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Productivity Commission Inquiry into National Workers' Compensation

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Introduction:

Further to APLA's Submission dated 13 June 2003, the following issues are raised by way of supplementary submission:

1. Review of Oral Submissions – 4 December 2003;
2. Criteria for inclusion of common law;
3. Comparison of Queensland and Comcare Schemes following Interim Report recommending Comcare as a model;
4. Interim recommendations;
5. Conclusion.

1. Oral Submissions – 4 December 2003

APLA appeared at the Sydney hearings of the inquiry. In particular, APLA elected to submit in response to the Commission's preliminary views in relation to common law as a component of a national scheme. The following points were made:

- (i) APLA starts from the premise that the common law is a right that exists on the part of workers. The argument is not why it should exist; the argument is if the funding abilities of schemes impede that existence, then what changes if any, are necessary to maintain that right.
- (ii) APLA noted that much of the data relied upon by the Commission was significantly out of date, some stretching back two decades. APLA submitted primarily that much of the data was premised on behaviours experienced in schemes in previous eras. APLA respectfully submits that a reliance on behaviours cannot and does not give an accurate picture of scheme trends in 2003/2004.
- (iii) The Northern Territory government was quoted in relation to statements made ten years ago regarding the reasoning behind that government abandoning common law access. Data extracted from CPM4 shows in APLA's view, the predictions of that government to be hopelessly wrong when the performance of that scheme currently is examined against schemes that operate properly in a common law environment.
- (iv) By way of example when one compares the "no fault" scheme of the Northern Territory against Queensland, the following comparisons are telling:
 - (a) Premium rate – Northern Territory 2.42; Queensland 1.55
 - (b) Funding ratio – Northern Territory 72%; Queensland 132%

- (c) Compensation paid as a percentage of total expenses – Northern Territory 52.1; Queensland 63.7
 - (d) Compensation paid to a worker as a percentage of total income – Northern Territory 36.6; Queensland 56.2
 - (e) Legal costs paid as a percentage of total claims – Northern Territory 11%; Queensland 9%
 - (f) Legal costs per dispute – Northern Territory \$19.6k; Queensland \$10.8k
 - (g) Further disputation rate – Northern Territory 37%; Queensland 11%
- (v) On this key performance criteria nominated in the Comparative Performance Monitoring Reports, there can in APLA's view, be no basis for the Commission to draw any reasonable conclusion from a scheme like the Northern Territory shifting to "no fault" and expecting that common law was the root of the problem.
- (vi) APLA conceded in oral submissions that simple existence of common law in a scheme does not make it more viable than "no fault" schemes. Indeed some jurisdictions in Australia, which have enjoyed common law access, have not performed significantly well. APLA submits that scheme management and behaviours are pivotal to a well-run scheme.
- (vii) The Commission expressed interest at the oral hearings about the criteria by which the evaluation of the role of common law is judged. Commissioner Woods indicated that he had started to develop criteria including seriousness of injury; the extent of fault; the importance of certainty etc.
- (viii) APLA commissioned a survey of its members to seek out evidence in relation to the criteria by which Workers viewed the importance of common law access. Below is a sample for the Commission's benefit:
- (1) Fairness – actual wage loss can be claimed rather than reduced to statutory compensation;
 - (2) Finality, self esteem/independence;
 - (3) More reasonable damages;
 - (4) Better entitlements;
 - (5) Fair compensation for all losses;
 - (6) Certainty and the ability to get on with their lives;
 - (7) Resolution of claim by lump sum;
 - (8) Fairer reflection of loss sustained;
 - (9) Finality of relationship with Insurer.

- (ix) An issue raised in the findings was the cost, particularly the legal cost, associated with common law schemes.
- (x) APLA submitted that an analysis of CPM4 will reveal that the highest legal costs and schemes do not correlate with common law. The scheme management and structure appear to be important ingredients in relation to the management of costs. By way of example, the Australian Average noted (in CPM5) that \$10,363 compared to the Queensland average (a common law scheme) of \$6,470.
- (xi) Of interest is the ACT (another common law scheme), which came in at approximately \$23,000. APLA submitted that this only serves to highlight the importance of scheme management. There is no evidence available to the Commission to suggest that by necessity, inclusion of common law escalates legal costs.
- (xii) Stakeholders against common law highlighted the following issues as reasons against common law access:

- (1) The Scheme is slow and denies the victim access to timely compensation.

APLA submitted that scheme data from years ago may have supported this conclusion. The current data available from well-managed common law schemes contradicts any suggestion that the schemes are slow and untimely.

- (2) High transaction costs undermine affordability.

As has been shown by CPM data, there is no direct correlation between common law and high transaction costs. Indeed some common law schemes have extraordinarily low transaction costs whilst others have high costs. As relevant to the submissions and legal costs, scheme management is the critical differential in APLA's respectful view.

- (3) Dissipation of lump sums by victims.

The evidence drawn to support this conclusion came from a study commissioned 14 years ago of motor vehicle accident victims, performed by Messrs Neave & Howell.

As submitted to the Commission, structured settlements have gone some considerable way to allaying concerns raised 14 years ago and secondly,

anecdotal evidence suggests that a good majority of workers apply those funds positively to assist in occupational change.

Although no obvious patterns could be drawn from survey data, the greater majority of workers used lump sums to reduce liabilities including mortgages and other loans. Between 5% and 30% applied damages to funding self-employment opportunities and between 10% and 50% acquired assets. One thing was certain from the data: suggestions that all common law claimants irresponsibly dissipate lump sums and turn to social security is an obvious myth.

APLA concedes that some aspects of available common law schemes appear to be important ingredients in a financially stable scheme. In particular the use of elections as opposed to thresholds proves to be an option that has sustained the financial viability of common law schemes while providing access to workers that want to pursue common law remedies.

2. Criteria for Common Law Inclusion

It was indicated in the interim report that evaluation of whether common law should be included within a national scheme, should consider its impact on the welfare of the most seriously injured, rehab and return to work, and scheme affordability.

a) Severity of Injury

It is in APLA's submission manifestly unfair and indeed discriminatory to exclude all but the most seriously injured from common law access.

Some jurisdictions have attempted over the years to define what seriously injured means but as has been learned in many jurisdictions, one size does not fit all and the circumstances of each case are different.

Further, there is no social or economic basis for attempting to take away anybody's rights without valid reason, in these circumstances.

Current common law schemes demonstrate that severity of injury is simply not a necessary precursor to a well-funded common law scheme. It would be erroneous of the Commission to so conclude.

b) Rehab and Return to Work

Much play has been made of the suggestion that access to common law impedes rehabilitation and return to work. Some examples were cited by reference to outdated data in the course of the interim report.

As submitted orally, particular mechanisms of common law schemes run in the current modern era dispel any such suggestions. The introduction of pre-court processes and properly set up mitigation provisions, defeat any such arguments. An analysis by the Commission of well-run and well-funded common law schemes currently will demonstrate this.

c) Scheme Affordability

Whilst APLA submits that the starting premise is that every person should have rights to common law access, the qualification was conceded that this must fall into line with scheme affordability. APLA does not support the concept of a scheme which cannot be financially supported.

There is no doubt on data available to the Commission, that the most affordable scheme in Australia at the present time is a scheme which offers full common law access. It is tragic that the obviously successful ingredients from such a scheme have not been given closer consideration in other schemes, which appear to be suffering.

3. Recommendations

Turning to the interim recommendations by the Commission, the following are noted:

- (i) That common law should not be included in the framework on the grounds that it does not offer a stronger incentive for accident reduction than a “no fault” Scheme.

APLA response: There is no greater deterrent for a tortfeasor than the threat of common law activity.

No evidence has been produced to suggest that employers consider a statutory scheme to be a greater incentive for accident reduction than common law.

Anecdotally, it would appear obvious that the latter is a greater deterrent.

- (ii) That it does not compensate seriously injured workers to a greater extent than statutory schemes.

APLA response: Example 7 in CPM4 gives a comparison of payments given to seriously injured workers.

The data demonstrates two things:

- (1) Any suggestion as was wheeled out in the public liability crisis, that the common law is driving the schemes broke because of ridiculous payments is put to bed by CPM data when comparing statutory and common law payments.
- (2) The common law was not designed to provide a lottery to its entrants. It was designed to attempt to put workers back into the position they were in prior to the work injury.

Statutory schemes do not take into account all of the circumstances surrounding individual Workers.

- (iii) Common law is a more expensive compensation mechanism.

APLA response: APLA submits that when transaction costs amongst all of the Australian schemes are analysed there can be no conclusion that common law alone causes greater expense in the management of the scheme. The data at best provides mixed conclusions regarding various aspects of transactional costs but one thing is certain, the most affordable scheme operating in the country today obviously has a sustainable transaction cost limit, given its incredible performance for all stakeholders

- (iv) If common law is to be included in a national framework, then access should be restricted to the most seriously injured; and non-economic loss.

APLA response: The issue of limiting access to the most seriously injured is dealt with earlier in the submission. In relation to limiting access to claims for non-economic loss, economic loss is one of the most significant variables when it comes to restoring workers to pre-accident status. In APLA's view, having regard to the performance of good current common law schemes, there is simply no basis to apply such a restriction.

4. Comcare

Finally it has been suggested that a Comcare-type model would be one of the more favourable models to investigate should common law be included.

