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Time for Tort Law Reform?

Queensland, like other states and territories, has witnessed the demise of events that go to the heart of lifestyle and community spirit. This Brief will update developments in the medical indemnity and public liability insurance saga since the release of the Research Brief, Public Liability Insurance, *in March 2002.*

The Brief will consider the package of reforms recently announced by the Queensland Government to deal with the impact of damages claims on the increasing costs of public liability insurance. Particular reference will be made to the **Personal Injuries Proceedings Bill**, *being prepared for introduction into the Queensland Parliament in June 2002, and the New South Wales* Civil Liability Bill, *currently before the New South Wales Parliament.*

The Queensland Personal Injuries Proceedings Bill *will seek to address the contribution made by personal injuries litigation to the growing cost of insurance. It will do so through a number of measures that include imposing some restrictions on lawyer advertising; limiting legal costs for smaller claims; capping some components of damages awards; and abolishing jury trials.*

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1 INTRODUCTION

Queensland, like other states and territories, has witnessed the demise of events that go to the heart of lifestyle and community spirit. This Brief will update developments in the medical indemnity and public liability insurance saga since the release of the Research Brief, *Public Liability Insurance*, in March 2002.[1] It will consider the package of reforms recently announced by the Queensland Government to deal with the impact of damages claims on the increasing costs of public liability insurance, with particular reference to the **Personal Injuries Proceedings Bill** being prepared for introduction into the Queensland Parliament in June 2002. Recent moves in New South Wales to address the crisis, including the introduction of the Civil Liability Bill, currently before the NSW Parliament, are also discussed. The Queensland and New South Wales Premiers are both strong advocates of tort reform as providing part of the solution to the current difficulties.

A Pricing Review released by the Australian Competition and Consumer Commission (ACCC) in late March 2002 found that the insurance industry has had low returns for nine years and that much of the problem has been caused by past mismanagement, and under-pricing of premiums – all of which was exacerbated by the collapse of HIH Insurance.[2] However, Australians do appear to be becoming more litigious – another factor among the many that have created the problems the nation is now facing. State and Federal Governments have recently begun focussing on the need to bring some moderation back into, what is seen by some, as our over-litigious culture encouraged by the 'ambulance chasing' activities of some over-zealous lawyers and generous damages awards made by the courts.

The Queensland Personal Injuries Proceedings Bill will seek to address the contribution made by personal injuries litigation to the growing cost of insurance. It will do so through a number of measures that include imposing some restrictions on lawyer advertising; limiting legal costs for smaller claims; capping some components of damages awards; and abolishing jury trials. The Government is aiming for reform that is balanced so that

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1 Nicolee Dixon, 'Public Liability Insurance', *Research Brief*, Queensland Parliamentary Library, No 7/2002.

2 Commonwealth. Australian Competition and Consumer Commission, *Insurance Industry Market Pricing Review*, March 2002.

persons who suffer grave injuries in accidents that are not their fault will be entitled to claim compensation and have fair access to the courts.[3]

The Brief discusses developments up to 3 June 2002.

2 UPDATE ON PREVIOUS DISCUSSION

Since the publication of the Research Brief, *Public Liability Insurance*, there have been a number of issues involving public liability insurance and medical indemnity insurance which have provided impetus for all governments to review the law of negligence; personal injuries daims and awards; and the role of the legal profession. Since March 2002, developments have included those outlined below.

2.1 NATIONAL FORUMS ON PUBLIC LIABILITY

A forum held between senior Commonwealth, State and Territory Ministers on 27 March 2002 agreed on a package of measures aimed at solving the public liability insurance crisis. The second round of meetings was held on 30 May 2002. The Ministers agreed –

- to consider measures to protect specific community organisations such as volunteers and not-for-profit groups from actions in negligence. In the May meeting, the Commonwealth agreed to introduce legislation to protect volunteers from negligence actions by providing an indemnity from their employing organisation (such laws have been passed in South Australia). Ministers also agreed to urgently examine the implications of exempting not-for-profit groups from personal injuries damages claims;
- to consider options for group insurance buying for community organisations and call on the insurance industry to play a proactive role in the process;
- to have the insurance industry collect and provide to the Australian Prudential Regulation Authority (APRA) more detailed information on claims data, particularly claims costs for not-for-profit adventure tourism and sporting groups;
- to give the ACCC a monitoring reference over the insurance industry to observe market developments and premium prices to ensure any cost savings are being passed on to consumers. The Productivity Commission was also asked to compare insurers' practices against world standards;
- to develop and improve risk management practices of not-for-profit groups;

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[3] Hon P D Beattie MP, Queensland Premier and Minister for Trade, 'Personal Injuries Proceedings Bill', Ministerial Statement, *Queensland Parliamentary Debates*, 8 May 2002, p 1269.

- to support Commonwealth changes to taxation laws to encourage structured settlements – where compensation is provided by way of periodic payments rather than by a lump sum award (discussed further below);
- to embark on tort reform and changes to lawyers' practices, such as advertising. Caps on payouts, to more closely align with amounts awarded under statutory schemes, would be considered – but left to each state to determine, along with other restrictions. Measures for early resolution of claims, including pre-litigation compulsory conferencing, and early exchange of evidence (eg investigation reports), are to be considered.[4]

  The May forum announced a panel of three eminent judges to undertake a review of negligence laws, seeking to achieve uniformity across jurisdictions. The review is to be finalised in August. It will consider the impact of any changes to tort law on the *Trade Practices Act*. One aspect of negligence laws being considered is the concept of 'joint and several liability', where one defendant– usually a more wealthy party such as a local authority – might wear all of the damages even if only partially responsible. Most jurisdictions have legislation allowing defendants to seek contribution from other responsible tortfeasors in particular situations.

The Commonwealth also agreed make amendments to the *Trade Practices Act 1974* (Cth) to ensure that waiver clauses and indemnity forms for inherently dangerous activities, such as bungie jumping and sky diving, provide a defence to claims unless the organisation conducting the activities is negligent.[5] However, the chair of the ACCC, Mr Allan Fels, warns that the changes may prevent persons bringing negligence actions for serious injuries but do little to reduce premiums. It could also lead to organisations becoming less careful in protecting the safety of the participants in those activities.[6] Generally speaking, waivers will not protect the organisation if the injury does not arise in the ordinary course of the activity but is a result of the organisation's negligence, such as failure to maintain equipment.

2.2 COUNCIL OF AUSTRALIAN GOVERNMENTS MEETING

A meeting of the Council of Australian Governments (COAG) on 5 April 2002 agreed to make tort reform a top priority and also asked the ACCC and APRA to examine the

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4 Senator The Hon H Coonan, Minister for Revenue and the Assistant Treasurer, *Joint Communique – Ministerial Meeting on Public Liability*, Melbourne, 30 May 2002.

5 State and Territory Fair Trading legislation will need to be reviewed in this context also.

6 Josh Gordon, 'Bid to resolve insurance crisis meets mixed response', *Age Online*, 28 March 2002. Downloaded from http://www.theage.com.au.

insurance industry to ensure that it acted transparently and responsibly in setting premiums.

The ACCC's Market Pricing Review, mentioned above, predates the full impact of the HIH collapse and the September 11 terrorist attacks in the United States. It noted that public liability insurance and indemnity insurance was performing poorly compared to other sectors such as consumer credit insurance and commercial motor vehicle insurance. The Government has therefore asked the ACCC for an updated report by July 2002, looking at the competitiveness of public liability and professional indemnity sections of the insurance industry.

It was also decided that State Attorneys-General would not be directly involved in developing the tort law reform agenda. It would instead by carried out by a working group of Treasury Department heads who would consult State and Federal Attorney-General Departments and other operational areas affected by the insurance problems. This move came after the NSW Premier warned that the process could be compromised by plaintiff lawyers lobbying the Attorneys-General.[7]

2.3 QUEENSLAND GOVERNMENT'S GROUP INSURANCE PROPOSAL

The aforementioned *Public Liability Insurance* Research Brief examined the findings and recommendations of the Liability Insurance Taskforce (the Taskforce) interim Report. The Taskforce was established by the Queensland Government in early 2002 to investigate the impact on the community of public liability insurance premiums.[8] One recommendation was that the Queensland Government investigate the feasibility of a group insurance purchasing arrangement for the not-for-profit community sector with the Government acting as facilitator. It suggested that the Government call for Expressions of Interest from those organisations to determine the level of support for such a scheme.[9]

A group purchasing arrangement is one where not-for-profit groups band together to collectively buy an overarching insurance policy from a broker or underwriter. The Taskforce considered that such a scheme had the potential to reduce premiums for those groups by around 15% and would provide a sound basis for implementing coordinated risk management strategies. It believed that there were various options for determining the premium price payable by each group.

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7 Chris Merritt, 'Law officers out of loop', *Australian Financial Review*, 8 April 2002, p 3.

8 The Report is available on the Department of Premier and Cabinet website at http://www.premiers.qld.gov.au/about/pcd/economic/insurancetaskforce.pdf.

9 *Liability Insurance Taskforce Report*, p 19 ff.

