The National Disability Insurance Scheme and why there must be a full inquiry by the Productivity Commission by Blair Williams[1]

Summary

The Inquiry by the Productivity Commission into the National Disability Long-term Care and Support Scheme for people suffering a serious or profound disability is an opportunity for an historic social reform in Australia. This essay, written by a solicitor who practised in Victoria for twenty five years as a personal injury solicitor, reviewing the speeches by the Prime Minister and Mr Shorten and recent articles, commends the Government for its initiative and argues that the Inquiry by the Productivity Commission must be a comprehensive inquiry into how best Australia may provide essential care and support for all in Australia who suffer a disability, not only the eligible people with a severe or profound disability. The Productivity Commission should examine all the current systems that provide compensation for the disabled, including the state based common law systems and no fault insurance schemes, to report to the Government how Australia can best provide the essential care ands support to all the disabled, excluding only those disabled by aging alone.

The Productivity Commission Inquiry into a National Disability Long-term Care and Support Scheme

The Government is to be congratulated for the tremendous and timely initiative that the Prime Minister announced on Monday, 23 November 2009 to request the Productivity Commission carry out an Inquiry into a National Long-term Care and Support Scheme (the Inquiry) that "will look into the costs, benefits and feasibility of approaches which provide essential care and support - on an entitlement basis - for eligible people with a severe or profound disability."[2]

The Prime Minister correctly judges "How we care for people with a disability is a fundamental matter that goes to our values and our character as a nation. But it is also a matter of responsible economic management" and that Australia needs a "system that provides some certainty for people with a disability and their families, no matter where they live, and how they acquired their disability. A system that is not based on rationed services, and is not crisis-driven" but is "what people with disability want and it's also the most cost-effective and efficient solution."[3]

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[1] The author is a solicitor, who qualified in England and since 1984 has practised in Victoria. Since 1987 he has acted for plaintiffs seeking compensation for personal injury. As a solicitor he has extensive experience of dealing with injured people and their families who, in addition to the injury, had also to manage the stress of litigation and often unemployment. He encouraged his clients through the arduous process, not only to win compensation but also to nurture self-belief to rebuild their confidence.

[2] The Address to the National Disability Awards Ceremony in the Great Hall of Parliament House in Canberra <http://www.pm.gov.au/node/6349>

[3] Ibid

The Productivity Commission is to be asked to "look at a no-fault social insurance model reflecting the shared risk of disability across the population as well as other options for long-term care and support, building on international best practice. It will also consider the complex but critical interactions with other schemes and systems - income support, aged care, and state based compensation schemes."[4]

Following the Prime Minister's announcement Mr Shorten, Parliamentary Secretary for Disabilities and Children's Services, said "the current system is inadequate. It is a patchwork quilt where crisis decides funding". The existing arrangements are described as "state government transport accident and workers compensation schemes [that] provide benefits for people hurt in workplace or motor vehicle accidents, although the scale of the benefits and coverage varies around the country". Mr Shorten said "We need a sustainable system which isn't crisis-driven and which can be funded according to the needs of the disabled, not according to the cause of their disability."[5]

Mr Shorten has said further in relation to the current system "Between the various state compensation schemes that cover people injured in car or workplace accidents, less than 50 per cent receive compensation. This compensation is often paid as a lump sum and is not always enough to last through an injured person's life. It has been said to me that the best thing to do for someone who has fallen off the roof of their home and suffered a spinal injury, is to bundle them into the car and drive it into the nearest lamp-post. That grim piece of gallows humour reflects the sad truth that getting adequate compensation for a person with a serious injury is still a lottery. State borders, the whim of the courts, and the cause of the injury play a far greater role than need, fairness or justice. Yet people injured in accidents at least have the chance for some kind of compensation, and treatment that is whole-of-life and centred on the individual. They are the comparatively lucky ones."[6]

The Prime Minister described the Inquiry as an inquiry that will lead to an historic social reform that will lead to a "transformative change to the disability service system - how it is delivered, funded and administered"[7] Mr Shorten described the reform on 24 November 2009 on Radio National Breakfast Fran Kelly as ranking with "the environment, industrial relations and the other issues that have dominated the national stage in the last few years."[8]

Feasibility Study into a National Disability Long-term Care and Support Scheme

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[4] Ibid

[5] As reported by Mark Davis, National Editor, in The Age and The Sydney Morning Herald on 24 November 2009 <http://www.smh.com.au/national/insurance-scheme-may-allow-lifetime-care-for-disabled-20091123-iz8g.html>

[6] Speech to Institute of Actuaries National Accident Compensation Conference on 23 November 2009 at Bill Shorten MP <http://www.billshorten.com.au/> Extras and Speeches

[7] The Address to the National Disability Awards Ceremony in the Great Hall of Parliament House in Canberra <http://www.pm.gov.au/node/6349>

[8] Interview with Fran Kelly on Radio National Breakfast on 24 November 2009 at Bill Shorten MP <http://www.billshorten.com.au/> Extras and Speeches

The Feasibility Study and the Terms of Reference for the Inquiry were announced by the Government on 3 December 2009.[9] The Feasibility Study is part of the National Disability Strategy and is "into a long-term care and support scheme for people with disability in Australia."[10] The Productivity Commission will commence the Inquiry in April 2010.

The Feasibility Study declares:

- "While Australia's social security and universal health care systems provide an entitlement to services based on need, there is currently no equivalent entitlement to disability care and support services"[11],

- "The Government is committed to finding the best solutions to improve care and support services for people with disability"[12],

- "The appointment of the Productivity Commission to undertake a feasibility study recognises that this is a complex area of public policy which requires detailed consideration"[13],

- "A range of important issues need to be examined, including: the design and parameters of any long-term care and support scheme; financing issues; service delivery and workforce issues; the interface with existing major areas of service delivery; the potential impact on Commonwealth and state responsibilities for the provision of services and support; the impact on carers; the interface with existing workers' compensation, medical indemnity insurance and third party motor vehicle insurance arrangements; necessary changes to legislation; and options for governance"[14],

- "A serious examination is required including extensive modelling and analysis of interactions with other existing service systems such as health, aged care and income support"[15],

[9] See the Feasibility Study into a National Disability Long Term Care and Support Scheme <http://www.fahcsia.gov.au/sa/disability/progserv/govtint/Pages/feasibility_study.aspx> and Terms of Reference productivity Commission Inquiry into a National Disability Long Term Care and Support Scheme <http://www.fahcsia.gov.au/sa/disability/progserv/govtint/Pages/tor.aspx>
[10] The Feasibility Study into a National Disability Long Term Care and Support Scheme <http://www.fahcsia.gov.au/sa/disability/progserv/govtint/Pages/feasibility_study.aspx>
[11] Ibid
[12] Ibid
[13] Ibid
[14] Ibid
[15] Ibid

- "The feasibility study will assess whether a long-tem care and support scheme would be appropriate, practical and economically responsible in the Australian context."[16]

The Feasibility Study "will assess the costs, including cost effectiveness, benefits and feasibility of an approach which:

- provides long-term essential care and support for eligible people with a severe or profound disability, on an entitlement basis;
- is intended to cover people with disability acquired early in life rather than as the natural process of ageing;
- calculates and manages the costs of long-term care and support for people with severe and profound disability;
- replaces existing funding for the eligible population;
- ensures a range of support options are available, including individualised approaches;
- provides care and support for each person taking into account their desired outcomes over their lifetime;
- includes a coordinated package of care services which covers accommodation support, aids and equipment, respite, transport and a range of community participation and day programs available for a person's lifetime;
- assists the person with disability to make decisions about their support; and
- provides supports for people to undertake employment where possible."[17]

The Cost of the Long-term Care and Support Scheme

The Feasibility Study:

- "will examine a range of options and approaches, including international examples, for the provision of long-term care and support for people with

[16] Ibid
[17] Ibid

severe or profound disability"[18] and

- "will model and examine in detail the costs and benefits of any scheme. Costs will depend on the type of scheme proposed including eligibility and the range of assistance to be provided, as well as the projected offsets from improved outcomes for people with disability and their carers and more efficient services."[19]

The Purpose of the Feasibility Study

"The feasibility study is an initial step to build the evidence base required for Government to consider any future reform. The Productivity Commission has been asked to report to Government by July 2011. The Government will consider the findings in detail and provide a response in due course."[20]

The Terms of Reference for the Productivity Commission Inquiry into a National Disability Long-term Care and Support Scheme

The Terms of Reference are[21]:

"Scope of the review

The Productivity Commission is requested to undertake an inquiry into a National Disability Long-term Care and Support Scheme. The Inquiry should assess the costs, cost effectiveness, benefits, and feasibility of an approach which:

- provides long-term essential care and support for eligible people with a severe or profound disability, on an entitlement basis and taking account the desired outcomes for each person over a lifetime;
- is intended to cover people with disability not acquired as part of the natural process of ageing;
- calculates and manages the costs of long-term care and support for people with severe and profound disability;
- replaces the existing system funding for the eligible population;
- ensures a range of support options is available, including individualised approaches;
- includes a coordinated package of care services which could include accommodation support, aids and equipment, respite, transport and a range of community participation and day programs available for a person's lifetime;

[18] Ibid
[19] Ibid
[20] Ibid
[21] <http://www.fahcsia.gov.au/sa/disability/progserv/govtint/Pages/tor.aspx>

- assists the person with disability to make decisions about their support; and
- provides support for people to participate in employment where possible.

In undertaking the inquiry, the Commission is to:

1. Examine a range of options and approaches, including international examples, for the provision of long-term care and support for people with severe or profound disability.

   The Commission is to include an examination of a social insurance model on a no-fault basis, reflecting the shared risk of disability across the population.

   The Commission should also examine other options that provide incentives to focus investment on early intervention, as an adjunct to, or substitute for, an insurance model.

2. The Commission is to consider the following specific design issues of any proposed scheme:

   - eligibility criteria for the scheme, including appropriate age limits, assessment and review processes;
   - coverage and entitlements (benefits);
   - the choice of care providers including from the public, private and not-for-profit sectors;
   - contribution of, and impact on, informal care;
   - the implications for the health and aged care systems;
   - the interaction with, or inclusion of, employment services and income support; and
   - where appropriate, the interaction with:
     - national and state-based traumatic injury schemes, with particular consideration of the implications for existing compensation arrangements; and
     - medical indemnity insurance schemes.

3. Consider governance and administrative arrangements for any proposed scheme including:

   - the governance model for overseeing a scheme and prudential arrangements;

- administrative arrangements, including consideration of national, state and/or regional administrative models;
- implications for Commonwealth and State and Territory responsibilities;
- the legislative basis for a scheme including consideration of head of power; and
- appeal and review processes for scheme claimants and participants.

4. Consider costs and financing of any proposed scheme, including:
    - the costs in the transition phase and when fully operational, considering the likely demand for, and utilisation under different demographic and economic assumptions;
    - the likely offsets and/or cost pressures on government expenditure in other systems as a result of a scheme including income support, health, aged care, disability support system, judicial and crisis accommodation systems;
    - models for financing including: general revenue; hypothecated levy on personal taxation, a future fund approach with investment guidelines to generate income;
    - contributions of Commonwealth and State and Territory governments; and
    - options for private contributions including copayments, fees or contributions to enhance services.
5. Consider implementation issues of any proposed scheme, including:
    - changes that would be required to existing service systems;
    - workforce capacity; and
    - lead times, implementation phasing and transition arrangements to introduce a scheme with consideration to service and workforce issues, fiscal outlook, and state and territory transitions."

The Productivity Commission

The role of the Productivity "is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting

the welfare of Australians. Its role, expressed simply, is to help governments make better policies in the long term interest of the Australian community."[22]

What should be the scope of the Inquiry?

The disabled and the existing systems

It is argued the Inquiry will not be the inquiry to lead to historic social reform unless it is a comprehensive inquiry by the Productivity Commission that looks into the essential care and support for *all the disabled* except those specifically excluded (the disabled who are disabled solely because of ageing) and examines the existing systems, including the state based common law systems and state based no fault compensation schemes that provide care and support for the disabled, including those disabled because of accidental injury, and evaluates how effectively the existing systems provide benefits to the disabled..

First the disabled and the Feasibility Study and the Terms of Reference both refer to *people with disability* and *people with a severe or profound disability*.

However the main thrust of the referral to the Productivity Commission is clear.

The Feasibility Study and the Terms of Reference set out the Inquiry "will assess the costs, including cost effectiveness, benefits and feasibility of an approach which provides long-term essential care and support for eligible people with a severe or profound disability, on an entitlement basis" and "calculates and manages the costs of long-term care and support for people with severe and profound disability".

Who are the disabled in Australia who are "eligible people with a severe or profound disability"?

Who are the "people with a severe or profound disability" who are not "eligible"?

The Feasibility Study sets out the Inquiry "is intended to cover people with disability acquired early in life rather than as the natural process of ageing whereas the Terms of Reference set out in the Scope of the Review the Inquiry "is intended to cover people with disability not acquired as part of the natural process of ageing."

Second the existing systems and the Feasibility Study in setting out the "range of important issues need to be examined, including: the design and parameters of any long-term care and support scheme; financing issues; service delivery and workforce issues; the interface with existing major areas of service delivery; the potential impact on Commonwealth and state responsibilities for the provision of services and support; the impact on carers; the interface with existing workers' compensation, medical indemnity insurance and third party motor vehicle insurance arrangements; necessary changes to legislation; and options for governance" does not make clear whether the Productivity Commission will critically examine the "existing workers' compensation, medical indemnity insurance and third party motor vehicle insurance

[22] See the website of the Productivity Commission < http://www.pc.gov.au/>

arrangements" and other relevant systems to evaluate how effective they are in providing long term care and support for people with severe and profound disability.

The Terms of Reference is clearer. The Productivity Commission in undertaking the Inquiry is to examine "a range of options and approaches including international examples, for the provision of long-term care and support for people with severe or profound disability" including "a social insurance model on a no-fault basis, reflecting the shared risk of disability across the population" and also "other options that provide incentives to focus investment on early intervention, as an adjunct to, or substitute for, an insurance model."

Is this a reference to the existing state based common law systems?