Annexed to the submission is an analysis of key performance indicators highlighted in CPM4. The analysis looks at key criteria underpinning successful schemes in Australia.

By each criteria, the best performer nationally is noted together with a comparison between Comcare (the favoured model) and Queensland (the best performing model in the country).

The conclusion in the analysis is, in APLA's respectful submission, self-explanatory. That is, there is no sustainable argument to attempt to put Comcare forward as a preferable model when one has regard to the successes of the number one performing scheme in the country.

5. Conclusion

APLA appreciates the opportunity to submit to the Commission and as detailed in discussions with Commissioner Woods in April 2003, APLA is prepared to continue working with the Commission and any other authorities to assist in identifying key ingredients for the inclusion of successful Workers' Compensation schemes. APLA believes that key stakeholders have not been included historically in these discussions and an appropriate working party comprising key stakeholders provides the platform to produce sustainable options for Workers' Compensation schemes in this country.



“COMCARE AND THE NATIONAL REVIEW”

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“The Comparison”

- **Examine Key Performance Criteria of Comcare**
- **Compare Key Performance Criteria of Best Performing Scheme Operator**
- **Compare Key Performance criteria of Qld**
- **Compare Key Performance criteria - Australian Average**



“The Criteria”

- **Premium Rates**
- **Ratio of Assets to liabilities**
- **Ratio of Assets to liabilities (indexed to base year)**
- **Total Premium Income for Australian schemes**
- **% change of total premium income 1997-2001**



“The Criteria” (continued)

- **Direct compensation paid as a proportion of total expenditure**
- **Medical & other services as a proportion of total expenditure**
- **Admin costs as a proportion of total expenditure**
- **Total scheme expenditure as a proportion of total scheme income**
- **Direct compensation paid as a proportion of total scheme income.**
- **Legal costs as a % of total costs**



“The Criteria” (continued)

- **Disputation Rates**
- **Average legal cost per dispute**
- **Average dispute resolution cost**
- **Further disputation rate - Appeals as a % of 1st level dispute outcomes. Rates**



“The Criteria” (continued)

- **Comparison of Pre-Injury earnings + Benefits payable**
- **Workplace fatality - Benefits to dependent spouse**
- **Permanent impairment lump sums**
- **Total payments for Permanent Incapacity**

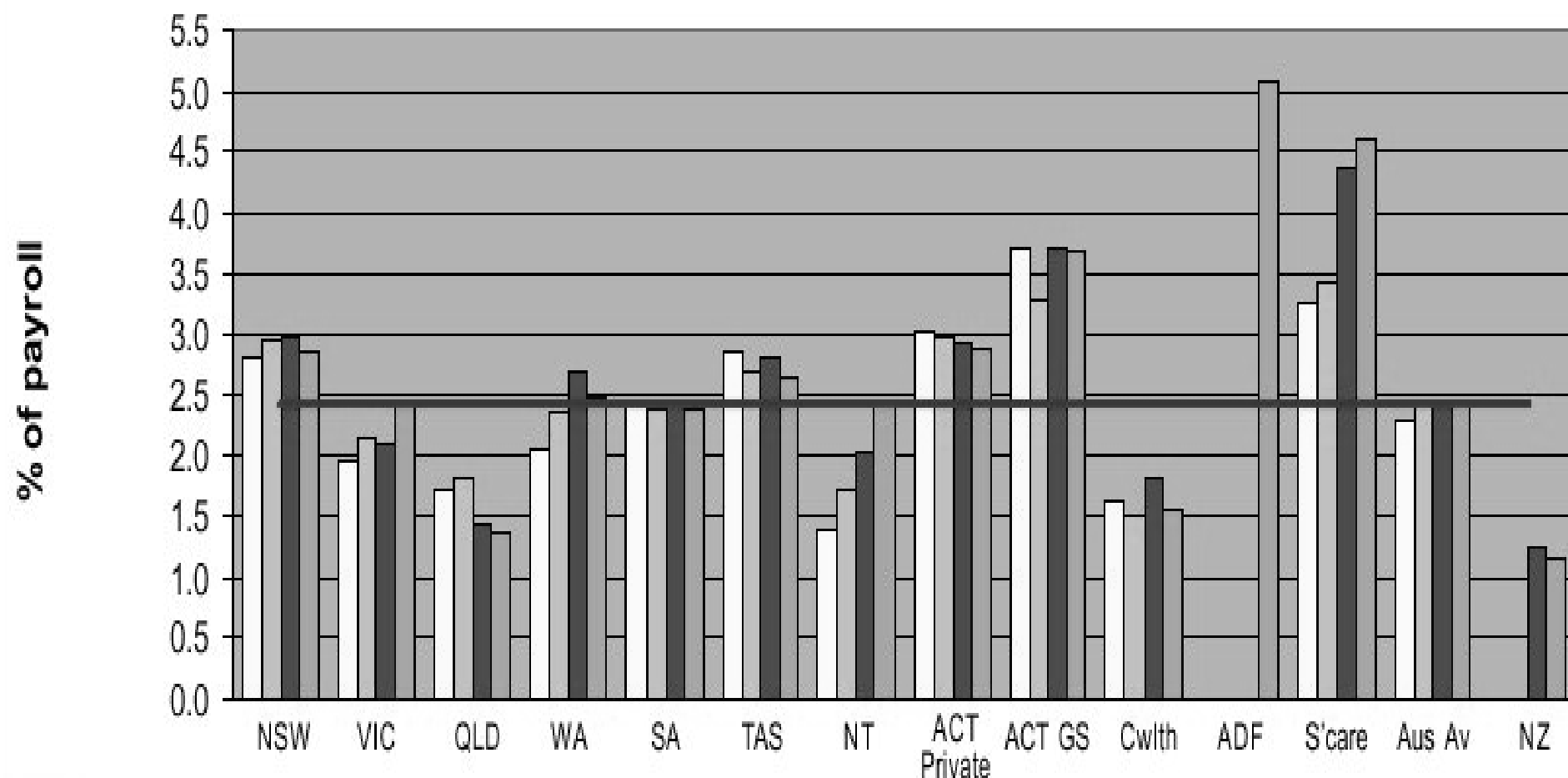


The criteria: Premium Rates

- **Definition: “Premium Rate is calculated by reference to a percentage of payroll of an employer for every \$100.**
- **Comcare: 1.54%**
- **Best Performer - (Qld): 1.35%**
- **Aust Average: 2.42%**
- **Notes (i) Comcare with virtually no Common Law access beats net average**
- **(ii) Qld with full Common Law access, can outdo a virtual no-fault scheme.**



Standardised Average Premium Rates

[illegible]

The Criteria: Premium Rates - (Standardised) GST included

- **Comcare: 1.69%**
- **Best Performer - (Qld): 1.49%**
- **Aust Average: 2.66%**

The Criteria: Change in Standardised Premium Rates 1999-2001 (exc GST)

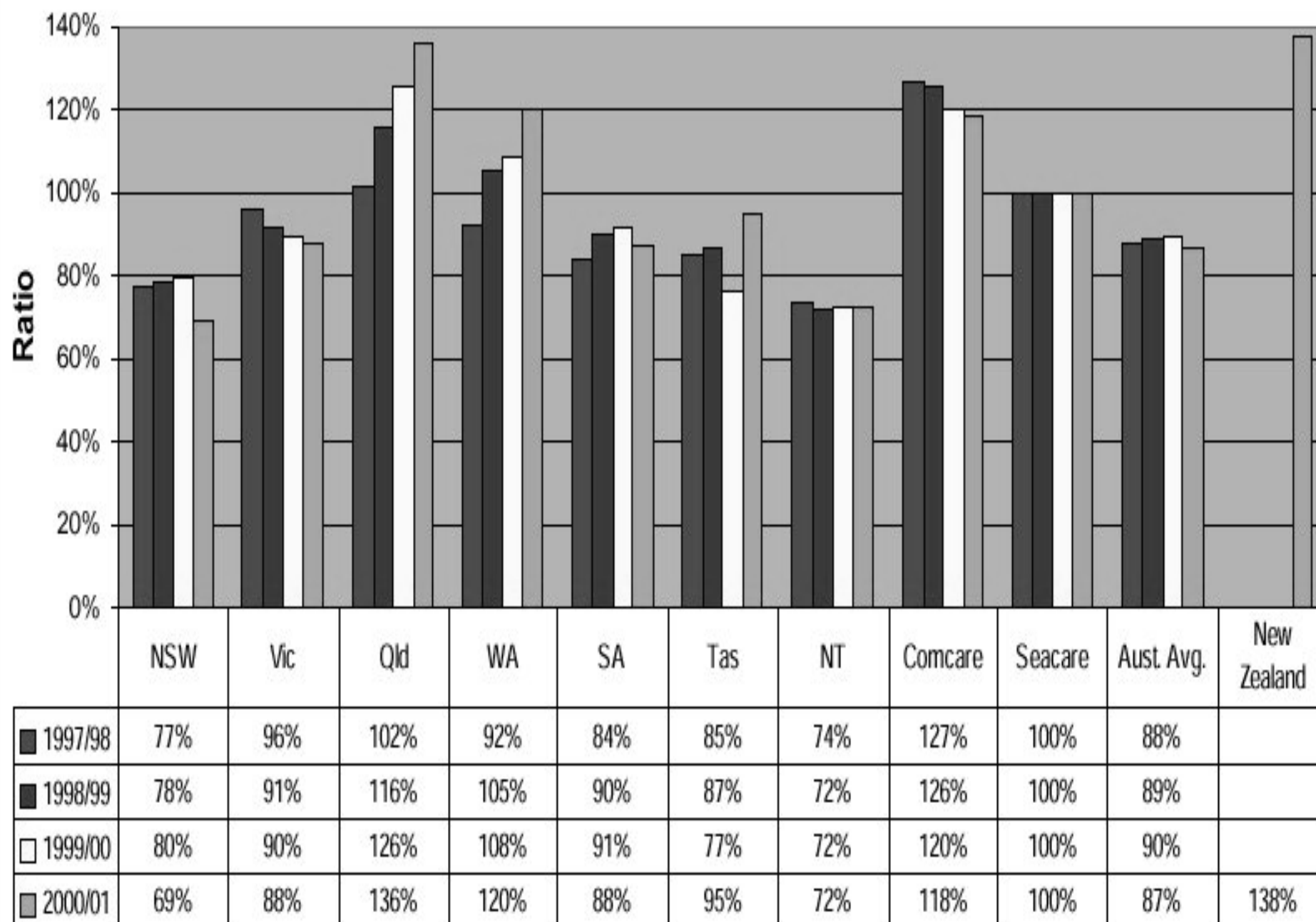
- **Comcare: -15% (B.P)**
- **Qld: -5.2%**
- **Aust Average: 2.66%**



