64, 16.64, 16.65
Business Franchise Licences (Petroleum Products) Act, 1982	17.36
Commercial Transactions (Miscellaneous Provisions) Act, 1974	14.60
Community Welfare Act, 1982	8.39, 10.7, 16.43, 16.87
Compensation Court Bill, 1983	16.87
Compensation Court Act, 1984	2.42
Compensation to Relatives Act, 1897	2.10, 2.34, 12.2, 12.3, 12.22, 12.24, 12.28, 12.62, 12.70, 14.81, 14.83, 14.100
Compensation to Relatives (De Facto Relationships) Amendment Bill 1984	12.22
Conveyancing Act, 1919	12.60
Crimes Act, 1900	2.48, 5.5, 12.70, 14.122
Criminal Injuries Compensation Act, 1967	2.47, 2.48
De Facto Relationships Bill 1984	12.20
Electricity Commission Act, 1950	15.41, 15.45
Fatal Accidents Compensation Act, 1847	2.10
Government Insurance Act, 1927	15.42, 15.43, 15.54

Industrial Arbitration Act, 1940	8.42
Land and Environment Court Act, 1979	16.64
Land Tax Management Act, 1956	15.55
Law Reform (Marital Consortium) Act, 1984	2.35, 10.2
Law Reform (Married Persons)Act, 1964	2.10
Law Reform (Miscellaneous Provisions) Act, 1965	2.11, 12.4, 12.70, 14.18, 14.19
Law Reform (Miscellaneous Provisions) Act, 1965	2.10, 2.27, 2.34
Legal Services Commission Act, 1979	16.78
Limitation Act, 1969	16.28
Maritime Services Act, 1935	15.41
Married Persons (Property and Torts) Act, 1901	2.10
Mental Health Act, 1958	16.84
Metropolitan Water, Sewerage and Drainage Act, 1924	15.41, 15.45
Miscellaneous Acts (Workers' Compensation) Amendment Act, 1984	2.42
Motor Traffic Act, 1909	5.5, 14.122, 17.34, 17.46
Motor Traffic Regulations, 1935	17.46
Motor Traffic (Road Safety) Amendment Act, 1982	5.4, 5.5
Motor Vehicles (Third Party Insurance) Bill 1942	2.20
Motor Vehicles (Third Party Insurance) Act, 1942	1.40, 2.20, 2.32, 2.37, 2.39-2.41, 2.43, 3.37, 3.97, 4.64, 10.24, 13.10, 13.42, 13.44, 13.46, 13.49, 14.4, 14.5, 14.15, 14.20, 14.21, 14.77, 17.19, 17.27, 17.28, 17.31
Motor Vehicles (Third Party Insurance) Amendment Act, 1977	1.40, 4.64
Motor Vehicles (Third Party Insurance) Amendment Act, 1984	1.42, 2.32, 3.37, 3.97, 10.24, 17.19
Motor Vehicles (Third Party Insurance) Regulations, 1942	13.49, 14.48, 17.27, 17.31
Ombudsman Act 1974	16.90
Pay Roll Tax Act 1971	15.54

Public Instruction (Amendment) Act, 1916	8.39
Public Service Act, 1979	15.43, 15.45, 15.46
Sale of Goods Act, 1923	14.60
Sporting Injuries Insurance Act, 1978	2.50.2.51
Sporting Injuries Insurance (Amendment) Act 1984	2.51
Sporting Injuries Insurance (Workers' Compensation) Amendment Act, 1984	2.42
Stamp Duties Act, 1920	15.54, 15.55
Stamp Duties (Financial Institutions Duty) Amendment Act, 1982	15.55
State Bank Act 1981	15.41
State -Transport (Co-ordination) Act 1931	14.6-14.8
Statutory and Other Offices Remuneration Act 1975	15.44
Statutory Duties (Contributory Negligence) Act 1945	2.16
Supreme Court Act 1970	16.87, 16.89
Supreme Court Rules, 1970	16.89
Transport Act, 1930	17.34
Transport Authorities Act, 1980	15.41, 15.45, 17.31
Water Resources Commission Act, 1976	15.41
Water Traffic Regulations, 1969	14.9
Workers' Compensation Act, 1926	2.10, 2.19, 2.37, 2.39, 2.40, 2.43, 2.44, 4.66, 5.25, 7.56, 8.6, 8.7, 8.16, 8.19, 8.37, 9.12-9.14, 9.62, 11.35, 11.38, 12.5, 12.21, 12.24, 12.25, 12.28, 12.32, 13.10, 13.49, 14.30, 14.57, 14.58, 14.69, 14.75, 14.77, 14.79, 14.85, 14.87-14.89, 14.94, 14.101, 14.102
Workers' Compensation (Amendment) Act, 1984	2.42, 15.30
Workers' Compensation (Brucellosis) Amendment Act 1984	2.42
Workers' Compensation Regulations, 1926	13.49
Workmen's Compensation Act, 1910	2.18

Northern Territory

Motor Accidents (Compensation) Act 1979	4.19, 4.45-4.47, 7.3, 8.12, 8.42, 12.6, 12.21, 12.37, 12.58, 13.57, 14.12, 14.41, 14.110, 14.118, 15.29.16.33
Motor Accidents (Compensation) Rates of Benefit Regulations 1984	4.45, 4.46
Territory Insurance Office Act 1979	15.29, 15.44

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Common Law Practice Act 1867-1981	2.32
Motor Vehicles Insurance Act 1936-1979	14.20
Workers' Compensation Act 1916	2.42, 16.20

South Australia

Supreme Court Act 1935	4.7

Tasmania

Motor Accidents (Liabilities and Compensation) Act 1973	4.25, 4.39, 4.40, 7.3, 7.7, 7.45, 7.49, 8.14, 8.19, 8.42, 12.6, 12.37, 12.58, 14.12, 14.41, 14.71, 14.109, 14.118, 15.29, 15.41, 15.42, 15.44, 16.8, 16.33
Motor Accidents (Liabilities and Compensation) (Premiums) Order 1981-1982	4.41