The Productivity Commission is to consider "the following specific design issues of any proposed scheme" and one of the "design issues" is "*where appropriate*, the interaction with national and state-based traumatic injury schemes, with particular consideration of the implications for existing compensation arrangements and medical indemnity schemes.

It is argued the Government now has an historic opportunity to request the Productivity Commission to undertake a comprehensive inquiry and after examining and evaluating the existing systems in Australia and overseas, both common law systems and no fault insurance schemes, to report to the Government how best Australia provides essential care and support for the disabled. The role of the Productivity Commission to "help governments make better policies in the long term interest of the Australian community" means it is best suited to carry out the Inquiry.

Parliamentary Joint Committee on Corporations and Financial Services

The referral to the Productivity Commission is timely as it was announced on the same day that the report was issued by the Parliamentary Joint Committee on Corporations and Financial Services which it is reported "recommended that the Government work with industry to develop the "most appropriate mechanism by which to cease payments" – such as commissions – from product manufacturers to financial advisers" and although "it stopped short of recommending laws to ban payments, the Report of the Parliamentary Joint Committee on Corporations and Financial Services recommended changes to the Corporations Act to require financial advisers to place their clients' interests ahead of their own." The Government has decided to wait for the report into the inquiry into the superannuation system (Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System - The Cooper Inquiry) due to report to the Government in June 2010 before making a decision on the Report and recommendations of the PJC on Corporations and Financial Services.[23]

[23] See 'Financial Fees debate to continue' by Ruth Williams Business Day of The Age on 25 November 2009 <http://www.theage.com.au/business/financial-advice-fees-debate-to-continue-20091124-jhfv.html>

The Government is correct to wait the outcome of the Cooper Inquiry[24] as that will consider and report on similar issues; however the importance of the Parliamentary Joint Committee on Corporations and Financial Services is that it led to decision of the Financial Planning Association to abolish commissions, an indication that the status quo in relation to the financial planning industry must change.[25] There is growing pressure that similar changes should be considered for the superannuation industry[26], which is why the Government should not make any decisions on the recommendations until it has received both Reports.

The Parliamentary Joint Committee on Corporations and Financial Services and its Report with its well argued recommendation for reform; the Report recommended changes to the Corporations Act to require financial advisers to place their clients' interests ahead of their own; was met by the vested interests seeking to preserve the status quo and resist the reform for reasons of self interest.[27] The vested interests must now be encouraged to participate in and not stifle the debate on the recommendation in the Report. The best outcome for the consumer is assured only when there has been a comprehensive inquiry, a full and well argued report and vigorous debate on the recommendations. The reform is sufficiently important and fundamental, as it has been reported that it is, and will deliver enduring benefits to the consumer, a committed Government must not allow the reform to be defeated by the vested interests acting in self-interest seeking to preserve the status quo to preserve their own benefits.

Senator Ripoli stated the aims of the Parliamentary Joint Committee on Corporations and Financial Services "were to improve consumer protection and to create a better,

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[24] The Cooper Inquiry released the Phase-One Preliminary Report on 14 December 2009. the Report, Clearer Super Choices: Matching Governance Solutions, in Section 2, Summary of Emerging Themes, and advising on the key themes that emerged in the 110 formal submissions and the 100 meetings conducted with industry associations, superannuation funds, financial institutions, academics, lawyers and other interested parties, both in Australia and overseas, the first key theme is "superannuation is not just another 'financial product'; it is different" and for the stated reasons, "the government has an added responsibility to get the settings right. It also adds weight to the need for protection of member interests. This is especially true in situations where the individual member is not equipped, either because of circumstances or through lack of financial literacy, to secure their own best interests." It is submitted that the same importance should apply to the Inquiry and because the clients of the personal injury lawyers are usually in the same position as the clients of the financial planners, whose position was examined by the Parliamentary Joint Committee on Corporations and Financial Services and the individual member of a superannuation fund, they are 'not equipped, either because of circumstances or through lack of financial literacy, to secure their own best interests." The Government has an 'added responsibility to get the settings right' of the system that provide the essential care and support to the disabled persons Australia and the first step is that the Inquiry is comprehensive and addresses the essential issues http://www.supersystemreview.gov.au/

[25] See 'Financial Planners would support ban on commissions' ABC Radio PM 19 November 2009 <http://www.abc.net.au/pm/content/2009/s2747928.htm>

[26] 'Time to bite super commission bullet' by Annette Sampson The Sydney Morning Herald 20 June 2009 <http://www.smh.com.au/business/time-to-bite-super-commission-bullet-20090619-cr5s.html>

[27] 'A grim outlook for commissions' by Alan Kohler Business Spectator 26 November 2009 at <http://www.businessspectator.com.au/bs.nsf/Article/A-grim-outlook-for-commissions-pd20091126-Y5RMB?OpenDocument>

more efficient and more professional financial planning industry" and the intent of the recommendations is "consumer protection."[28]

So it is with the Inquiry.

It is essential that the Productivity Commission is given the extended Terms of Reference to address the essential questions and to report and make recommendations on the best system of providing essential care and support for all the disabled. The purpose of the Inquiry must be seen, as with Parliamentary Joint Committee on Corporations and Financial Services, to improve consumer protection and to create a better, more efficient and more effective system to provide care and support for all disabled persons, including those who are disabled because of injury and not only the eligible people with a severe or profound disability. The intent of the recommendations of the Productivity Commission's Report must be, as with recommendations in the Report of the Parliamentary Joint Committee on Corporations and Financial Services, consumer protection.

The Productivity Commission will report to the Government on 31 July 2011. The author has no doubt if the Productivity Commission is given the extended Terms of Reference the Report will recommend 'root and branch reform'.[29] The intention in writing this essay is to argue the Productivity Commission is permitted to apply 'root and branch reform' to the common law tort system.

Reform was recommended by a previous inquiry, the Australian Woodhouse Report, and did not lead to historic social reform.[30] Australia missed a unique opportunity and now that Australia has established another inquiry considering a no fault insurance scheme there must be a comprehensive inquiry that asks the essential questions with respect to the common law system, there must be a comprehensive Report and then vigorous debate on the recommendations for reform.

The future of the disabled requires no less. If the Productivity Commission is not given extensive terms of reference so there is not a comprehensive inquiry and a comprehensive Report, this Government will have failed the disabled.

It is the mark of an enlightened society that we continually challenge ourselves to do things better and there should be no sacred cows.[31] The Government must not

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[28] See *Ripoli's blue print for a' better, more effective' industry* by Simon Hoyle dated 23 November 2009 in professional planner < http://www.professionalplanner.com.au/current-issues/ripolls-blueprint-for-a-better-more-effective-industry.html>

[29] See *Canberra goes crazy with inquiries* by Andrew Main in the Australian 4 June 2009 dealing with the prospect of inquiries in Canberra proposing root and branch reform <http://www.theaustralian.com.au/news/canberra-goes-crazy-with-inquiries/story-0-1225720667381>

[30] See The Australian Woodhouse Committee later in this article

[31] Sacred Cow is defined by the Collins Online Dictionary as 'person, institution custom etc unreasonably held to be beyond criticism alluding to the Hindu belief that the cow is sacred' and the Longman Dictionary of Contemporary English as 'a belief custom, system that is so important to some people that they will not let anyone criticize it'

permit itself to be intimidated by the status quo. The Productivity Commission must ask the essential questions.[32]

In his 2004 address *Tort Law Reform In Australia - Address To The London Market At Lloyd's* to the Anglo- Australian Lawyers Society & to the British Insurance Law Association on 16 June 2004 examining the state of the law in Australia after the Tort Law Reforms Chief Justice Spigelman concluded "May I say in conclusion that there has been no serious discussion in Australia of us adopting on an universal basis the no fault type insurance scheme that exists in New Zealand. It does, as I have said, exist for motor vehicle accidents in Victoria and has been advocated more widely. Nevertheless, if the changes both in judicial attitudes and the legislative regime now in place do not result in a system of compensation for accidents which is widely accepted to be economically sustainable, a no fault scheme may appear to be the only alternative.[33]

The No Fault Insurance Compensation Scheme in New Zealand

The reference to "a no fault insurance model reflecting the shared risk of disability across the population as well as other options for long-term care and support, building on international best practice"[34] points to the New Zealand system.

There are a number of no fault insurance compensation schemes both in Australia and overseas in some provinces of Canada, some states in the United States of America and in New Zealand.[35]

The models that are considered to be the most appropriate for examination by the Productivity Commission are the no fault insurance compensation schemes operated in New Zealand by the Accident Compensation Corporation and in Victoria by the Transport Accident Commission.

The no-fault insurance compensation scheme that has operated in New Zealand since 1974 has been severely criticised in discussions between the author and other personal injury lawyers in Melbourne and used as a justification by the other personal injury lawyers in Melbourne for the retention of the common law compensation system is Victoria. This is despite the recognition that the common law system is criticised as it clearly does not provide comprehensive benefits to all persons disabled by injury.

It is essential therefore that Productivity Commission be required to review, evaluate and report on the existing common law compensation systems together with the no

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[32] In ***Tort Law Reform in Australia*** the Address by Address by the Honourable J J Spigelman AC Chief Justice Of New South Wales to the Anglo-Australian Lawyers Society & the British Insurance Law Association at Lincoln's Inn, London on 16 June 2004 and Presentation To The London Market at Lloyds on 6 July 2004 <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_160704>

[33] Ibid

[34] The Address to the National Disability Awards Ceremony in the Great Hall of Parliament House in Canberra <http://www.pm.gov.au/node/6349>

[35] See No-fault insurance Wikipedia at <http://en.wikipedia.org/wiki/No-fault_insurance>

fault systems operating in Australia and the no fault compensation scheme that has operated successfully in New Zealand since 1974. The description of these schemes as comprising a 'patchwork quilt' is apt as the existing schemes are mostly state based and provide partial and specific compensation only depending on the circumstances of the injury causing the disability.[36]

Australia has previously considered establishing a national compensation scheme recommended by the Australian Woodhouse Committee, but the recommendations were not implemented.[37] The referral to the Productivity Commission now presents another opportunity to consider a national compensation scheme.

The no fault compensation system in New Zealand was established on 1 April 1974 following the Royal Commission on Accident Compensation in 1966 to 1967 and the Woodhouse Report, which recommended establishing in New Zealand a no fault compensation scheme. Woodhouse Report is regarded as one of the most significant legal reforms of this generation.[38]

The New Zealand scheme was developed from the Workers Compensation Act 1900, which was a limited compensation scheme providing benefits to injured workers. The Royal Commission was established to investigate and report on the adequacy of the workers' compensation benefits. The Woodhouse Report recommended a completely new 'no-fault' approach to compensation for personal injury and that compensation be provided to all injuries (but not illness) on a no fault basis.[39]

The Scheme was first administered by the Accident Compensation Commission and in 1992 the name of the Commission was changed to Accident Compensation Corporation. In the Annual Report for 1989/90 the Accident Compensation Commission proposed ending the distinction between "accidents" (which are covered) and "illness" (which is not) but the Government of New Zealand did not accept the recommendation. The Accident Compensation Corporation is the sole and compulsory provider of insurance for all work and non work injuries, the current

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[36] See page 2 and footnote 5

[37] See Report of the National Committee of Inquiry, Compensation and Rehabilitation (Australian Woodhouse Report)

[38] Sir Arthur "Owen" Woodhouse in Wikipedia <http://en.wikipedia.org/wiki/OwenWoodhouse>

[39] Sir Owen Woodhouse completed three Reports. The first Woodhouse Report (1967) "contained a complex set of policy considerations which were readily susceptible to attack by influential sections of our community. It is also apparent that Sir Owen Woodhouse developed and expanded his principles in two subsequent reports which need to be considered in conjunction with the first Woodhouse Report. The Australian Government commissioned Sir Owen Woodhouse to prepare a proposal to reform that country's compensation scheme. The Australian Woodhouse Report [Report of the National Committee of Inquiry, Compensation and Rehabilitation in Australia, July 1974] recommended cover for disability arising from sickness, disease and congenital incapacities. The "Third Woodhouse Report" was prepared by the Law Commission when Sir Owen Woodhouse was its President. In its report "Personal Injury, Prevention and Recovery" (1988), the Law Commission recommended an end to the "inequality of luck" which flows from providing cover for those who suffer personal injury by accident, but not to those who are disabled by sickness or disease." See the Report of the Ministerial Advisory Panel on work related gradual process disease or infection at the website of the Department of Labour <http://www.osh.govt.nz/publications/research/gradual-disease0605/pg4.html>

legislation is the Injury Prevention, Rehabilitation, and Compensation Act 2001 and the Act provides benefits to all citizens and visitors to New Zealand.[40]

***Accidents Compensation and the Law* and the criticism of the fault based tort law**

In 1970, soon after the Woodhouse Report in 1967, Professor Patrick Atiyah published ***Accidents Compensation and the Law*.** Professor Atiyah proposed that the law of tort be abolished and be replaced by a no fault compensation scheme administered by the state. The abandonment of the law of tort was proposed because of Professor Atiyah's detailed criticism of the principle of fault underlying the law of tort." Professor Atiyah proposed six major criticisms of the system, which suggest that liability in personal injury claims should not focus on the relationship between the claimant and defendant, but between the parties and society. His examples were primarily concerned with road traffic accidents"[41]

Atiyah's Accidents, Compensation and the Law is now a leading legal text. Professor Atiyah wrote the first three editions and from 1987 the fourth edition and subsequent editions have been written by Professor Peter Cane.

***The Damages Lottery* and further criticism of the fault based tort law**

In 1997 Professor Atiyah wrote ***The Damages Lottery*** in which he continued to press for the abolition of the law of tort and the fault principle, however the state based no fault system Atiyah had proposed in Accidents Compensation and the Law was replaced by private insurance.

The Damages Lottery was reviewed by Pat O'Malley originally published in the journal Law in Context[42]. The review by O'Malley is useful as it contrasts the development of the modern law of negligence with the strident criticism by Professor Atiyah.

