Adjusting the Balance

Inquiry into Aspects of the Wrongs Act 1958

Final Report
February 2014
About the Victorian Competition and Efficiency Commission

The Victorian Competition and Efficiency Commission (VCEC), which is supported by a secretariat, provides the Victorian Government with independent advice on business regulation reform and opportunities for improving Victoria’s competitive position.

VCEC has three core functions:

- reviewing regulatory impact statements, measuring the administrative burden of regulation and business impact assessments of significant new legislation
- undertaking inquiries referred to it by the Treasurer, and
- operating Victoria’s Competitive Neutrality Unit.

For more information on the Victorian Competition and Efficiency Commission, visit our website at: www.vcec.vic.gov.au

Disclosure of interest

The Commissioners have declared to the Victorian Government all personal interests that could have a bearing on current and future work. The Commissioners confirm their belief that they have no personal conflicts of interest in regard to this inquiry.
26 February 2014

Hon. Michael O’Brien MP
Treasurer
1 Treasury Place
MELBOURNE VIC 3002

Dear Treasurer

**VCEC Inquiry into Aspects of the Wrongs Act 1958**

In accordance with the terms of reference received by the Commission on 30 May 2013, we have pleasure in submitting the Commission’s final report **Adjusting the Balance: Inquiry into Aspects of the Wrongs Act 1958**.

Yours sincerely

Dr Matthew Butlin  
Chair  

Bill Mountford  
Commissioner
Terms of reference

Victorian Competition and Efficiency inquiry into aspects of the Wrongs Act 1958

I, Michael O’Brien MP, Treasurer of Victoria, pursuant to section 4 of the State Owned Enterprises (State Body – Victorian Competition and Efficiency Commission) Order (‘the Order’) hereby direct the Victorian Competition and Efficiency Commission (‘the Commission’) to conduct an inquiry into aspects of the Wrongs Act 1958.

Background

Significant reforms were made to the Wrongs Act 1958 (the Act) in 2002 and 2003 under the auspices of a national program of reform of tort law aimed at addressing the insurance crisis of the late 1990s and early 2000s, which was characterised by spiralling public liability and professional indemnity premiums, and the withdrawal or unavailability of insurance cover for many areas of economic and social activity for which cover was previously available.

The reforms were strongly informed by The Final Report of the Review of the Law of Negligence (2002), produced by a panel convened pursuant to a Ministerial Meeting on Public Liability and chaired by the Hon David Ipp (the Ipp Report).

In general, the reforms were designed to circumscribe some common law rights to compensation for the negligent acts of others, with a view to reducing insurers’ liability for damages, which would lead in turn to a reduction in premiums for insurance and an increase in the availability of insurance.

There is evidence to suggest that in the period since the nationwide implementation of tort law reforms there has been a reduction in premiums for public liability and professional indemnity insurance, as well as a reduction in claims and an increase in the number of policies written (National Claims and Policies Database, Australian Prudential Regulation Authority, September 2011).

However, aspects of the reforms have also been criticised as disproportionately restricting the rights of plaintiffs, by imposing unreasonable barriers and limitations that may lead to legitimate claims being denied compensation, or being under-compensated. There is also concern that the Act deals with different plaintiffs inconsistently due to anomalies in the implementation of the policy objectives of the reforms that have become apparent since the reforms were introduced.

The purpose of this review is to identify and make recommendations to address any anomalies, inequities or inconsistencies in the Act that can be implemented without compromising the original objectives of the tort law reforms. The review is not intended to revisit the underlying objectives of the tort law reforms.

Scope of studies

The Commission is to inquire into and report on the operation of the Act in relation to personal injuries and related matters,¹ and develop, evaluate and recommend options

¹ The Commission is not to inquire into the operation of the provisions dealing with proportionate liability for economic loss and property damage.
for the Act to operate more efficiently and equitably consistent with the objectives of
the tort law reforms of 2002 and 2003.

The Commission is directed to make recommendations relating to personal injury
damages, including:

• the limits placed on available damages for personal injury or death, for both
economic and non-economic loss, by the Act;
• the impairment thresholds for personal injury imposed by the Act in relation to
damages for non-economic loss;
• discount rates applicable to lump sum damages awarded for future economic loss;
and
• limitations on damages for gratuitous attendant care.

In addition, to considering the operation of the Act in relation to personal injuries, the
Commission is directed to make recommendations relating to the appropriateness of,
and possible reforms to, the existing strict liability regime for aircraft owners (Section 31
or Part VI of the Act).

In recommending options for amendment to the Act, the Commission is to have regard
to:

• whether any such options would have an unduly adverse impact on the price
and/or availability of public liability or professional indemnity insurance in Victoria;
• the risk faced by potential defendants of unmeritorious litigation;
• the possible impact on decision-making and administrative bodies, including
courts and the Medical Panels; and
• consistency with other legislative regimes prescribing compensation for personal
injury, including the Victorian Accident Compensation Act 1985 and Transport
Accident Act 1986, and interstate regimes, having regard to the different
objectives of these regimes.

Inquiry process

In undertaking this inquiry, the Commission is to have regard to the objectives and
operating principles of the Commission. The Commission is to consult with key interest
groups and affected parties, and may hold public hearings. The Commission should
also draw on the knowledge and expertise of relevant Government departments and
agencies.

The Commission is to produce a draft report for public consultation. A final report is to
be provided within 9 months of the receipt of this reference.

HON. MICHAEL O’BRIEN MP
Treasurer
Received: 30 May 2013
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<td>Australian Aviation Insurance Forum</td>
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<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
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<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
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<td>ACT</td>
<td>Australian Capital Territory</td>
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<td>ALA</td>
<td>Australian Lawyers Alliance</td>
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<td>AMA</td>
<td>Australian Medical Association</td>
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<td>AMA-4 Guides</td>
<td>American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition)</td>
</tr>
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<td>AOPA</td>
<td>Aircraft Owners and Pilots Association of Australia</td>
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<td>Australian Prudential Regulation Authority</td>
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<td>ARPI</td>
<td>Australian Risk Policy Institute</td>
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<td>AWE</td>
<td>Average Weekly Earnings</td>
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<td>CLBA</td>
<td>Common Law Bar Association</td>
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<td>DBA</td>
<td>Damage by Aircraft Act 1999 (Cth)</td>
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<td>DPC</td>
<td>Victorian Department of Premier and Cabinet</td>
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<td>DTF</td>
<td>Victorian Department of Treasury and Finance</td>
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<td>DRE</td>
<td>Diagnosis-Related Estimates</td>
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<td>GEPI</td>
<td>Guide to the Evaluation of Psychiatric Impairment for Clinicians</td>
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<td>GST</td>
<td>Goods and Services Tax</td>
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<td>HCCS</td>
<td>High Cost Claims Scheme</td>
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<td>ICA</td>
<td>Insurance Council of Australia</td>
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<td>LIV</td>
<td>Law Institute of Victoria</td>
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<td>MAV</td>
<td>Municipal Association of Victoria</td>
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<td>NDIS</td>
<td>National Disability Insurance Scheme</td>
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<tr>
<td>NIIS</td>
<td>National Injury Insurance Scheme</td>
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<td>NRF</td>
<td>Norton Rose Fulbright Australia</td>
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<td>NSW</td>
<td>New South Wales</td>
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<td>PC</td>
<td>Productivity Commission</td>
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<td>QLD</td>
<td>Queensland</td>
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<td>QSC</td>
<td>Queensland Supreme Court</td>
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<td>RVAC</td>
<td>Royal Victorian Aero Club</td>
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<td>SA</td>
<td>South Australia</td>
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<td>TAC</td>
<td>Transport Accident Commission</td>
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<td>VCEC</td>
<td>Victorian Competition and Efficiency Commission</td>
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<td>VMIA</td>
<td>Victorian Managed Insurance Authority</td>
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<td>VSC</td>
<td>Victorian Supreme Court</td>
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</table>
VSCA  Victorian Supreme Court of Appeal
VWA  Victorian WorkCover Authority
WK  Wotton + Kearney Insurance Lawyers
Glossary

Asymptomatic disease  A disease where the symptoms have not yet manifested.

Attendant care services  Any of the following: services of a domestic nature; services relating to nursing; services that aim to alleviate the consequences of an injury.

Average weekly earnings  The average weekly wage or salary of all Victorians engaged in employment, as published by the Australian Bureau of Statistics.

Certificate of Assessment  A certificate provided by a medical doctor to a claimant that certifies that the degree of impairment suffered by the claimant meets the threshold test for significant injury.

Claimant (or plaintiff)  A person who makes or is entitled to make a claim for personal injury damages.

Damages  Any form of monetary compensation.

Dependant  Any person who was wholly, mainly, or in part dependent on the financial support of a deceased person at the time of their death.

Deeming test  A test used in the Accident Compensation and Transport Accident Acts to meet the definition of serious injury. To meet this test, a person must have a whole-of-person impairment of 30 per cent or more.

Discount rate  A discount rate is used to adjust future payments to an equivalent lump sum amount valued in current prices.

Economic loss  The loss of past income or past or future earning capacity as the result of an injury.

Fault  Includes an act or omission.

Full compensation principle  The principle that plaintiffs should be awarded damages necessary to restore them to the position they would have been in had no wrong been committed against them.

Gratuitous attendant care services  Attendant care services that have or are to be provided by another person to a claimant, and for which the claimant has not paid or is not liable to pay.

Gross claims incurred (insurance)  The total cost to the insurer of a particular claim over the relevant period.

Gross written premium (insurance)  The total amount of premium received by the insurer when a policy is taken out.

Horizontal equity  In the context of personal injury damages, the notion that similar levels of compensation should be awarded for injuries of similar severity.