On 15 April 2002 the Government decided to establish a group insurance scheme, due to a huge response from the not-for-profit community sector. The aim is to have it in place by 1 September 2002. The Government is now collecting relevant information from those interested organisations which will be used in negotiations with insurance underwriters to obtain the best possible price for bulk insurance. Participants will need to commit to the scheme for three years to provide continuity so that the most favourable price possible can be negotiated. The Government will act as an intermediary and have a monitoring role. It will ensure that contractual arrangements are met and that there is fairness in premium pricing. More information can be found at the Group Liability Insurance Scheme page on Queensland Treasury's website.[10]

The Premier is reported to believe that around 6000 not-for-profit organisations will sign up and that the scheme may ameliorate the current impact of premium rises on important social events such as agricultural shows. The Redlands Show closed after 110 years as it was unable to absorb a 500% increase in its premiums since 1995 and other agricultural shows are also under threat.[11]

2.3.1 Group Insurance in Other Jurisdictions

The NSW Council of Social Services has received financial support from the NSW Government for up to 5000 health and community groups affected by insurance problems to buy group insurance. The Victorian Government and Municipal Association of Victoria have announced plans to provide cheaper group insurance to around 12,000 not-for-profit community groups in Victoria and Tasmania to cover most community events and festivals but not sport or adventure activities or emergency services. There will be two levels of cover, the cheapest aimed at organisations such as historical societies. In South Australia, many community groups have, for some years, taken advantage of insurance arrangements managed by Local Government Risk Services. The Government is seeking to extend the arrangements to cover more community groups. Other jurisdictions are at various stages of progress towards implementing group insurance schemes.[12]

2.4 RECENT LARGE DAMAGES AWARDS

In recent months, those have included –

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[10] At http://www.treasury.qld.gov.au/groupinsurance/index.htm.

[11] Elissa Lawrence, 'Insurance rise is a show stopper', *Courier Mail*, 14 April 2002, p 3.

[12] *Joint Communique – Ministerial Meeting on Public Liability*, 30 May 2002, Attachment A.

- a finding by a NSW Supreme Court jury in May that a Council was responsible for injuries suffered by a man who became a quadriplegic after he dived into surf between the flags at Bondi Beach and struck a sandbar. He was awarded $3.75m (after damages were reduced by 25% for the man's contributory negligence) on the basis that the Council was in breach of its duty in not putting up warning signs about the sandbar. There was evidence that he had consumed a bottle of beer with a friend about one hour prior to the incident and had taken an ecstasy tablet the night before;[13]
- a novice wrestler, who was rendered a quadriplegic from a dangerous throw, was awarded $5.7m in damages after a Victorian court found that the man's bout had not been properly supervised;[14]
- a NSW Supreme Court judge awarded $8.8m (reduced to $7m due to 20% contributory negligence of the plaintiff) to a man who became a quadriplegic after sliding into a rock on a snowfield while tobogganing on a 'for sale' real estate sign. Both the ski resort and the NSW Education Department were joined as defendants to the action. Tobogganing was expressly forbidden at Blue Cow and, unlike a toboggan, the real estate sign could not be steered and controlled.[15]

3 THE MEDICAL INDEMNITY CRISIS

The appointment of a provisional liquidator in early May 2002 to one of Australia's biggest medical indemnity providers, United Medical Protection (UMP), caused consternation among doctors and hospital patients. UMP indemnifies over 60% of Australia's medical profession and around 80% of Queensland doctors. Many surgeons in NSW and Queensland reacted by refusing to operate on private patients and deliver babies due to uncertainty about their insurance cover and fears of bankruptcy through being personally exposed to medical negligence claims.

Following the appointment of the liquidator, urgent talks were held between the Commonwealth Government, UMP and the Australian Medical Association (AMA). As a result, the Government agreed to draft 'ironclad' legislation to guarantee claims incurred between 29 April (when provisional liquidation was announced) and 30 June 2002.

The Commonwealth Government had already provided a $35m guarantee to UMP, in March 2002, to enable it to meet APRA's new capital reserve requirements. However,

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13 'Council to pay surfer $3.75m', *Australian*, 14 May 2002, p 3.

14 Tony Keim, 'Victims prefer court to gain compensation', *Courier Mail*, 9 May 2002, p 7.

15 Trevor Sykes, 'It's about time the insurers had some protection', *Australian Financial Review*, 11 May 2002, p 10.

prior to appointment of the liquidator, UMP was facing around $1 billion in outstanding claims.

The Commonwealth Government recently secured the agreement of UMP's provisional liquidator to 'unfreeze' UMP's assets to ensure that awards made against its members, in actions that are currently before the courts, can be paid out. The NSW Supreme Court cleared that arrangement only when undertakings were given that the arrangement would not disadvantage other creditors of UMP.

On 31 May 2002, the Government announced that it would extend and underwrite an extension on the guarantee until 31 December 2002. The costs will be covered through a levy on doctors over a five-year period via a special fund. It is possible that UMP members will pay around $5000 pa, with the more 'riskier' occupations paying more than general practitioners. That fund will also cover claims that have been incurred but not yet reported but the AMA president has warned that doctors would be reluctant to cover this 'tail' unless governments undertook structural reform, including limits on liability. While it appears that doctors can practise with some certainty of cover until the end of the year, it seems inevitable that the levy will be passed on to patients through increased consultation fees and higher insurance premiums.[16]

3.1 WHAT WENT WRONG?

Medical indemnity cover is different to most insurance cover. It is provided by medical defence organisations (MDOs) which are discretionary mutual bodies – ie they provide cover and meet claims upon them on a discretionary basis. Generally, there are no formal contracts and doctors are subscribing members rather than premium-paying policyholders. Services provided to members include legal and medical advice. UMP provided cover for most of its members on a claims-made basis up to $5m pa and payments in excess of that are discretionary.[17] Of the six MDOs in Australia, UMP is the largest.

The MDO system appeared to work for over a century, until recently when UMP began to find itself in trouble. In early 2001, UMP changed from a 'claims-incurred' to a 'claims-made' basis which means that doctors are covered only if they are members at the time a claim is made against them even if they were members when the liability was

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[16] John Kerrin, 'Patients pay to cover doctors', *Weekend Australian*, 1-2 June 2002, p 10.

[17] Hon C J Knowles MP, Minister for Health, Health Care Liability Bill 2001 (NSW), Second Reading Speech, *NSW Legislative Assembly Hansard Online*, 19 June 2001, p14777. At http://www.parliament.nsw.gov.au

incurred. Sometimes, it takes 20 years for the claim to be made.[18] When introducing a *Health Care Liability Act 2001* into the NSW Parliament on 19 June 2001, the NSW Health Minister noted that UMP was already experiencing difficulties resulting from an upwards revision of its claims cost exposure for outstanding claims and a large increase in the number of new claims. It had advised its members that cover would rise by 8% and a further call would be made on them. UMP's misfortunes increased following the HIH collapse where it had considerable amounts of its reinsurance.[19]

As with the public liability insurance crisis, rising claims against the insurers and large court awards are cited as contributing factors. In particular, in a recent medical negligence court case, a woman received a $14m award after a failed attempt at forceps delivery in 1979 resulted in her being born with cerebral palsy – twice any previous damages award for medical negligence.[20] This case influenced the setting of premiums for the future. Doctors in many key specialities, such as obstetrics, have seen their insurance costs exceed $100,000 per annum over the past year.

Again, however, problems within UMP itself have been seen as another factor in its demise. It had apparently failed to adequately provide for future claims, and there are allegations of it having underpriced its cover for a decade.[21] It is understood that, unlike many other MDOs, it has been a practice of UMP to not fully bring into account its potential liabilities. That practice, and lack of transparency, meant that its future financial position was unclear.[22] At present, MDOs are not regulated by APRA because they are not insurance companies.[23] UMP's insurance subsidiary, Australian Medical Indemnity Limited (AMIL), was subject to APRA supervision.

Amid the impending collapse of UMP, State and Federal Health Ministers met with medical and insurance industry leaders to seek some solutions, including a possible move by MDOs to a regulated environment. However, MDOs will need time to meet new capital requirements and provide for unreported claims. At present, they are extremely under-provisioned. It has been estimated that the whole medical insurance industry will

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18 Richard Owen, 'Malpractice net is full of holes', *Courier Mail*, 10 May 2002, p 4.

19 Colleen Ryan, 'Mounting medical bill long overdue', *Australian Financial Review*, 23 April 2002, p 1.

20 Simon Lomax & AAP, 'Record $13m payout to woman injured at birth', *Courier Mail*, 6 November 2001, p 3.

21 Colleen Ryan, 'Mounting medical bill long overdue'.

22 Hon C J Knowles MP, Second Reading Speech, Health Care Liability Bill 2001 (NSW).

23 Colleen Ryan, 'Mounting medical bill long overdue'.

have to obtain over $500m in new capital to meet unfunded claims.[24] The meeting also considered other measures, including tort law reform, to be discussed at further sessions.

3.2 QUEST FOR SOLUTIONS

The AMA has urged governments to pursue nationally consistent reforms in three areas. First, it wants governments to review tort law. Second, it seeks the establishment of a national compensation scheme for the severely injured where the component for future care in the current lump sum damages award would be replaced by provision of appropriate services with costs sourced from Medicare and/or private health insurance. Finally, it wants a commitment by doctors to a range of risk management type issues. The Insurance Council of Australia (ICA) supports the idea of the medical component of claims being dealt with directly through Medicare and medical insurance rather than recouped later from public liability insurers through cumbersome administrative procedures.[25] However, it may be a controversial move and viewed as making the whole community, not doctors, absorb the load.[26]

In the urgent talks with the AMA and UMP following the provisional liquidation announcement, the Commonwealth Government said that it would consider other solutions such as a national scheme to care for severely injured patients.