"The trend in tort law over the past half century has more effectively constituted tort law as a regime for socially spreading the costs of accidents - in particular, by widening the duty of care to cover all people reasonably foreseeable as likely to be affected by one's actions. It meant that to a much greater extent losses would no longer lie where they fell but would be sheeted home to the negligent. As most of the latter rely upon insurance to cover the threat of damages awarded against them, and/or (if they are commercial entities) build the estimated cost of damages into the price of commodities, the modern law of tort emerges as a kind of social insurance scheme. However the problems mapped out in *Accidents Compensation and the Law* made clear in this capacity tort law is hopelessly inefficient, unjust and expensive. Its transaction costs are many times those of insurance proper, and many victims are deterred from obtaining compensation by the high costs and the risks attendant

[40] Accident Compensation Corporation <http://en.wikipedia.org/wiki/Accident_Compensation_Corporation> See also History of the ACC in New Zealand at the website of the Accident Compensation Corporation <http://www.acc.co.nz/about-acc/overview-of-acc/introduction-to-acc/ABA00004>

[41] See the entry in Wikipedia Atiyah: Accidents Compensation and the Law for the six criticisms of the fault based tort law at http://en.wikipedia.org/wiki/Atiyah%27s_Accidents

[42] Pat O'Malley (1999) 16 (2) http://digital.federationpress.com.au/view/3aj4a/9a5r2/toc

upon any legal action. Many more victims are unable to recover because of the need to demonstrate negligence. Some tortfeasors turn out to be damage proof, and even successful plaintiffs often have to wait unconscionably long periods before compensation is delivered by the courts"[43]

Further *"*Certain arguments against tort law are presented that are either new (that is, since ***Accidents Compensation and the Law****)* or are given greatly expanded treatment and prominence. Perhaps most salient amongst these are the condemnations of the considerable quanta and total volumes of damages currently awarded and the greatly increased range of harms for which remedy is now made available, and the greatly extended category of those – usually with deep pockets – who may find themselves the targets of legal action. Atiyah's problem (repeating conclusions he had reached some time earlier (Atiyah 1987)) is that these changes have not 'stretched' the law in any way that he considers 'just'. In summary, his view is that there has been an exaggeration of the extent to which the 'wrong' plaintiffs are receiving 'excessive' damages from the 'wrong' defendants. According to *The Damages Lottery* many plaintiffs with minor or even undemonstrable harms bring actions –either motivated by greed, or by lawyers encouraging them to sue on the assumption that insurance companies will settle most claims that are not for significant amounts. The suggestion is that the Courts are increasingly likely to pay attention to such claims, and often award outrageous damages, because judges are 'pro-plaintiff'. This [Atiyah] feels, reflects the fact that judges are always 20 years behind the times. They still preserve the old welfare state attitude that 'someone else', preferably a large organisation, should be held responsible for all misfortunes."[44]

"But despite the development of the law of negligence and that "it compensates, with often excessive windfalls some victims of life's accidents…. Atiyah [in the *Damages Lottery*] argues that these are very few indeed (1.5% of those suffering from incapacities), and they are victims who in any case are not necessarily the most needy or the worst injured – merely the ones who win the 'damages lottery'."[45]

Professor Atiyah illustrates clearly the limitations of the common law system to deliver care and support to persons who suffer injury and in addition to the criticisms mentioned, there is inherent inability of the common law system to ensure that every plaintiff is successful in his or her claim and wins damages to compensate for the injury.

The common law system clearly cannot provide a satisfactory system of compensation as is provided by a no fault compensation system despite what O'Malley says of the unintended consequences of development of tort law and the modern law of negligence during these years as providing "a kind of social insurance scheme".

[43] Ibid
[44] ibid
[45] ibid

Chief Justice Spigelman refers this period as the "imperial march of negligence". Professor Atiyah refers to the "stretching the law"[46] during this period. Whatever the reason for the inherent inability[47], the result is the common law system cannot break free from its traditional approaches and provide the necessary system of compensation that primarily focuses on the needs of the injured.[48].

These are matters that should be addressed by the Productivity Commission when it conducts the Inquiry so that the Report comments on the failings of the common law system.

Negligence: the last outpost of the Welfare State
Negligence and Insurance Premiums: Recent Changes in Australian Law
Tort Law Reform in Australia

In these three related addresses Chief Justice Spigelman reviews the law of negligence in the expansionary and the contractionary periods both, that is before and after the Crisis in Insurance in 2002, evaluates the effect of the changing judicial attitudes and the legislative changes in the Tort Law Reform and reports that the common law system is not an efficient system for delivering compensation to the injured. He proposed an inquiry be established to investigate what improvements could be made to the system.

In ***Negligence: the last outpost of the Welfare State*** in 2002 Chief Justice Spigelman in reviewing the expansionary development of tort law into the modern law of negligence argues it is not at all satisfactory as a system intended to deliver appropriate compensation to the injured. "Over a few decades - roughly from the sixties to the nineties - the circumstances in which negligence would be found to have occurred and the scope of damages recoverable if such a finding were made,

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[46] See ***Tort Law Reform in Australia***, the Address by the Honourable J J Spigelman AC, Chief Justice Of New South Wales to the Anglo-Australian Lawyers Society & the British Insurance Law Association at Lincoln's Inn, London on 16 June 2004 and Presentation To The London Market At Lloyd's on 6 July 2004 <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_160704> and ***Negligence: the last outpost of the Welfare State*** the Address by the Honourable J J Spigelman AC Chief Justice Of New South Wales, to The Judicial Conference of Australia: Colloquium at Launceston on 27 April 2002 http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_270402

[47] ***Tort Law Reform in Australia*** and Chief Justice Spigelman refers to the "undefined elements of the tort left much open. What damages are remote? What does "commonsense" suggest as the cause? When is a contribution to the creation of a risk "material"? Should a limitation period be extended? Should the plaintiff's evidence be accepted? How should one choose between two widely divergent experts' opinions, each of which is probably at, or beyond, the boundaries of the range of legitimate opinion? Should the plaintiff be believed about what effect a hypothetical warning would have had upon him or her? There is much flexibility in the outcome of negligence litigation."

[48] ***Negligence: the last outpost of the Welfare State*** and Chief Justice Spigelman refers to the "traditional function of the law of negligence, reinforced as this function is in almost all cases by insurance, of distributing losses that are an inevitable by-product of modern living (the theme of Fleming's *Law of Torts* on which many of us were weaned) appears to have reached definite limits as to what society is prepared to bear. Furthermore, there is a substantial body of anecdotal evidence of undesirable side effects of the present system: rural GP's that have ceased doing obstetrics; councils that have removed such lethal instruments as swings and seesaws from children's playgrounds; charitable fund raising events that have been cancelled. The only reason why all our rock ledges and cliff tops are not festooned with signs is that nobody believes that they would actually affect the outcome of litigation and would probably make things worse."

appeared to expand considerably. Professor Atiyah referred to this long term historical trend as "stretching the law". There may be an equivalent parallel trend, perhaps of even greater practical significance, of "stretching the facts". There seems little doubt that the attitude of judges has been determined to a very substantial extent by the assumption, almost always correct, that a defendant is insured. The result was that the broad community of relevant defendants bore the burden of damages and costs awarded to an injured plaintiff. Judges may have proven more reluctant to make findings of negligence, if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home."[49]

Chief Justice Spigelman concluded that "the pressure for change, particularly in some area of insurance, is regarded as acute and requiring immediate action." and "An appropriate way of approaching such a task would be to invoke the resources of all of the law reform commissions throughout the Commonwealth and to allocate specific matters for inquiry to individual commissions. The entire project could be supervised under the auspices of the Standing Committee of Attorneys-General. No doubt there will be some reluctance to allow the lawyers to control the agenda in this regard."[50]

In ***Negligence and Insurance Premiums: Recent changes in Australian Law***[51] in 2003 Chief Justice Spigelman referred to ***Negligence: the last outpost of the Welfare State*** as being "the recognition that the law of negligence in Australia, in its practical application, had become unsustainable. The subtitle was intended to suggest that, notwithstanding the fact that the system required proof of fault, the practical operation of the system appeared to find fault quite readily, perhaps too readily".

He concluded pessimistically a bleak future for the law of negligence. "The process of change in Australian tort law is not complete." and "One thing is clear, by a combination of a major change in judicial attitudes, led by the High Court, and wide-ranging legislative change, the imperial march of the tort of negligence has been stopped and reversed. New categories of liability, which were a feature of recent decades are now less likely to emerge."[52]

It is fortunate there is now an inquiry in Australia and essential it is a comprehensive inquiry.

In ***Tort Law Reform in Australia***[53] in 2004 Chief Justice Spigelman reports on the changes by the Tort Law Reform that "It is reasonably clear that something dramatic has happened to civil litigation in New South Wales. Similar effects are seen in other states" caused by "First, there has been a substantial shift in judicial attitudes at an

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[49] Ibid

[50] Ibid

[51] ***Negligence and Insurance Premiums: Recent changes in Australian Law*** the Address by Address by the Honourable J J Spigelman AC Chief Justice Of New South Wales delivered in Auckland, New Zealand on 27 May 2003< http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_270503>

[52] Ibid

[53] ***Tort Law Reform in Australia*** the Address by Address by the Honourable J J Spigelman AC Chief Justice Of New South Wales to the Anglo-Australian Lawyers Society & the British Insurance Law Association at Lincoln's Inn, London on 16 June 2004 and Presentation To The London Market At Lloyds on 6 July 2004 <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_160704>

appellate level, led by the High Court of Australia. Secondly, there have been major changes to the law of negligence implemented by statute."[54]

Chief Justice Spigelman concludes the address "As can be seen the change in the law of negligence in Australia has been quite dramatic. The working out of the new statutory regime has commenced and will take some time. There remains a significant debate as to whether or not the reforms have gone too far. Australian lawyers are focussing attention on the considerable increase that has been reported in insurance company profits. Political pressure on premiums is increasing but, in the long term, the level of premiums will be determined by the renewed ability of Australia to attract insurance company capital, particularly, the capital of reinsurers and by a turn in the insurance market cycle which, sooner or later, is inevitable.

I am conscious that I have used the word "reform", a word that has long since acquired a positive connotation of 'improvement', which puts anyone opposed to the relevant change on the defensive. Not all the changes I have identified would be accepted by Australian lawyers as "reforms" in that sense."[55] leading to the call for reform previously quoted.

"May I say in conclusion that there has been no serious discussion in Australia of us adopting on an universal basis the no fault type insurance scheme that exists in New Zealand. It does, as I have said, exist for motor vehicle accidents in Victoria and has been advocated more widely. Nevertheless, if the changes both in judicial attitudes and the legislative regime now in place do not result in a system of compensation for accidents which is widely accepted to be economically sustainable, a no fault scheme may appear to be the only alternative."[56]

With the referral to the Productivity Commission there is the opportunity for the comprehensive inquiry followed by the serious discussion as to how best we provide care and support for all the disabled in Australia.

Report of the National Committee of Inquiry, Compensation and Rehabilitation (Australian Woodhouse Report)

In discussing the scope of the Inquiry by the Productivity Commission it is helpful to review the previous inquiry in Australia and how Mr Justice Woodhouse and Professor Atiyah could have been instrumental in the establishment of a no fault compensation system in Australia. They both were appointed as members of the Committee of Inquiry Mr Whitlam established in March 1973 to investigate whether a national compensation scheme was appropriate for Australia. Mr Justice Woodhouse was the Chairman. The third member of the Committee of Inquiry was Justice Meares of the Supreme Court of New South Wales. The Inquiry produced the Report of the National Committee of Inquiry, Compensation and Rehabilitation in Australia, now known as the Australian Woodhouse Report.

[54] Ibid
[55] Ibid
[56] Ibid

In his article in the Victoria University of Wellington Law Review in 2003 '***Looking back at accident compensation: an Australian perspective***' Professor Harold Luntz explains, "the evolution of the Woodhouse principles in the context of Australian policy and politics, and offers reasons why the proposed scheme never came to enactment."[57] Professor Luntz dismisses the suggestion "It is sometimes said that in 1975 Australia came within a whisker of adopting a scheme of accident compensation similar to that which has been in operation in New Zealand since 1974" as "an exaggeration".

Professor Luntz notes "There were indeed proposals at that time that would have led to an even more ambitious scheme for compensating people suffering from an incapacity however caused" but this scheme was not adopted. Professor Luntz describes the opposition to the no-fault scheme "The organisations representing lawyers led the objectors, with claims that "rights" would be eroded and benefits would fail to match the full compensation they claimed the common law provided." The other opponents of the scheme were the medical profession protecting its members who wrote the medico-legal reports and the insurance industry.

In dealing with the system in 2002, when the paper was written, Professor Luntz notes "Late in 2002, there are Labor Governments in every State and self-governing Territory of Australia. But there have been no moves to introduce a Woodhouse-type scheme anywhere." and after mentioning the "debate raging about the huge increases in public liability premiums that have been foisted on small business and non profit organisations, mainly as a result of the collapse of a large insurance group, HIH" he closes "In this context, in January 2002, the Federal Minister for Small Business [Mr Hockey was a banking and finance lawyer and Director of Policy to the Premier of New South Wales before entering politics as the federal member for North Sydney in 1996. He was the Minister for Financial Services and Regulation from 1998 to 2001 and Minister for Small Business and Tourism from 2001 to 2004[58]] suggested that the New Zealand scheme be investigated to see whether it should be adopted in Australia. He was immediately howled down by representatives and lawyers and others and told to keep to his portfolio by senior ministers." and "No longer does the Woodhouse call for "community responsibility" resonate among the politicians and the public."[59]

Professor Luntz stated his purpose in writing '***Looking back at accident compensation: an Australian perspective***' "is to consider the events leading up to the Australian proposals, to outline briefly how the proposals differed from the scheme implemented in New Zealand and to recount what has happened in relation to the basic idea of no-fault compensation since that time. It is a matter of profound regret that the opportunity was lost to bring about radical change in the arrangements for compensating the incapacitated in Australia. Subsequent changes in economic and cultural attitudes have made a similar opportunity less likely in the near future. But the basic soundness of the five principles on which the New Zealand scheme was built — community responsibility, comprehensive entitlement,

[57] [2003] VUWLawRev 16 at <http://www.austlii.edu.au/nz/journals/VUWLRev/2003/16.html>
[58] See Joe Hockey Wikipedia <http://en.wikipedia.org/wiki/Joe_Hockey>
[59] [2003] VUWLawRev 16 at <http://www.austlii.edu.au/nz/journals/VUWLRev/2003/16.html>

complete rehabilitation, real compensation and administrative efficiency — must surely lead to sense prevailing at some time in the future."[60]

The principal assistant to the Australian Woodhouse Committee was Geoffrey Palmer, then a New Zealand Professor of Law and later the Prime Minister of New Zealand. In his article in the Victoria University of Wellington Law Review in 2004 '***The Future of Community Responsibility***'[61] Professor Palmer examines collective responsibility, which he considers "the central philosophical principle" of the Woodhouse Reports in both New Zealand and in Australia and "based on the "optimistic vision that the achievement of real security was important for building a better society."