Victoria

Motor Accidents Act 1973	4.25-4.30, 4.32, 4.3 3, 7.3, 7.7, 8.13, 8.19, 8.42, 9.18, 12.6, 12.21, 12.58, 12.59, 14.12, 14.21, 14.41, 14.97, 14.108, 15.31, 15.41, 15.42, 15.44, 15.45, 15.53, 16.8, 16.27, 16.33
Motor Accidents (Amendment) Act 1979	4.29, 4.30
Motor Accidents (Amendment) Act 1981	4.28, 4.32, 4.33
Public Service Act 1958	15.45
Occupier's Liability Act 1983	14.66
Workers' Compensation Act 1958	2.42, 14.71

Western Australia

Motor Vehicle (Third Party Insurance) Act 1943-1976	4.5

New Zealand

Accident Compensation Act 1972	4.51, 4.52
Accident Compensation Act 1982	4.51, 4.53, 7.3, 7.7, 7.29, 7.57, 8.5, 8.19, 8.44, 8.55, 8.56, 9.19-9.21, 10.3, 10.13, 10.59, 11.36-11.40, 11.46, 12.6, 14.20, 14.107, 15.31, 15.41, 15.42, 16.8, 16.25, 16.35
Accident Compensation Bill 1971	4.51

United Kingdom

Administration of Justice Act 1982	4.9, 4.20
Employers' Liability Act 1880	2.10, 2.18
Fatal Accidents Act 1846	2.10, 12.2
Highways (Miscellaneous Provisions) Act 1961	2.28
Law Reform (Contributory Negligence) Act 1945	2.10
Law Reform (Personal Injuries) Act 1948	2.10
Social Security Act 1975	5.40
Workmen's Compensation Act 1897	2.14

Table of Cases

	Paragraph
A, Application for Review by (1979) 4 ACCR (NZ) 56.	14.27
Abela v. Giew (1965) 65 SR (NSW) 485	2.16
Accident Compensation Commission v. Kivi [1980] 2 NZLR 385.	10.3
Andrews v. Hopkinson [1957] 1 QB 229.	14.61
Aquilina v. Noel Schmutter (Sales) Pty. Ltd., 4 August 1983, Supreme Court of New South Wales, Yeldham J.	14.26
Archer v. Richards, 28 June 1984, terms of settlement lodged in Supreme Court of New South Wales, Common Law Division	4.15, 6.27
Arthur Robinson (Grafton) Pty. Ltd. v. Carter (1968) 122 CLR 649	3.69
Australian Iron and Steel Pty. Ltd. v. Government Insurance Office of New South Wales [1977] 2 NSWLR. 446	14.77
Australian Iron and Steel Pty. Ltd. v. Government Insurance Office of New South Wales [1978] 2 NSWLR 59.	14.77
Baker v. Bolton (1808) 1 Camp. 493.	2.7, 12.2
Baker v. Willoughby [1970] AC 467.	14.37
Beavis v. Apthorpe [1963] NSWR 1176.	14.35
Bellingham v. Dykes, 22 August 1983, Supreme Court of New South Wales, Court of Appeal	3.70

Best v. Samuel Fox and Co. Ltd. [1952] AC 716	2.35
Bloomfield v. Brambrick, 17 August 1979, Supreme Court of New South Wales, Court of Appeal	2.30, 10.24
Boak and Director-General of Social Security (1982) 9 SSR 90	2.56
Bogan v. Hutchings, 28 March 1983, Supreme Court of New South Wales, Court of Appeal.	3.75
Bourke v. Butterfield and Lewis Ltd. (1926) 38 CLR 354	2.16
Bowater v. Rowley Regis Corporation [1944] KB 476.	2.11
Boyle v. Nominal Defendant [19591 SR (NSW) 413.	14.19
Bradburn v. Great Western Railway Co. (1874) LR 10 Ex. 1.	2.33, 14.99
Brewer v. Incorporated Nominal Defendant [1980] VR 469.	14.24
Burnicle v. Cutelli [1982] 2 NSWLR 26.	2.35
Cannull v. Di Matteo, 21 August 1979, Supreme Court of New South Wales, Court of Appeal.	10.41
Carrick v. Commonwealth of Australia [1983] 2 Qd. R. 365.	2.30

Chadwick v. British Railways Board [1967] 1 WLR 912, [1967] 2 All ER 945.	14.18
Commercial and General Insurance Co. Ltd. v. Government Insurance Office of New South Wales (1973) 129 CLR 374	14.4, 14.23
Commissioner for Railways v. McDermott [1967] 1 AC 169.	14.18
Commissioner for Railways v. Quinlan [1964] AC 1054.	14.65
Cull v. Judd [1980] WAR 161.	10.58
Cullen v. Trappell (1980) 146 CLR 1.	2.31, 3.63
Cunningham v. Harrison [1973] QB 942.	10.23
Cutler v. Vauxhall Motors Ltd. [1971] 1 QB 418.	14.32
Davie v. New Merton Board Mills Ltd. [1959] AC 604	2.25
Davis v. Kudrins, 5 June 1975, Supreme Court of New South Wales, Court of Appeal.	3.45, 7.93
Dawson v. Stevens Brothers Pty. Ltd. [1983] 32 SASR 375.	14.23
Day v. Standard Waygood Ltd. (1941) 65 CLR 204.	14.27
Denning v. Morris, 11 August 1978, Supreme Court of New South Wales, Court of Appeal.	3.45, 7.93