In an answer to a question on notice in the Queensland Parliament, asked on 17 April 2002, the Queensland Health Minister, the Hon Wendy Edmond MP, stated that she endorsed the Queensland Government's proposed Personal Injuries Proceedings Bill but in specific reference to the medical indemnity issues suggested a number of other measures. Those included facilitation of greater disclosure and communication between the profession and patients; requiring medical indemnity insurers to implement risk management programs for doctors; and steps to ensure that all relevant persons are aware of potential claims to facilitate early resolution.[27]

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[24] Colleen Ryan, 'Mounting medical bill long overdue'.

[25] See Insurance Council of Australia *Public Liability Submission to Ministerial Forum*, March 2002. Downloaded from ICA website at http://www.ica.com.au/liabilitysub.

[26] Colleen Ryan, 'Mounting medical bill long overdue'.

[27] Hon W Edmond MP, Minister for Health and Minister Assisting the Premier on Women's Policy, *Answer to Question on Notice No 377*, asked on 17 April 2002.

4 TORT LAW REFORM

Tort law covers, among other things, damages for personal injuries arising through the negligence of another person and is part of the common law. In the public liability insurance context, a body or enterprise is sued in negligence but it is protected from personal exposure to damages payouts by an insurance policy. Under the common law, there is an unfettered right of access to the courts and no restriction on damages that the courts may award.

As a matter of constitutional responsibility, liability for damages for personal injuries is primarily a matter for the states and territories to regulate. During the past few decades, statutory reforms have been made in a number of areas of the common law involving personal injury claims, particularly in motor accident compensation and workers' compensation.

The features of such statutory schemes may include the limitation of payouts, thresholds for making claims, and some restrictions on claimants' rights to recover common law damages. For example, under the WorkCover Queensland scheme, a schedule of capped payouts provides compensation of up to $112,500 for above-knee amputations or loss of a leg and $150,000 for total loss of vision, totally dependent quadriplegia, and for a number of serious permanent injuries. It has been claimed that it is common for injured workers to reject those capped payments and pursue larger multi-million dollar claims in the courts if it was likely that employer negligence could be proved.[28]

Legislation governing both common law damages and statutory compensation tends to vary across jurisdictions.[29] While stakeholders are divided about the factors that have contributed to the current public liability and medical insurance problems, all are agreed that any solution must be by way of a consistent national approach.

4.1 THE 'BLAME GAME'

Insurers, politicians and many sections of the community (particularly groups and businesses recently forced to close) blame the current insurance problems on the growing tendency of Australians to find someone to blame for injuries they sustain, rather than take individual responsibility. Lawyers are perceived as fuelling the lawsuit culture through aggressive advertising practices. On the other hand, lawyers claim that insurers must take responsibly for their past mismanagement.

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28 Tony Keim, 'Victims prefer courts to gain compensation', *Courier Mail*, 9 May 2002, p 7.

29 See eg R P Balkin & J L R Davis, *Law of Torts*, 9th ed, Butterworths, 1998, Chapters 11, 12.

At the time of the national forum of Ministers in March, the Federal Assistant Treasurer, the Hon Helen Coonan MP, said that while people who are injured by someone else's negligence should be able to claim, the system had got 'out of whack' and reforms were needed to bring the balance back.[30]

In a recent symposium address, former Chief Justice of the High Court, Sir Harry Gibbs, criticised lawyers and some judges for fostering a system of litigation and exposing deficiencies in the law of negligence.[31] This comes on top of comments made by former Queensland Supreme Court judge, the Hon Justice J B Thomas, in his retirement speech that the judiciary had contributed to creating a 'compensation-oriented society'. His Honour said that over the years, judges have 'let the quantum of damages get out of hand and … lowered the barriers of negligence and causation. … Some of us have enjoyed playing Santa Claus, forgetting that someone has to pay for our generosity.[32] However, the Chief Justice of the Queensland Supreme Court has recently defended judges against the critics, arguing that the courts have been following a 'fairly predictable path' for decades.[33]

4.2 QUEENSLAND LIABILITY INSURANCE TASKFORCE FINDINGS

As noted in the *Public Liability Insurance* Research Brief, the Liability Insurance Taskforce Report considered tort reform issues.

The Taskforce found that, although solicitor advertising and larger damages awards did impact upon public liability insurance premiums, they were not the only factors. Nor did they account for the sudden large rise in premium increases. It was noted that Queensland courts adopt a more conservative approach to damages awards in personal injuries claims than their Victorian and New South Wales counterparts.[34]

In any event, the Taskforce found it difficult to draw any firm conclusions on this issue due to the lack of statistical data and information, including what proportion of insurance claims actually ended up in the courts and which payments were made as a result of court awards. There was also the fact that part of the costs of claims generally include

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30 Steve Lewis, 'Crisis draws limited action', *Australian Financial Review*, 28 March 2002, p 3.

31 Editorial: 'Lawyers blamed for crisis', *Courier Mail*, 16 May 2002, p 16.

32 Hon J B Thomas JA, *Retirement Speech*, 22 March 2002, Banco Court (Queensland), pp 7-8. Downloaded from Qld Courts website at http://www.courts.qld.gov.au.

33 Siobhain Ryan, Emma Chalmers, 'De Jersey defends courts over blowout in injury payouts', *Courier Mail*, 13 May 2002, p 2.

34 Queensland Government. *Liability Insurance Taskforce Report*, p vii.

investigation and administration costs that would be incurred regardless of whether or not the matter goes to court or, whether or not a solicitor is instructed. The Taskforce believed that more information had to be collected about these matters to inform further work on tort law reform.[35]

Those findings have been supported by the Director of General Insurance at Ernst & Young who believes that there are deficiencies in the claims statistics, even those provided by the APRA, because there is no consistency regarding what constitutes a 'claim'. The data may cover property claims as well as personal injury claims and some insurance companies report a 'claim' when they merely become aware of a potential claim whereas others do not report until the legal demand arrives.[36] The ICA's executive director has also stated that the industry acknowledges the need for more comprehensive data.[37] As noted previously, these problems are being addressed as an outcome of the meeting of Ministers on 30 May 2002.

In terms of possible tort reform, the Taskforce was concerned that a balance be struck between the rights of individuals to receive adequate compensation and the community's capacity to pay higher premiums. It was also noted that tort law reform in the United States has not resulted in lower premiums for consumers.

The Taskforce did, however, consider and comment on various possible reforms such as structured settlements; abolition of jury trials; and establishing a statutory compensation scheme to set maximum payouts for particular heads of damage and types of injury. It was noted that under the Queensland statutory schemes (eg WorkCover Queensland), costs and premiums had remained steady while still allowing claimants qualified access to the courts.

It also considered that benefits could be achieved by more improvement in the procedural aspects of claims, such as early resolution through mediation. Importantly, because nationally consistent legislative changes were needed, the Taskforce noted that tort reform would take some time to achieve. However, changes to procedural laws could be pursued at individual state levels while waiting for substantive reforms on a national basis.

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35 *Liability Insurance Taskforce Report*, pp vii, 31-36.

36 Colleen Ryan, 'Day of reckoning as insurance becomes a public liability', *Australian Financial Review*, 27 March 2002, p 1.

37 Allesandra Fabro, 'States fall out over insurance reforms', *Australian Financial Review*, 5 April 2002, p 3.

4.3 STATE RESPONSE

The New South Wales Premier and the Queensland Premier have been prominent among government leaders in advocating reform of the legal system for personal injuries damages. The NSW Premier, the Hon Robert Carr MP, considers that while the Commonwealth Government must regulate the insurance industry, the states can do their part by reforming laws that deal with public liability.[38]

The Queensland Premier, the Hon Peter Beattie MP, has joined with Mr Carr to urge other states and territories to move on tort reform and to ensure that the Commonwealth, through the ACCC and APRA, monitors insurance premiums.

Other states and territories are developing their own policies to address the difficulties currently faced.[39] Just prior to the meeting of Treasurers on 30 May, Victoria announced a range of proposals to include protection of volunteers and charity workers from litigation, providing for structured settlements, and allowing indemnity forms to provide a defence to claims arising out of participating in adventure activities.[40]

5 NEW SOUTH WALES REFORMS

In July 2001, significant reforms to medical negligence actions in New South Wales were made by the *Health Care Liability Act 2001* (NSW), considered below. The NSW Premier seeks to extend the principles of that legislation to the general public liability context with the introduction of the Civil Liability Bill into the NSW Legislative Assembly. Mr Carr has urged governments of each state and territory to adopt as much of the Bill as is relevant to their jurisdictions.[41] He considers that any significant reduction in premiums will not be achieved unless other jurisdictions undertake similar reforms to those in NSW.[42]

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38 Hon R J Carr MP, Premier, Minister for the Arts and Minister for Citizenship, 'Public Liability Insurance', Ministerial Statement, *NSW Legislative Assembly Hansard Online*, 20 March 2002. Downloaded from http://www.parliament.nsw.gov.au.