But whereas in New Zealand the Woodhouse Report was accepted in a non-partisan manner, in Australia the Australian Woodhouse Report failed.

In the Australian Woodhouse Report the community responsibility was expressed as "There is the initial principle of community responsibility. For three main reasons the community must accept the obligations that are clearly owed to every person who has been struck down by sickness or by injury. First there are the civilised reasons of humanity. Next, there are the economic reasons of self-interest. If the well-being of the workforce is neglected the economy soon will suffer injury and society itself thus has much to lose. Finally, there is the plain fact that rights universally enjoyed must be accompanied by obligations universally accepted. The scheme proposed is a national scheme. It involves national responsibility. It must be organised as a responsibility of the State."[62]

In his article in the Deakin law Review in 2008 ***'There must be a better way': Personal Injuries Compensation since the 'Crisis in Insurance'*** 2008 Andrew Field examined the current system of compensation in Victoria, six years after 2002, the year of the insurance crisis and reports that the legislative reforms made in response to the crisis have further emasculated the law of negligence and made it a 'pale shadow of its former self' and asks the question whether "in the changed conditions of the first decade of the twenty-first century, it should now be asked again whether Victoria and other Australian jurisdictions are ready for broad-based no fault injury compensation."[63]

It is to be considered fortunate that his rhetorical question has been answered so promptly with the referral to the Productivity Commission.

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[60] Ibid

[61] [2004] VUWLawRev 41 at <http://www.austlii.com/nz/journals/VUWLawRw/2004/41.html>

[62] National Committee of Inquiry on Compensation and Rehabilitation in Australia *National Rehabilitation and Compensation Scheme Committee: Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia* (Vol 1, Australia Government Publishing Service, Canberra, 1974) paragraph 256

[63] '***There must be a better way': Personal Injuries Compensation since the 'Crisis in Insurance'*** Deakin Law Review (2008) 13 (1) at <http://www.deakin.edu.au/buslaw/law/dlr/pdf_files/vol13-iss1/3.pdf> at page 69

For Field now is a timely opportunity to pose the question "whether there is a better way of compensating for injuries".[64] Field uses the words 'changed conditions and 'again' because of the experience in the 1970's when, as Field describes it, "Australia toyed with the idea of adopting a broad-based no fault compensation scheme similar to that which was introduced in New Zealand in 1974 and continues to this day. At the time, Australia rejected such a scheme in favour of the continued operation of the common law. The arguments in favour of a largely unfettered law of negligence evidently held sway. However, in the ensuing thirty years the law has changed. Even before the 'crisis in insurance', no fault compensation schemes for most transport accidents and workplace injuries were introduced in many states, creating what is effectively a hybrid system of no fault compensation and common law compensation."[65]

The Inquiry by the Productivity Commission

What should be important to the Productivity Commission when it considers a national compensation system for the disabled is that since the report of the Woodhouse Committee failed to be accepted in Australia, no fault compensation schemes have been introduced and have "found favour are now operating successfully in various Australian state jurisdictions in the form of limited schemes in areas such as workers' compensation and transport accidents. And yet even the acceptance of these schemes, which only apply in limited situations, has clearly been compromised by political interests and the pressuring of lobby groups",[66] the pressure coming from the same vested interests that defeated the recommendations of the Australian Woodhouse Report and campaigned to retain the common law system.

The Productivity Commission must conduct a comprehensive inquiry, critically examining the current system that Field refers to as "effectively a hybrid system of no fault compensation and common law compensation".[67] The Government would be wise to grasp the opportunity of requesting the productivity Commission conduct a comprehensive inquiry.

What is the appropriate national long-term care and support scheme for Australia

So where to from here: is the New Zealand scheme so much worse than the current system of common law compensation in Victoria as many personal injury lawyers in Melbourne say to justify the retention of the common law system or is the New Zealand system misunderstood?

Further if the New Zealand Scheme is misunderstood and it is shown to deliver a better national long-term care and support scheme for the disable in Australia,

[64] Ibid at page 69
[65] Ibid at page 69
[66] Ibid at page 91 and also see Luntz who describes soon after the rejection of the Woodhouse Report no fault schemes were introduced in the Northern Territory for transport accidents and workplace accidents that eventually abolished common law actions. The schemes continue today.
[67] Ibid at page 69

should the Productivity Commission recommend a more extensive scheme as was recommended by the Australian Woodhouse Report?

Field reviews the New Zealand system and reports that it is not "a precarious bureaucratic structure always on the verge of collapse", rather it "is a far healthier beast than its detractors would have the world believe." Further "the arguments proposed in New Zealand in support of the no fault scheme over the common law have not diminished and are just as applicable in Australia. Indeed, in the years since the crisis in insurance, those arguments have been magnified."[68]

So should Australia introduce a no fault compensation scheme or retain the current system in its present form or with further alterations? In 2008 Field notes that the 'times and the law have changed" and the common law is quite different to what it was in the early 1970's[69].

He correctly asks the question "when viewing the present complex and restrictive state of the common law, should we now be considering alternatives? Whether the best alternative is merely a winding back of the legislation of 2002 and 2003, or a wholesale return to the common law, or as a further alternative the adoption of a no fault compensation scheme."[70]

Field concludes that this is a moot question. The common law system will be vigorously defended by the same vested interests as argued successfully against the adoption of the scheme in the 1970's. Field argues that the most significant argument of these vested interests in the 1970's was that the common law "at that time still functioned in a largely unfettered way. There were no injury thresholds", "no limits on damages" and it is understandable why the common law was retained.[71]

Field believes even accepting the "flaws with the common law… a wind back is possible" and "if the no fault option was pursued, although it could cut through many of the problems of the adversarial system, it could also produce an ironic twist", which Field considers may be "that the same insurers who decried the excesses of the common law could become its greatest defenders" so as not to be "banished from the system".[72]

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[68] Ibid at page 94

[69] Ibid at page 97 It is relevant to note the conclusion to ***Negligence and Insurance Premiums*** Chief Justice Spigelman "The process of change in Australian tort law is not complete. In a number of crucial respects the overriding wish that there be national uniformity will require modification of some of the recently enacted provisions. I have concentrated on those changes which impinge to a significant degree on areas other than personal injury. It is by no means yet clear where, in many of these respects, Australian law will come to rest. One thing is clear, by a combination of a major change in judicial attitudes, led by the High Court, and wide-ranging legislative change, the imperial march of the tort of negligence has been stopped and reversed. New categories of liability, which were a feature of recent decades are now less likely to emerge."

[70] '***There must be a better way': Personal Injuries Compensation since the 'Crisis in Insurance'*** Deakin Law Review (2008) 13 (1) at <http://www.deakin.edu.au/buslaw/law/dlr/pdf_files/vol13-iss1/3.pdf> at page 97

[71] Ibid at pages 96-97

[72] Ibid at pages 97-98

Field concludes that "whichever option is ultimately adopted, there is at least one certainty" and that is having regard to the present system, he "is certain that there must be a better way.[73]

I agree with this conclusion – there must be a better way than the current system but I disagree with Field that 'even accepting the "flaws with the common law… a wind back is possible' whether this be of the legislation of 2002 and 2003 or a wholesale to the common law.

The criticisms of the common law system remain and now that the Government has proposed an inquiry to investigate whether it is feasible to provide compensation for all persons suffering disability irrespective of cause, it would, it is submitted, be an admission of failure to retain the common law system, unless the argument for the retention is so overwhelmingly preferable to a national no fault national compensation scheme.

Will there be a better way if a national no fault compensation system such as the Government now proposes is investigated by the Productivity Commission, which may be said to be modelled on the New Zealand system[74]. When Field considered no fault compensation system in 2008 as an alternative to the "present complex and restrictive state of the common law"[75] he noted that though it may seem to be "a return to welfare state thinking, the 1940's, and schemes that crippled national economies through the 1950's and the 1960's such a scheme "is not about social restructuring" but "it is ultimately about dollars and cents – the most efficient use of those dollars and cents – and also about fairness."[76]

And Australia has considered such a scheme before.

Field describes the scheme proposed by the Woodhouse Committee as "not a post-war reward for victory over the invader, which is an often repeated reason for Britain's post war revolution. Rather, what Australia considered adopting in the 1970's was a new approach to the dilemma of inefficient and expensive methods of providing for the injured. That a Senate Committee composed equally of Government and Opposition senators advocated such a scheme (albeit with some tinkering), speaks volumes about the attractiveness of the scheme. As the bi-partisan approach indicates, this was not an issue of political philosophy. It was a pragmatic issue of dollars and cents."[77]

The clients as consumers and conflict of interest

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[73] Ibid at page 98

[74] The Terms of Reference to the Productivity Commission are closer to the scheme proposed for Australia than that proposed for and adopted by New Zealand. See Luntz The key difference as to the disabled persons who were covered by the schemes between the respective first stages -the Report of the Royal Commission in New Zealand and the Report of the Woodhouse Committee in Australia – was in New Zealand the scheme was confined to personal injury by accident whereas in Australia it encompassed all incapacity, irrespective of cause.

[75] '***There must be a better way': Personal Injuries Compensation since the 'Crisis in Insurance'*** Deakin Law Review (2008) 13 (1) at page 97

[76] Ibid at page 95

[77] Ibid at page 96

When the Productivity Commission conducts the Inquiry it must critically examine the common law system to must evaluate the benefits the system provides to clients of the personal injury solicitors. These clients are consumers and the Productivity Commission must determine whether the clients receive the primary benefit.

The question the Productivity Commission should consider is for whose primary benefit does the personal injury industry exist – the clients or the personal injury solicitors?

This is because of the conflict of interest when the personal injury solicitors are retained by their clients on a no win no fee arrangement. The no win no fee arrangement is customary in the modern practice of personal injury law in Victoria and elsewhere in Australia where the common law system is retained and the potential of a conflict of interest is an inherent part of the practice of personal injury law today.

The solicitor owes a fiduciary duty to the client and an element of the fiduciary duty is the 'duty not to put [his/her] or anyone else's interests before those of the client".[78]

The no win no fee retainer

The essence of the personal injury claim today is the no win no fee retainer. The Courts have previously examined the solicitor and client relationship in a personal injury claim when the solicitor is retained on a no win no fee agreement and owes a fiduciary duty to a client.

Re the Legal Practitioners Act 1970 Re An Application By the Law Society of the Australian Capital Territory In Relation To the Conduct of Gary Alan Robb and Gerard Peter Rees.[79]

The fiduciary relationship and the duties imposed on the solicitor

> "The nature of the court's jurisdiction and the power exercisable in relation to the admission, direction and disciplining of persons admitted by it to practise as barristers and solicitors is well known and has been the subject of statements by this Court on many occasions, most recently in Re Grosse (unreported, 22 February 1996). It is an inherent jurisdiction and is circumscribed by the Legal Practitioners Act and other legislation only by express provision or necessary implication. Proceedings for professional misconduct on the part of a solicitor may be brought by the Law Society. Such proceedings are brought and determined in the public interest. But the Court

[78] Conflicts of Interest, Find Australia Law <http://www.findlaw.com.au/article/15674.htm> See also Conflict of Interest at the University of New South Wales website defining Conflicts of interest as actual, perceived, or potential and an "increasing magnitude of the personal benefit expected" is a factor in increasing the risk that there will be a inherent potential for a material conflict of interest <http://www.hr.unsw.edu.au/employee/conflict.html>

[79] [1996] ACTSC 57 at <http://www.austlii.edu.au/au/cases/act/ACTSC/1996/57.html>

has the inherent power and the responsibility, to initiate such proceedings of its own motion on information brought before it: see for example Re Gruzman (1968) 70 SR (NSW) 316. Whether or not the proceedings have been brought by the Law Society as in the present case, the Court is not restricted to considering the precise allegations as formulated. If the evidence is capable of establishing misconduct other than that alleged, the Court must in the discharge of its duty consider the questions that arise relating to possible misconduct, so long as the practitioner is on notice of the nature of the case and the case proceeds to a determination of those questions without unfairness to the practitioner.[80]

Although it will be necessary in these reasons to return to the nature of the Court's power, we make these preliminary observations because the evidence compels the Court to consider questions which go well beyond allegations of breaches of particular provisions of the Legal Practitioners Act. There are questions concerning the fiduciary relationship between solicitor and client, the duties that are imposed upon the solicitor in accordance with that relationship, conflicts of interest between those of the client and those of the solicitor and the inevitability of those conflicts in a practice such as that conducted by the solicitors. Those questions were all addressed by Mr. Conti QC, who appeared for the solicitors, and we have no doubt that there is no unfairness to solicitors occasioned by the Court adverting to all those questions, as we believe it must.[81]

The questions that arise do so against the general background of the solicitors' practice. There can be no doubt that, like all solicitors, Mr Robb and Mr Rees stood in a fiduciary relationship to the clients for whom the firm acted. Broadly that relationship meant that they are to be held "to something stricter than the morals of the market place": Meinhard v. Salmon (1928) 164 NE 545 at 546 (Cardozo J). More particularly for present purposes, they were obliged not to put themselves in a position where that duty and their interests conflicted and not to allow any undisclosed personal interest to come into conflict with that duty: Finn, Fiduciary Obligations 1977, at 4."[82]

The no win no fee agreement and the conflict of interest

"Solicitors who act only for clients in a special interest group are at risk of becoming restricted in their perspective of legal practice. Furthermore, as the firm's clients were in no position to finance litigation out of their own pocket, the solicitors found it necessary, in order to attract and keep the clients and