The Criteria: Ratio of Assets to Liabilities (standardised)

- **Definition: Represents the ratio of net assets to outstanding claim liabilities (sometimes referred to as 'the funding ratio' in some schemes)**
- **Comcare: 118%**
- **Best Performer (Qld): 136%**
- **Aust Average: 87%**

Ratio of Assets to Claims Liabilities 1997/98 to 2000/01

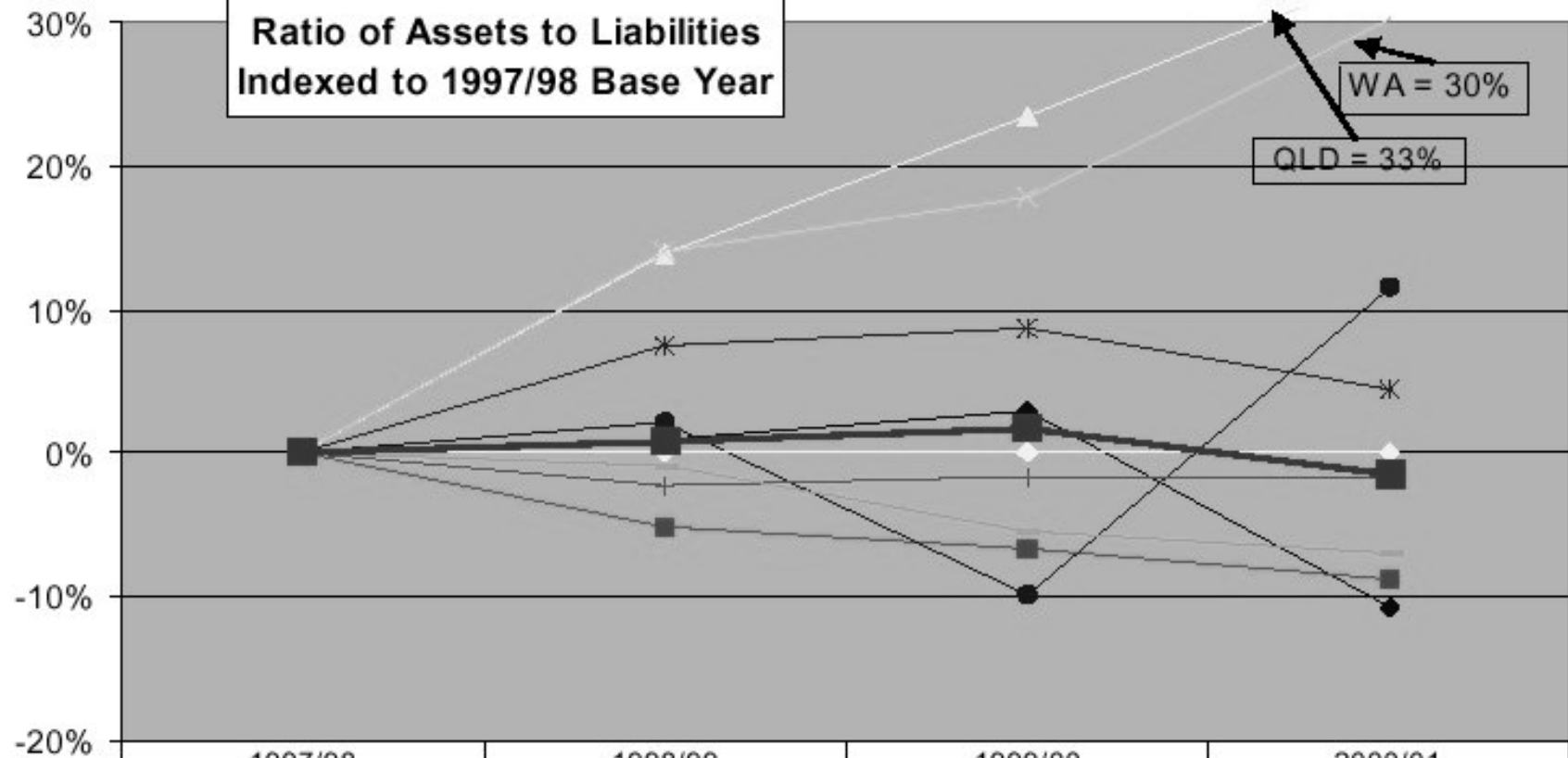


The Criteria: Ratio of Assets to Liabilities - indexed to 1997/98 Base Year

- **Definition:** The change in Assets to liabilities over a four year period, expressed as a percentage
- **Comcare:** -7%
- **Best Performer (Qld):** 33%
- **Aust Average:** -1%
- **Notes:** (i) Most schemes are going backwards
- (ii) Comcare going backwards at a rate far greater than National Av.
- **Qld has gone forwards by 33%**



**Ratio of Assets to Liabilities
Indexed to 1997/98 Base Year**



	1997/98	1998/99	1999/00	2000/01
◆ NSW	0%	1%	3%	-11%
■ Vic	0%	-5%	-7%	-9%
▲ Qld	0%	14%	23%	33%
✕ WA	0%	14%	18%	30%
✱ SA	0%	8%	9%	4%
● Tas	0%	2%	-10%	12%
+ NT	0%	-2%	-2%	-2%
— Comcare	0%	-1%	-5%	-7%
— Seacare	0%	0%	0%	0%
■ Aust. Avg.	0%	1%	2%	-1%

The Criteria: Total Premium Income

- Definition: Total Premium Income (Billion) for each Australian Scheme
- Comcare: \$.093B (93M)
- Qld: \$.506B (506M)
- Aust Total: \$5.7B

The Criteria: % change in Premium Income from 1997-2001

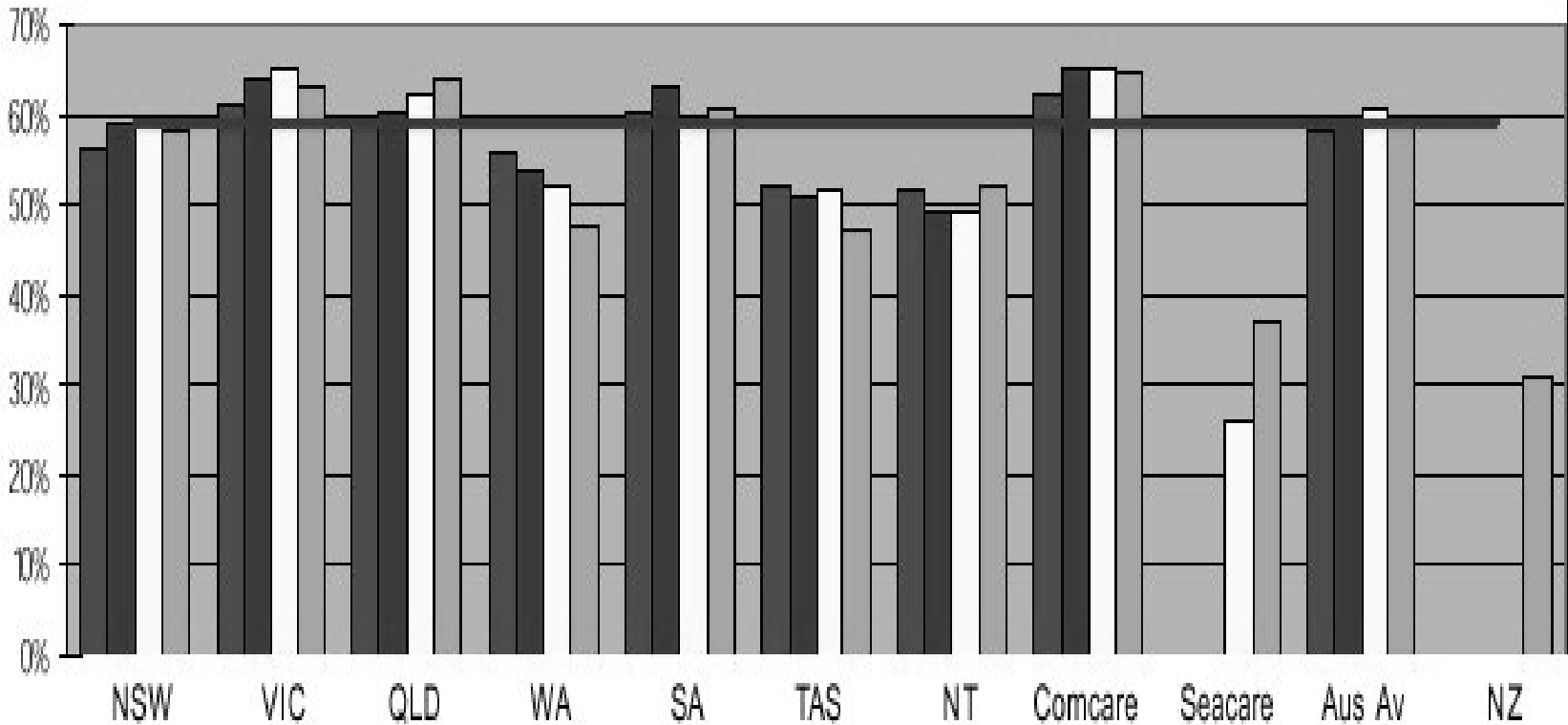
- **Comcare: -15%**
- **Qld: -23%**
- **Aust: +30%**
- Notes: (i) Against a national average of 30's over 4 years, Qld with full Common Law access reduced premium income by almost a quarter in 4 years.
- (ii) Comcare with virtually no Common Law access could only manage a 15% reduction