Donnelly v. Joyce [1964] QB 454.	10.23
Donoghue v. Stevenson [1932] AC 562.	2.11, 2.12, 14.61
Doudle v. Kinnell, Cannel and Coking Coal Co. Ltd. [1947] AC 377.	14.38
Drake v. Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577.	16.60
Dulieu v. White and Sons [1901] 2 KB 669.	2.11
Elchab v. Brown, 9 June 1977, Supreme Court of New South Wales, Court of Appeal.	1.36
Evans v. Muller (1983) 57 ALJR 393, (1983) 47 ALR 241.	2.33
Fairbairn v. Cummins [1961] ALR 205.	11.21
Faulkner v. Keffalinos (1970) 45 ALJR 80	14.37
Fawcett v. BHP By-Products Pty. Ltd. (1960) 104 CLR 80.	14.4, 14.23
Fazlic v. Milingimbi Community Inc. (1982) 38 ALR 424, (1982) 56 ALJR 211	11.57
Federal Commissioner of Taxation v. Slaven (1984) 15 ATR 242.	4.30, 8.13, 12.46
Fisher v. Smithson (1977) 17 SASR 223	12.42

Fitzgerald v. Penn (1954) 91 CLR 268.	14.36
Fleming v. White [1981] 2 NSWLR 719	2.48
Frankcom v. Woods, 1 October 1980, Supreme Court of New South Wales, Court of Appeal.	10.41
Froom v. Butcher [1976] QB 286.	2.27
Gent-Diver v. Neville (1953) St R.Q. 1.	2.28
Gillet v. Dean, 7 June 1983, Supreme Court of New South Wales, Court of Appeal.	3.45
Gorringe v. Transport Commission (Tas.) (1950) 80 CLR 357.	2.28
Government Insurance Office of New South Wales v. King (1960) 104 CLR 93.	14.26
Government Insurance Office of New South Wales v. RJ Green and Lloyd Pty. Ltd. (1966) 114 CLR 437	14.4, 14.22, 14.25
Grabkowski v. Majchrowski (1978) 19 SASR 290	4.7
Graham v. Baker (1961) 106 CLR 340.	2.33, 14.99
Gray v. Murray [1979] Tas. R 48.	14.25
Griffiths v. Kerkemeyer (1977) 139 CLR 161.	2.30, 10.23, 10.24

Griffiths v. The Commonwealth (1983) 50 ACTR 7.	14.37
R Application for Review by (1978) 3 ACCR.(NZ) 42.	14.27
Halvorsen v. Livingstone, 16 March 1970, Supreme Court of New South Wales, Court of Appeal.	3.30
Harkin v. Motor Accidents Board, CCH Victorian Workers' Compensation Guide, No.74-109.	14.25
Harris v. Motor Accidents Board, Appeal No.9 of 1980, Victorian Motor Accidents Tribunal.	14.24
Harvey Trinder (NSW) Pty. Ltd. v. Government Insurance Office of New South Wales (1966) 114 CLR 449	14.23
Harwood v. Wyken Colliery Co. [1913] 2 KB 158.	14.38
Heffernan v. Occidental Minerals Corporation of Australia [1978] 2 NSWLR. 412	12.3
Herrington v. British Railways Board [1972] AC 877.	14.65
Hinz v. Berry [1970] 2 QB 40	14.18
Hobsons Pty. Ltd. v. Thorne [1954] WCR 59	14.72
Hodges v. Frost (1984) 53 ALR 373	10.23
Hoffmueller v. The Commonwealth (1981) 54 FLR 48	14.33, 14.36

Hole v. Hocking [1962] SASR 128	14.31
Holloway v. McFeeters (1956) 94 CLR 470	3.32
Insurance Commissioner v. Joyce (1948) 77 CLR 39	2.28
Jackson v. Jackson [1970] 2 NSWR 454	10.48
Jaensch v. Coffey (1984) 58 ALJR 426.	12.4, 13.57, 14.18, 14.19
Jobling v. Associated Dairies Ltd. [1982] AC 794	14.37
Johnson and Morris Pty. Ltd. v. Government Insurance Office of New South Wales [1972] 2 NSWLR 743	14.4
Johnson v. Kelemic (1979) Fam L Cas. 78,487	2.30, 10.24
Jones v. Gleeson (1965) 39 ALJR 258; [1966] ALR 235	2.33, 14.99
Jones v. Schiffman (1971) 124 CLR 303.	12.3
Kealley (JR) v. Jones [1979] 1 NSWLR 723	2.35
Koop v. Bebb (1951) 84 CLR 629	14.46
Kovac v. Kovac [1982] 1 NSWLR 656	2.30, 10.24
Lamont v. Motor Accidents Board [1983] VR 88.	14.24

Lexmead Ltd. v. Lewis [1982] AC 225.	14.61
Lim Poh Choo v. Camden and Islington Area Health Authority [1980] AC 174.	3.44
Lindeman Ltd. v. Colvin (1946) 74 CLR 313	14.35, 14.36
Lindquist v. Maier [1980] Qd. R. 203.	14.99
Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] AC 555.	2.25
Livingstone v. Halvorsen (1978) 53 ALJR 50; (1978) 22 ALR 213.	3.29, 3.30
McCann v. Scottish Co-op Laundry Association Ltd. [1936] 1 All ER 475.	14.38
McDonald v. Director-General of Social Security, 27 March 1984, Federal Court of Australia.	16.69
McGuire v. Motor Accidents Board, C.C.H. Victorian Workers' Compensation Guide No.74-130.	14.24
McIntosh v. Williams [1979] 2 NSWLR. 543.	12.3
McLoughlin v. O'Brian [19821 2 W.LR. 982; [1982] 2 All ER 298	12.4, 14.18
Maklouf v. Tannous, 2 August 1984, Supreme Court of New South Wales, Cantor J.	2.22