[80] Ibid at paragraph 5
[81] Ibid at paragraph 6
[82] Ibid at paragraph 7 and in relation to obligation "not to put themselves in a position where that duty and their interests conflicted and not to allow any undisclosed personal interest to come into conflict with that duty" the Productivity Commission may consider it appropriate to investigate and make whether the personal injury solicitor be required to disclose the 'magnitude of the personal benefit expected' (see the comment on the conflict of interest at footnote 66) when recommending a settlement proposal to the client . These disclosures will be in addition to the disclosures already required to be made by the solicitor when accepting instructions.

to finance the disbursements and out-of-pocket expenses of litigation such as court filing fees and doctors' reports, that they conduct the practice on a speculative basis. The exact terms of their instructions to act are unclear as there does not appear to have been a standard form of written instructions of retainer or to commence proceedings. In general, the solicitors had a "no win no fee" arrangement with their clients. In other words, unless there were moneys forthcoming from the defendant, or more usually, the defendant's insurer, by way of settlement by agreement or judgment for damages in the plaintiff's favour, the solicitors waived their right to be paid by the client in respect of the solicitors' profit costs. The liability of the client to pay the solicitors may be said to have been truly contingent, although the term "contingent fee" has come to mean a fee dependant not only on success but on the size of the sum recovered, and is best avoided at this stage of the discussion."[83]

"It is plain from the foregoing that the solicitors had a substantial personal interest in the successful outcome of their clients' cases and in the moneys that thereby became payable to the clients. Whether they were aware of it or not, a crucial matter to which we shall return, it is also obvious that there was conflict between their interests and the interests of the clients in being properly advised in relation to settlements and the profit costs and disbursements. With the solicitors acting under considerable pressure as far as the workload was concerned, it was almost inevitable that, unless they were fully aware of their responsibilities and particularly astute to discharge them, trouble would arise."[84]

"The means by which the solicitors were able to offer their services to persons injured in the workplace or on the roads was the speculative action. Speculative actions in respect of personal injuries have now become common. The market appears to be competitive. Many solicitors, quite properly, according to present day standards, advertise their services literally on a "no win no fee" basis. The solicitors in the present case had the advantage of trade union connections. No example of the solicitors' instructions or retainer in writing was put into evidence. The Court is reliant upon the evidence of the solicitors and that evidence is only as to the effect of their agreement with their clients. There is no evidence, for instance, as to whether the clients agreed in the event of success to pay costs at a higher level than would have been the case if they had advanced moneys on account of costs at the commencement of, or from time to time during the litigation. There is no evidence that successful clients paid higher fees in order to subsidise unsuccessful clients. However, overcharging is not part of

[83] Ibid at paragraph 13.

[84] Ibid at paragraph 18. As for the 'potential for trouble the Productivity Commission may consider it appropriate to request a report from the regulatory authorities in each common law jurisdiction in Australia on the complaints received from clients of personal injury solicitors and relating to these matters.

the case against the solicitors and there is no evidence that they charged excessive profit costs."[85]

"The inequality of bargaining power between solicitor and client where the solicitor is acting for an impecunious client on a speculative basis makes it unlikely that a client could make any informed decision about the adequacy of an offer of settlement inclusive of costs."[86]

"Once the solicitor allows a conflict of interest to develop, the solicitor must be scrupulous in ensuring that the conflict of interest does not lead to breach of the fiduciary duty. Where the solicitor has a financial stake in the outcome of a case and the quantum of the monetary recovery on behalf of the client, the solicitor's interest and that of the client may overlap but the conflict continues. The present solicitors have shown by their past conduct that they did not appreciate or were indifferent to that simple truth. In the case of Mr. Robb, there were several aggravating factors to which we have made reference. The propriety of a solicitor's conduct is not to be measured solely by the results obtained for clients or by the esteem in which he or she is held by other practitioners. The efficiency of the solicitors in obtaining money for injured plaintiffs is undoubted, but it is also clear that they tended to allow the practice to become a litigation factory, oblivious to the true nature of the duty to the clients and to counsel and others on whose forbearance they relied for the very success of their venture. Their conduct was not based on any positive but mistaken belief that they were acting in accordance with the Legal Practitioners Act. They assumed all too readily that because recovery of their profit costs and disbursements depended upon their obtaining a successful result for the client, the interests of the client and of themselves coincided."[87]

Baker Johnson v Jorgensen[88]

The facts

Baker Johnson, a firm of solicitors, appealed from a decision of a magistrate dismissing the claim against Narelle Karen Jorgensen for fees. Baker Johnson "argued before the magistrate that, because the respondent's claim had been settled for a payment of $10,000, this meant that she had won and was therefore required to pay the normal professional costs" and "the argument was rejected by the magistrate, who described it as "misleading and inequitable and bordering on unconscionable". The magistrate regarded it as ludicrous to suggest that the retainer entitled the solicitors to the full costs if, for example, the client recovered a nominal amount only, and found that that was not the intention of the parties to the agreement."[89]

[85] Ibid at paragraph 75
[86] Ibid at paragraph 67
[87] Ibid at paragraph 174
[88] [2002] QDC 205 <http://www.austlii.edu.au/au/cases/qld/QDC/2002/205.html>
[89] Ibid at paragraph [2]

The no win no fee agreement was analysed by the Court[90]:

> "[17]I am unaware of any authority on the correct interpretation of this expression, and neither advocate was able to assist me with any[91]. In *Adamson v Williams*[92] the Court of Appeal found it "unnecessary to decide whether "win" includes the reaching of a settlement in which the client might obtain some damages *over and above* his obligation for fees." (emphasis added). The terms used by the Court suggest that their Honours would not have regarded a less favourable settlement as a win. In my opinion it is a matter of determining objectively the meaning of the expression, by reference to what ordinary people in the position of the parties would have understood it to mean.
>
> "[18] In my opinion the construction placed on the expression by the magistrate was correct. I do not consider that an outcome can properly be characterised as a win from the point of view of the respondent unless the respondent actually recovers something herself. In my opinion, properly understood, the expression "no win no fee" is a succinct way of saying "the client will not have to pay the solicitor other than from the proceeds of the claim". It is not necessary, for present purposes, for me to consider whether the expression implies that there will be no liability on the part of the client for any costs to any other party to the proceeding.[93] I am only concerned with the position as between the solicitor and the client. In my opinion the ordinary meaning and true construction of a retainer on a "no win no fee" basis is that the solicitor is saying in effect: "you will not have to pay me any fees except out of whatever I can recover for you." The effect is that the client will not have to pay anything out of the client's own pocket. On the basis of the retainer found by the magistrate therefore his decision was correct."

Legal Services Commissioner v Baker[94]

Complaints were made to the Legal Services Commissioner and following an investigation charges were brought against Michael Vincent Black, the senior partner of Baker Johnson for professional misconduct and unprofessional conduct.
in respect of five clients, including Narelle Karen Jorgensen.

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[90] Ibid at paragraphs [17] and [18]

[91] The footnote to the report of the decision is "There are a number of decisions referring to "no win no fee" retainers, but none that I have found which is directly on point. It was not argued that a result of such a retainer is that nothing is recoverable by the solicitor: cf *Awwad v Geraghty & Co* [2001] QB 570"

[92] [2001] QCA 38

[93] The footnote to the report of the decision is "Some have expressed the view that the expression "no win no pay" may imply that nothing is payable to anyone in the absence of success in the action: New South Wales Law Society (1997) 35(1) LSJ 80.

[94] Legal Practice Tribunal [2005] LPT 002 dated 27 September 2005. See also Baker Johnson v Jorgensen [2002] QDC 205. Michael Vincent Baker was the senior partner of Baker Johnson, which appealed the decision of a magistrate dismissing the firm's claim against for fees

The fiduciary relationship and the duties imposed on the solicitor

The judgement of Moynihan SJA assisted by Mr K Horsley and Dr S Hayes describes and paragraphs 32 to 40 the ethical standard for a solicitor representing a client in a personal injuries claim:

> [32] A lawyer's individual personal responsibility to a client is "the essence" of the relationship. Lawyers have a position of special influence over clients in the conduct of the client's affairs and are obliged to serve and protect the client's interests at all times.
>
> [33] The lawyer should put the client's interest first and treat the client fairly and in good faith, giving due regard to a client's position of dependence upon the practitioner, and the client's dependence on the lawyer's training and experience and the high degree of trust clients are entitled to place in lawyers.
>
> [34] Lawyers should assist their clients to understand issues, their rights and obligations so as to allow the client to give proper instructions, particularly with respect to compromise. Communication should be consistent with the client's knowledge and sophistication.
>
> [35] The clients out of whose affairs these charges (except the last two) arose were seeking to recover damages for negligence arising out of motor vehicle, work place or other accidents. The practitioner and the firm were held out as having particular interest and competence in that area of practice and were obliged to conduct the litigation in the manner most advantageous to the client.
>
> [36] The clients were not wealthy or sophisticated people experienced in legal matters. They therefore were particularly reliant on the practitioner and the firm for advice and to act in their interest in the conduct of their affairs and for gaining an understanding of their legal rights.
>
> [37] The retainers of those clients were generally on a contingency basis because the clients were unable to fund the litigation from their own resources and their financial circumstances were such that they could not easily meet any costs order against them.
>
> [38] The fact that such retainers were a developing field at the time these were entered into seems to me not to be a factor mitigating the practitioner's responsibilities, rather the contrary.
>
> [39] The circumstances of the clients whose business has given rise to these complaints was such as to require the practitioner and the firm to pay particular attention to ensure that the client understood the terms of the retainer and the contents of any document the client was required to sign defining the relationship with the firm.

> [40] In such circumstances here practitioners must be scrupulous in putting the client's interest before their own not least because or the potential of a conflict between the client's interest and the practitioner's interest in being paid.[95]

Two charges of professional misconduct were proved, including permitting the proceedings to be instituted in the Magistrates Court and pursued against Narelle Jorgensen. Moynihan SJA and Mr K Horsley and Dr S Hayes as the l
Legal Practice Tribunal decided that the name on Michael Vincent Baker be removed from the Local Roll of Legal Practitioners.

Legal Services Commissioner v Baker[96]

Baker appealed the order to remove his name from the Roll of Legal Practitioners and the appeal was dismissed.

The speculative claim and the client

Personal injury solicitors justify the no win no fee retainer as ensuring the injured clients are able to sue for damages with no risk.

The no win no fee retainer relates only to the costs the client is to pay the solicitor if the claim is successful. If the claim is not successful the client as the unsuccessful party to the litigation will be subject to a costs order made by the Court and will be liable to pay these costs. It has been my experience that some clients worry that a costs order may be made and often regret starting the litigation.

Clearly this is not litigation with no risk.

Further it is rarely comforting to the anxious clients when the solicitor assures them that the defendants often do not enforce the costs orders, seeking the costs order only to finalise the litigation.

Personal injury solicitors assess the merits of the claim before deciding to act for the client on a no win no fee retainer and often encourage the clients to proceed. The development of the modern law of negligence in the second half of the twentieth century stopped with the 'Crisis in Insurance'. The restrictions of the Tort Law Reforms, the effect of the changed judicial attitudes and the recent decisions of the High Court that Chief Justice Spigelman refers to are now 'de-stretching the law.'[97]

The result is that the prospect for personal injury claims is becoming more uncertain.

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[95] Ibid at paragraphs 32 to 40 The Legal Services Commissioner
[96] [2006] QCA 145
[97] See footnote 19 and '**Obviously Obvious: Obvious risks, Policy and Claimant Inadvertence'** by Tracey Carver (2007) 14(1) Murdoch University Electronic Journal of Law 66-99 at <https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_obviously_obvious.pdf>

Andrew Field in ***'There must be a Better Way': Personal Injuries Compensation since the 'Crisis in Insurance'***[98] in contrasting the no fault insurance scheme to the common law in awarding compensation mentions the criticism of Ian Callinan, formerly a Justice of the High Court that the common law with the adversarial system is too long and costly.

Field then gives as an example of the long and costly process and "how the common law can be a black hole of inefficiency" four decisions of the High Court in 2005 "involving diving accidents in which plaintiffs suffered spinal injuries" and "in which judges at all levels differed in their opinions" and concludes that it is difficult to believe the "level of waste and uncertainty in the fault-finding exercise" in the common law". Field then asks the important question "how much of this expense could have been better spent compensating the injured?"[99]

How much indeed? This question and the related issues should now be considered by the Productivity Commission.

It is interesting to wonder that had there had been a no fault insurance scheme available that offered certainty of income support, payment of medical expenses and the like and an impairment benefit whether these plaintiffs would have chosen the uncertainties of the common law.

The four decisions of the High Court are:

Swain v Waverley Municipal Council[100] (Swain) decided on 9 February 2005 giving compensation to the 24 year old quadriplegic who suffered injury in November 1997 when he dived into a wave while entering the surf between the red and yellow safety flags at Bondi Beach and struck a sandbar. The jury awarded damages of $3.75 million after deducting 25% for the plaintiff's contributory negligence. The Court of Appeal by a 2-1 majority allowed the Council's appeal and the High Court by 3-2 majority restored the jury's verdict.

Waterways Authority v Fitzgibbon[101] (Fitzgibbon) decided on 5 October 2005 there should be a retrial of the plaintiff's claim. On 29 March 1997 the plaintiff, then 20 and from Brisbane, was competing in Sydney in a sailing regatta. A victorious sailor, Nathan Wilmot was thrown into the water. The plaintiff suffered irreversible quadriplegia when he struck a sandbar. The plaintiff said he was jostled and fell from the jetty's edge. There was no handrail. The defendant relied on evidence the plaintiff had admitted while in hospital that he had dived into the water as he believed Wilcox was in trouble. The trial judge dismissed the plaintiff's claim at trial. On appeal, the Court of Appeal ordered a retrial holding the finding by the trial judge that the plaintiff had deliberately dived into the water was 'glaringly improbable'.