39 Rosemary Odgers, Matthew Franklin, 'Lawyer ads banned to cut payouts', *Courier Mail*, 8 May 2002, p 1.

40 Josh Gordon & Darren Gray, 'State's plan to ease liability headache', *Age Online*, 30 May 2002.

41 Hon R J Carr MP, Premier, Minister for the Arts and Minister for Citizenship, 'Public Liability', Question Without Notice, *NSW Legislative Assembly Hansard Online*, 7 May 2002.

42 Chris Merritt, 'NSW tries to drive tort reform', *Australian Financial Review*, 12 April 2002, p 55.

5.1 RESTRICTIONS ON LAWYER ADVERTISING

It is reported that many stakeholders agree that the growing litigiousness of Australians, encouraged by some lawyers who engage in aggressive advertising, needs to be addressed.[43]

On 27 February 2002, the NSW Government announced restrictions on advertising by lawyers. Advertising on television, radio and in hospitals is banned. In the print media and on the Internet, advertising is limited to stating a lawyer's area of expertise and contact details. The NSW Law Society is understood to have welcomed the restrictions as curbing 'offensive, vulgar, obscene, sensational or unprofessional' advertisements which have brought lawyers into disrepute. On the other hand, the NSW Bar Association considered that the move was unfair and would ultimately hurt the poor and favour the rich.[44]

Since 1995, as a result of competition policy reform, lawyers have been allowed to advertise in the print and news media. Some solicitors have aggressively advertised a 'no-win-no-fee' arrangement where the lawyer only charges the client for the cost of their legal services if the client wins the action. Because legal aid is not available for personal injuries actions, such arrangements have proved attractive for persons who may have a potential claim, and may be severely injured through no fault of their own, but cannot afford to engage a lawyer to bring the action.

It is those considerations that have led politicians, including the Queensland Premier, to clearly separate the issue of advertising from the concept of the 'no-win-no-fee' arrangements because the latter do have a valuable role to play. The Queensland reforms in this area are outlined later in this Brief. The Queensland Law Society (QLS) president, Mr Joe Tooma, has agreed that there is merit in stopping the sensationalist advertising by a small number of solicitors but is opposed to a blanket ban because suitable advertising informs injured persons that a 'no-win-no-fee' service is available if they cannot afford to bring an action. He commented that solicitor advertising is no different to other professions (including insurance companies) advertising their services.[45]

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43 Craig Johnstone, 'Ducking for cover', *Courier Mail*, 9 May 2002, p 19.

44 Linda Morris, 'Advertising curbs put brakes on the "ambulance chasers"', *Sydney Morning Herald Online*, 28 February 2002. Downloaded from http://www.smh.com.au.

45 Queensland Law Society, 'Public Need Protection in Ad Ban Plan', *Media Release*, 1 March 2002. Downloaded from the QLS website at http://www.qls.com.au/p-frame.htm; Colleen Ryan, 'Day of reckoning as insurance becomes a public liability'.

5.2 CIVIL LIABILITY BILL (NSW)

On 7 May 2002, the NSW Premier released the Government's consultation draft Civil Liability Bill 2002 to implement the first stage of tort law reforms announced on 20 March 2002. The first tranche of reforms enshrined in the Bill will cover restrictions on damages and lawyers' costs. The second stage will be dealt with later in the year. The Premier has labelled the tort reforms the most comprehensive package of reforms advanced in any jurisdiction. It is reported that the Law Society had been told about the proposals and that the package has been developed with input from the insurance industry and informed by independent legal advice.[46]

The Civil Liability Bill 2002 (NSW) was introduced into the NSW Legislative Assembly on 28 May 2002.[47] At the same time, the Premier tabled actuarial advice from the firm Pricewaterhouse Coopers which has costed the stage one reform measures. Its best estimate is that there will be a 17.5% reduction in the cost of personal injury claims and an overall 14% reduction in public liability claims, the consequence of which should be a reduction in premium prices of around 12%. Mr Carr noted that the Government could not guarantee a fall in prices but it could, however, put in place the necessary reforms to enable them to fall.[48]

The damages provisions are virtually identical to those in the *Health Care Liability Act 2001*. Consequential amendments will be made to the *Health Care Liability Act* on the basis that the restrictions introduced under the Bill will apply to claims for personal injury damages currently covered under that Act. Some damages awards are excluded from the operation of the new legislation, such as awards in respect of motor accident compensation claims and workers' compensation claims, which have their own legislative framework. Compensation for victims of crimes causing injury, death, or sexual assault are also excluded to ensure that the Bill does not impose restrictions on those claims.

The main features of the Bill are outlined under the headings below.

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46 Chris Merritt, 'NSW tries to drive tort reform'.

47 Downloaded from the Parliament of NSW website at http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/1?open&tab=bills .

48 Hon R J Carr MP, Premier, Minister for the Arts and Minister for Citizenship, Civil Liability Bill 2002 (NSW), Second Reading Speech, *Legislative Assembly Hansard Online*, 28 May 2002, p 27. Downloaded from http://www.parliament.nsw.gov.au.

5.2.1 Retrospectivity

The legislation will operate retrospectively from 20 March 2002, the day the package of reforms was first announced. However, following public consultation, the Bill introduced to Parliament contains a proviso to ensure that claimants who are negotiating settlements with the Crown are not disadvantaged. The amendment (which does not apply to health care claims) enables claims against the Crown, including government owned corporations, to operate under the old system provided that the claim was notified before 20 March 2002 and proceedings are commenced by 1 September 2002. Proceedings do not have to be commenced by 1 September, if the claimant's injuries have not stabilised by that date.

The changes seek to ensure that the Government does not receive the benefit of retrospectivity.[49] However, the NSW Opposition has criticised the retrospectivity clause as unfairly excluding persons with claims against the private sector.[50]

5.2.2 Cap on Awards for General Damages

Damages for non-economic loss are sometimes referred to as 'general damages'. They are intangible by nature. Note that while medical expenses are sometimes included in 'general damages', they do not appear to be affected by the Bill. In the context of the Bill, 'non-economic' loss' means amounts attributable to pain and suffering, loss of amenities of life, loss of expectation of life, and disfigurement.

The Bill proposes that courts will not be able to award damages for non-economic loss unless the severity of the loss is at least 15% of a 'most extreme case' (not defined in the Bill). Thus, minor claims are excluded. Once the 15% threshold applies, the amount to be awarded is assessed on a sliding scale. When introducing the Bill into Parliament, the Premier stated that the actuarial advice from Pricewaterhouse, concerning the impact of the measures, suggested that the threshold will discourage smaller claims but would lead to an increase in general damages for the more seriously injured claimants.[51]

Awards for this component of damages will be capped at $350,000 (indexed annually) and made only in the most extreme cases. Interest will not be awarded on general damages because they do not represent financial loss. These restrictions are the same as for claims under the *Health Care Liability Act*.

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49 Hon R J Carr MP, Civil Liability Bill, Second Reading Speech.

50 Linda Morris, 'Pass liability laws or we'll use force, warns Carr', *Sydney Morning Herald Online*, 29 May 2002.

51 Hon R J Carr MP, Civil Liability Bill, Second Reading Speech.

The Premier has stated that damages for pain and suffering are not specifically for covering the cost of care or loss of income and that overgenerosity in awards for losses that were intangible and difficult to quantify in financial terms should not be allowed to unfairly burden the community.[52] The changes will not affect medical expenses or loss of earnings.

5.2.3 Cap on Awards of Damages for Economic Loss

Economic loss, in the context of the Bill, includes past and future economic loss due to loss of earnings, or the deprivation or impairment of earning capacity, or the loss of expectation of financial support.

The maximum amount that courts will be able to award for past or future economic loss will be three times the amount of average weekly earnings. The draft Bill contained a dollar amount of $2,712 per week but was changed to its present form to achieve consistency with the announced Queensland provisions concerning awards for economic loss.[53] The limit reflects that provided under the *Health Care Liability Act* and for motor accident claims. The expectation appears to be that high salary earners will be encouraged to take out income protection insurance.[54]

Future economic loss is a speculative component of damages to compensate for financial losses that will be incurred due to the deprivation or impairment of earning capacity in the future. Problems in assessing future economic loss are particularly evident in the case of an infant who may, but for the injury, have grown up to pursue an average career earning an average income or, on the other hand, may well have become a brilliant brain surgeon. The Bill proposes that a court cannot make an award for future economic loss unless the claimant satisfies the court that the assumptions about their future earning capacity or other events upon which the award is to be based accords with their most likely future circumstances, but for the happening of the injury. The court will then adjust the amount by reference to the percentage possibility that the events may have occurred but for the injury.

The future economic loss component of the award will have to be discounted by 5% or by some other prescribed rate. A discount rate of 3% currently applies to this component in NSW, given that it is speculative and the claimant has the immediate benefit

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52 Hon R J Carr MP, 'Public Liability Insurance', Ministerial Statement, 20 March 2002.

53 Hon R J Carr MP, Civil Liability Bill, Second Reading Speech.

54 Hon R J Carr MP, NSW Leads Australia on Public Liability Reform as Premier Carr Releases Bill, *Premier's Press Release*, 7 May 2002.

of the award to invest now. The increased discount is in line with similar changes for health care claims and reflects the 5% discount applicable in Queensland.