Mapleson v. Motor Accidents Board, Appeal No. 4 of 1975, Victorian Motor Accidents Tribunal.	14.26
Markovic v. Director-General of Social Services (1982) 5 SSR 48.	2.56
Meth v. Moore (1982) 44 ALR 409	14.61
Moore v. Court, 23 September 1982, Supreme Court of New South Wales, Maxwell J.	1.36, 3.17
Moore v. Nominal Defendant [1983] 1 Qd. R. 507.	14.20
Moriarty v. McCarthy [1978] 2 All ER 213, [1978] 1 WLR 155	10.13, 10.38, 10.58
Mount Isa Mines Ltd. v. Pusey (1970) 125 CLR 383.	14.18
Musca v. Colombini [1970] WAR 33.	3.69
Nash v. Miners, 6 April 1983, Supreme Court of New South Wales, Court of Appeal.	12.62
Nathan and James v. Vos [1970] SASR 455.	4.7
National Employers' Mutual General Insurance Association Ltd. v. Calver [1983] 3 NSWLR 107.	9.62
National Insurance Co. of New Zealand Ltd. v. Espagne (1961) 105 CLR 569.	2.33, 2.56, 14.36, 14.99
Neall v. Watson (1960) 34 ALJR 364.	14.31, 14.33, 14.36

Nettleship v. Weston [1971] 2 QB 691.	2.28
O'Brien v. McKean [1970] Qd. R. 166.	10.13
O'Connell v. Jackson [1972] 1 QB 270.	2.27
Overseas Tankship (UK) Ltd. v. The Miller Steamship Co. Pty. [1967] 1 AC 617.	2.12
Peacock v. Amusement Equipment Co. Ltd. [1954] 2 QB 347.	14.100
Pennant Hills Restaurants Pty. Ltd. v. Barrell Insurances Pty. Ltd. (1981) 145 CLR 625.	4.69
Performance Cars Ltd. v. Abraham [19621 1 QB 33.	14.29
Phillips v. Eyre (1870) LR 6 QB 1.	14.46
Pipikos v. W. Brown and Sons Pty. Ltd. [1970] SASR 508.	14.33, 14.36
Piro v. W. Foster and Co. Ltd. (1943) 68 CLR 313	2.16
Planet Fisheries Pty. Ltd. v. La Rosa (1968) 119 CLR 118.	3.69
Preston v. Mercantile Mutual Insurance Co. Ltd. [1971] SASR 221.	10.41
Pyne v. Wilkenfeld (1981) 26 SASR 441.	14.35

Redding v. Lee (1983) 57 ALJR 393, (1983) 47 ALR 241.	2.33, 14.99, 14.104
Redpath v. Belfast and County Down Railway [1947] NZ 167.	14.99
Renmark Hotel Incorporated v. Federal Commissioner of Taxation (1949) 79 CLR 10.	15.54
Robinson v. Post Office [1974] 1 WLR 1176; [1974] 2 All ER 737.	14.33, 14.36
Roggenkamp v. Bennett (1950) 80 CLR 292.	2.28
Rowe v. Scanlan [1969] 1 NSWR 43.	2.34
Russell v. Men of Devon (1788) 2 TR 667.	2.7
Ryan v. Motor Accidents Board, Appeal No. 6 of 1976, Victorian Motor Accidents Tribunal.	14.26
Rylands v. Fletcher (1868) LR 3 HL 330.	2.6
Salisbury v. Australian Iron and Steel Ltd. (1944) SR (NSW) 157.	14.32, 14.38
Re Saverio Barbaro and the Minister for Immigration and Ethnic Affairs (1980) 3 ALD 1.	16.71
Searle v. Wallbank [1947] AC 341.	2.7
Sharman v. Evans (1977) 138 CLR 563.	2.30, 3.68, 6.15, 10.51

Sheridan v. Luvis, 7 August 1981, Supreme Court of New South Wales, Court of Appeal	1.36
Siems v. Haylock, 7 June 1984, Supreme Court of New South Wales, Master Greenwood.	10.41
Skelton v. Collins (1966) 115 CLR 94.	2.30, 2.31, 11.21, 11.54
Slaven v. Federal Commissioner of Taxation (1983) 14 ATR 431.	8.13, 8.16
Smith v. Charles Baker and Sons [1891] AC 325.	2.11
Smith v. Leech Brain and Co. Ltd. [1962] 2 QB 405.	14.33, 14.36
State Government Insurance Commission v. Stevens Brothers Pty. Ltd. (1984) 58 ALJR 346.	14.22, 14.23
State Rail Authority of New South Wales v. Sharp [1981] 1 NSWLR 240.	14.18
Stennett v. Hancock and Peters [1939] 2 All ER 578.	14.61
Stephenson v. Waite Tileman Ltd. [1973] 1 NZLR 152.	14.35
Stewart v. Sydney City Council [1973] 1 NSWLR 444.	14.25
Strohfeldt v. Francis [1968] 1 NSWR 251.	2.16
Sullivan v. Secretary, Department of Transport (1978) 20 ALR 323.	16.68

Taylor v. Bristol Omnibus Co. Ltd. [1975] 2 All ER 1107; [1975] 1 WLR 1054.	10.23
Tinkler v. Federal Commissioner of Taxation (1979) 29 ALR 663.	4.30, 8.13
Todorovic v. Waller (1981) 56 ALJR 59; (1981) 37 ALR 481.	2.29, 2.32, 4.69
Toohey v. Hollier (1955) 92 CLR 618.	2.35
Utting v. Luhtala, 9 November 1983, Supreme Court of New South Wales, Court of Appeal	3.29
V, Appeal by (1980) 5 ACCR (NZ) 55.	14.33
Vaux v. Law Union and Rock Insurance Co. Ltd. (1961) WN(NSW) 588.	14.25
Vecera v. Dickinson, 28 May 1982, Supreme Court of New South Wales, Court of Appeal.	11.57
Victorian Railways Commissioners v. Coultas (1888) 13 App Cas 222.	2.7
Walker v. Great Northern Railway Co. of Ireland (1891) 28 LR. Ir. 69.	2.7
Walling v. Nominal Defendant, 22 May 1981, Supreme Court of New South Wales, Maxwell	1.36, 3.17
Ward v. Corrimal-Balgownie Collieries Ltd. (1938) 61 CLR 120.	9.62, 14.38