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[98] '***There must be a better way': Personal Injuries Compensation since the 'Crisis in Insurance'*** Deakin Law Review (2008) 13 (1) at <http://www.deakin.edu.au/buslaw/law/dlr/pdf_files/vol13-iss1/3.pdf>

[99] Ibid at page 95.

[100] [2005] HCA 4 at <http://www.austlii.edu.au/au/cases/cth/HCA/2005/4.html>

[101] [2005] HCA 57 at <http://www.austlii.edu.au/au/cases/cth/HCA/2005/57.html>

The Waterways Authority appealed to the High Court which by a by a 4-3 majority ordered a retrial.

Vairy v Wyong Shire Council[102](Vairy) decided on 21 October 2005 with **Mulligan v Coffs Harbour City Council**[103] (Mulligan) and dismissing the appeals by the plaintiffs. Vairy suffered irreversible tetraplegia in January 1993 when he dived from a rock platform into the sea at Soldiers Beach on the Central Coast of New South Wales and struck the sandy bottom. Vairy succeeded at trial, the trial judge deciding that there had been a breach of duty by the defendant and awarded damages. The defendant was successful in its appeal, the Court of Appeal deciding by a majority 2-1 that there had been no breach of duty as the danger of diving into water of unknown and variable depth, which turned out to be too shallow was obvious. In January 1999 Mulligan dived from a standing position in water in a creek at Coffs Harbour in Northern News South Wales. He was standing in water that was to his mid thigh. Mulligan suffered irreversible quadriplegia when he struck the sandy bottom. Mulligan was unsuccessful at trial and on appeal unsuccessful, the Court of Appeal deciding unanimously that there had been no breach of duty as the danger of diving into water of unknown and variable depth, which turned out to be too shallow was obvious. The High Court found dismissed both appeals; Vairy by a majority of 4-3 and Mulligan unanimously finding no breach of duty.

A more recent example of the long and costly process and how the common law can be a black hole of inefficiency and a decision of the High Court involving a diving accident in which the plaintiff suffered spinal injuries and in which judges at all levels differed in their opinions is **Roads and Traffic Authority v Dederer and Great Lakes Shire Council**[104] (Dederer) decided on 30 August 2007. The plaintiff was a 14½ year old boy, who in December 1998, dived off the top rail of the bridge between the twin towns of Foster and Tuncurry on the Mid North Coast in New South Wales. It was eight or nine metres to the water below and because of the receding tide, the water was barely two metres deep. Dederer struck his head on the sand and suffered injury; irreversible partial paraplegia. Dederer sued the Roads and Traffic Authority and Great Lakes Shire Council. He was successful at trial against both defendants. There was a finding of contributory negligence of 25% and the damages awarded were reduced. The Court Appeal held the Civil Liability Act 2002 (NSW) applied and Great Lakes Shire Council was not liable[105] and by a majority 2-1 held that Act did not

[102] [2005] HCA 62 at <http://www.austlii.edu.au/au/cases/cth/HCA/2005/62.html>
[103] [2005] HCA 63 at <http://www.austlii.edu.au/au/cases/cth/HCA/2005/63.html>
[104] [2007] HCA 42 at <http://www.austlii.edu.au/au/cases/cth/HCA/2007/42.html
[105] The Civil Liability Act 2002 was passed as part of the Tort Law Reform that followed the Review of the Law of Negligence and the final report dated 2 October 2002 (the Ipp Report). Rather than making the law more certain the Act introduced new concepts, for example recreational activity, dangerous recreational activity and obvious risk that impact on the duty of care owed and liability of a defendant. These terms introduce yet more uncertainty into the common law system. See Jaber v Rockdale City Council [2008] NSWCA 98 (Jaber) decided on 28 May 2008. The plaintiff was 19 years old, when h dived headfirst from a pylon on a wharf under the care, control and management of the Council. He struck the seabed and suffered serious spinal injuries. In the previous four years he had picnicked there with his family and had watched others diving from the wharf. When he dived and suffered injury this was the first time he had been on the wharf and the first time he had dived into

apply to the RTA which was liable too Dederer. The finding of contributory negligence was increased to 50%. The RTA appealed to the High Court which allowed the appeal by a majority 3-2 deciding that the trial judge and the Court of Appeal had erred in finding the defendant had breached the duty of care owed to the boy.

When a speculative claim is lost

What is significant in the above examples of how the common law can be a black hole of inefficiency is firstly the long delay between the tragic accident and the final decision on the claim for compensation. Swain, Fitzgibbon and Vairy were injured in 1997 and Mulligan in 1999 and their claims for compensation decided finally in 2005. Philip Dederer was 14½ when he was injured in 1998 and 23 when his claim for compensation was rejected.

It is impossible to imagine the suffering of those catastrophically injured and their families for these extended period of time while waiting for a decision on compensation and then for the rest of their lives.[106] Of course there is rejoicing (with a palpable feeling of relief) when the final decision confirms the award of damages but what is the feeling when the final decision is to dismiss the claim?

Contrast this uncertainty with the certainty of the benefits payable to the catastrophically injured provided by the Transport Accident Commission. The Transport Accident Act 1986 established what is generally accepted as the best No

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the water. The plaintiff sued the Council "alleging that it was in breach of its duty of care, relevantly, in failing to adequately warn persons such as the appellant that it was dangerous to dive from the wharf." He failed at trial and on appeal. Handley AJA said in his judgement in the Court of Appeal of New South Wales "I agree with Tobias JA that the appellant's claim failed because of the relevant sections of the *Civil Liability Act*. However, in my judgment the claim also failed under the general law. The Council had no duty to warn the appellant of a diving risk and had not invited or encouraged the appellant to dive head first off the bollards." http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2008/98.html?query=%22recreational%20activity%22 and the discussion of the uncertainty by Michael Coldham of Anderson Rice in the Winter 2008 Bulletin at http://www.andrice.com.au/documents/Winter%202008.pdf The reforms were made throughout all the Australian common law jurisdictions – see the report by Minter Ellison Tort law reform throughout Australia A brief review of recent amendments 7th Edition – October 2007 at http://www.minterellison.com/public/resources/file/ebab3d47ce168ac/RG-TortLawReform_0710.pdf

[106] Tobias JA said in his judgement in the Court of Appeal in New South Wales in Vairy and Mulligan "Each man then executed a dive with tragic consequences. Each struck his head on the sandy bottom and suffered a broken neck. Mr Vairy sustained irreversible tetraplegia and Mr Mulligan irreversible quadriplegia. To all intents and purposes their lives were seemingly ruined." Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council [2004] NSWCA 247 at paragraph 16 <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2004/247.html> In his article "Injury Compensation needs reform" dated 25 August 2009 Lindsay Tanner, MP for Melbourne and Minister for Finance and Deregulation in the Rudd Government, says "Many years ago I worked as a personal injuries lawyer. I was involved in many hundreds of different cases, mostly for workers in the manufacturing, construction and maritime sectors. Some had suffered horrific injuries; others were able to recover and return to work. Some were heart-rending stories of lives virtually destroyed. Crippling injury would be augmented by marriage breakdown, psychological deterioration and financial ruin." <http://blogs.watoday.com.au/business/lindsaytanner/2009/08/25/injurycompensa.html>

Fault Scheme currently operating in Australia and the scheme that provides the best care and support for the catastrophically injured and their families.

This is why it is essential that the Productivity Commission as part of the Inquiry must study the TAC scheme and contrast the care and support and delivery of benefits to the injured and their families with the common law system and its uncertain and at times rather haphazard delivery of benefits to the injured and their families.[107]

The unsatisfactory outcomes for Swain, Vairy, Mulligan and Dederer convincingly demonstrates the urgent need for a national no fault insurance scheme that will provide certainty to the injured and their families, and a scheme that will focus on the needs of the injured and their families.

Further accepting the no fault approach is superior in its delivery of care, support and benefits for the catastrophically injured and their families that is essential for providing the quality of life for the disabled that the Prime Minister referred in his speech as a "fundamental matter that goes to our values and our character as a nation"[108] the Productivity Commission in the Inquiry should examine and report on the "costs, benefits and feasibility of approaches which provide essential care and support"[109] for all the disabled in Australia, irrespective of the causes[110].

A further illustration of "how the common law can be a black hole of inefficiency" is the Modbury Triangle Principle, which is there is no duty to prevent the responsibility for the criminal acts of strangers. The plaintiffs in the following decisions were not catastrophically injured as were Swain, Fitzgibbon, Vairy, Mulligan and Dederer, and may not have suffered a "a severe or profound disability", using the Prime Minister's description[111], however the plaintiffs suffered a disability because of injury. This is why it is important that the Productivity Commission conducts the Inquiry focussing on the delivery of care, support and benefits to all the disabled, not only "eligible people with a severe or profound

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[107]The TAC pays no fault benefits for medical and treatment costs, impairment and loss of income see the TAC Corporate website"The TAC is a Victorian Government-owned organisation set up in 1986. Its role is to pay for treatment and benefits for people injured in transport accidents. It is also involved in promoting road safety in Victoria and in improving Victoria's trauma system.
Funding used by the TAC to perform these functions comes from payments made by Victorian motorists when they register their vehicles each year with VicRoads. The TAC is a "no-fault" scheme. This means that medical benefits will be paid to an injured person - regardless of who caused the accident. Legislation guides the TAC in the types of benefits it can pay and any conditions that apply. This legislation is called the *Transport Accident Act 1986*. To ensure it remains a long-term compensation scheme, the TAC uses its funds fairly and responsibly. This ensures the TAC is able to meet the needs of seriously injured people who need lifetime care.
<http://www.tac.vic.gov.au/jsp/corporate/homepage/home.jhttp://www.tac.vic.gov.au/jsp/content/NavigationController.do;jsessionid=FAHNDNJOKLNG?areaID=25 sp> Burt & Davies, Personal Injury Lawyers has a detailed explanation of the benefits paid by TAC <http://www.burtdavies.com.au/tac-claims-faq.html>

[108] See footnote 3 on page 2.

[109] See footnote 2 on page 1.

[110] The Inquiry will exclude persons who suffer the disability caused by ageing alone.

[111] See footnote 2 on page 1.

disability"[112] as all persons suffering a disability have needs that must be met by the system providing the care, support and benefits,

The four decisions are:

Modbury Triangle Shopping Centre Pty Ltd v Anzil (Modbury Triangle)[113] decided on 23 November 2000.

At 10.30 on 18 July 1993 the plaintiff, who was the manager of a video shop in the shopping centre was attacked and badly injured by three men in the car park of the shopping centre. The shopping centre had lit the car park until 11 pm but decided from the beginning of 1993 not to light the car park after 10 pm. the practice of lighting the car park after 10 pm. The manager and his wife sued the shopping centre for compensation and succeeded in the District Court of New South Wales. His damages were $205,000 and the wife was awarded $50,000 for loss of consortium. The shopping centre appealed and in the Court of Appeal in South Australia the three judges unanimously affirmed the trial judge's decision. The shopping centre appealed to the High Court and the Court by a majority of 4-1 dismissed the claims for compensation deciding the shopping centre did not owe a duty of care to the plaintiff to prevent the harm by the criminal acts of the third parties.

The High Court considered the rule first set out by the High Court in 1945 in the decision of Smith v Leurs[114] when "Dixon J said:

"It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognized that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger."[115]

An inherent factor in the common law system the rules that apply to finding fault that is the key to the compensation.

The claim by Mr and Mrs Anzil illustrates these rules are flexible and further the subsequent claims for compensation illustrates the difficulty for the clients is the uncertain outcome for the clients.

Ashrafi Persian Trading Co Pty Ltd v Ashrafinia (Ashrafi)[116] decided by the Court of Appeal in NSW on 27 July 2001, nine months after the High Court established the Modbury Triangle Principle.

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[112] See footnote 2 on page 1.
[113] [2000] HCA 61
[114] [1945] HCA 27
[115] Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 Gleeson CJ at paragraph 20
[116] [2001] NSWCA 243 <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2001/243.html>

On 27 April 1996 the plaintiff was lying asleep in a room a motel owned by her family's company and managed by her brothers when an unknown person hit her in the head with an iron bar. She suffered severe head injuries and sued the family company for compensation. She succeeded in the District Court of NSW and in November 2000 was awarded damages of $419,556.04. The award was set aside by the Court of Appeal of NSW because of the Modbury Triangle Principle, deciding the relationship of the plaintiff to an owner of a motel was not a special relationship to be an exception to the Modbury Triangle Principle.

Proprietors of Strata Plan 17226 v Drakulic (Drakulic)[117] decided by the Court of Appeal in NSW on 27 November 2002, two years after the High Court established the Modbury Triangle Principle.

The facts of Drakulic were very similar to Ashrafi. At 2.45 am on 9 September 1993 the plaintiff, the owner of a unit in a residential building, was assaulted and robbed by an intruder, when returning from work. The front door to the building was fitted with a lock, but it was not in use at the time of the assault. As in Modbury Triangle, there were disputed questions of causation, but relevant for present purposes was the question whether the body corporate owed its tenant a duty to take reasonable precautions for her safety whilst on the premises. The plaintiff succeeded at trial and was awarded damages of $298,349.00. The trial judge was satisfied the relationship between the plaintiff and the defendant was 'special' in the *Modbury* sense of 'special relationship'.

The Court of Appeal allowed the appeal, as it did in Ashrafi and considered the reasoning in Modbury Triangle, including particularly the question of control. After referring to circumstances in which it is well-established that a duty exists, based on the duty to control the conduct of others, the Court concluded:

> "In none of these senses can it be said that the defendants here had control over the assailant: they had no power to assert control over him, they could not assert authority over him, they were not expected to be able to control him as of right."[118]

Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem (Adeels)[119] decided by the High Court on 10 November 2009

The plaintiff, Moubarak, attended a function at the reception restaurant of the defendant. In the early hours of I January 2003 there was a dispute on the dance floor between Mourabak and Danny Abbas and Abbas left the premises and returned with a gun. Both Mourabak and Bou Najem were injured. Both plaintiffs succeeded in the District Court of New South Wales and were awarded damages, Moubarak $1,026,682.98 and Bou Najem $170,000.00.