Interest on damages for economic loss will have to be calculated from the time the loss was incurred until the date of the determination. The rate will be prescribed or otherwise stated.

5.2.4 Restrictions on Awards For Gratuitous Attendant Care Services

Gratuitous attendant care services are services provided to the injured person free of charge that relate to nursing, domestic matters, or which aim to alleviate the consequences of an injury. The caregiver will usually be a relative or spouse of the injured person. The proposed changes below reflect measures contained in the *Health Care Liability Act.*

The Bill will prevent damages being awarded for such services unless the court is satisfied that there is a reasonable need for them, solely because of the injury, and they would not have otherwise been provided. The reason for this measure is so that a defendant will not pay for gratuitous services that would have still been provided, irrespective of the injury, as a part of an ongoing family relationship.[55]

There will also be no awards made for gratuitous attendant care services that are of a short-term nature and there will be restrictions on amounts awarded for services provided over a longer term. Note also, that no interest will be paid on damages awarded for gratuitous attendant care services.

5.2.5 Structured Settlements

The Bill proposes to allow parties to agree to settle a claim by way of a structured settlement. A structured settlement is an agreement that provides for periodic payments funded by an annuity or other agreed method rather than by way of a lump sum award. Structured settlements are already a feature in health care and motor accident claims and are understood to be used in Canada, the USA and Britain. The NSW Premier has stated that the second stage of the law reform program in this area will expand the application of structured settlements and may propose a wider range of options for damages awards.[56]

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55 Hon R J Carr MP, 'Public Liability Insurance', Ministerial Statement, 20 March 2002.

56 Hon R J Carr MP, 'Public Liability Insurance', Ministerial Statement, 20 March 2002.

The attraction of structured settlements for governments is that some claimants who receive large lump sum awards spend it unwisely, invest it badly, or the amount of the sum itself may not be adequate to meet long term needs. Many require significant financial assistance to pay to supported accommodation providers or to nursing home operators who are caring for them. The consequence, if funds run out, is that the claimant will then need to rely on social security. An exclusion period will, however, apply depending upon the amount of the lump sum award.

It is understood that the Commonwealth has undertaken to amend its taxation laws that currently make structured settlements less attractive.[57] Amendments to encourage the use of structured settlements were supported by the forum of senior Ministers held on May 30.

5.2.6 No Exemplary, Punitive or Aggravated Damages

Under the new legislation, the courts cannot award exemplary, punitive, or aggravated damages. Those damages are not compensatory damages and have already been prohibited for motor accident and health care claims. They are considered to pose an unnecessary risk factor for insurers.[58]

5.2.7 Third Party Contributions and Contributory Negligence

The Bill sets out how the court is to determine the contribution that a third party (against whom a claim is excluded by the Bill) may recover from the defendant according to the extent of responsibility of each of them.

Damages in a claim under the *Compensation to Relatives Act 1897* (NSW) will be able to be reduced by the amount of the deceased person's contributory negligence. Legislation in Queensland already allows for this.

5.2.8 Restrictions on Legal Costs

The Bill proposes that if the amount of damages recovered is $100,000 or less, the maximum amount that can be recovered for the cost of the claimant's or defendant's legal services will be the greater of 20% of the amount recovered or $10,000 (until varied by Regulation). The Bill, as introduced to Parliament, made some changes from the draft,

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[57] Hon R J Carr MP, 'Public Liability', Question Without Notice, 7 May 2002.

[58] Hon R J Carr MP, 'Public Liability Insurance', Ministerial Statement, 20 March 2002.

particularly extending the restrictions to also cover defendants' legal costs. In addition, changes were made to ensure that the restrictions also apply to costs of agents and employees of the lawyer but do not apply to disbursements for services provided by others (eg doctors' reports, investigation reports). It is now also made clear that the cost restrictions do not apply if there is a costs agreement that complies with the legislation.

Amendments to the draft now provide for some exceptions to the cap on costs. One exception enables the court to award indemnity costs against a party who has refused an offer of compromise and the eventual outcome is no less favourable than the offer. Another situation where extra costs can be awarded is where the other party has caused unnecessary delay.

The Premier has indicated that it has appeared that a number of small claims may be overserviced or argued in a way that drives up legal costs and makes insurance more expensive. The ICA has claimed that the combination of defence legal costs and plaintiff legal costs may account for over half of the total costs of public liability insurance.[59]

5.2.9 Where Claim Lacks Merit

An interesting move proposed by the draft Bill was that if the court believes that the claim lacks merit, a claimant's lawyer may be made to pay the defendant's legal costs of the action if the claim does not succeed (the claimant fails to recover anything by way of damages). As a result of amendments to the draft Bill, the same sanction now applies to lawyers defending a claim who may advance a spurious defence. The court may also order that the lawyer indemnify any other party against the costs payable by the party indemnified.

Note that lawyers will be prohibited from acting for a person on a claim or defence of a claim unless he or she reasonably believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success.

While contravention will not amount to an offence, it may amount to professional misconduct or unsatisfactory professional conduct, even if the client has instructed the lawyer to pursue the claim. The lawyer will be required to certify that he or she has reasonable grounds for believing that the claim or defence has reasonable prospects of success before it is lodged with the court. The Bill makes it clear that preliminary legal

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[59] Ashley Crossland, 'Imperilled: The big payout', *Australian Financial Review*, 13 April 2002, p 25.

work done in order to assess whether the claim or defence has reasonable prospects of success is not affected by this provision.

Some parts of the legal profession have responded that it is difficult to see why a lawyer would 'run' a matter that is not likely to succeed because there is no incentive to do so and that just because a firm has a 'no-win-no-fee' policy does not mean that it will pursue unmeritorious claims. Rather, the policy means that the firm will help a client to pursue a legitimate claim when he or she would not otherwise be able to afford to do so.[60]

5.3 RESPONSE BY LEGAL GROUPS

Lawyers' groups, particularly the Australian Plaintiffs Lawyers' Association (APLA) and the Law Council of Australia (LCA), have criticised Premier Carr's stand arguing that tort reform will not reduce premium prices.[61] Indeed, Mr Carr has acknowledged that a fall in premiums could not be guaranteed as a consequence of the reforms. APLA's national president believes that premiums would fall only when competition returned to the insurance industry or premiums were regulated by the government. In the meantime, the measures in the Bill will impact upon the legitimately injured.[62] The NSW Law Society president argues that lawyers have been 'singled out unfairly' and that reform alone will not make it easier for community groups to held events and carnivals.

The NSW Law Society believes there is merit in some of the reform proposals (eg structured settlements) but there are some that give concern. Those include the proposed 15% threshold for general damages which will disadvantage persons such as the elderly; and the retrospective nature of the laws as many persons whose injuries were sustained before 20 March but had not stabilised (which they must do in order to commence legal action) will be affected.[63]

In particular, capping damages awards has met the greatest resistance. Plaintiff lawyers see this as having the effect of punishing the victim rather than the party responsible for the injury. There is even concern expressed by politicians that persons who become

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60 Law Society of New South Wales, Letter to the Premier Re: Public Liability Insurance, 2 April 2002. Downloaded from Law Society of NSW website at http://www.lawsocnsw.asn.au.

61 Chris Merritt, 'Carr lacks support on tort reform', *Australian Financial Review*, 9 April 2002, p 7.

62 Linda Morris, 'Insurers to tough out the doldrums, *Sydney Morning Herald Online*, 17 May 2002.

63 Law Society of New South Wales, President's Page, 'State Government's Tort Law Reforms for Public Liability do not Solve the Problem', May 2002. Downloaded from http://www.lawsocnsw.asn.au.

quadriplegics or sustain other horrific injuries may end up relying upon social security payments.

Adding support to the criticisms are recent comments by the NSW Chief Justice, the Hon James Spigelman, that if the NSW Government allows the insurance industry to influence its reforms, fairness would be compromised and there will be long-term resentment in the community. The level of compensation a person receives would vary depending upon whether they were injured in a car, at work, on the operating table, or in a public swimming pool. His Honour proposed some alternative reforms which include restricting the situations in which a person must guard against the failure of another person to take care of their own safety.[64]

5.4 NEW SOUTH WALES HEALTH CARE LIABILITY ACT 2001

The *Health Care Liability Act 2001* (NSW) commenced in July 2001. It established a package of reforms to compensable personal injuries claims arising from medical and hospital care provision. It was introduced in response to rising medical indemnity premiums caused by factors such as larger claims, the need for MDOs to build reserves to meet unfunded liabilities, and the development of risk rating by specialty groups.[65]

The provisions relating to court awarded damages in medical negligence claims are virtually identical to those for general public liability damages contained in the Civil Liability Bill, explored in detail earlier. The measures aim to keep the costs of medical indemnity cover sustainable.

The Act also makes it compulsory for practitioners to be covered by approved professional indemnity insurance, and requires insurers to comply with specified accountability requirements and have a comprehensive risk management program in place.

Practitioners, nurses and other health practitioners who assist an injured person in an emergency situation are given immunity from being sued, provided the assistance was provided in good faith and on a gratuitous basis.

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64 Paola Totaro, 'Insurance reform unfair, says chief judge', *Sydney Morning Herald Online*, 16 May 2002.