Intergenerational equity  In the context of personal injury damages, the equitable treatment of younger and older persons, relative to each other.
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Injury</td>
<td>Personal or bodily injury and includes a pre-natal injury, a psychiatric injury, disease, and aggravation, acceleration or recurrence of an injury or disease.</td>
</tr>
<tr>
<td>Impairment</td>
<td>An injury, illness or condition that interferes with a person’s daily living activities. In the Wrongs Act, impairment is defined as ‘permanent impairment’.</td>
</tr>
<tr>
<td>Insurance premium</td>
<td>The payment required periodically by an insurer to provide coverage under a given insurance plan for a defined period of time.</td>
</tr>
<tr>
<td>Ipp report</td>
<td>The 2002 ‘Review of the Law of Negligence’ which formed the basis of many of the tort law changes in each Australian jurisdiction.</td>
</tr>
<tr>
<td>Long-tailed insurance payouts</td>
<td>In insurance markets, means that many years may pass between the period for which cover was provided and the date at which claims arising from incidents are finally settled.</td>
</tr>
<tr>
<td>Medical Panels</td>
<td>Under the Wrongs Act, Medical Panels determine whether a claimant has satisfied the threshold test of having sustained a significant injury.</td>
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<tr>
<td>Medical indemnity insurance</td>
<td>A class of professional indemnity insurance which covers medical professionals for malpractice.</td>
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<tr>
<td>Musculoskeletal injury</td>
<td>An injury which affects any combination of a person’s muscles, tendons, ligaments or bones.</td>
</tr>
<tr>
<td>Narrative test for serious injury</td>
<td>A test used in the Accident Compensation and Transport Accident Acts to meet the definition of serious injury. A narrative test is an assessment of the effect of the injury on a person’s quality of life.</td>
</tr>
<tr>
<td>Negligence</td>
<td>The breach of a duty of care resulting in loss or damage to another person.</td>
</tr>
<tr>
<td>Net combined ratio (insurance)</td>
<td>Adds together the net loss ratio and the underwriting expense ratio.</td>
</tr>
<tr>
<td>Net loss ratio (insurance)</td>
<td>Indicates the adequacy of insurance premiums, defined as net claims incurred divided by net earned premium.</td>
</tr>
<tr>
<td>Non-economic loss</td>
<td>Loss of one or more of the following as a result of an injury: pain and suffering; loss of amenities of life; loss of enjoyment of life.</td>
</tr>
<tr>
<td>Null hypothesis</td>
<td>The assumption that there is no relationship between two measured variables.</td>
</tr>
<tr>
<td>Personal injury damages</td>
<td>Damages that relate to the injury or death of a person caused by the fault of another person.</td>
</tr>
<tr>
<td>Plaintiff</td>
<td>See ‘claimant’.</td>
</tr>
<tr>
<td>Pre-injury earnings</td>
<td>A person’s earnings prior to being injured, also referred to as ‘without injury’ earnings in reference to the earnings they would have had, had they not suffered an injury.</td>
</tr>
<tr>
<td>Post-injury earnings</td>
<td>The actual earnings or earning capacity of a person, after suffering an injury.</td>
</tr>
</tbody>
</table>
Professional indemnity insurance
Indemnifies professional people for their legal liability to their clients and others relying on their advice and/or services.

Public liability insurance
Protects individuals, businesses and organisations against the financial risk of legal liability for death or injury, loss or damage to property.

Pure mental harm
Mental harm that is not the consequence of an injury of any other kind; also defined as mental harm which is not accompanied by other personal or property damage caused by the same harmful event.

Radiculopathy
The pain emanating from the nerve root in the spine and passing to the extremities.

Respondent
Refers to the defendant in a legal proceeding.

Serious injury
Defined in the Accident Compensation and Transport Accident Acts by reference to a deeming test and a narrative test.

Significant injury
Defined in the Wrongs Act by reference to two tests: whether an injury exceeds a threshold defined in terms of permanent impairment; or whether it meets the test of a specific exception to the threshold.

Strict liability regime
Removes the requirement for the claimant to prove negligence, intention or another cause of action.

Threshold test for significant injury
In the case of injury (other than psychiatric injury), whole-of-person impairment of more than five per cent. In the case of psychiatric injury, whole-of-person impairment of more than 10 per cent.

Type 1 error (threshold test for significant injury)
A person is wrongly eligible to access damages for non-economic loss as a result of the negligent actions of another — that is, a person is wrongly judged to have suffered a significant injury based on objective criteria.

Type 2 error (threshold test for significant injury)
A person is wrongly deemed ineligible to access damages for non-economic loss as a result of the negligent actions of another — that is, a person is wrongly judged to not have suffered a significant injury based on objective criteria.

Tort law
The common law of civil wrongs, of which the tort of negligence is the dominant tort.

Underwriting expense ratio (insurance)
Underwriting expenses divided by net earned premium.

Vertical equity
In the context of personal injury damages, the notion that persons in different situations should be treated differently according to their level of need.

Vicissitudes
Deductions from awards for economic loss to take into account risks that earnings would not have continued until the assumed retirement age.

$1 per week multipliers
Values used to convert a weekly stream of damages for future loss or expenses to a lump sum.
Key messages

Victoria, along with other states and territories, introduced a number of limitations on personal injury damages in the early 2000s to help deal with the decreasing availability and increasing cost of public liability and professional indemnity insurance.

Over time a number of potential anomalies, inconsistencies and inequities arising from the limitations set out in the Wrongs Act 1958 (Vic) have been identified and the Commission was therefore directed to examine these issues and make recommendations to address them, without compromising the original intention of the limitations, and without having an unduly adverse impact on insurance premiums.

The Commission has identified a package of changes to the limitations on personal injury damages that is intended to address several anomalies, inconsistencies and inequities but without having an unduly adverse impact on the price and availability of insurance. Based on detailed analysis and extensive consultation with participants, the Commission estimated that this package is likely to improve compensation for some claimants, and increase public liability and professional indemnity insurance premiums by up to five per cent.

The Commission’s recommended package of changes to the limitations on personal injury damages would:

- widen access to damages for non-economic loss (pain and suffering) by reducing slightly the existing injury thresholds for spinal injuries and psychiatric injuries
- provide for additional compensation for pain and suffering to severely injured persons by slightly increasing the cap on damages for non-economic loss
- ensure that more injured people and their dependants are able to receive compensation for their economic loss (loss of earnings and earning capacity)
- allow injured people to claim for a limited entitlement for loss of capacity to care for others.

The Commission considered several other options but did not include these in the final package because of their potential impact on premiums. Such options included reducing the discount rate applied to lump-sum payments from five to four per cent and introducing a narrative test for access to damages for non-economic loss.

The Commission considers there is a need to revisit the limitations on personal injury damages prior to the full implementation of the National Disability Insurance Scheme (expected to be 2019). This will provide an opportunity to revisit a number of issues, particularly the level of the discount rate applied to lump-sum damages.

In order to offset the impact of its recommendations on the Medical Panels and the courts, the Commission also recommended some changes to the process for referring personal injury claims for assessment by Medical Panels Victoria.

The Commission was also asked to inquire into the strict liability regime for damage caused by aircraft to a person or property on land or water. The Commission recommended amending this regime to provide that damages for mental harm caused by aircraft accidents are only recoverable — under a strict liability regime — if the mental harm is accompanied by personal or property damage caused by an aircraft.
Summary

The Victorian Government, like other Australian governments, imposes limitations on personal injury damages, that is, the compensation that can be awarded to people injured or killed as a result of the negligence of others. These limitations were introduced into the Wrongs Act 1958 (Vic) over 10 years ago to address the decreasing availability and increasing cost of public liability and professional indemnity insurance.

The limitations on personal injury damages directly or indirectly affect a very large number of individuals and organisations across the government, business and community sectors. They directly affect people seeking compensation for injuries sustained where fault can be established. They affect private and public sector insurers who offer public liability and professional indemnity insurance and indirectly the holders of the nearly 730,000 risks (a proxy for policies) that were written in Victoria in 2012. They also affect members of the medical and legal profession who are involved in the claims process.

The main purposes of the inquiry are to identify any anomalies, inconsistencies and inequities arising from the limitations on personal injury damages and to evaluate options to address them, without compromising the original objectives of the limitations. In undertaking the inquiry, the Commission has identified several anomalies, inconsistencies and inequities. Addressing them will, however, involve striking a balance between the community’s expectation that those injured as a result of the fault of others receive fair compensation, and the community’s desire that public liability and professional indemnity insurance is both available and affordable. This report sets out the Commission’s findings and recommendations for adjusting the balance between these competing considerations.

Background and context

The Wrongs Act is the principal statute governing claims for damages for economic and non-economic loss arising from personal injury and death in Victoria, as a result of fault. The Wrongs Act applies to cases involving claims for compensation such as slips or falls in a public place, and harm as a result of medical treatment. Where negligence is established by a court — or accepted by both the claimant and respondent prior to a court judgment — damages can be awarded in the form of monetary compensation for the injuries sustained. The Commission understands around 1000 personal injury claims are made per year under the relevant provisions of the Wrongs Act.

The Wrongs Act is one of three key pieces of legislation governing injury compensation, the other two being the Accident Compensation Act 1985 (Vic) and the Transport Accident Act 1986 (Vic). These two Acts govern compensation for injuries sustained in the workplace or in transport accidents. These two Acts are different from the Wrongs Act in that they provide access to no-fault compensation, as well as to common law damages for serious injuries on the basis of fault. The accident compensation and transport accident schemes are also administered by statutory insurers, whereas private insurers provide the majority of coverage for common law claims governed by the Wrongs Act.