The Criteria: Direct Compensation Paid as a Proportion of Total Expenditure

- **Comcare: 64.6%**
- **Qld: 63.7%**
- **Aust Average: 59.3%**
- Notes: Although Comcare comes in marginally better than Queensland by 1.1%, it is a much smaller scheme with no 'real' Common Law expense.

Direct Compensation Paid as a Proportion of Total Expenditure

[illegible]

The Criteria: Medical and Other Services as a Proportion of Total Expenditure

- **Comcare: 18.8%**
- **Best Performer (NSW): 22.8%**
- **Qld: 13.8%**
- **Aust Average: 20.2%**

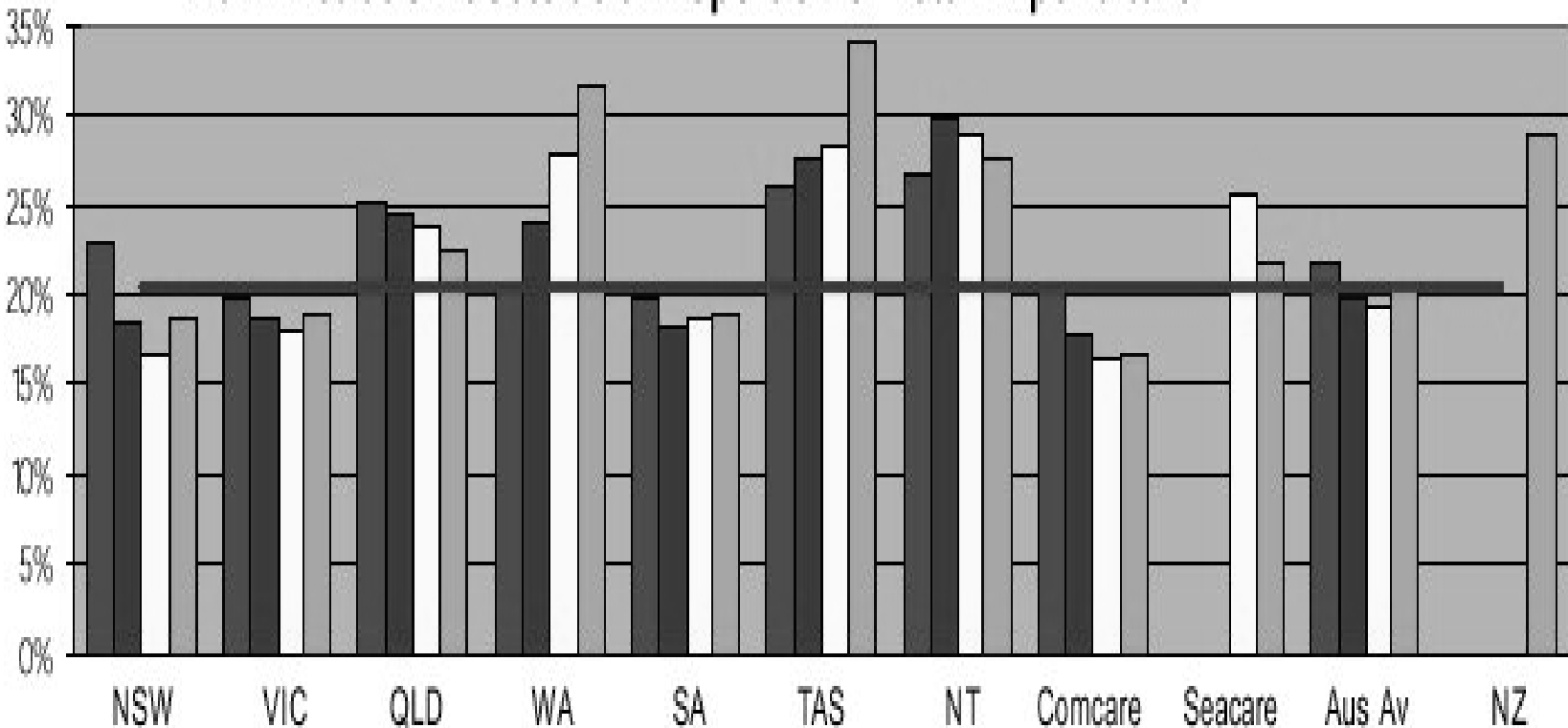


The Criteria: Administration Costs as a Proportion of Total Expenditure

- **(BP) Comcare: 16.5%**
- **Qld: 22.5%**
- **Aust Average: 20.5%**



Administration Costs as a Proportion of Total Expenditure

[illegible]

The Criteria: Total Scheme Expenditure as a Proportion of Total Scheme Income

- **Comcare: 123.4%**
- **Best Performer (NT): 70.3%**
- **Qld: 88.2%**
- **Aust Average: 82.9%**
- Notes: (i) Comcare is spending \$123 for every \$100 it brings it to its scheme.
- In the last 4 years Comcare's expense to income has gone from 118% - 123%.

Region	Light Gray Bar (%)	Dark Gray Bar (%)	Black Bar (%)	White Bar (%)
NSW	78	84	81	81
VIC	74	81	81	76
QLD	61	61	64	65
WA	59	81	81	69
SA	81	97	91	81
TAS	81	81	81	81
NT	71	89	76	64
Comcare	119	119	119	122
Seacare	48	66	66	66
Aus Av	81	81	81	81
NZ	31	31	31	31

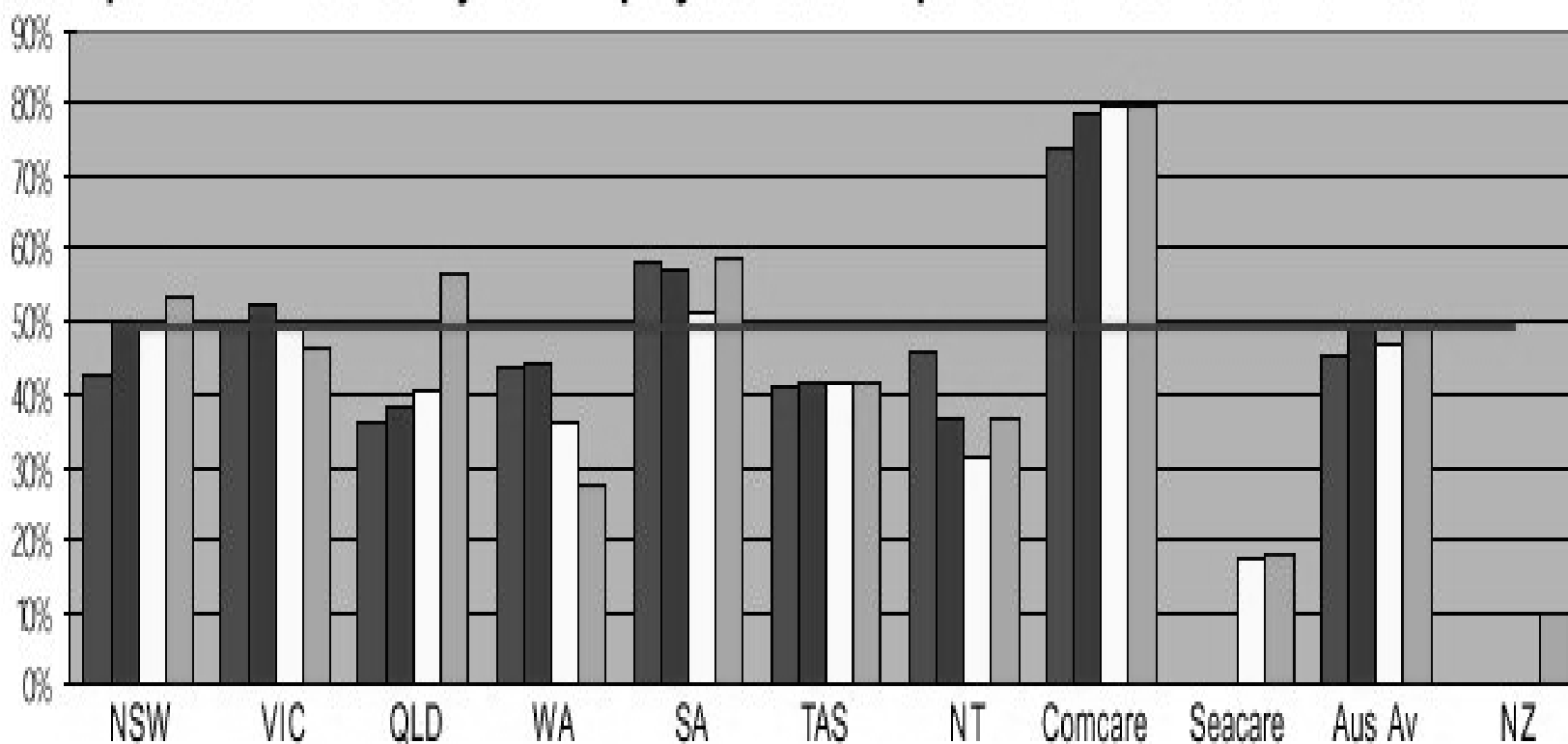
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The Criteria: Direct Compensation Paid to Injured Employees as a Proportion of Total Scheme Income