Adeels appealed and the Court of Appeal of New South Wales unanimously dismissed the appeal. Adeels appealed again to the High Court and the High Court

[117] [2002] NSWCA 381< http://www.austlii.edu.au/au/cases/nsw/NSWCA/2002/381.html>
[118] Proprietors of Strata Plan 17226 v Drakulic [2002] NSWCA 381 per Heydon JA at paragraph 75
[119] [2009] HCA 48 http://www.austlii.edu.au/au/cases/cth/HCA/2009/48.html

allowed the appeal. The Court considered the Modbury Triangle Principle again and rejected Adeels' argument there was no duty of care deciding that an occupier of licensed premises does owe a duty of care to the patrons to prevent them suffering harm while on the premises and in certain circumstances the occupier would owe a duty to prevent harm by a criminal act by a third party if the act was sufficiently foreseeable. The Court decided that the circumstances of the injury to the plaintiffs Adeels was not liable.

The Adversarial System

The decisions of the High Court in Vairy, Mulligan, Dederer, Anzil, Ashrafi, Drakulic and Adeels illustrate how the damages lottery of the common law operates. In every Court in Australia which hears common law claims some are successful and some are not. It is the nature of the common law system which uses the adversarial system.[120]

It can be argued that appeals are necessary to lead to the certainty of the common law and the decisions of the High Court are an important part of this certainty, however it must be questioned whether the injured desire a different certainty as soon as possible after injury and this is the certainty of payment of medical, treatment and rehabilitation expenses, income support and compensation.

As part of the Inquiry the Productivity Commission system should also review whether the adversarial system is suitable in deciding personal injury claims.

The Law Reform Commission of West Australia investigated the adversarial system and the report "Advantages and Disadvantages of the Adversarial System in Civil Proceedings"[121] is helpful in considering whether the adversarial system is suitable for deciding personal injury claims. When dealing with the criticism of the system the report notes that "Critiques of the adversarial system have become more trenchant and sophisticated since at least the 1970's. To some extent these have been entwined with the growth in tribunals." and that "it is by no means clear that all citizens particularly want their disputes to be resolved in adversarial and partisan ways. Some people and successful organisations wish to move on from warrior ways."[122]

The Law Reform Commission concludes[123] that "Law reform is undoubtedly needed" and "Lord Woolf's remarks about the English situation in 1996 are broadly applicable in Australia:

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[120] The adversarial system (or adversary system) of law is the system of law that relies on the contest between each advocate representing his or her party's positions and involves an impartial person or group of people, usually a jury or judge, trying to determine the truth of the case. As opposed to that, the inquisitorial system has a judge (or a group of judges who work together) whose task is to investigate the case see Wikipedia at <http://en.wikipedia.org/wiki/Adversarial_system>

[121] <http://www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/consults/1-2civiladvers.pdf>

[122] Ibid at pages 5-6

[123] Ibid at page 6

> The defects I identified in our present system were that it is too expensive in that costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal; there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of courts, all too often, are ignored by the parties and not enforced by the courts."[124]

Lord Woolf's criticism of the adversarial system is identical to the criticism by Atiyah of the law of tort, the fault principle and the common law system.[125]

In August 2009 Lindsay Tanner criticized the common law system when he was a practising solicitor twenty five years ago. In ***Injury compensation needs reform***[126] the criticism is in terms which the productivity Commission may investigate if there are extended terms of reference for the Inquiry.

> "One thing I learned very quickly was the fragmented, antiquated system of compensating injury sufferers produced very arbitrary results. People who could sue an employer or motorist at common law, based on their negligence causing the injury, sometimes were reasonably well-compensated. Some who had relatively limited injuries, such as minor whiplash from a vehicle accident, were arguably over-compensated.
>
> People injured at work without negligence being present could claim workers' compensation. These benefits were almost invariably inadequate, but they were better than those available to people injured away from work, or those with disabilities present from birth. For them, the meagre offerings of the social security system were all that was available.
>
> The fact that these arrangements varied from state to state just made the whole thing even more complex and arbitrary. These were also separate compensation systems for seafarers and Federal public servants.
>
> Twenty-five years on, not much has changed. Some States have restricted access to common law negligence claims, there are better compensation arrangements for some motor accident victims and the diversity of arrangements across different jurisdictions is even greater. The need for

[124] Lord Woolf Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (1996) s1, para 2

[125] See also Commonwealth Inquiry on changes to negligence law (August 2002) by Evan Whitton and his conclusion that "Justice (a fair go all round) requires that negligence be removed from the adversary system and replaced by a no-fault system funded by government and insurance companies."

[126] < http://blogs.watoday.com.au/business/lindsaytanner/2009/08/25/injurycompensa.html> and see previously footnote 106

sweeping reform is even higher. In recent times, greater awareness of the problems of people with major disabilities has underscored the need for change.

The Whitlam Government tried to introduce a uniform national injury compensation scheme, broadly similar to the system which has operated in New Zealand for many years. Unfortunately it was unable to get its scheme through a Liberal-dominated Senate.

It is unlikely that we will see any major reform in this area in the near future, as Australia's various governments are grappling with the challenging task of building uniform national industrial relations and occupational health and safety systems. Nevertheless, the current campaign for a national catastrophic injury compensations scheme should trigger a wider debate about injury compensation in our society generally. The present system is fragmented, inequitable, inefficient and arbitrary. Reform could be some time coming but it's certainly long overdue."

Over compensation of the limited injuries

Mr Tanner notes twenty five years ago the injured suffering "relatively limited injuries, such as minor whiplash from a vehicle accident, were arguably over-compensated" and now some states "have restricted access to common law negligence claims, there are better compensation arrangements for some motor accident victims and the diversity of arrangements across different jurisdictions is even greater."

In Victoria the introduction of the no fault insurance scheme introduced by the Transport Accident Act 1986 was one of the "better compensation arrangements for some motor accident victims" that Mr Tanner refers to. The scheme abolished the claims for minor whiplash injuries, but the overcompensation of those suffering relatively limited injuries continues.

In Victoria despite the Tort Law Reforms introducing the threshold of the significant injury[127] public liability claims remain a very important part of the common law system. Many of these claims are similar to the minor whiplash injuries and are arguably overcompensated when compared to the more difficult threshold of serious injury.

The public liability claims are made at common law; the emasculated common law that Andrew Field refers to in '***There must be a Better Way': Personal Injuries Compensation since the 'Crisis in Insurance'***[128], as the "pale imitation of its former self"[129], which Field sees as the "defender" of the many plaintiffs who now are "the

[127] ***It's OK to say Sorry but Can You Sue? Victoria's Personal Injury Reforms*** by Michael Lombard and Michael McGarvie LIV Journal November 2003 at <http://www.advicelinelawyers.com.au/its-ok-to-say-sorry-but-can-you-sue-victorias-personal-injury-reforms>

[128] 37 Deakin Law Review (2008) 13 (1) <http://www.deakin.edu.au/buslaw/law/dlr/pdf_files/vol13-iss1/3.pdf>

[129] Ibid at page 97

poorer, and their pain and suffering is often set at nought" because "the rights of plaintiffs were taken away to assist financially challenged private businesses."[130]

The Productivity Commission should investigate whether this description of the common law is accurate. The important question that must be answered now is whether the plaintiffs should continue to have rights to enter the damages lottery operated by the common law or whether it is preferable that they have the right to claim the benefits provided by a national no fault compensation scheme. The plaintiffs who entered the damages lottery and failed, often after long trials and appeals,[131]may have a different view of these rights.

Lump sum damages or periodic payments of compensation

Meanwhile the personal injury industry continues with successful claims achieving the threshold significant injuries and navigating the shoals of duty of care, breach of duty and liability with good fortune or skill to establish the liability of the defendant.

The damages paid to these successful plaintiffs are a lump sum since that is the common law way. The assessment of damages is a complex matter. The common law pays the damages as a lump sum and when contrasted with the benefits paid by the TAC the lump sum is seen to be an assessment of the plaintiff's future loss or considered in the context of the no fault scheme, the sum of the future benefits.

A difficulty with the lump sum as pointed out by Mr Shorten is the 'compensation is often paid as a lump sum and is not always enough to last through an injured person's life."[132]

The TAC pays benefits which provide essential care and support - on an entitlement basis - for eligible people but not only those suffering a severe or profound disability.

The benefits for the costs of medical, treatment and rehabilitation are paid to those injured in transport accident - these are paid to all the injured whatever their impairment - and as they are incurred. This is obviously the better way to pay these costs rather than by a lump sum that estimates the future costs of a lifetime of care and support.

Loss of income benefits (defined in the Act loss of earning and loss of earning capacity benefits) are paid for a three year period to an earner as is defined by the Act.

An impairment benefit is paid as compensation for the injuries suffered in the transport accident.

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[130] Ibid at page 97

[131] See for example claims of Vairy, Mulligan, Dederer, Mr and Mrs Anzil, Ashrafinia, Drakulic, Moubarak and Bou Najem previously discussed

[132] See page 2 and this comment was made appropriately by Mr Shorten in his speech to Institute of Actuaries National Accident Compensation Conference on 23 November 2009 see footnote 6

The benefits paid to the catastrophically injured, accepted as those who suffer an injuries that causes an impairment of 50% or more. In addition to the lifetime medical benefits the TAC will an impairment benefit and loss of earning capacity benefits, which are indexed for what would have been their working life.

It is my opinion and I believe it is generally agreed that in Australia there is no finer system that the TAC system for providing essential care and support for the catastrophically injured.

If there is any dispute then the issue should be investigated by the Productivity Commission and 'the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians' report to the Government in its role of helping "governments make better policies in the long term interest of the Australian community"[133] whether the payment of periodic benefits and the payment of medical, treatment and rehabilitation expenses when incurred is the better system for all injured and disabled.

The personal injury solicitor will support the damages being paid as a lump sum as the successful plaintiff should have the freedom to manage the compensation. The Productivity Commission should be asked to investigate and report whether the freedom to manage their compensation is beneficial to the successful plaintiffs as there may not have been sufficient consideration of the disadvantages of paying damages as a lump sum, not only the freedom to manage the compensation as contrasted with the freedom to mismanage the compensation, but also the difficulties with having to assess what sum will be sufficient to pay for the lifetime medical costs and the lifetime loss of income costs.

Significant in this context however is that the Rules of Court in Victoria set out the procedure required for a claim for compensation by a "person under disability"[134]. The settlement or compromise of a claim for compensation must be approved by the Court and the settlement sum is paid into Court to be invested by the Senior Master for the benefit of the person under disability. In practice the Senior Master pays periodic payments and pays expenses when incurred.

The Productivity Commission should investigate whether payment of compensation by periodic payments is a better system for all injured and disabled rather than only the catastrophically injured under a no fault scheme and a person under disability.

The Failure of the Benefit

[133] See page 8 and footnote 22

[134] See the Supreme Court (General Civil Procedure) Rules 2005 Order 15. There is a similar procedure in the County Court of Victoria see the County Court Civil procedure Rules 2008 Order 15. A person under disability is a minor or a handicapped person. A handicapped person is person who is incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to the claim for compensation.

Also of significance is when the claim for compensation fails there is a loss of the expected benefit. This, it is submitted, is no different to the loss suffered by the investor consumers who were client of Storm Financial. The loss suffered by the clients of Storm Financial led to the Parliamentary Joint Committee on Corporations and Financial Services which examined the system that led to the loss.

As personal injury claimants regularly suffer a loss and do not secure damages as compensation for their injury the Productivity Commission should investigate the common law system as the Parliamentary Joint Committee on Corporations and Financial Services investigated the loss suffered by clients of Storm Financial.

The Parliamentary Joint Committee on Corporations and Financial Services

The Parliamentary Joint Committee on Corporations and Financial Services was established to conduct an inquiry into "the recent financial product company collapses, including Storm Financial and Opes Prime. The inquiry [was required to investigate and report on] the role played by financial advisers, the state of the general regulatory environment, remuneration models (such as commissions), the role of marketing and advertising in financial product distribution, the licensing arrangements of those who sold the financial products and services, and the consumer protection and insurance arrangements in place."[135]

The Submissions to the Committee led to an intensive investigation into the relationship between the financial advisers and their clients, the consumers. The Financial Planning Association made changes before the Committee delivered its report[136] showing how powerful an instrument of change the Parliamentary Joint Committee was.

The Productivity Commission will invite Submissions and providing the terms of Reference are sufficient to require the Productivity Commission to investigate all the systems that provide care, support and compensation to the disabled of Australia, it is hoped that the Submissions will lead to an intensive investigation into the relationship between the personal injury solicitors and their clients, the plaintiffs of the personal injury claims, as the consumers.

The similarity between the role of financial planners and personal injury solicitors and their clients, both consumers, is compelling. It is to be expected that the legislation will be altered to impose on a financial advisers a "fiduciary duty to their clients requiring them to place their clients' interests ahead of their own."[137]

The solicitors owe a fiduciary duty to their clients, but because it is usual in personal injury claims for the clients to be permitted by the solicitors to retain them in a no win no fee agreement, it is submitted there arises a potential for a conflict of interest, in the same way that there was a conflict of interest with the financial planners who charged their clients by commissions rather than a fee for service.

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[135] See the website ASIC Australian Securities & Investments Commission Update for former clients of Storm Financial at <http://www.asic.gov.au/asic/asic.nsf/byheadline/Storm+financial?openDocument>
[136] See footnote 8
[137] See footnote 44

The relationship between the personal injury solicitors and their clients when there is a no win no fee agreement is often described by the solicitors as "we are both on the punt' meaning both the clients and the personal injury solicitors bear equally the risk of the outcome. In practice however the personal injury solicitors are rewarded with a significantly higher benefit than their clients when there is a successful outcome to the litigation.[138]

The costing system[139]

When the personal injury claim is successful the personal injury solicitor will be paid costs by the client. These are known as the "solicitor and own client costs" or solicitor-client costs. These flow from the contract or the retainer between the solicitor and the client. The successful party will apply to the Court for an order of costs, in terms that the unsuccessful party will pay the party party costs of the proceeding as taxed. The phrase" as taxed" means determined by the Court.

The party party costs will usually not be the entire costs the successful party must pay the solicitor. The allowable party party costs are those that are determined to be necessarily and properly incurred for the attainment of justice[140] and are in practice much less than the solicitor-client costs.