Finally, the Wrongs Act provides for access to damages in some cases of aviation incidents. The aviation provisions establish a strict liability regime, which removes the requirement for the claimant to prove negligence on the part of the owner or operator of the aircraft. Issues relating to the aviation provisions are discussed in the latter part of this summary.
The Wrongs Act places several limits on personal injury compensation

The Wrongs Act imposes several major limits on access to compensation for economic and non-economic loss arising from personal injury and death in Victoria, as a result of negligence. While the specific details are summarised in table 1, in broad terms the main limitations are:

- monetary limits (caps) on damages for personal injury or death, for both economic and non-economic loss
- impairment thresholds for eligibility to claim damages for non-economic loss
- a fixed discount rate to be applied to lump sum damages awarded for future economic loss and expenses
- limitations on damages for gratuitous attendant care and the loss of capacity to care for dependants.

Table 1  Limitations on personal injury damages under the Wrongs Act

<table>
<thead>
<tr>
<th>Caps on economic and non-economic loss for personal injury or death</th>
</tr>
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<tbody>
<tr>
<td>Economic loss</td>
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<tr>
<td>Non-economic loss</td>
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</table>

**Impairment thresholds for non-economic loss for personal injury**

| Non-economic loss | The person injured must establish that they had suffered a ‘significant injury’. There are two means of establishing significant injury:
(1) Meeting an injury threshold:
   - in the case of injury (other than psychiatric injury), whole person impairment of more than five per cent
   - in the case of psychiatric injury, impairment of more than 10 per cent.
(2) Exceptions for specific events:
   - loss of a foetus
   - loss of a breast
   - psychological or physical injury arising from the loss of a child due to an injury to the mother or foetus or child before, during or immediately after the birth. |

**Thresholds and caps on damages for care**

<table>
<thead>
<tr>
<th>Loss of capacity to care for dependants</th>
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<tbody>
<tr>
<td>Threshold: at least six hours per week or for six months prior to the injury.</td>
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<tr>
<td>Cap: maximum amount is limited to payment for no more than 40 hours per week at an hourly rate that does not exceed one-fortieth of total AWE. There is no cap on the duration for which damages can be awarded.</td>
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</table>

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<thead>
<tr>
<th>Compensation for care by others</th>
</tr>
</thead>
<tbody>
<tr>
<td>Threshold: at least six hours per week or for six months after the injury being suffered.</td>
</tr>
<tr>
<td>Cap: maximum amount is limited to payment for no more than 40 hours per week at an hourly rate that does not exceed one-fortieth of total AWE. There is no cap on the duration for which damages can be awarded.</td>
</tr>
</tbody>
</table>

**Discount rate**

| Discount rate | A prescribed discount rate of 5 per cent applies to the award of damages for future economic loss. |

These limitations were introduced in 2002 and 2003 in response to concerns about the decreasing availability and increasing costs of public liability and professional indemnity insurance. Drawing on parliamentary debates and reports from the time, including the national review of tort law chaired by the Hon. David Ipp, the Commission understands that the objectives of the 2002 and 2003 amendments were to ensure the availability of professional and public liability insurance for business and the wider community, while protecting the rights of people to have access to the courts to recover damages for personal injuries.

Since the introduction of the personal injury limitations, there has been a significant increase in the quantity of public liability and professional indemnity insurance risks underwritten and a significant decrease in the average premium cost (figure 1). While there may be many reasons for these desirable trends, they illustrate why the inquiry terms of reference are concerned with finding ways to address anomalies, inconsistencies or inequities in ways that avoid undermining the original intent of the tort law changes that occurred in the early 2000s.

**Figure 1** Trends in public and product liability premiums and risks underwritten in Victoria

![Graph showing trends in premiums and risks](image)

Notes: Risks written differ from policies: one policy may have numerous risks underwritten. Data given by underwriting year.

Source: APRA 2013a.

**The focus of this inquiry is on anomalies, inconsistencies and inequities arising from the limitations**

As noted in the terms of reference and confirmed through the consultation process, the limitations on personal injury damages have been criticised by stakeholders, including for:

- imposing unreasonable limitations that lead to legitimate claims being denied compensation, or being under-compensated
• dealing with plaintiffs inconsistently due to anomalies in the implementation of the changes, including in the measurement of ‘significant injury’
• producing damages awards that differ for similar injuries across the three injury compensation regimes that exist in Victoria — the Wrongs Act, the Accident Compensation Act and the Transport Accident Act.

The Commission was directed to identify and assess any anomalies, inconsistencies and inequities arising from the administration of limitations on personal injury damages and to make recommendations relating to personal injury damages, including in relation to:
• the limits placed on available damages for personal injury or death, for both economic and non-economic loss
• the impairment thresholds for personal injury imposed in relation to damages for non-economic loss
• discount rates applicable to lump sum damages awarded for future economic loss
• limitations on damages for gratuitous attendant care.

The Commission was also asked to make recommendations relating to the appropriateness of, and possible reforms to, the existing strict liability regime for aircraft owners and operators (Part VI of the Act).

In making recommendations, the Commission has had regard to:
• whether any such options would have an unduly adverse impact on the price and/or availability of public liability or professional indemnity insurance in Victoria
• the risk faced by potential defendants of unmeritorious litigation
• the possible impact on decision-making and administrative bodies, including courts and the Medical Panels
• consistency with other legislative regimes prescribing compensation for personal injury, including the Accident Compensation Act and the Transport Accident Act, and interstate regimes, having regard to the different objectives of these regimes.

To ensure that the Government could make informed decisions about adjusting the balance, the Commission sought to consult widely on the possible changes and the likely impacts on public liability and professional indemnity insurance premiums (box 1). This analysis drew on a range of existing data sources, new data provided by Medical Panels Victoria, including on the number and categories of Wrongs Act injury claims, and modelling of the likely impacts on public sector medical indemnity premiums by the Victorian Managed Insurance Authority (VMIA).

Essentially, the Commission understood its task as identifying clear anomalies, inconsistencies and inequities so as to improve outcomes for people injured as a result of negligence, but without ‘unduly adverse’ impacts on the availability and cost of insurance. As discussed below, many of the opportunities for improvement identified by the Commission and participants would increase compensation to some claimants, which, in turn, would likely increase insurance premiums to some extent. However, for the purpose of determining a threshold whereby increases in premiums could become ‘unduly adverse’, the Commission has made the technical assumption that ‘unduly adverse’ means limiting the aggregate increase in insurance premiums to about five per cent or less. Ultimately, decisions about the appropriate balance between victims of

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1 The Commission was specifically asked not to inquire into the operation of the provisions dealing with proportionate liability for economic loss and property damage.
negligence and insurance policy holders is a judgement for Government, underpinned by good information about the possible effects on various groups.

Box 1 Stakeholder consultation for the inquiry

In preparing its report, the Commission sought to draw on the views and knowledge of key stakeholders operating within the framework of the Wrongs Act personal injury compensation system. In July 2013, it released an issues paper inviting written submissions and detailing a range of matters on which it was seeking input. Eighteen submissions were received in response to the Issues Paper. Approximately 30 interested parties were consulted directly, including Commonwealth, State and local government departments and agencies, representatives of the insurance sector, legal practitioners, associations, academics and clubs.

In November 2013, the Commission released a draft report inviting feedback from stakeholders on draft recommendations and modelling assumptions. Seven submissions were received on the draft report. The Commission also held two roundtables with participants to test its assumptions, methodology and draft recommendations. Participants — including plaintiff and defendant lawyers and insurance organisations — generally considered the Commission’s approach to estimating the impacts of its recommendations on the price and availability of public liability and professional indemnity insurance to be reasonable. Participants also provided some additional information that improved the Commission’s estimates of impacts on insurance premiums.

Source: Submissions to the inquiry.

What are the main anomalies, inconsistencies and inequities?

Participants identified a number of anomalies, inconsistencies and inequities that, they argued, lead to people missing out on ‘fair’ compensation for economic and non-economic losses, or produced large differences in outcomes for similarly injured parties across the major injury compensation regimes. Participants also raised a number of technical issues with the application of the Wrongs Act provisions, such as problems with existing measures of spinal and psychiatric injuries and the treatment of asymptomatic diseases.

As noted, the Commission’s approach to the issues raised by participants primarily involved attempting to assess the impact on the level of damages awarded to claimants and the corresponding effects on private sector public liability and medical indemnity insurance premiums.

Other considerations such as economic efficiency generally received less weight. Although tort law has the potential to influence incentives to take care (that is, invest in activities that reduce the risk of personal injury), other factors such as market incentives and the regulation of safety have become more important drivers of these incentives. This may partly explain why the empirical evidence suggests a weak relationship between tort law and injury rates.

Consistency across the three personal injury schemes also rated relatively low as a criterion in the Commission’s assessment of options, if those options reduced potential damages for claimants under the Wrongs Act. This is mainly because of the very different nature of the three personal injury schemes. Under the Wrongs Act claimants must establish fault on the part of respondents but both the accident compensation and
transport accident schemes provide access to compensation from statutory bodies on a no-fault basis.

Eligibility to access damages for non-economic loss (chapter 3)

One of the major issues for the inquiry concerned the eligibility to access damages for non-economic loss, such as the pain and suffering caused by an incident. VMIA data shows about 20 per cent of its total medical indemnity insurance claim costs are for non-economic loss (general damages) (VMIA 2013, 6).

The Wrongs Act sets a threshold that limits access to damages for non-economic loss to circumstances where a person has suffered a ‘significant injury’. This means, in most cases, an injury resulting in an impairment that meets a threshold level, defined as being:

- in the case of injury (other than psychiatric injury), impairment of more than five per cent
- in the case of psychiatric injury, impairment of more than 10 per cent.

The Act also provides exceptions to these thresholds for specific injuries: the loss of a foetus; psychological or physical injury arising from the loss of a child due to an injury to the mother or foetus or child before, during or immediately after the birth; and the loss of a breast (table 1).