- **(BP) Comcare: 79.8%**
- **Qld: 56.2%**
- **Aust Average: 49.2%**
- **Notes: (i) Comcare's rise as a % over 4 years has been 6%**
- **(ii) Qld's rise as a % over 4 years has been 19.8%**
- **(iii) National rise as a % over 4 years has been 3.7%**



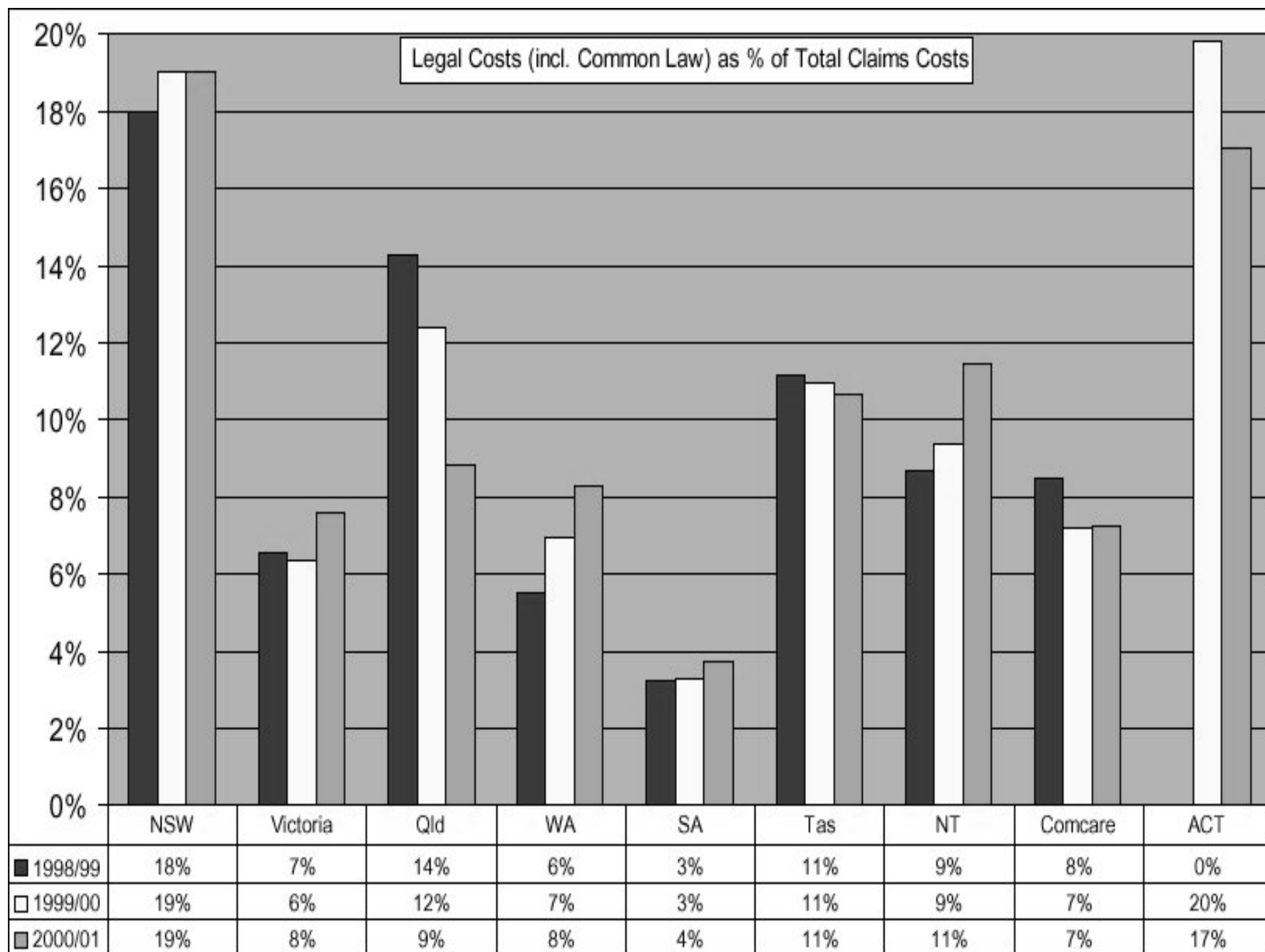
Direct Compensation Paid to Injured Employees as a Proportion of Total Scheme Income

[illegible]

The Criteria: Legal Costs (inc Common Law) as a % of Total Claims Costs

- **Comcare: 7%**
- **Best Performer (SA): 4% - (No Common Law)**
- **Qld: 9%**
- **Aust Average: 10.4%**
- Notes: (i) In 3 years Qld's % of legal costs paid has dropped by 5%
- In 3 years Comcare's % of legal costs has dropped by 1%

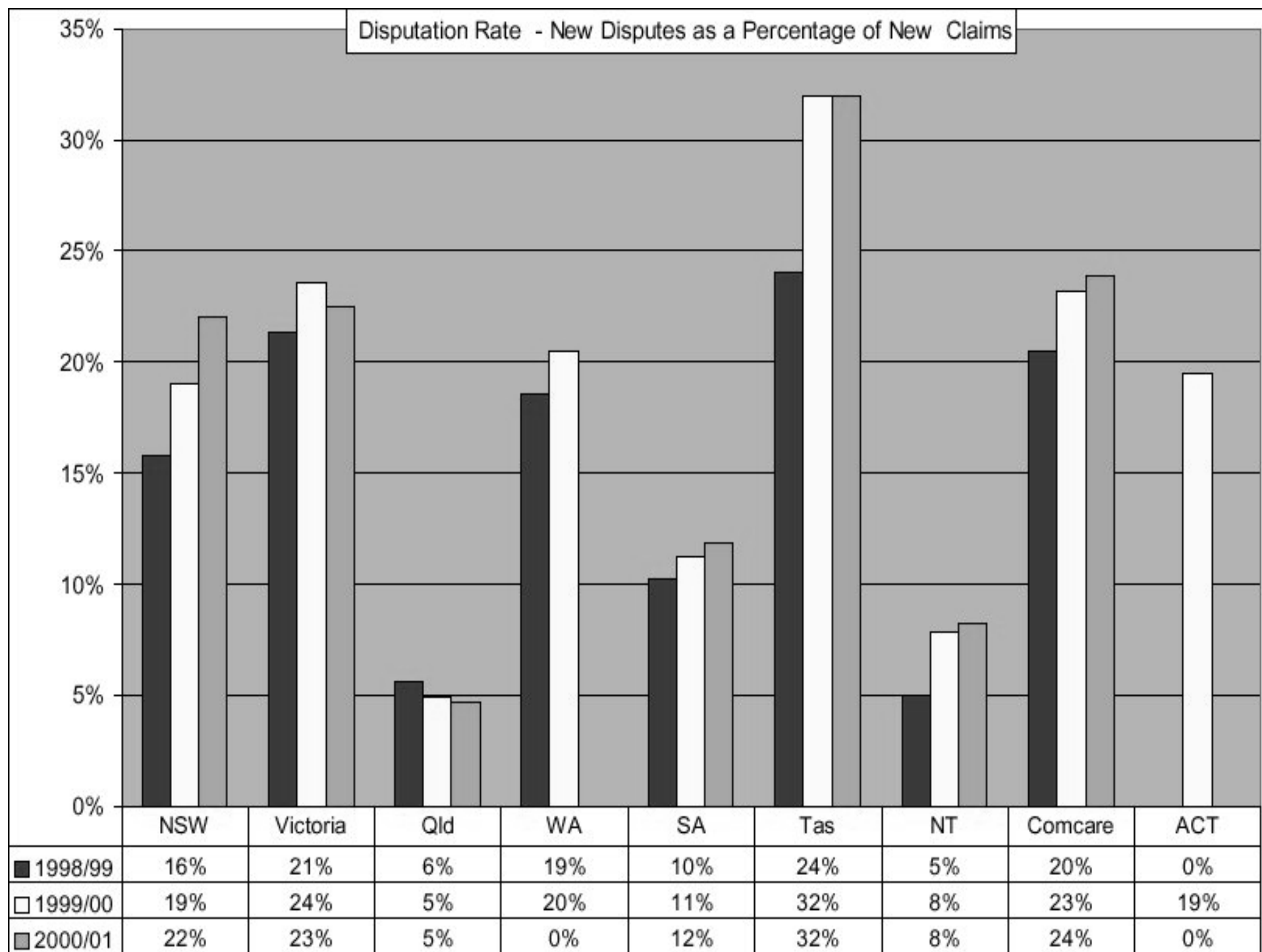




The Criteria: Disputation Rates

- **Definition: New Disputes as a % of New Claims**
- **Comcare: 24%***
- **Best Performer (Qld): 5%**
- **Aust Average: 19.4%**
- Notes (i) Comcare's disputation rate has increased every year since 1998
- (ii) Qld's disputation rate has dropped or been unchanged every year
- *Comcare has disputed its own disputation rate.