Warren v. Coombes, 12 March 1976, Supreme Court of New South Wales, Yeldham J. On appeal to the High Court of Australia (1979) 142 CLR 531.	3.30
Watt v. Rama [1972] VR 353.	2.11, 14.17
West (H) and Sons Ltd. v. Shephard [1964] AC 326.	11.22, 11.25, 11.54
Weston v. G re-.it Boulder Gold Mines Ltd. (1964) 112 CLR 30.	2.47
Wheeler v. New Merton Board Mills Ltd. [1933] 2 KB 669.	2.16
Wieland v. Lord Carpets Ltd. [1969] 3 All ER 1006.	14.35
Wilson v. McLean, (1961) 106 CLR 521.	10.27, 10.41
Wilson v. Peisley (1975) 50 ALJR 207; (1975) 7 ALR 571.	14.31
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Select Bibliography

I. BOOKS

Allen, D., Bourn, D. and Holyoak, J. (eds.)	*Accident Compensation after Pearson* (Sweet and Maxwell, London, 1979).
Atiyah, P.S.	*Accidents Compensation and the Law* (3rd ed., Weldenfeld and Nicholson, London, 1980).
Batten, A.G.M. and Dinsdale, W.A.	*Public Liability Insurance* (Stone and Cox, London, 1967).
Bernzweig, E.P.	*By Accident, Not Design* (Praeger Publishers, New York, 1980).
Calabresi, G.	*The Costs of Accidents* (Yale University Press, New Haven, 1970).
Ehrenzweig A.A.	*Negligence Without Fault: Trends Towards an Enterprise Liability for Insurable Loss* (University of California Press, Berkeley and Los Angeles, 1951)
Fahy, J. L	*Accident Compensation Coverage* (7th ed, Accident Compensation Corporation, Wellington, 1983).
Fifoot, C.H.S.	*History and Sources of the* Common *Law: Tort and Contract* (Stevens and Sons, London, 1949).
	The Law of Torts (6th ed., Law Book Co., Sydney, 1983).
Fleming, J.G.	*An Introduction to the Law of Torts* (Oxford University Press, Oxford, 1967).
Glass, H.H., McHugh, M.H. and Douglas, F.M.	*The Liability of Employers* (2nd ed., Law Book Co., Sydney, 1979).

Hart, H.L.A. and Honore, A.M.	*Causation in the Law* (Clarendon Press, Oxford, 1959).
	Accident Compensation (Croom Helm, London, 1980).
Ison, T.G.	*The Forensic Lottery* (Staples Press, London, 1967).
Jones, B.	*Sleepers Wake!* (Oxford University Press, Melbourne, 1982).
JUSTICE (British Section of the International Commission of Jurists)	*No Fault on the Roads* (Stevens and Sons, London, 1974).
Keeton, R. and O'Connell, J.	*Basic Protection for the Traffic* Victim (Little Brown and Co., Boston, 1965).
Kewley, T.H.	*Social Security in Australia 1900-1972* (2nd ed., Sydney University Press, Sydney, 1973).
Leslie, P.A. and Britts, M.M.G.	*Motor Vehicle Law (NSW)* (4th ed., Law Book Co., Sydney, 1975).
Linden, A.M.	*Studies in Canadian Tort* Law (Butterworths, Toronto, 1968).
	Assessment of Damages (2nd ed., Butterworths, Sydney, 1983).
Luntz, H.	*Compensation and Rehabilitation* (Butterworths, Sydney, 1975).
Luntz, H., Hambly, A.D. and Hayes, R.	*Torts: Cases and Commentary* (Butterworths, Sydney, 1980).
Marks, F.	*Workers' Compensation Law and Practice in New South Wales* (CCH Australia Ltd., Sydney, 1983).
Mills, C.P.	*Workers' Compensation (New South Wales)* (2nd ed., Butterworths, Sydney, 1979).

Morison, W.L, Phegan, C.S. and Sappideen, C. — *Cases on Torts* (5th ed., Law Book Co., Sydney, 1981).

Nygh, P.E. — *Conflict of Laws in Australia* (4th ed., Butterworths, Sydney, 1984).

O'Connell, J. — *The Injury Industry* (Commerce Clearing House Inc., New York, 1971).

Ogus, A.I. and Barendt, E.M. — *The Law of Social Security* (Butterworths, London, 1978).

Palmer, G.W.R. — *Compensation for Incapacity* (Oxford University Press, Wellington, 1979).

Posner, R. — *Economic Analysis of Law* (2nd ed., Little Brown and Co., Boston and Toronto, 1977).

II. ARTICLES AND CONFERENCE PAPERS

Allodi, F.A. — "Accident Neurosis: Whatever Happened to Male Hysteria?" (1974) 19 *Canadian Psychiatric Association Journal* 291.

Balmford, R — "The Administrative Appeals Tribunal in Practice" (1984) 58 *Law Institute Journal* 799.

"The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence"(1967) 34 *University of Chicago Law Review* 239.

Blum, W. and Kalven, H. — "Public Law Perspectives on a Private Law Problem -Auto Compensation Plans" (1964) 31 *University of Chicago Law Review* 641.

Brown, C. — "Deterrence and Accident Compensation Schemes" (1979) 17 *University of Western Ontario Law Review* 111.

Calabresi, G. — "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70 *Yale Law Journal* 499.