The assessment of non-economic loss is controversial because of the need to make judgements about the degree of injury, and to disregard impairments from unrelated or pre-existing injuries or causes. To bring a greater degree of objectivity to injury assessment, physical impairment is assessed in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition) (AMA-4 Guides). Psychiatric impairment is measured using the Guide to the Evaluation of Psychiatric Impairment for Clinicians (GEPIC).

To illustrate the impact of the existing limitations on non-economic loss, one participant gave the example of a child who sustained a serious hand injury that required major surgery and a lengthy period of recovery. The incident left the child with permanent scarring and some permanent impairment in the use of their hand. In this case, the Medical Panel assessing the child’s injuries determined that the extent of permanent impairment was less than five per cent and the child was therefore ineligible to claim damages for non-economic loss. Such injuries may be considered significant, but still below the permanent impairment threshold of significant injury provided under the Wrongs Act.

Another example illustrated how some participants view the existing thresholds as being difficult to satisfy, especially in the case of spinal injuries, where assessment is structured in five per cent increments. One participant, for example, described how a claimant suffered an injury in negligent circumstances leading to ‘significant symptoms’ including ‘continuous back and recurring episodes of sciatic nerve pain’ relating to a spinal impairment. While the injury impacted significantly on the claimant’s ‘daily capacities and independence’, it was assessed at five per cent whole person impairment and therefore the claimant was ineligible to claim compensation for non-economic loss. In order to meet the existing threshold of greater than five per cent, the impairment would need to be rated at 10 per cent, meaning the injuries sustained would need to be an increment greater than those in the example. There is no provision in the AMA-4 Guides for an assessment of a spinal injury to be made between five and 10 per cent.

Participants also highlighted an anomaly in the application of the GEPIC tool to the assessment of psychiatric injuries. GEPIC provides for five classes of psychological
impaired ranging from ‘normal to slight’ to ‘severe’. A person is categorised as meeting Class Two of the GEPIC if they have a psychological impairment score of 10 to 20 per cent (Epstein, Meldelson, and Strauss 2005). The Wrongs Act threshold for psychological impairment does not align completely with GEPIC, in that two individuals assessed as having a ‘Class Two’ or ‘mild’ impairment could be treated quite differently. That is, while a person with 11 per cent impairment would be eligible for compensation for non-economic loss, a person with 10 per cent impairment would be ineligible.

One of the original aims of the non-economic loss thresholds was to reduce the number of small claims that are expensive to deal with. Imposing any threshold inevitably creates perceived inequities for those falling just below the threshold. However, as the Medical Panels are not required, for example, to collect and report consolidated information about the nature of injuries or the outcome of their assessments, the number of claims falling just below the existing threshold is unknown.

There appears to be a sound case for re-examining the thresholds for non-economic loss to ensure that they represent the minimum level of regulation necessary to deal with the problems that they were originally designed to address. However, the Commission is inclined to adopt a cautious approach to changes to the thresholds. Such caution stems from difficulties faced by the Commission in assessing the potential impact of changes in the threshold on total claim numbers and costs, and ultimately on insurance premiums. Another factor is the uncertainty about the potential effects of changes on claimant and respondent behaviour.

Taking into account these factors, the Commission regards the greater than five per cent impairment threshold for physical injuries and the need to demonstrate permanent impairment as appropriate for meeting the underlying objectives of tort law changes. However, there are two specific measurement issues that need to be addressed, namely the treatment of spinal injuries assessed at five per cent and psychiatric injuries assessed at 10 per cent. The Commission proposes that these types of injuries be eligible for access to damages for non-economic loss. Limitations in the measurement tool — the AMA-4 Guides — mean that spinal injuries assessed at five per cent are not currently eligible for access to damages for non-economic loss. It seems anomalous that not all Class Two psychiatric impairments are eligible to access damages for economic loss, given the need for clinical judgements to be made between 10 or 11 per cent impairment.

To deal with cases falling just below the current threshold, some participants suggested that a ‘narrative test’ be introduced similar to that applied in the Accident Compensation and Transport Accident Acts. For example, a narrative test would apply to claimants who do not meet the injury thresholds, but can demonstrate to the court that they have sustained a long-term impairment or loss of a body function, permanent serious disfigurement or a severe long-term behavioural disturbance.

The Commission does not support the introduction of a narrative test into the Wrongs Act as an alternative gateway to access damages for non-economic loss. The experience of the accident compensation and transport accident schemes suggests that introducing a narrative test has the potential to lead to a significant increase in Wrongs Act claims, which would be associated with a significant increase in court and other administrative costs. This in turn may significantly impact public liability and medical indemnity insurance premiums.

**Caps on economic and non-economic loss (chapter 4)**

The caps on economic and non-economic loss were another major issue considered by the inquiry. The Wrongs Act restricts the maximum amount of damages that can be awarded by the courts for economic loss to three times average weekly earnings.
A rationale for this cap was to strengthen incentives for self-insurance. Damages for non-economic loss are subject to a cap of around $500,000.

**Cap on economic loss**

Participants generally considered the application of the cap for economic loss in its current form to be anomalous and inequitable for high-income earners with partial post-injury earning capacity. This was highlighted by a 2012 Victorian Supreme Court judgment — Tuohey v Freemasons Hospital [2012] VSCA 80 — that determined that the cap does not apply to the difference between pre- and post-injury earnings. Rather, a court must disregard the amount by which a person’s pre- or post-injury earnings exceed the cap of three times AWE. This means that where the plaintiff’s capacity to earn is diminished as a result of negligence, if that ‘person’s post-injury earning capacity is also in excess of three times the average weekly wage, then that person will not be entitled to any damages for loss of earning capacity’ (Larking and Spain 2012, 32). In contrast, under the Transport Accident and Accident Compensation Acts people are able to claim the difference between their pre- and post-injury earnings up to their prescribed limit.

To address this anomaly, the Commission has recommended that the cap on economic loss apply to the gap between pre- and post-injury earnings. A similar amendment was made in Queensland in 2006, although other Australian jurisdictions have not adopted this approach. The Commission’s approach is also supported by the restrictions on insurance benefits available to people suffering a partial loss of income.

Participants also highlighted an inequity for dependants of deceased people caused by the application of the cap on economic loss, whereby dependants of the deceased with high personal expenses may receive little or no compensation. This inequity arises because of the interaction of the cap with the requirement for courts to deduct the deceased person’s expenses from their income when calculating financial support for dependants. To address this issue, the Commission recommended amending the Wrongs Act to provide that the court should first deduct expenses from earnings, and then apply the cap to the remainder.

Taken together, these changes to the cap on economic loss are expected to have a minor or negligible impact on insurance premiums, given the small number of people likely to be affected each year.

**Cap on non-economic loss**

To improve equity for severely injured people, the Commission also considers that a small increase in the cap on non-economic loss is warranted, to align it with the Accident Compensation Act. This is expected to have a minor impact on insurance premiums.

**Discount rate (chapter 5)**

Damages for future economic loss or expenses under the Wrongs Act are usually awarded by the courts or settled by parties as a lump sum, rather than ongoing, payments. Discount rates are used to convert future payments into an equivalent present value lump sum amount. The discount rate should reflect the real risk-free rate of return on investment of the lump sum. This is proxied by the real return on the 10-year Commonwealth Government bond rate.

Some participants expressed concern that given recent falls in the risk-free rate of return, the discount rate used in the Wrongs Act of five per cent is unfairly high, particularly disadvantaging younger and severely disabled people. Other participants
called for greater consistency with the higher discount rate prescribed in the other two
compensation schemes.

Based on thirty years' experience, the historical data on real risk-free returns from
long-term government bonds suggests a case for reducing the discount rate in the
Wrongs Act from five per cent to four per cent. Using the average rate for a shorter
period, such as the past five years, would give excessive weight to the distorting effects
of the global financial crisis on financial markets.

While reducing the discount rate to four per cent would increase payouts, particularly
for younger and severely injured people, it would also place significant pressure on
insurance premiums. As best the Commission can judge, given the information
available to it, such a change might increase medical indemnity insurance premiums
by around eight per cent, and public liability insurance premiums by around four per
cent. Reducing the discount rate would also further increase the inconsistency
between the discount rate used in the Wrongs Act and the rate used in the Accident
Compensation and Transport Accident Acts, which use a discount rate of six per cent
for economic loss.

Consequently, amending the discount rate does not form part of the Commission’s
recommended package of options for reform, because it would appear to have an
unduly adverse impact on the cost of public liability and professional indemnity insurance.

Other personal injury damages issues (chapter 6)

Based on consultations, the Commission examined a number of additional potential
anomalies, inconsistencies and inequities in the limitations on personal injury damages:

- **Damages for loss of the capacity to care for others**: In 2005, the High Court abolished
  the right to common law damages for loss of the capacity to care for others. Unlike a
  number of other Australian jurisdictions, Victoria has not legislated to provide a limited
  entitlement to this head of damages. This means that a claimant whose injury
  prevents him or her from caring for a dependant cannot claim for the value of that
  care, which is generally calculated as a proportion of average weekly earnings.
  Evidence from other jurisdictions suggest that providing a limited entitlement to this
  head of damages would improve equity by benefiting a small number of potential
  claimants without an unduly adverse impact on the price or availability of public
  liability or professional indemnity insurance.

- **Differences in the treatment of remedial surgery of spinal injuries**: The assessment of
  spinal injuries under the Wrongs Act is inconsistent with how these injuries are
  assessed under the Accident Compensation and Transport Accident Acts. Under
  the Wrongs Act, a claimant’s spinal injury is assessed before surgery, whereas under
  the other Acts, spinal injury is assessed after. This means that post-surgical
  improvement or deterioration can be taken into account for the purposes of spinal
  injury assessment under the other Acts. The Commission recommends an
  amendment to the Wrongs Act to bring it into line with these other Acts.