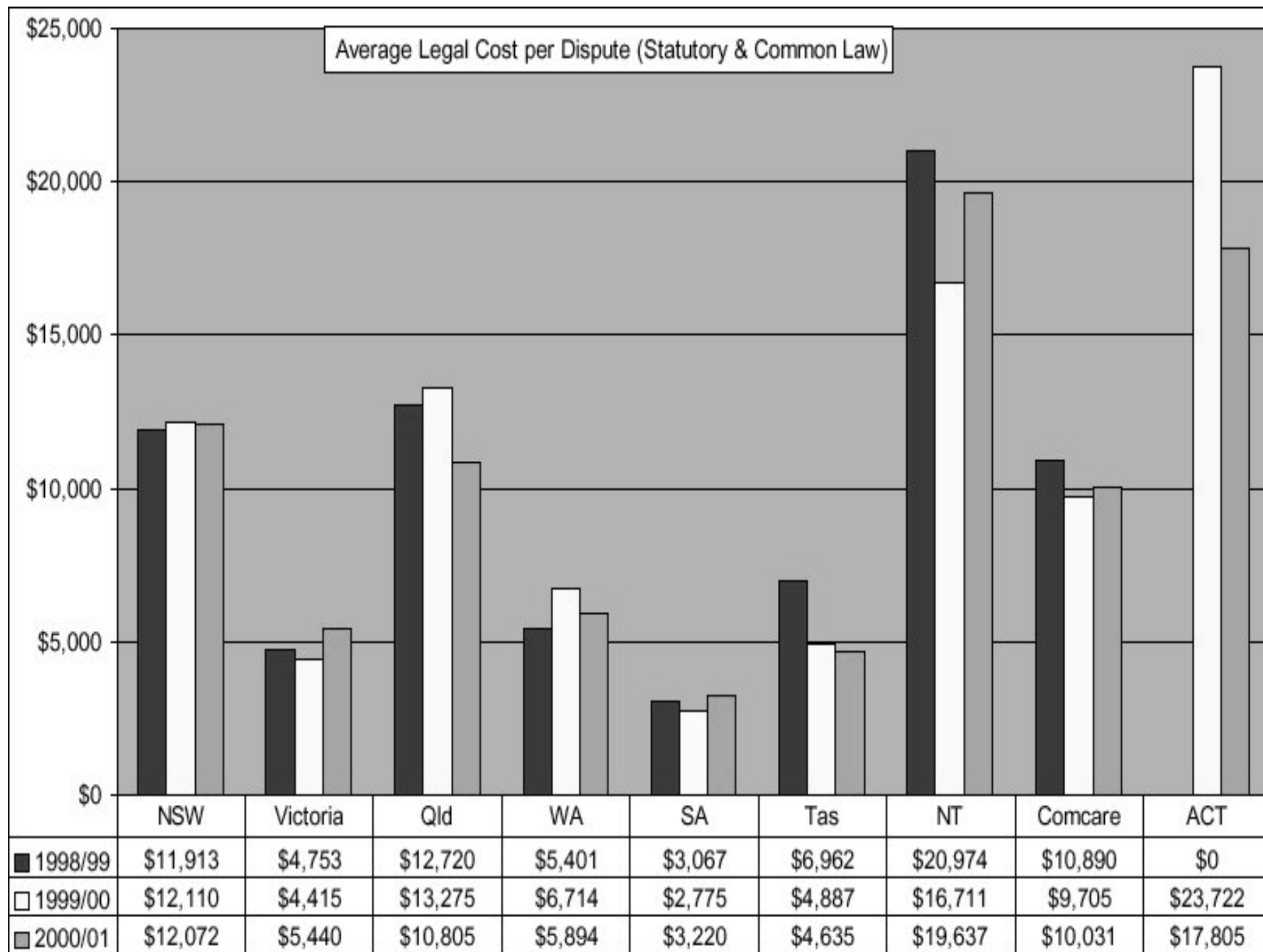




The Criteria: Average Legal Cost Per Dispute (Stat + Common Law)

- **Comcare: \$10,031**
- **Best Performer (SA): \$3,220**
- **Qld: \$10,805**
- **Aust Average: \$10,100**
- Notes: (i) SA has no Common Law
- (ii) Comcare has virtually no Common Law yet is marginally lower than Qld with full Common Law Access.



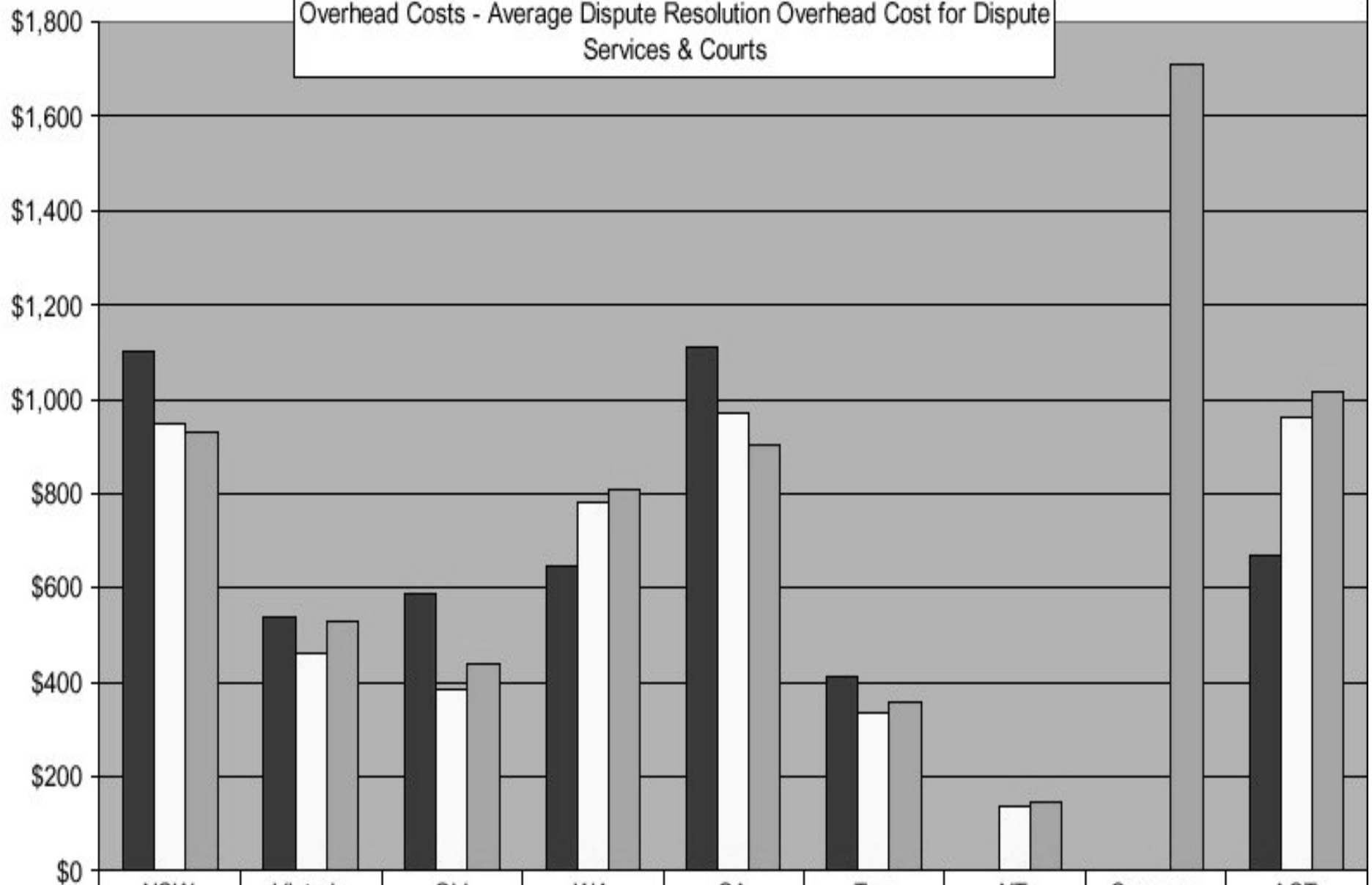


The Criteria: Average Dispute Resolution Costs

- **Definition: This is the dispute overhead (non-legal) costs per dispute. This includes contribution to Public Court Systems, conciliation services, medical panels and internal review systems**
- **Comcare: \$1709**
- **Qld: \$440**
- **Aust Average: \$780**