65 Hon C J Knowles MP, Minister for Health, Health Care Liability Bill 2001 (NSW), Second Reading Speech, NSW Legislative Assembly Hansard, 19 June 2001, p 14777.

At the time it was introduced, AMA President, Ms Kerryn Phelps, is reported to have said that the legislation should be a template for other states and UMP is understood to have believed that it would allow them to reduce premiums in NSW by 30%.[66]

5.5 PROPOSED SECOND STAGE OF TORT LAW REFORM

The Premier has announced that the Government will be pursuing broad reforms to the law of negligence in the next parliamentary session – all of which seek to restore 'sense and balance in litigation, the law of negligence in particular'.[67] Mr Carr has noted that stage two of the reforms is 'uncharted waters', never previously addressed by Parliament, and that time is needed to ensure that the measures are drafted carefully so that genuinely deserving cases are protected.[68]

Stage two of the negligence reforms are understood to include –[69]

- special protection for good Samaratins who help others in emergency situations so that those persons do not risk being sued for any acts or omissions created by their actions;
- ensuring that warnings of risk can operate as a defence for risky entertainment or sporting activities where operators are not in breach of safety laws;
- reconsideration of the High Court's removal of the immunity of highway authorities so that an assessment of their liability will take into account their general obligations to the community and their available resources;[70]
- abolishing reliance by plaintiffs on their own intoxication if they are drunk or drugged when they carry out an activity;
- preventing persons from claiming where their injury is sustained in the course of committing a crime;
- ensuring that the standard of care to be met in professional negligence actions, including medical negligence, is that the professional act reasonably in the circumstances, as accepted within the profession (peer acceptance). Mr Carr is

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66 Ashley Crossland, 'Tort reform assertion too vague – law council', *Australian Financial Review*, 2 May 2002, p Y.

67 Hon R J Carr MP, 'Public Liability', Question Without Notice, 7 May 2002.

68 Hon R J Carr MP, Civil Liability Bill, Second Reading Speech, 28 May 2002.

69 See Hon R J Carr MP, 'Public Liability', Question Without Notice, 7 May 2002; Hon R J Carr MP, 'Public Liability Insurance', Ministerial Statement, 20 March 2002.

70 Nicolee Dixon, 'High Court Abolishes Negligence Immunity for Highway Authorities', *Research Brief*, Queensland Parliamentary Library, No 16/2001.

reported to consider that the test has drifted towards asking whether there was any other possible way in which the act could have been performed that might not have caused the injury;[71]

- reviewing the 'foreseeability of harm' element in an action for negligence to reverse the trend of requiring defendants to avoid every conceivable risk, however unlikely.

6 QUEENSLAND'S PERSONAL INJURIES PROCEEDINGS BILL

Some key aspects of the proposed Personal Injuries Proceedings Bill will include –

- banning personal injuries advertising in the electronic media but allowing lawyers to advertise information about their services in the print media and over the Internet;
- early notification of claims following an injury or onset of symptoms – this seeks to enable insurers to have better information about the possible size of claims and allow the injured party to receive appropriate medical services at the earliest opportunity;[72]
- imposing limits on the economic loss component and loss of service claims to three times average weekly earings; and limiting loss of comfort claims to actions following death or where damages exceed $30,000;
- banning costs and outlays on payouts less than $30,000; and restricting costs to $2,500 where payouts are between $30,000 and $50,000;
- replacement of jury trials with a trial by a judge sitting alone (as occurs in motor vehicle and workers' compensation claims);
- an obligation on the claimant to mitigate their loss;
- exclusion of awards of exemplary and punitive damages;
- timeframes for defendants/insurers to determine liability; and
- open exchange of material such as medical and investigative reports.[73]

An insurance policy taskforce has been created to coordinate the preparation of the Bill and consultation is being undertaken. The taskforce is headed by the Department of the Premier and Cabinet and includes representatives from relevant government agencies.

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[71] Robert Wainwright, 'Now it will be harder to sue doctors', *Sydney Morning Herald Online*, 3 May 2002.

[72] See Insurance Council of Australia, *Public Liability Submission to Ministerial Forum*, March 2002. Downloaded from http://www.ica.com.au/liabilitysub.

[73] Hon P D Beattie MP, Ministerial Statement, 8 May 2002, p 1269.

The Premier has said that the June changes will be only the first stage of reform. The second stage will include –

- preventing recovery where the injury occurs through the claimant's criminal activity (with appropriate boundaries),
- allowing courts to take into account the increase in risk caused by the claimant taking recreational drugs;
- waivers where persons undertake high risk activities (with appropriate projections for minors);
- protection of volunteers from being sued except for gross negligence, by way of indemnity from the organisation for which they work.[74]

Other measures in the second stage may include caps on non-economic loss; dispensing with the concept of 'joint and several liability'; and reducing the time in which persons could commence a legal action which would involve amending the *Statute of Limitations*.[75]

6.1 RESPONSES

Similarly to its NSW counterpart, the Queensland Law Society considers that lawyers have been unfairly blamed for the insurance crisis when there is no real evidence to show there has been an explosion of insurance claims over the last few years. The QLS position is that the problem would be best solved through group insurance policies for community organisations.

QLS president, Mr Joe Tooma considers, however, that the reform proposals are fairer than the more stringent NSW reforms which include caps on general damages. He does, as noted earlier, support the regulation of 'sensational'. advertising by some solicitors but considers that the power to regulate should rest with the QLS. That is to ensure that the public will still have ready access to information about legal services.[76]

On the other hand some Queensland doctors believe the NSW proposed reforms, particularly the cap on general damages, are more likely to encourage insurers to return to medical indemnity than those changes proposed by the Queensland Bill. The Chair of the

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[74] *Joint Communique – Ministerial Meeting on Public Liability*, 30 May 2002, Attachment A; the Hon T Mackenroth, Deputy Premier, Treasurer & Minister for Sport, 'Queensland to pursue key insurance issues at national forum', *Queensland Media Statement*, 29 May 2002.

[75] *Joint Communique – Ministerial Meeting on Public Liability*, 30 May 2002, Attachment A.

[76] Sam Strutt, 'Qld Law Society supports ban on 'no win, no fee' ads', *Australian Financial Review*, 10 May 2002, p 56.

medico-legal taskforce set up by the Queensland branch of the AMA, David Molloy, considers that the proposals to date will do little to contain damages awards. Dr Molloy noted that jury trials were rarely used for medical negligence claims and that the real problem was judges 'playing Santa Claus'.[77]

The Queensland Premier has indicated some disappointment that the pressure has been taken off the insurance industry and said that he had expected that insurance companies would have completed actuarial assessments to show that they could reduce premium increases in the wake of the Government's proposals.[78] Mr Beattie said that he fears that some not-for-profit organisations would have to cancel functions while some, such as pony clubs, are fighting for survival. Indeed, some pony clubs are threatened by increases in premiums of up to 1000% and public swimming pools may have to close despite a recent Government bailout.[79]

However, the ICA has indicated that premiums will not fall until the proposed reforms were enshrined in legislation and there was evidence, such as some test court cases, that they were working. Insurers were, however, reportedly hopeful that the laws would improve the situation but it would be bad management for insurers to reduce premiums in the hope that the reforms may work.[80]

7 CONCLUSION

Both the Queensland Premier and the NSW Premier regard their proposed legislative reforms to personal injuries actions as going further than any other jurisdiction. The NSW proposals are possibly the most far-reaching to date. Both Premiers are seeking to cooperate and may consider 'marrying up' the two legislative regimes although they believe that there is some consistency already in a number of the changes, such as limiting damages and curbing lawyer advertising. They will both work to encourage other states to follow their lead.[81]

Both Premiers, however, have stated that the proposed legislation does not seek to disadvantage those with genuine claims but if the current problems in the legal system are not fixed quickly, people will not be covered for any insurance at all. Mr Beattie has

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77 Craig Johnstone, 'Ducking for cover'.

78 Hon P D Beattie MP, Premier and Minister for Trade, 'Public Liability Insurance', *Answer to Question on Notice, Queensland Parliamentary Debates*, 14 May 2002, pp 1538-1539.

79 Peter Morley, 'Liability protest rounds up riders, *Courier Mail*, 19 May 2002, p 36.

80 Lachlan Heywood, 'Insurance cost may shut pools', *Courier Mail*, 20 May 2002, p 4.

81 Annabel Hepworth, 'Carr: reform no panacea', *Australian Financial Review*, 23 May 2002, p 6.

summed up the crisis by saying that there are doctors who are reluctant to operate and not-for-profit organisations that cannot hold fetes, and the whole social fabric in many areas of Australia is beginning to be put at risk.[82]

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[82] Rosemary Odgers, Matthew Franklin, 'Lawyer ads banned to cut payouts'.

APPENDIX A - MINISTERIAL MEDIA STATEMENT

Hon. Peter Beattie MP, Premier and Minister for Trade

Cabinet Acts on Medical Indemnity and Public Liability Insurance

07 May 2002

State Cabinet has decided on a package of reforms to deal with urgent problems regarding medical indemnity and public liability insurance, Premier Peter Beattie announced today (Tuesday).

"The State Government will create an Insurance Policy Taskforce as a matter of urgency to co-ordinate the preparation of a Personal Injuries Proceedings Bill by next month as the first stage of tort law reform," said Mr Beattie.