- **An inconsistency arising from the interaction of personal injury Acts**: The Commission
  found that transport accident claims arising from the use of a motor vehicle that are
  indemnified by the Transport Accident Commission are not subject to the thresholds,
  caps or discount rates imposed by the Wrongs Act. The Commission recommends
  amending the Wrongs Act to remove this anomaly.

- **Damages for costs of gratuitous attendant care by others**: In order for a claimant to
  obtain damages for gratuitous attendant care, one of the two following conditions
  must be satisfied. First, that care is required for six hours or more per week, or second,
  that care is required for six months or more (even if it is provided for less than six hours
per week). The test recommended by the Ipp report and adopted by most other jurisdictions is stricter: care must be required for at least six hours per week and for at least six consecutive months. There is no evidence to suggest that the current approach — alternative, rather than cumulative, thresholds — is having a significant adverse impact on insurance premiums. As such, the Commission considered that no change should be made to this provision at this time.

A modest reform package is warranted (chapter 7)

The Commission has recommended a package of reforms that address some clear anomalies, inconsistencies and inequities, without an ‘unduly adverse’ impact on the cost of insurance (table 2). These involve:

- providing that spinal injuries assessed at greater than or equal to five per cent impairment are eligible to access damages for non-economic loss
- adjusting the psychiatric injury impairment threshold for access to damages for non-economic loss to greater than or equal to 10 per cent
- providing that the cap on damages for economic loss applies to the gap between pre- and post-injury earnings
- providing that in claims of loss of expectation of financial support, deductions for the deceased person’s expenses are to be made before applying the cap on economic loss
- increasing the maximum amount of damages that may be awarded to a claimant for non-economic loss to align with the current Accident Compensation Act cap of around $555 000
- providing a limited entitlement for loss of capacity to care for others, in line with the New South Wales approach
- providing that the impairment assessment for spinal injuries take into account the claimant’s post-surgery, rather than pre-surgery, condition
- providing that common law claims arising from the use of a motor vehicle are subject to the limitations of the Wrongs Act in regards to caps, thresholds and the prescribed discount rate.

The package is unlikely to have an ‘unduly adverse’ impact on the price or availability of insurance

As noted, the terms of reference require the Commission to, amongst other things, consider whether options for addressing anomalies, inconsistencies and inequities would have an unduly adverse impact on the price and/or availability of public liability or professional indemnity insurance in Victoria. This has guided the Commission’s view that its task is to adjust the balance between ensuring those injured as a result of the negligence of others receive fair compensation, whilst ensuring that adjustments to the personal injury provisions do not have an ‘unduly adverse’ impact on public liability and professional indemnity insurance premiums.

The Commission observes that ‘unduly adverse’ is a quite imprecise term. As noted, the Commission has made the technical assumption that this means an aggregate increase of around five per cent. An increase of this magnitude would represent a small real increase in premiums. The Commission has estimated that the recommended package will increase premiums between around two to five per cent (table 2). Similar impacts could be expected for Victorian public sector insurance premiums, based on modelling by the VMIA.
### Table 2  
**Recommended package: personal injury damages**

<table>
<thead>
<tr>
<th>Area</th>
<th>Additional claims costs ($m)</th>
<th>Likely average impact on insurance premiums (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Lower bound</td>
<td>Upper bound</td>
</tr>
<tr>
<td>Eligibility to access damages for non-economic loss</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Provide that spinal injuries assessed at greater than or equal to five per cent impairment are eligible to access damages for non-economic loss</td>
<td>0.6</td>
<td>4.0</td>
</tr>
<tr>
<td>• Adjust the psychiatric injury impairment threshold for eligibility to access damages for non-economic loss to greater than or equal to 10 per cent</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cap on economic loss</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Provide that the cap on damages for economic loss applies to the gap between pre- and post-injury earnings</td>
<td>1.0</td>
<td>2.0</td>
</tr>
<tr>
<td>• Provide that in claims of loss of expectation of financial support, deductions for the deceased person’s expenses are to be made before applying the cap on economic loss</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cap on non-economic loss</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Increase the maximum amount of damages that may be awarded to a claimant for non-economic loss to align with the cap under the Accident Compensation Act</td>
<td>0.6</td>
<td>9.3</td>
</tr>
<tr>
<td>Limitations on damages for loss of capacity to care for others</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Provide a limited entitlement for loss of capacity to care for others, in line with the New South Wales approach</td>
<td>4.1</td>
<td>4.1</td>
</tr>
<tr>
<td>Other issues</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Provide that the impairment assessment for spinal injuries take into account the claimant’s post-surgery, rather than pre-surgery, condition</td>
<td>n.e.</td>
<td>n.e.</td>
</tr>
<tr>
<td>• Provide that common law claims arising from the use of a motor vehicle are subject to the limitations of the Wrongs Act in regards to caps, thresholds and discount rates</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total recommended package</td>
<td>6.3</td>
<td>19.4</td>
</tr>
</tbody>
</table>

Notes:  
Numbers may not equate due to rounding.  
\(^a\) The average impact on insurance premiums is based on spreading estimated additional claims costs evenly over 2012 Victorian public liability and medical indemnity premium revenue.  
\(^b\) n.e. not estimated. No data is available to estimate the impact of this change, although it is assumed to reduce claims costs and thus place downward pressure on insurance premiums.

Source: See relevant chapters.
The Commission’s estimates represent likely average impacts across the private sector markets for public liability and professional indemnity insurance. Some segments may be more affected than others. For example, premiums for providers of obstetric services may be more affected by changes to limitations on damages for care, rather than changes to thresholds for non-economic loss — given their greater exposure to care claims.

The Commission’s calculations also assume full pass through of additional claims costs by insurers to insurance policy holders. The Commission notes the actual outcome will depend on several factors, including existing insurance margins and competition amongst insurers. Recent trends in insurer financial performance suggest insurers may have the capacity to absorb some additional costs (chapter 2).

Likely future developments in disability policy suggest a need to revisit the personal injury provisions of the Wrongs Act at some future point. For example, the recent establishment of the National Disability Insurance Scheme (NDIS) and the work on the development of the National Injury Insurance Scheme (NIIS) may impact on the award of damages for negligence and thus the future price and/or availability of public liability and professional indemnity insurance. The Commission notes that the magnitude of impacts of these schemes is subject to significant uncertainty at this time. For example, much of the practical elements of the NDIS and NIIS remain to be defined or developed.

It would therefore be desirable to reconsider the limitations on damages for personal injury and death in the Wrongs Act closer to the full implementation of the NDIS (expected to be July 2019). Such a reconsideration could also be an opportunity to consider the impact of any changes to the Act made in response to this inquiry, as well as the scope for additional changes such as to the discount rate and to gratuitous attendant care. As noted, the Commission considers it important, for example, to revisit the issue of the discount rate applied across all three of the Wrongs Act, the Accident Compensation Act and the Transport Accident Act, given recent falls in the risk-free real interest rate and the impacts of the discount rate on equity and the value of consistency in this area across the three Acts.

Medical Panels process (chapter 8)

The terms of reference also require the Commission to have regard to the impact of its recommendations on the workload of the Medical Panels and the courts. The Commission’s recommendations are likely to increase the workload of the Medical Panels and therefore the Commission has sought to alleviate this impact by identifying opportunities to improve the efficiency and equity of Medical Panels processes.

To reduce transaction costs and improve equity, the Commission has recommended requiring the claimant to serve the prescribed information on the respondent in a prescribed form; and requiring respondents to use a prescribed form when referring a question to a medical panel. The Commission has also recommended granting courts the authority to stay proceedings until the claimant has served the respondent with a Certificate of Assessment — accompanied by the prescribed information in a prescribed form.

Strict liability for aviation (chapter 9)

The terms of reference also require the Commission to make recommendations relating to the appropriateness of, and possible reforms to, the existing strict liability regime for damage caused by aircraft to a person or property on land or water. Reflecting both historical reasons and efficient risk allocation principles, a regime of strict liability for damage by aircraft applies to all aircraft operations in Australia, under either
Commonwealth or Victorian legislation. This means that claims for injury or loss arising from the use of an aircraft need not prove negligence on the part of the owner or operator of the aircraft.

While participants raised some general concerns about the strict liability regime, its specific application to pure mental harm caused considerable concern, principally due to the unavailability of aviation insurance for pure mental harm. This situation creates a commercially unacceptable degree of exposure for a very small segment of the aviation sector, potentially leading to insolvency and owners and operators being unable to meet claims.

The Commission concluded that the rationale for strict liability was sound, but has proposed to remove strict liability for pure mental harm in keeping with the approach adopted by the Commonwealth. That is, claims for mental harm under the strict liability regime would only be allowed if the mental harm was accompanied by personal or property damage that was also caused by the aircraft. While this potentially disadvantages some future claimants, they would still be able to seek compensation for pure mental harm under common law where negligence can be established.

**Recommendations**

The Commission has made three recommendations.