Overhead Costs - Average Dispute Resolution Overhead Cost for Dispute Services & Courts

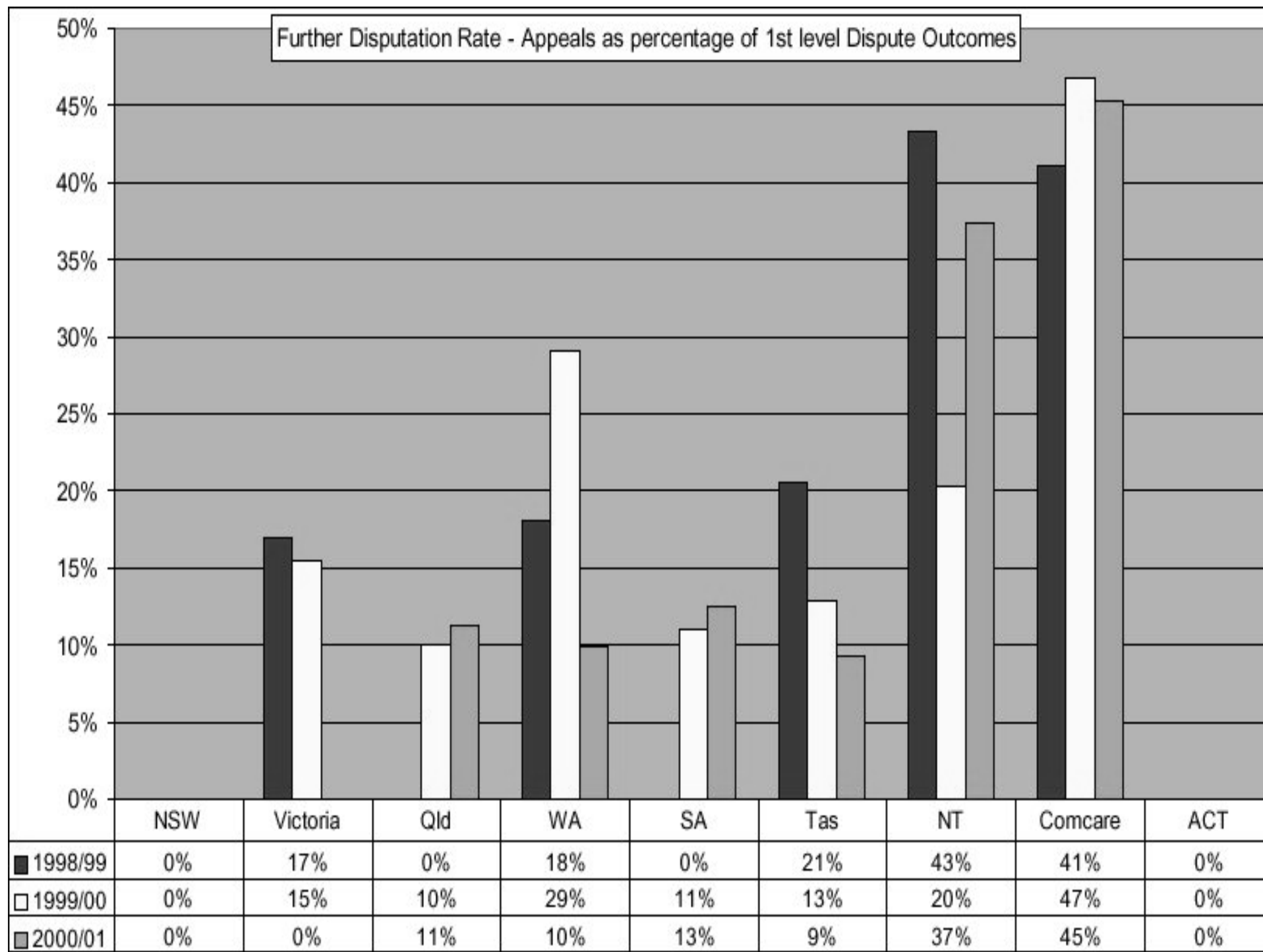


	NSW	Victoria	Qld	WA	SA	Tas	NT	Comcare	ACT
■ 1998/99	\$1,102	\$540	\$586	\$647	\$1,112	\$413	\$0	\$0	\$671
□ 1999/00	\$946	\$461	\$387	\$783	\$972	\$337	\$135	\$0	\$964
■ 2000/01	\$929	\$528	\$440	\$811	\$904	\$357	\$146	\$1,709	\$1,013

The Criteria: Further Disputation Rate

- **Definition:** Represents as a % the number of appeals that result from a first level failed dispute resolution process.
- **Comcare: 45%**
- **Qld: 11%**
- **Aust Average: 20.8%**
- **Notes:** (i) When comparing Comcare's dispute costs + dispute rates at 1st and 2nd level, it appears to be running out of control, as compared to the rest of the country.

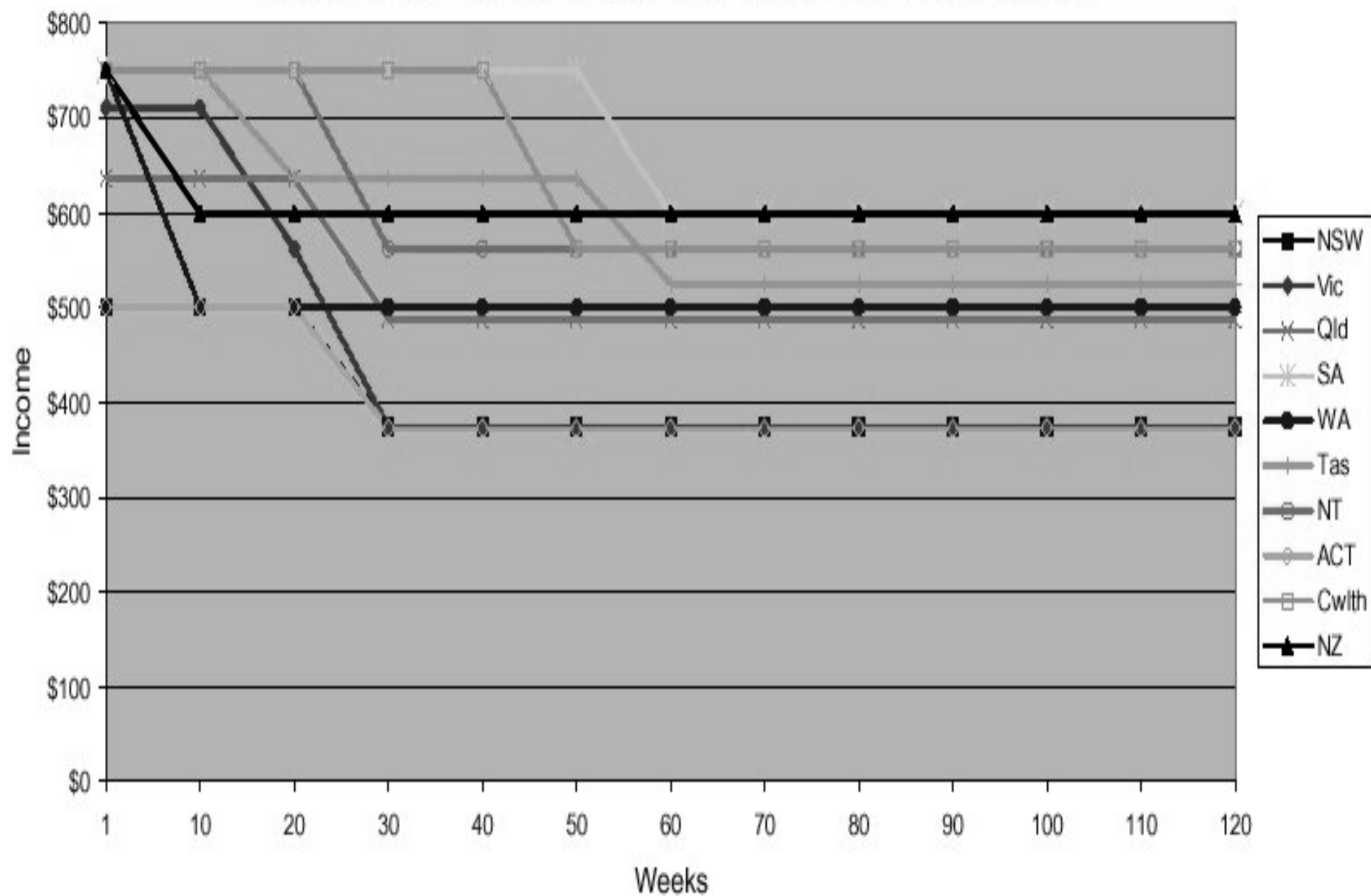




The Criteria: Comparison of Pre-Injury Earnings + Benefits Payable

- **Definition:** Application of respective scheme formulae, assuming an award weekly wage at \$500, but average weekly earnings of \$750 for 12 months pre-accident.
- **Comcare:** we 1-45 : \$750
 - we 45-12- : \$570E
- **Qld:** we 1-20 : \$637.50
 - we 26-120 : \$457.50