Gulpan, R. and Taylor, C. "Psychiatric Disorders Following Road Traffic and Industrial Injuries"(1973) 7 *Australian and New Zealand Journal of Psychiatry* 32.

Davis, J.L.R. "Damages for Personal Injury and the Effect of Future Inflation" (1982) 56 *Australian Law Journal* 168.

Else-Mitchell, R. "The Place of the Administrative Tribunal in 1965", paper reproduced in the *Papers of the Third Commonwealth and Empire Law Conference* (1965).

"The Pearson Report: It's Strategy" (1979) 42 *Modern Law Review* 249.

Fleming, J.G. "The Role of Negligence in Modern Tort Law" (1967) 53 *Virginia Law Review* 815.

Ford, B.M. "Medical Rehabilitation" (1974) 2 *Medical Journal of Australia* 177.

Ganora, A. "Survey of Patients 1-150 Consecutive Referrals Presenting with Back Pain to the Illawarra Rehabilitation Centre," paper presented at the Illawarra Rehabilitation Centre Insurance Symposium (June 1983).

Gaskins, R. "Tort Reform in the Welfare State: The New Zealand Accident Compensation Act" (1980) 18 *Osgoode Hall Law Journal* 238.

Hacker, M. "Juggling Two Relationships is Tedious" (1983) 6 *Quad Wrangle* 23.

Hall, A.N. "Aspects of Federal Jurisdiction: The Administrative Appeals Tribunal (Cth.)" (1983) 57 *Australian Law Journal* 389.

Hanlon, J. (QC) Conference paper, "The Victorian Motor Accidents Board and Common Law Rights", delivered at the conference entitled "The Compensation of Motor Accident Victims in Victoria - A Model for Australia?" (Law Institute of Victoria, Melbourne, October 1983).

Ison, T.G. Conference paper, "Workers' Compensation - The Canadian Experience", delivered at the conference entitled "Workers' Compensation - New Directions?" (South Australian Ministry of Labour, Adelaide, May 1984).

Jenkyn, N.A. (QC), Glass, H.H. (QC) and Hughes, T.E.F. (QC)	" Liability Without Fault - The Claim that a Change of Law is Necessar@' (1963) 37 *Australian Law Journal* 209.
Johnson, J.E., Flanigan, G.B. and Weeks J.K.	"An Empirical Investigation of the Costs of Adopting No-Fault Insurance Systems: 1971-1980" (1983) 2 *Journal of Insurance Regulation* 168.
Kelly, C.C. and Webb, B.L	"No-Fault A Review of its Cost" (1983) 2 *Journal of Insurance Regulation* 176.
Kirby, M.D.	"Administrative Review: Beyond the Frontier Marked 'Policy-Lawyers Keep Out... (1981) 12 *Federal Law Review* 121.
Krause, C.	"Structured Settlements for Tort Victims" (1980) 66 *American Bar Association Journal* 1527.
Landes, E.M.	"Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of the Effects of No-fault Accidents" (1982) 25 *Journal of Law and Economics* 49.
	"Compulsory Arbitration of Civil Claims up to $10,000" (1983) 21 *Law Society Journal* 234.
Law Society of New South Wales	"The Society's No-Fault Transport Injury Compensation Proposals" (1984) 22 *Law Society Journal* 208.
Lloyd, J.H.	"Compensation Neurosis" (1980) 9 *Australian Family Physician* 84.
Lloyd, J.H. and Stagoll, B.	"The Accident Victim Syndrome - 'Compensation Neurosis' or Iatrogenesis" (1979) 13 *New Doctor* 29.
Lloyd-Bostock, S.	"Common Sense Morality and Accident Compensation" (1980) *Insurance Law Journal* 331.
Luntz, H.	"The Benefits Payable Under a Statutory Scheme", paper delivered at the seminar entitled "Accident Compensation: The Prospects for Reform", organised by University of New South Wales in conjunction with New South Wales Law Reform Commission

(Sydney, August 1983).

McGinn, E. “Structuring Settlements- Old Concept New Approach”, (1982) 18 *Trial* 58.

McKellan, F. “Structured Settlements - A Current Review” [1979-81] *Advocates Quarterly* 389.

Mendelson, G. “Not ‘cured by a verdict’ Effect of Legal Settlement on Compensation Claimants” (1982) *Medical Journal of Australia* 132.

Miles, D.A. “Enhancing the Victorian System of Compensation” (1983) 57 *Law Institute Journal* 1359.

Miller, H. “Accident Neurosis” (1961) *British Medical Journal* 919.

Moore, D. “The Use of Annuities in the Settlement of Personal Injury Cases” (1982) *Insurance Counsel Journal* 50.

O’Connell, J. “Operation of No-Fault Auto Laws: A Survey of the Survey” (1977) 56 *Nebraska Law Review* 23.

O’Connell, J. and Simom, R. “Payment for Pain and Suffering: Who Wants What, When and Why?” [1972] *University of Illinois Law Forum* 1.

Palmer, G.W.R. “What Happened to the Woodhouse Report” [1981] *New Zealand Law Journal* 561.

Palmer, G. “Politics, Power and Health: from Medibank to Medicare” (Sept-Oct 1983) *New Doctor* 19.

Pearce, D.C. “The Australian Government Administrative Appeals Tribunal” (1976) 1 *University of New South Wales Law Journal* 193.

Phegan, C.S. “Tort Defences in Conflict of Laws - The Second Condition of the Rule in *Phillips v. Eyre* in Australia” (1984) 58 *Australian Law Journal* 24.