**Recommendation 7.1**

To address anomalies, inequities and inconsistencies in the limitations on damages for personal injury and death, the Victorian Government amend the Wrongs Act 1958 (Vic) to:

- provide that spinal injuries assessed at greater than or equal to five per cent impairment are eligible to access damages for non-economic loss
- adjust the psychiatric injury impairment threshold for eligibility to access damages for non-economic loss to greater than or equal to 10 per cent
- provide that the cap on damages for economic loss applies to the gap between pre- and post-injury earnings
- provide that in claims of loss of expectation of financial support, deductions for the deceased person’s expenses are to be made before applying the cap on economic loss
- increase the maximum amount of damages that may be awarded to a claimant for non-economic loss to align with the cap under the Accident Compensation Act
- provide a limited entitlement for damages for the loss of capacity to care for others, in line with the New South Wales approach
- provide that the impairment assessment for spinal injuries take into account the claimant’s post-surgery, rather than pre-surgery, condition
- provide that common law claims arising from the use of a motor vehicle are subject to the limitations of the Wrongs Act in regards to caps, thresholds and the prescribed discount rate.
Recommendation 8.1
To reduce transaction costs and improve equity, the Victorian Government amend Part VBA of the Wrongs Act 1958 (Vic) and the Wrongs (Part VBA Claims) Regulations 2005 (Vic) to:

- require the claimant to serve the prescribed information in a prescribed form
- grant courts the discretionary authority to:
  - order the claimant to serve the respondent with the Certificate of Assessment and the prescribed information in the prescribed form
  - stay proceedings until service has occurred
- require the respondent to refer the medical question to the Medical Panel using a prescribed form which:
  - includes a field for selecting the appropriate, generically worded medical question
  - must be accompanied by a copy of the prescribed information provided by the claimant.

Recommendation 9.1
That the Victorian Government amend section 31 of the Wrongs Act 1958 (Vic) to provide that damages for mental harm caused by an aircraft accident are only recoverable – under a strict liability regime – if the mental harm is accompanied by personal or property damage caused by the aircraft.
1 About the inquiry

Over 10 years have passed since major changes were made to the Wrongs Act 1958 (Vic) aimed at addressing the problems of rising professional indemnity and public liability insurance premiums, and the reduced availability of insurance cover for many areas of social and economic activity. These changes were made under the auspices of a national tort law reform program and were strongly influenced by the Review of the Law of Negligence, chaired by the Hon David Ipp (the Ipp report) (Negligence Review Panel 2002).

The changes restricted some common law rights to compensation for the negligent acts of others, with the aim of reducing the price and increasing the availability of public liability and professional indemnity insurance (Victorian Parliamentary Debates – Legislative Assembly 2003a). These insurance markets underpin many aspects of community life, including medical treatments, community and sporting events and recreational and commercial activities. An important part of the changes was the introduction of limitations — in the form of thresholds and caps — on liability for damages arising from negligence claims. The limitations were designed to limit some common law rights to compensation for the negligent acts of others, thereby reducing insurers’ liability for damages, which would in turn lead to a reduction in insurance premiums and an increase in the availability of insurance.

In the period since the implementation of tort law reforms, there has been a reduction in premiums for public liability and professional indemnity insurance, as well as a reduction in claims and an increase in the number of policies written (chapter 2). However, aspects of the changes have been criticised by some stakeholders, including for:

• imposing unreasonable limitations that lead to legitimate claims being denied compensation, or being under-compensated
• dealing with plaintiffs inconsistently due to anomalies in the implementation of the reforms.

The Commission’s inquiry examines the nature and extent of these issues and evaluates options for change using the principles of efficiency, equity and consistency with the original intention of tort law reform.

1.1 Scope of the inquiry

The terms of reference state that the purpose of the inquiry is to identify and make recommendations to address any anomalies, inequities or inconsistencies in the Wrongs Act relating to personal injury damages, without undermining the intent of tort law changes.

1.1.1 Inclusions

The Commission has been directed to make recommendations relating to personal injury damages, including:

• the limits placed on available damages for personal injury or death, for both economic and non-economic loss, by the Act
• the impairment thresholds for personal injury imposed by the Act in relation to damages for non-economic loss
• discount rates applicable to lump sum damages awarded for future economic loss
• limitations on damages for gratuitous attendant care.

The Commission has also been requested to make recommendations relating to the appropriateness of, and possible reforms to, the existing strict liability regime for aircraft owners (Part VI of the Act).

In making recommendations, the Commission has had regard to:

• whether any such options would have an unduly adverse impact on the price and/or availability of public liability or professional indemnity insurance in Victoria
• the risk faced by potential defendants of unmeritorious litigation
• the possible impact on decision-making and administrative bodies, including courts and the Medical Panels
• consistency with other legislative regimes prescribing compensation for personal injury, including the Accident Compensation Act 1985 (Vic) and Transport Accident Act 1986 (Vic), and interstate regimes, having regard to the different objectives of these regimes.

1.1.2 Exclusions

The terms of reference specifically exclude the Commission from revisiting the underlying objectives of tort law reforms, which were to limit some common law rights to compensation with the aim of reducing the price, and increasing the availability, of public liability and professional indemnity insurance. As such, in undertaking its task, the Commission has taken as given the need for limitations (in the form of thresholds, caps and a prescribed discount rate), while examining the nature and extent of any anomalies, inequities or inconsistencies in their application.

The Commission has also not sought to assess the overall impact of the tort law reforms in terms of their:

• effectiveness against their original objectives
• impact on economic efficiency
• impact on equity or fairness.

The Commission has been excluded from inquiring into the operation of the provisions of the Act dealing with proportionate liability for economic loss and property damage.

Participants raised a number of other issues that are outside the scope of the inquiry, namely:

• the limitation period for contribution claims contained in s 24(4)(a) of the Wrongs Act
• claims for damages relating to property damage allegedly caused by street trees (MAV, sub. 12; LIV, sub. 13).

Table 1.1 summarises the Commission’s understanding of the broad scope of inclusions and exclusions for the inquiry.
Table 1.1  Broad scope of inclusions and exclusions

<table>
<thead>
<tr>
<th>In scope</th>
<th>Out of scope</th>
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<tbody>
<tr>
<td>• Anomalies, inequities and inconsistencies</td>
<td>• The underlying objectives of the tort law</td>
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<tr>
<td>in regard to Part III, VA, VB and VBA of</td>
<td>reforms of the early 2000s, including the need for limitations on some common law rights.</td>
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<tr>
<td>the Wrongs Act including:</td>
<td>• The overall impact of the tort law reforms in terms of efficiency, equity and effectiveness.</td>
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<td>– limitations on damages for economic loss</td>
<td>• Parts of the Wrongs Act that relate to:</td>
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<td>(s 28A; s 28F)</td>
<td>– criminal defamation (Part I)</td>
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<tr>
<td>– limitations on damages for non-economic</td>
<td>– publishers (Part IA)</td>
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<td>loss (s 28G; s 28LE; s 28LF)</td>
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<td>– limitations on damages for gratuitous</td>
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<td>attendant care (s 19; s 19A; s 19B; s 28IA;</td>
<td>– negligence – intoxication and illegal activity (Part IIB)</td>
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<td>s 28IB)</td>
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<td>– limitations on loss of capacity to care</td>
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<td>for others (s 28ID; s 28IE; s 28IF)</td>
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<td>– discount rates used for calculating lump</td>
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<td>sum damages for future economic loss (s 28I)</td>
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<td>• The appropriateness of the existing strict</td>
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<td>liability regime for damage by aircraft (s 31)</td>
<td>– Good Samaritan protection (Part VIA)</td>
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<td>– mental harm (Part XI)</td>
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<td>– liability of public authorities (Part XII).</td>
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Sources: Wrongs Act; terms of reference.

1.2  Structure of the report

The remainder of the Commission’s report analyses:

• relevant background information regarding personal injury damages (chapter 2)
• the provisions governing access to non-economic loss (chapter 3)
• the caps on economic and non-economic loss (chapter 4)
• the discount rate for economic loss and other lump sum expenses (chapter 5)
• other personal injury issues, including limitations on damages for care (chapter 6)
• the likely impacts on the price and availability of public liability and professional indemnity insurance (chapter 7)
• issues associated with the Medical Panels process (chapter 8)
• the strict liability regime for damage by aircraft (chapter 9).

Chapters 3 to 6 include the Commission’s preferred options for addressing particular anomalies, inequities or inconsistencies regarding limitations on personal injury damages. Chapter 7 outlines the Commission’s recommendations, including an assessment of the
likely impact on the price and availability of public liability and professional indemnity insurance. Chapter 8 analyses issues associated with the efficiency of the Medical Panels process and recommends actions to reduce the cost of referrals. Chapter 9 examines the Wrongs Act strict liability regime for damage by aircraft.

Appendix A outlines the consultation activities undertaken by the Commission. Appendix B details the assumptions and calculations used by the Commission to estimate the indicative impacts of changes to limitations on personal injury damages on public liability and professional indemnity insurance premiums.

1.3 The Commission’s approach

In accordance with its Order-in-Council, the Commission’s approach is based on an overarching concern for the well-being of the community as a whole, rather than the interests of particular industries or groups. This means assessing options for reform from the perspective of likely net benefits to the Victorian community in terms of efficiency and equity, rather than benefits to any one particular group.

The Commission’s approach also recognises that:

- there may be several dimensions to efficiency and equity, some of which conflict
- there may be a need to trade-off equity and efficiency objectives.

The Commission’s approach to assessment is summarised in figure 1.1. Each chapter adapts this framework as required. In general, the Commission’s approach involves:

1. identifying the nature and extent of key issues raised by participants, that is, the anomaly, inequity and/or inconsistency
2. identifying options to address the issues
3. assessing options for reform of the base case (that is, the status quo) against the broad principles of efficiency, equity and consistency with the intent of the tort law reforms.
1.3.1 Assessing efficiency, equity and consistency

**Efficiency**

The Commission has used several dimensions of efficiency to identify and evaluate options for reform. The Commission considers that an efficient personal injury compensation system should achieve the following outcomes:

- Minimise transaction costs — such as legal and administrative costs — to plaintiffs, defendants, and administrative and decision-making bodies such as the courts and the Medical Panels. Wherever compensation is to be provided, the transfer should be done using the least resources possible (Dixon and Stern 2004, 6).