"We will ban all advertising in media for 'no-win, no-fee' legal work.

"Personal injury advertising will also be banned in the electronic media.

"However personal injury lawyers will be able to advertise the type of work they undertake in newspapers and on the Internet.

"Deputy Premier and Treasurer Terry Mackenroth will pursue the issues at a national level, at a meeting of State, Territory and Federal Treasurers on May 30," Mr Beattie said.

Key elements of the Personal Injuries Proceedings Bill, which will be introduced to the Parliament in June, are likely to include:

Before the issue of court proceedings:

* Early notification of claims following an injury or the appearance of symptoms;
* Timeframes for the defendant/insurer to make a determination on liability;
* Obligations on both parties to openly exchange information such as medical and investigative reports;

Limits on claims:

* Limit economic loss to three times average weekly earnings;
* Loss of comfort claims limited to actions following death or where damages exceed $30,000 (before contributory negligence);
* Loss of service claims capped at three times average weekly earnings;

Costs:

* No costs or outlays for claims settled for $30,000 or less unless the settlement or judgement exceeds the mandatory final offer of the insurance;
* Limit awards of costs and outlays for claims settled for more than $30,000 but not exceeding $50,000, to a maximum of $2,500;

Other major reforms:

* Exemplary, punitive or aggravated damages cannot be awarded against an insurer;
* Obligation on the claimant to mitigate the loss;
* Exclusion of jury trials.

"My Department will lead the Taskforce which will include representatives from the Departments of Health, Treasury and Justice and Attorney-General as well as the Motor Accident Insurance Commission," said Mr Beattie.

"Our problem is we're facing a crisis and unless there are some reforms, the system will collapse and nobody will get anything. We've got doctors who are reluctant to operate, we've got not-for-profit organisations which can't hold fetes, and the whole social fabric in a number of country and provincial cities is starting to be put at risk.

"So we have to reform, but we want to do it in a fair and balanced way and ensure it is in the public interest. Our reforms are not designed to limit compensation for people who suffer catastrophic disabilities.

"My message to people who have been injured is that if you've got a legitimate claim, you'll get a fair go.

"While we will restrict 'no-win, no-fee' advertising, we don't plan to abolish the 'no-win, no-fee' process because that does enable a lot of people without money to get access to the courts.

Minister for Justice and Attorney-General Rod Welford said: "It is time to change the culture that is driving people towards a 'sue-for-anything' mentality."

"We have to balance what is in the public interest in ensuring that injured people can gauge which lawyer to engage and what is against the public interest where unscrupulous lawyers are seeking to create business through urging people to sue."

"We have decided to restrict lawyers' advertising of personal injuries matters across the media, including newspapers, radio, television, the Internet and billboards."

"We all want to live in a fair society with access to justice and these curbs on advertising won't stop people exercising their rights to seek out and use 'no-win, no-fee' lawyers."

"However, there is an important balance needed and we see no value in the possibility of people being seduced by advertising to pursue frivolous or vexatious claims."

"Lawyers can still advertise their services but this will remove the opportunity for sensational or high pressure selling on personal injury matters."

Health Minister Wendy Edmond said: "Today's announcement is consistent with what I told the Australian Medical Association last week, when I said a working party comprising Health, Justice, Treasury and Premier's Department officials had been progressing tort law reform.

"I have been working with doctors to develop a long-term solution, but I have also been working to ensure that patients' rights are protected. One of the main effects of what the Government is doing will be to encourage other insurers to have the confidence to get into the medical indemnity market.

"This will provide doctors with the security they are seeking and ensure that they continue to provide services to patients.

"But what we are doing does not negate the need for improved management and regulation of medical defence organisations."

Media Contact: Steve Bishop 07 3224 4500

APPENDIX B – NEWSPAPER ARTICLES

Title **NSW, Queensland rush to limit personal damages**

Author **Sam Strutt**

Source **The Australian Financial Review**

Date Issue **08/05/02**

Page **3**

Proposed Legislative Change in New South Wales and Queensland.

The push to tackle Australia's spiralling insurance crisis gained momentum yesterday when NSW and Queensland unveiled major reforms aimed at restricting damages payouts.

Queensland Premier Peter Beattie said the Government would ban jury trials for people seeking personal injury payouts as part of a wider legislative push to address the crisis in public liability and medical indemnity insurance.

Under reforms approved by State Cabinet yesterday, lawyers in Queensland would be banned from advertising on a no-win, no-fee basis and some personal injury payouts will be capped.

NSW Premier Bob Carr said he had written to the other states, and the Prime Minister, John Howard, urging them to adopt parts of NSW's model for its first stage public liability reforms.

He told parliament the state was leading the nation with its draft legislation to toughen controls on damages payouts.

The legislation, to be introduced in the next sitting week, would be backdated to March 20 to prevent "ambulance-chasing lawyers" looking for an "imagined window of opportunity" before its enactment.

The Insurance Council of Australia welcomed the moves, saying NSW and Queensland had moved quickly on reform.

The bill to be introduced to the Queensland parliament next month would stop short of capping general damages.

Instead, it would limit claims of economic loss and service to three times the average weekly earnings.

Mr Beattie said a taskforce would be created immediately to draw up the legislation.

He said judges would now be required to hear all personal injury cases to prevent juries from making massive compensation payouts.

"Our reforms are not designed to limit compensation for people who suffer catastrophic disabilities," he said.

"Our problem is we're facing a crisis and unless there are some reforms, the system will collapse and nobody will get anything."

The NSW bill caps a maximum for general damages awards at $350,000 and sets the maximum damages for loss of earnings and earning capacity at $2,712 per week.

It also sets a threshold on costs recoverable by a lawyer in small claims and renders it professional misconduct to act if there are no reasonable grounds for believing a claim would succeed.

Last night, however, the legal fraternity warned that the NSW Government's tort law reforms would not reduce public liability insurance premiums.

Australian Plaintiff Lawyers Association national president Rob Davis said research showed there was no link between compensation payouts and rising premiums.

He said Mr Carr had ignored his group's requests for consultation on proposed legislation and he was failing to make real reforms in public liability insurance.

Law Society of NSW president Kim Cull said the draft reforms would not reduce premiums, and tort law reform was just one aspect of the crisis in public liability.

Title **Lawyer ads banned to cut payouts**

Author **Rosemary Odgers, Matthew Franklin**

Source **The Courier-Mail**

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Ambulance-chasing lawyers will be targeted in a crackdown on personal injury litigation to help resolve the crisis in public liability insurance.

State Cabinet yesterday approved reforms designed to limit claims and court costs and speed up personal injury settlements.

Premier Peter Beattie said that without the reforms, public liability insurance would collapse.

But lawyers said they were being unfairly targeted. Under the reforms, the lawyers' no-win, no-fee ads will be banned and personal injury lawyers will only be allowed to advertise in newspapers and on the Internet.

Compensation payouts for economic loss will be capped at three times average weekly earnings and juries excluded from hearing personal injury cases.

To encourage early settlements, courts will be barred from awarding costs when claims are settled for less than $30,000.

Where there are payouts of between $30,000 and $50,000, costs will be limited to $2500.

Structured settlements and changes to the statute of limitations are also expected to be considered before the legislation is taken to Parliament next month.

Mr Beattie said the measures would "put the brakes on the legal system" and stop unscrupulous lawyers encouraging people to sue for frivolous claims.

As NSW Premier Bob Carr released his own draft laws tightening controls on damages payouts yesterday, Mr Beattie said the Queensland reforms went further than any other state.

But he said people with genuine compensation claims would not be disadvantaged.

"If we don't fix this problem, people aren't going to be covered for any insurance at all," Mr Beattie said.

"We're facing a serious crisis here and it does require some tough measures to resolve it.

"We've got doctors who are reluctant to operate, we've got not-for- profit organisations which can't hold fetes, and the whole social fabric in a number of country and provincial cities is starting to be put at risk."

Other states and territ-ories are working on policies to address public liability insurance and their Treasurers will meet in Melbourne later this month on the issue.

Australian Plaintiff Lawyers Association state president Stephen Roche said the Government was attacking lawyers as the cause of the crisis while ignoring the need for increased supervision of the insurance industry.

Mr Roche said the reforms would punish average people who would be denied information about their access to the legal system.

"It's a return to Joh Bjelke-Petersen's days," Mr Roche said.

"He had a system of unfettered access to common law but no-one knew about it.

"Lawyer advertising never caused an injury."

Opposition Leader Mike Horan said the Beattie Government had taken too long to deliver.

"The Opposition first raised this issue almost a year ago and warned of the crisis looming across Queensland," Mr Horan said.

Attorney-General Rod Welford said Australia was moving towards a "sue-for-anything" mentality and the reforms would bring public liability sector payouts more into line with the workers' compensation system.

Mr Welford said there had been NSW cases where juries made multimillion-dollar awards, far exceeding payouts for more-serious incidents dealt with under workers' compensation.

He said the cost of these payouts had impacted on premiums in Queensland.

THE MAIN CHANGES:

AVERTISING CRACKDOWN

* Ban on all advertisements for no-win no-pay lawyers.
* Ban on television and radio advertisements for personal injury lawyers.
* The advertisements will still be allowed in print media and on Internet.