Rowe, F.	"Rehabilitation in Australia" (1958) 78 *International Labour Review* 461.
Stoljar, S.	"Accidents, Costs and Legal Responsibility" (1973) 36 *Modern Law Review* 233.
Sher, J.L. (QC)	"The Case for the Retention of Common Law Rights" (1983) 57 *Law Institute Journal* 1356.
Thompson, G.N.	"Post-traumatic Psychoneurosis-A Statistical Survey" (1965) *The American Journal of Psychiatry* 1043.
Thomson, W.A.R.	"Accident Neurosis" (1982) 22 *Medicine, Science and the Law* 143.
Todd, R.K.	"Administrative Review Before the Administrative Appeals Tribunal - A Fresh Approach to Dispute Resolution, Part II" (1981) 12 *Federal Law Review* 95.
Veitch, E.	"Cosmetic Reform: Periodic Payments and Structured Settlements" (1982) 7 *University of Tasmania Law Review* 136.
Weighhill, V.E.	"'Compensation Neurosis': A Review of the Literature" (1983) 27 *Journal of Psychosomatic Research* 97.
Wilson, J.R.	"Accident Compensation- a Union Viewpoint" [1983] *New Zealand Journal of Industrial Relations* 113.

III. REPORTS AND OTHER DOCUMENTS

Commonwealth

	Report No. 8, *Social Security Appeals* (Canberra Reprographic Printers, 1981).
Administrative Review Council	Report No.21, *The Structure and Form of Social Security Appeals* (AGPS, Canberra, 1984).
Australian Bureau of	Selected Reports

Statistics

Australian Council for Rehabilitation of Disabled	Discussion Paper, *A National Attendant Care Allowance* (1980)
Australian Council for Rehabilitation of Disabled and the International Year of Disabled Persons National Committee of Non-Government Organisations	Discussion Paper, *Income Security Policies for Mentally and Physically Disabled People in Australia* (Cth Govt Printer, Canberra, 1981).
Australian Law Reform Commission	Interim Report No.15, *Sentencing of Federal Offenders* (AGPS, Canberra, 1980).
Commission of Inquiry into Poverty	Third Main Report, *Social/Medical Aspects of Poverty in Australia* (Cth. Govt. Printer, Canberra, 1977).
	Research Report, *The Relationship Between Poverty and Disability in Australia,* prepared by S. Treloar (Australian Council for Rehabilitation of Disabled), Social/Medical Aspects of Poverty Series (AGPS, Canberra, 1977).
Commissioner for Employees' Compensation	Selected Annual Reports.
Department of Health	*Rehabilitation in Health Services* (AGPS, Canberra, 1979).
	Monograph Series No. 10, *Relative Costs of Home Care and Nursing Home and Hospital Care in Australia* (Canberra Reprographic Printers, 1980).
	Selected Annual Reports.
	Workers' Compensation Legislation in Australia 1980 (AGPS, Canberra, 1981).
Department of Social Security	Selected Annual Reports.
House of Representatives Standing Committee on Expenditure	*In a Home or at Home: Accommodation and Home Care for the Aged* (AGPS, Canberra, 1982).

National Committee of Inquiry	*Compensation and Rehabilitation in Australia* (AGPS, Canberra, 1974).
National Labour Consultative Council	*Disabled People: Working for a Better Future* (AGPS, Canberra 1982).
National Women's Advisory Council	*So Much Left Undone* (AGPS, Canberra. 1983).
Senate Standing Committee on Constitutional and Legal Affairs	*Clauses of the National Compensation Bill 1974* (AGPS, Canberra, 1975).

New South Wales

	Discrimination and Physical Handicap (1979)
Anti-Discrimination Board	Selected Annual Reports.
Auditor-General	Selected Annual Reports.
Cass, B., and O'Loughlim M.	*Social Policies for Single Parent Families in Australia: An Analysis and a Comparison with Sweden* (Report No. 40, Social Welfare Research Centre, University of New South Wales, 1984).
Cass, G.	*Workers' Benefit* or Employers' *Burden: A History of Workers' Compensation, New South Wales 1880-1926* (unpublished thesis, University of Sydney, 1982).
Commissioner for Motor Transport	Selected Annual Reports.
Council of Social Service of New South Wales	Cold Comfort, prepared by L. Gain, S. Ellis and D. Gray (NSW Govt Printer, 1983).
Department of Health	Selected Annual Reports.

Dowda, D.	*Spinal Cord Injury: Physical and Social Outcomes* (unpublished thesis, University of Sydney, 1982).
Government Insurance Office	Selected Annual Reports.
Hart, D., and Linklater, D.	*Psychological and Social Losses from Road Traffic Crashes* (Report 2/81, Traffic Accident Research Unit Department of Motor Transport, 1981).
Health Commission of New South Wales	Selected Annual Reports.
Herbert, D.	*Road Safety in the Seventies: Lessons for the Eighties* (Report 4/80, Traffic Accident Research Unit, Department of Motor Transport, 1980).
Hewson, D., Halcrow, J., and Brown, C.	*Compensable Back Injuries - Characterisation of a Ten-Year Rehabilitation Caseload* (Royal South Sydney Hospital Rehabilitation Centre, 1982).
Home Care Service of New South Wales	*The What, Where and Why of the Home Care Service of New South Wales* (1983).
Jamieson, J. R.	*Road Environment Aspects of the Fairfield In-Depth Crash Study* (Report 5/80, Traffic Accident Research Unit, Department of Motor Transport, 1980).
Joint Standing Committee on Road Safety	First Report, *Alcohol, Other Drugs and Road Safety* (NSW Govt. Printer 1982). Second Report, *Car Driver Licensing and Road Safety* (NSW Govt Printer, 1984).
New South Wales Law Reform Commission	Working Paper, *Deferred Assessment of Damages for Personal Injuries and* Interim Payments *During the Period of Assessment and the Relevance of Remarriage in an Action under Lord Campbell's Act* (WP 2, NSW Govt Printer, 1969). *Report on the Right of Appeal from Decisions of Administrative Tribunals and Officers* (LRC 16, NSW Govt. Printer, 1973). *Report on De Facto Relationships* (LRC 36, NSW Govt. Printer, 1983).