- Provide incentives and checks to ensure damages are paid to those actually injured and not to others claiming for other reasons — including those making frivolous or unmeritorious claims (chapter 3). For example, there should be the opportunity for an objective assessment of a person’s injuries prior to compensation being paid (chapter 3).

- Provide appropriate incentives to individuals, businesses and governments to take care to avoid injuries, taking into account the costs and benefits of precautionary actions. For example, under tort law, the prospect of being subject to a successful negligence claim (and in particular, to be liable for compensation for economic and non-economic loss) provides a person with a disincentive to behaving negligently and a positive financial incentive to spend on safety measures (PC 2002, 21). The empirical evidence on whether tort law promotes efficient investment in safety is mixed (chapter 2). Also, given that both markets and regulation provide incentives to invest in safety, small changes to limitations in the Wrongs Act will probably have very little impact on incentives to invest in safety (chapter 3).
Cost-benefit perspective

In considering efficiency impacts from the perspective of cost-benefit analysis, the Commission notes that a key function of a personal injury compensation system is to redistribute or transfer resources (in the form of compensation or the provision of goods and services) to injured persons from other groups in the community. These resources are normally transferred from insurance companies, government agencies or organisations large enough to self-insure (Luntz 2006, 12). This means that any change in the limitations on personal injury damages will result in a transfer of resources, with no change in benefit to the community overall. A transfer results only in distributional effects between different groups within society. Unless a judgement is made that one group derives more value from the resources than another group, redistribution by itself will not enhance community wellbeing (Victorian Government 2011, C10).

Equity

The concept of equity in relation to personal injury compensation also has multiple dimensions. In the first instance, the:

... most basic question is whether the absolute-dollar value of the compensation is appropriate. Do the total damages received by plaintiffs at each injury level meet (and not exceed) societal expectations about what constitutes reasonable compensation for that sort of injury? (Studdert, Yang, and Mello 2004, 55)

The full compensation principle which underpinned the award of personal injury damages has been challenged and modified by tort law changes of the early 2000s (chapter 2). This principle held that ‘plaintiffs should be awarded such sums of money as will restore them to the positions that they would have been in if there had been no wrong committed’ (Luntz 2006, 7).

Borrowing from taxation policy, the Commission’s analytical framework is conceptualised in terms of vertical and horizontal equity, as well as intergenerational equity (Studdert, Yang, and Mello 2004, 55).

Horizontal equity

Horizontal equity refers to treating people in similar situations in similar ways. In the context of personal injury, it requires ‘similar levels of compensation for injuries of similar severity’ (Studdert, Yang, and Mello 2004, 55).

The concept of horizontal equity is also relevant when assessing differences between the Wrongs Act and the other Victorian personal injury Acts — the Accident Compensation Act and the Transport Accident Act — in respect to the award of damages. These differences can mean that ‘a claimant may receive a different award for the same injury, regardless of whether the injury was sustained at work, in a motor accident or in the course of some other activity’ (Ipp 2007, 5). The Commission has carefully considered how the concept of horizontal equity should be applied, having regard to the following features of Victoria’s personal injury Acts:

- The Wrongs, Accident Compensation and Transport Accident Acts differ in their approach to the assessment of claims for compensation for personal injury. The Wrongs Act requires fault (or liability) to be established before damages can be awarded by a court. In contrast, both the Accident Compensation and the Transport Accident Acts provide for statutory compensation on a no-fault basis, that is, ‘without any inquiry into the question of who was at fault for the injury’
Under no-fault schemes, payments are awarded as benefits, including for medical and related expenses, lump sum impairment benefit, lost income payments, death/dependency benefits and minors’ benefits. No such statutory benefits are available under the Wrongs Act (LIV, sub. 13, 4).

- Both the Accident Compensation and Transport Accident Acts allow for access to common law damages for serious injuries on the basis of fault.

- Under the Accident Compensation and the Transport Accident Acts, statutory insurance arrangements and different objectives result in a unique set of restrictions on the treatment of injured people and setting of insurance premiums. While still significant, there is far less government intervention in civil liability processes governed by the Wrongs Act (chapter 2).

- The profile of injuries varies across the three personal injury Acts. For example, musculoskeletal injuries make up a larger proportion of Accident Compensation Act claims relative to Transport Accident Act claims, which have a greater proportion of traumatic injuries requiring hospitalisation and ongoing rehabilitation (VWA and TAC correspondence).

The Commission understands that comparing regimes simply on the basis of conditions prescribing eligibility for compensation may not provide a complete picture of the impact of changes to the Wrongs Act on horizontal equity (LIV, sub. 13, 4). The Commission has sought to take into account these factors in its assessment of the horizontal equity impacts of options.

The Commission also considers that relevant horizontal equity aspects for the inquiry are those provisions of the Accident Compensation and Transport Accident Acts governing eligibility and award for common law damages, rather than those governing access to no-fault statutory benefits (chapter 2). While these provisions are not strictly comparable, they provide a better basis for assessing horizontal equity as they all require fault to be proven and generally feature a long time lag between the injury suffered and the payment of compensation.

**Vertical equity**

Vertical equity reflects the notion that people in different situations should be treated differently according to their level of need (Studdert, Yang, and Mello 2004, 55). Applying this notion suggests, for example, that people with more severe injuries should receive higher levels of compensation than less severe ones. It also suggests that people with lesser financial needs (for example, higher-income earners) be treated differently from those with greater needs (for example, low-income earners).

**Intergenerational equity**

Intergenerational equity refers to the equitable or fair distribution of economic well-being or living standards between generations (Victorian Government 2004, 39). In the context of this inquiry, it refers to the equitable treatment of younger and older people, relative to each other (chapters 4 and 5).

**Consistency with the underlying objectives of tort law reform**

The Commission has also assessed options for changes to the limitations on personal injury damages based on an assessment of whether they are consistent with the underlying objectives of tort law reform.

According to the terms of reference, the limitations on personal injury damages were designed to limit some common law rights to compensation for the negligent acts of
others, thereby reducing insurers’ liability for damages, which would in turn lead to a reduction in insurance premiums and an increase in the availability of insurance. A particular focus was on reducing damages paid for minor injury claims (Victorian Parliamentary Debates – Legislative Assembly 2003a, 2078). In forming its recommendations, the Commission has estimated, where possible, the likely impacts on public liability and medical indemnity insurance premiums. As noted above, increases in premiums essentially represent a transfer from insured parties (and the wider community) to injured people and their dependants (chapter 2).

Consistency across different Acts and jurisdictions

As noted, Victoria’s personal injury Acts contain different features. There are also differences between Victoria’s limitations on personal injury damages and those in other jurisdictions. Achieving greater consistency across different Acts and with other jurisdictions deliver several potential benefits. One benefit would be to legal practitioners, insurers and medical practitioners operating across the three Acts, who would face lower administrative and compliance costs from dealing within common frameworks.

The Commission considers these benefits are likely to be minor, given:

- that the Accident Compensation and Transport Accident schemes operate as statutory no-fault schemes (with some exceptions), such that participants do not generally operate under all three Acts
- vast differences between jurisdictions in the objectives and design of personal injury schemes (ICA, sub. 14, 5).

1.3.2 Data sources

Wherever possible, the Commission sought to analyse options using data. This analysis was limited by several major data gaps. As noted by the Australian Risk Policy Institute, the Commission’s analysis was limited by the lack of available Victorian data to assess the impact of options on insurance market (ARPI, sub. DR22, 2). Reasons for this limited data include:

- most awards for personal injury compensation are made under confidential settlements (chapter 2).
- the Medical Panels do not maintain consolidated data on the types of injuries suffered by plaintiffs, nor on the outcomes of their determinations (chapters 3 and 8).
- predicting how changes in thresholds will affect the number and size of claims is inherently imprecise (chapter 3).
- there is little recent public information on the financial performance of the public liability and professional indemnity insurance markets, and many factors affect the determination of insurance premiums (chapter 2).

Given these limitations, the Commission has drawn from a number of different data sources to draw conclusions regarding the likely impact of options, including:

- participant views expressed in submissions and gathered through consultations

1 One exception is the Medical Panels process, which has some commonalities under the Accident Compensation and Wrongs Act regimes (chapter 8).
• data on insurance claims, payouts and insurer financial performance sourced from the Australian Prudential Regulation Authority
• data and experiences from the other Victorian personal injury Acts, including data on the type and cost of claims made at or near the Wrongs Act thresholds
• modelling of the likely impact on Victorian public sector medical indemnity premiums undertaken by the Victorian Managed Insurance Authority.

1.4 Stakeholder engagement

In preparing its inquiry report, the Commission sought to tap the views and knowledge of key stakeholders operating within the framework of the Wrongs Act personal injury compensation system.

• At the outset of the inquiry in May 2013, it invited stakeholder participation through the inquiry website.
• In July 2013, it released an issues paper inviting written submissions and detailing a range of matters on which it was seeking input. Eighteen submissions were received in response to the Issues Paper.
• Approximately 30 interested parties were consulted directly, including Commonwealth, state and local government departments and agencies, representatives of the insurance sector, legal practitioners, associations, academics and clubs.
• In November 2013, it released a draft report inviting feedback from stakeholders on draft recommendations and modelling assumptions. Seven submissions were received on the draft report.
• The Commission held two roundtables with participants to test the recommendations in its draft report.

Further details on these processes are provided in appendix A. The Commission thanks those who have participated in the inquiry.
2 Background: personal injury damages

This chapter outlines background information that has informed the development of the Commission’s approach to assessing options for improving the personal injury provisions of the Wrongs Act 1958 (Vic), including:

- historical principles underpinning the award of compensation for personal injury caused by negligence
- personal injury damages provisions of the Wrongs Act arising from tort law changes of the early 2000s
- roles of decision-making and administrative bodies relevant to the inquiry, including the courts and Medical Panels
- relevant personal injury damages provisions of the Accident Compensation Act 1985 (Vic)\(^1\) and the Transport Accident Act 1986 (Vic)\(^2\)
- economic perspectives on tort law and the critical role of professional indemnity and public liability insurance markets in personal injury compensation systems
- factors affecting the price and availability of public liability and professional indemnity insurance
- recent developments in professional indemnity and public liability insurance markets in Australia and Victoria.