The personal injury solicitor will be paid in addition the uplift fee.

When there is a no win no fee agreement the personal injury solicitor may also charge the client the uplift fee as the personal injury solicitors are permitted by law to claim the uplift fee of up to 25% of the legal costs (excluding disbursements) otherwise payable.[141]

It is often said that the uplift fee is to compensate the solicitors because of the uncertainty and the risk of the no win no fee arrangement extended to their clients, who if there was no such arrangement would have no access to 'the law and justice'.

However whether this was ever a sufficient reason it is submitted it is not a sufficient reason today when personal injury firms specialise in personal injury claims and advertise that they will act for clients on a no win no fee these terms.[142]

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[138] This is because of the costing system and the adversarial system as identified by Lord Woolf

[139] See Law Institute of Victoria 'Choosing a Lawyer' defining the solicitor- client costs as "Legal costs paid to your solicitor are generally referred to as "solicitor and own client costs" and are made up of the fees payable to your solicitor for professional services (professional fees) and disbursements. Disbursements are generally defined as being payments the law practice makes on behalf of the client – for example Court filing fees and Counsel's fees." http://www.liv.asn.au/Getting-Legal-Advice/Choosing-a-Lawyer/Legal-Practitioner-s-Costs

[140] See for example Samson Capital Pty Ltd v Westpac Private Equity Pty Ltd [2007] VSC 453 at paragraph 6 "On a taxation on a party and party basis all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed shall be allowed." <http://www.austlii.edu.au/au/cases/vic/VSC/2007/453.html>

[141] See the Legal Profession Act 2004 section 3.4 .28 http://www.austlii.edu.au/au/legis/vic/consol_act/lpa2004179/s3.4.28.html

[142] See the website of the Law Institute of Victoria at <http://www.liv.asn.au/Getting-Legal-Advice/Choosing-a-Lawyer/Legal-Practitioner-s-Costs> "Some costs agreements can be conditional on success (often known as "no win no fee" agreements), whereby payment of some or all of the legal

The Productivity Commission should examine whether there is a conflict of interest between the personal injury solicitor and client having regard to the costs paid to the solicitor when the claim is successful.

The speculative claim and the threshold of the serious injury

No win no fee retainers in Victoria became common soon after the thresholds of serious injury were imposed. Both Professor Luntz and Andrew Field in their articles ***'Looking back at Accident Compensation: Australian perspective'***[143] and '***There must be a Better Way': Personal Injuries Compensation since the 'Crisis in Insurance***'[144] discuss the no fault insurance schemes into Australia.

Field considers the experience good - "the introduction of no fault schemes has found favour in various Australian state jurisdictions in the form of limited schemes - though "the acceptance of these schemes, which only apply in limited situations, has clearly been compromised by political interests and the pressuring of lobby groups."[145]

Field uses the Transport Accident Act 1986 to illustrate how the political pressure and lobby groups compromised the no fault scheme as "it was conceived as a no fault scheme which would cover the field, abrogating the common law for all claims arising from injuries caused as a result of a transport accident. However, opposition in the Parliament's a upper house meant that the scheme was compromised, the result being that, under section 93, the option still remained of bringing a common law claim if the accident was classified as 'serious'."[146]

Field describes the scheme as a hybrid.

Both Luntz and Field describe the interference with the no fault insurance scheme in respect of workplace injuries; Luntz describing how "[a]bolition of common law actions in workers' compensation has been a political football kicked from side to side by successive governments in Victoria"[147] and Field describes the reintroduction of the common law right to sue for damages for a serious injury suffered in a work place accident as "showing the opportunism which has characterised government actions in relation to this topic, it was then the Labor Opposition which abandoned its old position and, having been encouraged by plaintiff lawyers, promised to

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costs is contingent on the successful outcome of the matter to which those costs relate. A conditional costs agreement can also provide for the payment of a premium (also known as an "uplift fee") of up to 25 per cent of the professional fees otherwise payable if there is a successful outcome of the matter."

[143] ***Looking back at Accident Compensation: Australian perspective***[2003] VUWLawRev 16 at <http://www.austlii.edu.au/nz/journals/VUWLRev/2003/16.html>

[144] [144] ***'There must be a better way': Personal Injuries Compensation since the 'Crisis in Insurance'*** Deakin Law Review (2008) 13 (1) at http://www.deakin.edu.au/buslaw/law/dlr/pdf_files/vol13-iss1/3.pdf

[145] Ibid at page 89 to 92

[146] ibid at page 91 an dit is the injury caused in the transport accident not the transport accident that must be serious as defined in the Act.

[147] *Looking back at Accident Compensation: Australian perspective*[2003] VUWLawRev 16 at <http://www.austlii.edu.au/nz/journals/VUWLRev/2003/16.html>

restore these limited common law claims. It did this in 2000 after assuming power. Such is the fate of no fault compensation schemes in Australia."[148]

The practice in Victoria to issue a claim for damages for injury in a transport or a workplace accident is a two stage process. The first stage is for the plaintiff to establish he has suffered a serious injury. The second stage is to issue the claim for damages.

There are very many applications by plaintiffs to establish a serious injury in Victoria; so many that the County Court of Victoria, the premier personal injury court in Victoria, has established a Serious Injury Division of the Damages and Compensation List "under Order 34A.04(1)(e) of the County Court Rules of Procedure in Civil Proceedings 1999" for "any application pursuant to s134AB of the Accident Compensation Act 1985 or s93 of the Transport Accident Act 1986."[149].

The law on the Serious Injury Applications has become extremely complicated and many decisions are appealed. Liability for the accident is not relevant in the first stage as the Court is concerned only with and determines whether the plaintiff has suffered a serious injury. The Serious Injury Application is the major contest. When the Serious Injury Application is successful costs are awarded.[150]

If the Application is successful the Court grants leave to the plaintiff to issue a proceeding claiming damages and awards costs. The proceeding to claims damages is a separate proceeding and liability is relevant and the plaintiff can claim damages only if the defendant is held liable for the accident. Many of these proceedings are settled and do not proceed to trial, however where liability is in dispute, there is often a trial.

If the defendant succeeds on liability or the plaintiff succeeds but cannot be awarded damages against the defendant, the plaintiff will fail and be ordered to pay the defendant's costs of the second proceeding.[151] It is only when the plaintiff succeeds on liability and is awarded damages against the defendant, that the plaintiff is awarded costs against the defendant.[152] All orders of cost are in the discretion of the court[153] but in practice costs usually follow the event and as set out in the sub section.

So it is the case when the Serious Injury Application is successful a costs order is made by the Court (these are party and party costs and see the previous discussion on the costing system). When this occurs the plaintiff receives no benefit from the

[148] Ibid at page 92
[149] See the website of the County Court of Victoria http://www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Lists+and+Sittings-Damages+%26+Compensation+List-Serious+Injury+Division?OpenDocument&1=30-Lists+and+Sittings~&2=20-Damages+%26+Compensation+List~&3=40-Serious+Injury+Division>
[150] See Transport Accident Act 1986 section 93 (12) (a)
[151] See Transport Accident Act section 93 (12) (b) (i) and (ii)
[152] See Transport Accident Act section 93 (12) (b) (iii)
[153] See Transport Accident Act <http://www.austlii.edu.au/au/legis/vic/consol_act/taa1986204/s93.html>

litigation, but the solicitor does.[154] Thus there is potential for solicitors to apply for a Serious Injury Certificate and secure a benefit when the defendant is not liable for the accident. If the personal injury solicitors and the clients are indeed "both on the punt" they would equally share the loss and the costs of the successful Serious Injury Application would be awarded only to the plaintiffs who are awarded damages.[155]

So it may be expected that the personal injury solicitors will be as interested in the Submissions to the Productivity Commission and were the financial planners/advisers in the Submissions to the Parliamentary Joint Committee and they will be as concerned with the report if the Productivity Commission recommends Australia can best care for people who suffer a disability by adopting a no fault insurance scheme meaning all people who suffer disability howsoever caused.

This is the reason why the terms of Reference should be extended so there is a comprehensive inquiry and a comprehensive report followed by vigorous debate and input by all the interested parties. This is the route to better policy.

The Productivity Commission should examine the current common law system to determine firstly the benefits that the common law system emasculated in recent years by the Tort Law Reforms and the changed judicial attitudes and whether the benefits are outweighed by the disadvantages some of the clients suffer as consumers.

When the Productivity Commission has determined the *actual* benefits to the clients of the common law system, and importantly to how many clients, it must then address the questions referred to it by the Government: whether Australia can best provide for the disabled by a no fault insurance scheme.

Medical treatment and the payment of Medical expenses

The payment of medical expenses is an important part of the Inquiry by the Productivity Commission. As Mr Shorten said on 23 November to the Institute of Actuaries Accident Compensation Conference "An insurance scheme is a big idea. It is as big and complex as the original idea for Medicare, or for compulsory

[154] The costs to be awarded are in respect of a Serious Injury Application for a workplace injury is more complicated than for a transport accident, however the provisions of section 134 AB (27) are similar to the provisions of section 93 (12) of the Transport Accident Act 1986. Sub section 27 provides the costs awarded are subject to the rules of court and by (a) when a Serious Injury Application is successful, "costs are to be awarded against a party against whom a decision is made". Subsection (b) provides, subject to section 28 and the provisions relating to when a statutory offer has been made in the proceeding, (i) if no liability to pay damages is established cots are to be awarded against the plaintiff, (ii) if the plaintiff wins on liability but no damages can be awarded costs are not awarded to the plaintiff and the plaintiff and the defendant must pay their own costs and (iii) if damages are to be awarded to the plaintiff, costs are to be awarded against the Victorian WorkCover Authority <http://www.austlii.edu.au/au/legis/vic/consol_act/aca1985204/s134ab.html>

[155] The Productivity Commission may consider it appropriate to request reports from the Transport Accident Commission and the Victorian WorkCover Authority on the Serious Injury Applications first on the number of Serious Injury Applications issued, how many are successful and the costs and disbursements paid, second on the number of the successful Serious Injury Applications which are followed by the issue of a claim for damages and third the number of the issued claims for damages which are successful and the costs and disbursements paid.

superannuation. It would be a fundamental shift in the provision of services for people with disability. But I believe it is an idea that demands serious debate and investigation to see if it could work. As a society we need to recognise that it is inevitable that profound and serious disabilities will strike many of us, whether through birth, accident, disease or old age. They are the shafts of fate that are coming for us, ready or not. The question we need to ask is what is the best way of ensuring that people are able to live with some measure of security that their needs will be met."[156]

When an Australian is injured the primary question is the provision and payment of medical, treatment and rehabilitation expenses. This is mostly provided in Victoria by the no fault insurance schemes and Medicare. Some treatment is provided by private medical insurance. The perception in Victoria is that the quality of the medical treatment is superior when provided by a no fault insurance scheme, for example the TAC.

An important consideration for a disabled person is the security of medical treatment. The Inquiry by the Productivity Commission should examine the provision of the medical treatment to the disabled by the no fault insurance schemes and whether it is superior to the provision offered by Medicare.

So how will Australia best care for those who suffer a disability

As with the previous no fault scheme proposed for Australia which was defeated by the vested interests if the Report of the Productivity Commission to the Government recommends that Australia can best care for people who suffer a disability by adopting a no fault insurance scheme it is certain there will be a vigorous campaign against the recommendations by the vested interests. Prominent among these vested interests will be the legal profession which will campaign to preserve the injured persons' rights and that justice demands the common law system be retained and continue to pay just compensation. It is not unimportant that the campaign will also preserve the personal injury industry and the lawyers' livelihoods.

This is why the inquiry by the Productivity Commission must fully investigate the current common law system to determine whether the clients of the personal injury solicitors as consumers are disadvantaged by the current practices and whether, if the Productivity Commission determines many of the clients are disadvantaged, whether having regard to the disadvantage, the current common law system should be retained because if the Productivity Commission reports that Australia can best care for people who suffer a disability by adopting a no fault insurance scheme, the current practises producing the disadvantage for the clients will disappear.

Conclusion

The Productivity Commission in undertaking the Inquiry must consider the best interests of the people who suffer the disability. The Feasibility Study sets out that "Advocates [of the disabled] have argued that a long-term care and support scheme

[156] <http://www.billshorten.com.au/more/index.cfm?Fuseaction=November_23rd,_&section=more_46555>

would deliver incentives for early intervention, provide certainty for people with disability and their families and encourage efficiency in the disability services system.[157] "The Campaign for a National Disability Insurance Scheme is supported across Australia by an unprecedented, politically bi-partisan and rapidly growing coalition of people with disabilities, carers, disability service providers, peak disability bodies and community and welfare organisations."[158] The Plan is set out on the website" ALL Australians need a no-fault insurance scheme for everyone who has, or acquires a significant disability."[159]

Tort Law and the modern law of negligence is no longer sufficient to deliver the essential care and support for the persons who suffer a disability because of accidental injury. The common law system has so many defects that cannot be overcome; the system is inherently unfair and limited in scope and uncertain in its operation. These defects have been exacerbated by the Tort Law Reforms in recent years. Consequently the common law system provides too few benefits for too few of the injured.

Now the Productivity Commission is to conduct the Inquiry and report to the Government on the costs, benefits and feasibility of establishing a national scheme in Australia to provide essential care and support for persons in Australia who suffer a disability, it is essential that the Productivity Commission is given sufficiently extensive Terms of Reference to require it to investigate and report on establishing a national scheme in Australia to provide essential care and support for all persons in Australia who suffer a disability, irrespective of the cause of the disability, providing the disability it is not caused by age alone.

The Terms of Reference must request the Productivity Commission examine and evaluate the existing systems and schemes that provide care and support for the disabled; all the disabled, including those disabled by accidental injury.

The Productivity Commission should then report to the Government how Australia can best provide the essential care and support for all people who suffer an eligible disability.

[157] The Feasibility Study into a National Long-Term Care and Support Scheme <http://www.fahcsia.gov.au/sa/disability/progserv/govtint/Pages/feasibility_study.aspx
[158] NDIS National Disability Insurance Scheme at <http://www.ndis.org.au/>
[159] Ibid