Public Service Board of New South Wales	Selected Annual Reports.
Review of New South Wales Government Administration	Interim Report, *Directions for Change* (NSW Govt. Printer, 1977). Further Report, *Unfinished Agenda* (Blake and Hargreaves, 1982).
Skinner, N., Henderson, M., and Herbert, D.	*Compulsory Wearing of Seatbelts - A Feasilibity Study* (Report 6/70, Traffic Accident Research Unit, Department of Motor Transport, 1970).
State Rail Authority of New South Wales	Selected Annual Reports.
Traffic Accident Research Unit, Department of Motor Transport	Selected Statistical Statements.
Traffic Authority of New South Wales	Selected Statistical Statements.
Urban Transit Authority of New South Wales	Selected Annual Reports.
Workers' Compensation Commission of New South Wales	*Report on the Inquiry into the Feasility of Establishing a System for the Rehabilitation of Injured Workers in New South Wales* (NSW Govt. Printer, 1971). Selected Annual Reports. Selected Statistical Statements.

Northern Territory

Third Party Insurance Committee	*Northern Territory Inquiry into Motor Accident Compensation.* Report to Chief Minister and Attorney General of Northern Territory (1979).

South Australia

Committee on Rights of Persons with Handicaps	*The Law and Persons with Handicaps* (Law Department, 1978)
University of Adelaide, Road Accident Research Unit	*Adelaide In-Depth Accident Study* 1975-1979 (University of Adelaide, 1979)

Tasmania

Board on Inquiry into the Needs of the Handicapped	*Report* (Tas Govt Printer, 1980)
Law Reform Commission of Tasmania	Working Paper, *Compensation for Personal Injuries Arising out of Tort* (1980) *Recommendations for the Establishment of a No-Fault System of Compensation for Motor Accident Victims* (Tas Govt Printer, 1972)
Motor Accidents Insurance Board	Selected Annual Reports.

Victoria

Board of Inquiry into Motor Vehicle Accident Compensation	*Report of the Board of Inquiry into Motor Vehicle Accident Compensation in* Victoria (Govt Printer, Melbourne, 1978).
Committee to Investigate Compensation of Road Accident Victims Irrespective of Fault	*Report* (Govt. Printer, Melbourne, 1972).
Delays Committee	*Report to the Chief Secretary on Delays in Settlement of Third Party Insurance Claims* (Melbourne, 1970-1971).
Motor Accidents Board	Selected Annual Reports.

Royal Commission on Motor Car Third-Party Insurance	*Report* (Govt Printer, Melbourne, 1960).
State Insurance Office	Selected Annual Reports.
Third Party Premiums Committee	Selected Annual Reports.
Victorian Chief Justice's Law Reform Committee	*Damages by Way of Periodical Payments* (1968)

Western Australia

Law Reform Committee Project	No. 5, *Interim Damages In Personal Injury Claims* (1969)

Canada

Automobile Accident Compensation Committee	*Report* (British Columbia, 1983)
Committee of Inquiry on Automobile Insurance	*Report* (Quebec, 1974).
Ontario Law Reform Commission	*Report on Motor Vehicle Accident Compensation* (Govt Printer, Toronto, 1973).
Royal Commission on Automobile Insurance	*Report of the British Columbia Royal Commission on Automobile Insurance* (Victoria, British Columbia. 1968).

New Zealand

Brochure, *Compensation for the Self Employed* (1983).

Rehabilitation Manual (Govt. Printer, Wellington, New Zealand, 1982).

	Claims Manual (Govt. Printer, Wellington, New Zealand, 1983).
Accident Compensation Corporation	Selected Annual Reports.
Accident Compensation Commission	*Purpose, Progress* (Allied Press Ltd., Wellington, New Zealand, 1980).
Department of Labour	*Personal Injury - A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Govt. Printer, Wellington, New Zealand, 1969).
Government Cabinet/Caucus Committee	*The New Zealand Accident Compensation Scheme: A Review* (Govt. Printer, Wellington. New Zealand, 1980).
Rehabilitation Review Committee	*Report of the Rehabilitation Review Committee* (Department of Social Welfare, 1982).
Royal Commission of Inquiry	*Compensation for Personal Injury in New Zealand* (Govt Printer, Wellington, New Zealand, 1967).
Select Committee on Compensation for Personal Injury	*Report of Select Committee on Compensation for Personal Injury in New Zealand* (Govt Printer, Wellington, New Zealand, 1970).

United Kingdom

JUSTICE (British Section of the International Commission of Jurists)	*No Fault on the Roads* (Stevens and Sons, London, 1974).
Law Commission	Law Com. 56, *Report on Personal Injury Litigation - Assessment of Damages* (HMSO, London, 1973).
Royal Commission on Civil Liability and Compensation for Personal Injury	*Report* (HMSO, London 1978).

United States

American Medical Association	*Guides to the Evaluation of Permanent Impairment* (1971).
Department of Transportation	*Automobile Insurance and Compensation Study: Economic Consequences of Automobile Accident Injuries* (US Govt Printer, Washington, 1970).
	Automobile Insurance and Compensation Study: Driver Behaviour and Accident Involvement - Implication for Tort Liability (US Govt Printer, Washington, 1970).
Henle, J.	*Rehabilitation of Auto Accident Victims,* prepared for the Automobile Insurance and Compensation Study, Department of Transportation (US Govt Printer, 1970).
State of New York Insurance Department	*Automobile Insurance ... For Whose Benefit?* (New York, 1970).

United Nations

International Labour Organisation	*Recommendations Concerning- Vocational Rehabilitation of the Disabled* (38th Session, adopted 22 June 1955, Geneva).
World Health Organisation Expert Committee on Medical Rehabilitation	*Second Report,* Geneva, 1968 (Technical Report Series No. 419, 1969).

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