Example No.1: Comparison of Pre-injury earnings and Benefits Payable



The Criteria: Workplace Fatality - Lump Sum Benefits to Dependent Souse

- **Definition: Deceased worker, 35 yo with award wage of \$500pw with average net earnings for 12 months pre-accident \$750 pw. Deceased worker had a dependent spouse + 2 children aged 7 & 8, the former entering the workforce at 16 and the latter in full time education until age 25.**

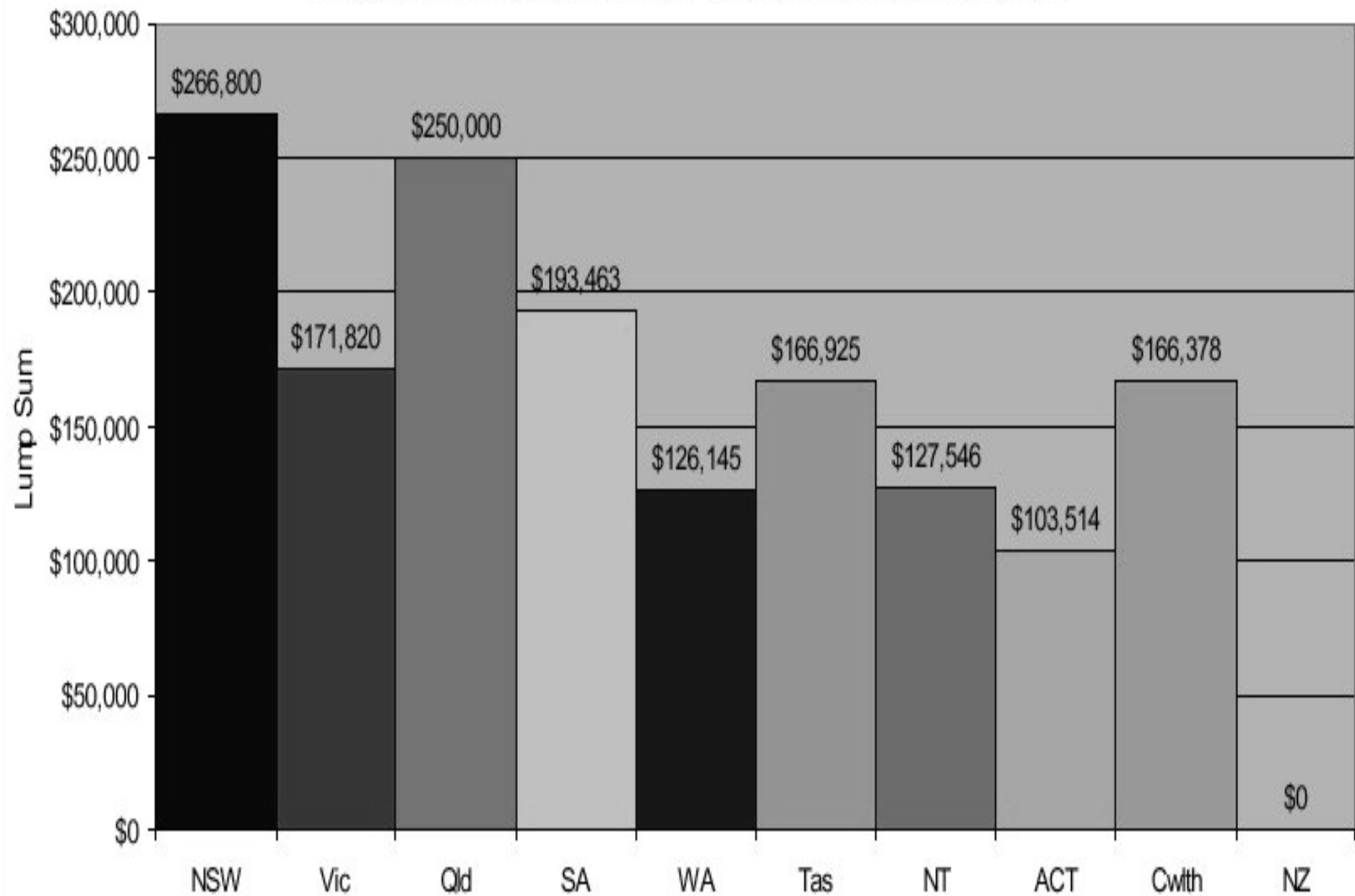
- **Comcare: \$166,378**

- **Qld: \$250,000**

- **Note: Common Law entitlements are in addition to those sums, but subject to charge.**



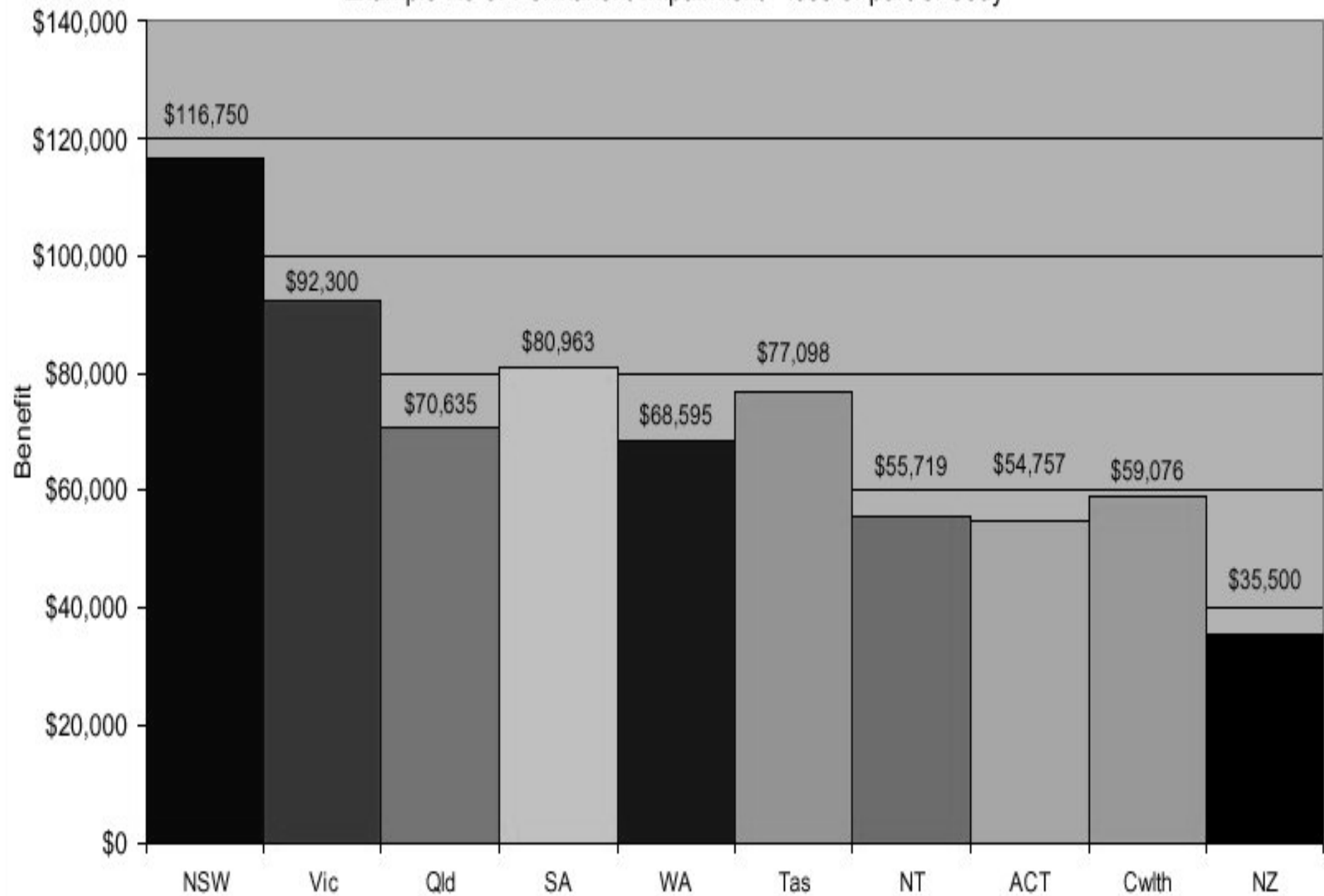
Example No 4: Workplace Fatality- Benefits to Dependent Spouse



The Criteria: Permanent Impairment Lump Sums

- **Definition: Injured worker received award wage of \$500pw. Injury involves severance of two digits - the thumb and forefinger of the right hand. Worker returns to full time duties 6 weeks post accident.**
- **Comcare: \$59,076**
- **Best Performer (NSW): \$116,750**
- **Qld: \$70,635**
- **Note: Includes weekly payments made in total loss period.**

Example No 6: Permanent Impairment - loss of part of body



The Criteria: Total Permanent Incapacity

- **Definition: 28 yo male worker, working 38 hour week, with no overtime. Worker injured suffering complete tetraplegia, below the sixth cervical neurological segment. This results in paralysis of hands, impaired upper-body movement and paralysis of trunk & lower limbs. He has lost all lower body function and is wheelchair bound.**

He earned \$500pw net and would have worked to 65.

The Criteria: Total Permanent Incapacity (continued)

- **Comcare: \$889,267**
- **Best Performer (VIC): \$1,050,170**
- **Qld: \$829,000**
- Notes: (i) Qld figure include GVK stat lump sum, but no other stat payments (These need to be added)



Example No. 7: Permanent Incapacity