STREAMLINING NEGOTIATIONS

* New time limits for defendants and insurers to determine liability.
* Earlier exchange of medical and other reports between insurers and claimants, and obligation for more open exchange of information between parties.

COURT COSTS CRACKDOWN

* Insurers encouraged to make realistic compensation offers by a ban on awarding of court costs to claimants in cases involving payouts of less than $30,000.
* Court costs limited to $2500 on $30,000-$50,000 payouts.

OTHER REFORMS

* Limit on payouts for lost income caused by injury to no more than three times the average weekly wage.
* Ban on jury trials to avoid unrealistic massive payouts.

Title **Day of reckoning as insurance becomes a public liability**

Author **Colleen Ryan**

Source **The Australian Financial Review**

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It's a $1.5billion industry that generates more than $300million a year in legal fees.

It underwrites a functioning society.

And it's not working.

Public liability is a huge industry on the verge of potentially massive change and yet almost no-one believes the statistics available, which form the basis for debate.

As Assistant Treasurer Helen Coonan sits down with state treasurers in Canberra today to consider the crisis in public liability insurance, she will be confronting one of the bitterest debates in Australian business.

Emotions are running high.

The rhetoric is inflated.

The "facts" are often wrong.

Opportunistic, incompetent insurance companies are allegedly dealing with a cavalier client base that believes insurance fraud is a victimless crime. The clients are being helped along by ambulance- chasing lawyers consumed by greed.

And all of this is controlled by a regulator whose lack of data indicates that it has no idea what is going on. It can't all be right.

All sides do agree that insurance premiums are rising steeply - in isolated cases by several hundred per cent, but across the industry by about 28 per cent this year.

There is incontrovertible evidence that rising premiums, or inability to obtain public liability insurance at all, has closed down literally hundreds of community events, from water skiing championships to country shows, and threatened the survival of the adventure tourism businesses.

The effects range across the whole spectrum of society - from yachties who couldn't afford the premiums to enter the Sydney to Mooloolaba yacht race this week, to equestrians who will need to renegotiate public liability cover for their sport from September, to small businesses which simply will not survive.

Just four months ago, public liability insurance was barely on the radar screen of problems facing the Australian economy.

Now it is a full-blown crisis.

How did this creep up on us?

Peter Ryan, leader of the National Party in Victoria and head of its national task force on public liability, explains the momentum behind the problem with a country analogy: "It is akin to sliding off the roof of a hay shed.

It starts out pretty slowly but then builds up speed until you are really moving when you get to the edge.

With June 30 looming, that is what is happening."

Much of the debate to date has focused on the theory that recent deregulation of the legal profession, accompanied by an aggressive new generation of lawyers touting for business, and a community which has developed a culture of complaint has led to a cascading of claims.

The political focus has been on reining in the lawyers and giving the community a wake-up call on trivial claims.

But that is only part of the problem, and perhaps not even the key part.

Peter McCarthy, director, general insurance, at accountants Ernst & Young, is bemused by the sudden crisis.

He has been warning of the coming crash in public liability for several years.

Three years ago he told an insurance industry conference that reserves in insurance company balance sheets were up to $1billion less than they should have been to meet claims.

Last year he upgraded that assessment to $3.5billion $1.5billion of this related to public liability. And, as he and the world's best known insurance man, Warren Buffet, point out, if you are under-reserving you are underpricing.

"These are truly startling figures," McCarthy wrote. "And [if properly accounted for] would have wiped out all the profit these classes of business have made for the whole industry for the last 22 years." This may explain why some insurance companies are frozen in fright refusing to take on many public liability risks at any price.

McCarthy believes that public liability insurance premiums for high risk categories need to increase by up to 400 per cent on their levels of 2000 if insurance companies price them properly.

Insurers have chronically underpriced public liability for several years, according to McCarthy.

He gives the example of two insurers who, over a period of seven years, wrote the public liability cover for a large Australian company with a high exposure to personal injury.

The first insurer wrote the business for three years and his loss ratio claims to premiums was 10,000 per cent.

That is, the premiums covered only 1per cent of the cost of claims. The second insurer took it on and the loss ratio was still 10,000 per cent. The two insurers lost over $50 million on that one company over seven years. The reasons McCarthy gives for the chronic underpricing in the Australian

insurance industry are poor management and an increase in the number and value of claims, which was not picked up quickly due to poor monitoring and a paucity of data. Heavy competition in the Australian insurance industry in the second- half of the 1990s also led to price cutting.

At the forefront was HIH, which collapsed spectacularly last year with losses of up to $5 billion. HIH was responsible for at least one-third of all public liability premiums. That business has been forced to find a new home.

This has led to bottle necks in the industry and alleged cherry picking by the remaining insurers.

"The collapse of HIH speeded up the crisis. It didn't cause the crisis," says McCarthy. "People also blame September 11 and the increase in reinsurance premiums, but reinsurance is a tiny part of the problem in liability. It accounts for somewhere between 8 and 11per cent of premiums."

Eugene Arocca, public liability partner at lawyers Maurice Blackburn Cashman, concedes that there has been underpricing in the industry. "A $300 premium for one-day coverage for a country show was ridiculous. It was probably one-tenth of what it should have been." But he does not believe that insurers are the victims in this scenario. "The demise of HIH has accelerated the catch up in premiums. One-third of the insurance market has disappeared and as such clients are more beholden to the insurers who are left. Plus there have been a number of mergers NRMA and RACV; AMP and GIO etc. There used to be government insurers who were the last port of call for those requiring insurance. They have been privatised.

All those companies are now out there chasing a profit whereas before the governments were providing fair insurance at fair prices." But Arocca thinks that the deterioration in claims experience has been vastly overstated.

The Insurance Council of Australia points to Australian Prudential Regulation Authority statistics which show that public liability claims increased from 55,000 in 1998 to 88,000 in 2000. "We are at the coal face," says Arocca, "And I can tell you that 88,000 claims in 2000 is nonsense."

"Maurice Blackburn Cashman and Slater & Gordon handle 20 per cent of the public liability cases in Victoria and we would have no more than 1,500 claims a year. There are only 4,000 liability cases in the County Court of Victoria in a year. Maurice Blackburn at present has only 400 outstanding liability cases in Victoria." Arocca points to the insurance industry as the culprit in overstating statistics. "Public liability is run by insurers and they are being selective and/or misleading in material provided."

Peter McCarthy also points to deficiencies in the statistics. "APRA statistics on the number of claims are highly suspect. There is no common definition of a claim. It includes property claims as well as personal injury. Some companies report claims when they become aware of a possible claim. Some don't report until the legal documentation arrives. The data includes the catch-up for under- reserving." So if the statistics are wrong does that mean the whole industry is operating in the dark? Quite possibly.

In the context of the Australian insurance industry, public liability is an unusual animal. It operates under unfettered common law, unlike workers' compensation insurance and compulsory third party insurance for motor vehicle accidents. In each of the latter two forms of insurance there is compulsory acquisition of data, standard policy forms and a degree of government supervision of premium setting and claims procedures.

This may be the direction in which public liability is headed. Bob Carr, Premier of NSW, has been the most aggressive among state premiers in suggesting solutions to the public liability crisis. He wants to introduce thresholds to prevent small and trivial claims; cap general damages, perhaps at $350,000, (a level which applies to health-care claims); and cap damages for loss of earnings and earnings capacity (as applies for motor accident and health care claims).

He also wants to change the way lawyers operate "reviewing contingency fee arrangements". Even Carr, the most active of the politicians in this debate, is ill- informed. Contingency fee arrangements (whereby a lawyer charges the client only if the client wins and then takes a predetermined percentage of the damages) are illegal in Australia under legal practitioners' legislation in the various states. Arocca pounces on Carr's error.

"His knowledge of this area of law is breathtakingly lacklustre. If the other ministers are going to be hoodwinked into his proposed changes, they should at least ask him what his understanding of contingency fees is," Arocca says.

"Either question his motives or question his intellect. He is lawyer bashing." However, Carr is not completely out of the ballpark. "No win no pay" arrangements are allowed in Australia. Under this arrangement the lawyer only charges the client if the client wins. There is no percentage of the payout allowed but a premium of fees of about 25 per cent is sometimes attached to the "solicitor client costs". These are the costs of conducting the case on top of court-determined costs. The abolition of "no win no pay" is an emotional issue. There is no legal aid available for personal injury cases. And it is not just the lawyers who shy away from the abolition of "no win no pay".

Peter Ryan in his National Party proposals (which include exempting voluntary organisations and introducing thresholds and caps on claims) has suggested only a ban on advertising of "no win no pay" arrangements. "You can't say to a 26-year-old timber worker whose left hand has been cut off by a faulty saw that you will only represent him if he deposits a hefty sum in your trust account. "The principle of `no win no pay' has its place. But the advertising of it has reached a point where it demeans the legal profession." Today's Canberra summit on public liability aims to achieve a common plan of action for state governments.

The Federal Government is carefully playing the role of facilitator, all care and no responsibility, and this has privately angered some state ministers. They are concerned that Treasurer Peter Costello has shown little interest in the issue and that there is only a minimal amount of preparatory work by senior officials. But the summit has provided a focus for state treasurers

and a deadline for proposals. Meanwhile, the community waits for its agricultural shows, its sporting events and its adventure tourism to resume as business views a slimmer bottom line.

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