2.1 The personal injury damages provisions of the Wrongs Act

2.1.1 About the Wrongs Act

The Wrongs Act is the principal statute governing claims for damages for economic and non-economic loss arising from personal injury and death in Victoria, in cases other than workplace injuries or transport accidents.\(^3\) The Accident Compensation Act provides a scheme for managing compensation claims for Victorian workplace injuries, while the Transport Accident Act provides a scheme covering injuries or death as a result of transport accidents which occur in Victoria or through the use of a motor vehicle.

There is some data available to estimate the number of Wrongs Act claims made and settled per annum. Precise estimates of the number and value of claims are difficult given:

- many claims are made up to three (or more) years after the accident/injury occurs
- claims may take years to settle.

The Commission estimated the number of Wrongs Act claims per annum by considering a number of different pieces of information:

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1 From 1 July 2014, the Accident Compensation Act will be renamed as the Workplace Injury Rehabilitation and Compensation Act 2013 (Vic). This change is not material to the matters discussed in this report.

2 Amendments to the Transport Accident Act — which received Royal Assent on 19 November 2013 — are not material to the matters discussed in this report.

3 Other cases of personal injury excluded from the Wrongs Act include intentional acts to cause death or injury or sexual assault. A full list of exclusions is at s 28C of the Act.
• A report by Cumpston Sarjeant prepared for the LIV suggested there are around 600 to 1000 claims made per annum for personal injury or death that would fall under the Wrongs Act (sub. 13, att. B). In responding to the draft report, the LIV suggested the Commission use the mid-point of this range to estimate insurance impacts (sub. DR24, 4).

• In discussions with stakeholders, it was suggested that there is generally a 50/50 split between litigated and un-litigated claims. County Court data provided by the LIV suggested there were about 500 writs issued per annum for Wrongs Act type claims (sub. 13, att. A). This suggests a total of about 1000 claims per annum.

• In a report prepared for the Insurance Council of Australia, Finity Consulting suggested there were approximately 1700 to 2000 claims per annum. This is based on APRA data that about 20 to 25 per cent of total public liability claims (equal to 6800) are for personal injury (sub. DR21, att. A, 3).

• Unpublished data from the APRA National Claims and Policies Database (NCPD) show the number of bodily injury claims finalised in Victoria has averaged around 850 claims per annum from 2007 to 2012 (APRA correspondence). The NCPD does not include all Wrongs Act claims as it excludes some insurance types such as marine liability insurance.

On balance, the Commission estimates 1000 claims per annum to be the most likely reasonable estimate of the number of Wrongs Act claims that impact on private sector public liability and professional indemnity insurance premiums. In addition, the Victorian Managed Insurance Authority (VMIA) advised that it settles in excess of 150 medical indemnity claims per annum (VMIA 2013, 6)

Section 28B of the Wrongs Act defines personal injury damages as ‘damages that relate to the death of or injury to a person caused by the fault of another person’. Other important definitions in the Act relevant to the inquiry are outlined in box 2.1.

Box 2.1 Wrongs Act: important definitions

The Wrongs Act defines terms that are relevant to the Commission’s inquiry, namely:

• damages: includes any form of monetary compensation

• injury: means personal or bodily injury and includes a pre-natal injury, a psychological or psychiatric injury, disease, and aggravation, acceleration or recurrence of an injury or disease

• significant injury: is defined by reference to two tests: whether an injury exceeds a threshold defined in terms of permanent impairment; or whether it meets the test of a specific exception

• impairment: means permanent impairment

• personal injury damages: damages that relate to the injury or death of a person caused by the fault of another person

• fault: includes an act or omission

• claimant: means a person who makes or is entitled to make a claim for personal injury damages

• non-economic loss: means any one or more of the following: pain and suffering; loss of amenities of life; loss of enjoyment of life
2.1.2 Historical common law principles underpinning the award of damages for personal injury

The Wrongs Act reflects legislative intervention in the common law of torts or ‘civil wrongs’, of which the law of negligence is the dominant tort. Negligence involves the breach of a duty of care resulting in loss or damage to another person. Examples of the types of negligence cases where the Wrongs Act applies include slips or falls in a public place, and harm as a result of medical treatment. Where negligence is established by a court — or accepted by both the claimant and respondent to a negligence claim prior to a court judgment — damages can be awarded in the form of monetary compensation for the injuries sustained (Luntz 2006, 1).

The general principles traditionally used by Australian courts to award damages for personal injury or death under common law were set out in Todorovic v Waller (1981) 150 CLR 402, 412:

- The compensatory principle, which holds that ‘plaintiffs should be awarded such sums of money as will restore them to the positions that they would have been in if there had been no wrong committed’ (Luntz 2006, 7).

- Where a serious injury has been suffered, it can be impossible to restore a person to the position they were in before their losses or injuries. As such, compensation was awarded so as to restore the person to their previous position ‘as far as money can do so’ (Luntz 2006, 7). The tort law changes of the early 2000s subsequently modified the full compensation principle (section 2.1.3).

- Damages for one cause of action must be recovered once and forever, and must be awarded as a lump sum rather than as periodic payments.4

- The plaintiff may do what she or he likes with the damages awarded.

- The burden lies on the plaintiff to prove injury or loss for damages sought (Luntz 2006, 11).

The traditional method used by the courts to assess personal injury damages is to ‘identify and value each component of loss ... and to sum these component parts’ (Abelson 2004, 131). In determining a lump sum payment for personal injury awards, the courts have taken account of certain conventional types of harm suffered by the claimant, notably:

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4 This principle no longer holds after changes were made to the Wrongs Act in 2003 to allow for ‘structured settlement’, in which ‘all or part of a damages award is paid in the form of an annuity or annuities and may include a deferred lump sum’ (Victorian Parliament 2002, 6).
• loss of past and future earning capacity
• costs of expenditure on need created by the injury, such as costs of hospital and medical treatment, aids and appliances, and voluntary nursing and assistance
• interest payments on past losses incurred as a result of the injury
• pain and suffering
• loss of amenities
• loss of expectation of life (Luntz 2006, 70).

2.1.3 Tort law reform in the early 2000s

In the late 1990s and early 2000s, concerns emerged that the award of damages for personal injury by the courts had become unaffordable and unsustainable (Luntz 2002a, 18). Some commentators argued that it was too easy for plaintiffs to establish liability for negligence, resulting in extremely high insurance premiums, the exit of some insurers from the market and limitations on the types of insurance available (Ipp 2007, 3). One view was that the community was ‘not prepared to pay for the level of compensation which the judiciary, and the legal profession generally, [had] come to regard as appropriate’ (Spigelman 2002, 434). The market for public liability and professional indemnity insurance was also significantly disrupted by the collapse of HIH Insurance (in March 2001) and the attacks of 11 September 2001 in the United States.

Consequently, the Commonwealth, state and territory governments jointly agreed to a review chaired by the Hon David Ipp of the law of negligence, including consideration of options to limit the liability and the quantum of awards for damages for personal injury and death.

The Ipp report noted perceptions and some empirical evidence from stakeholders that:

• damages awarded in personal injuries cases were frequently too high
• the absence of insurance or the availability of insurance only at unaffordable rates had an adverse impact on aspects of community life, including community events and sporting activities (Negligence Review Panel 2002, 25, 31).

In considering awards for personal injury damages, the Ipp report challenged the application of the full compensation principle to modern awards of personal injury damages, including on the grounds that:

• the principle was developed before the modern welfare state, which provides a safety net in the form of social security benefits for injured people
• reducing the number, and the cost of resolving smaller claims, would minimise resort to the courts and reduce the overall cost of the personal injury system (Negligence Review Panel 2002, 182).

While the Ipp report endorsed a nationally consistent approach to tort law reform, each state and territory government formulated its own response.

In Victoria in 2002 and 2003, major reforms were made to the Wrongs Act. They included the introduction of the following limitations on damages for economic and non-economic loss.
2.1.4 Limitations on damages for economic loss

Under the Wrongs Act, damages for economic loss are paid as compensation for loss of earnings, the deprivation or impairment of earning capacity, or the loss of expectation of financial support (s 28F(1)). Section 28F(2) also provides that, in calculating the damages for loss of earnings the court is to disregard any amount by which the claimant’s gross weekly earnings would, but for the death or injury, have exceeded an amount that is three times the amount of average weekly earnings (AWE) at the date of the award.

Chapter 4 examines potential problems with the cap on economic loss and assesses options for reform.

2.1.5 Limitations on damages for non-economic loss

Damages for non-economic loss (also known as general damages and damages for non-pecuniary loss) are paid as compensation for pain and suffering, loss of amenities of life and loss of enjoyment of life.

Amendments made to the Wrongs Act in 2002 and 2003 implemented both a threshold and a cap on damages for non-economic loss.

Section 28LE of the Act sets a threshold that restricts the damages recoverable for non-economic loss to circumstances where a person has suffered a ‘significant injury’. ‘Significant injury’ is defined in s 28LF and includes:

- in the case of injury (other than psychiatric injury), whole person impairment of more than five per cent
- in the case of psychiatric injury, impairment of more than 10 per cent. 5

In addition to the physical and psychiatric injury thresholds, some injuries are deemed to be ‘significant’ (without the need for medical assessment). These are:

- loss of a foetus
- psychological or psychiatric injury arising from the loss of a child due to an injury to the mother or foetus or child before, during or immediately after the birth
- loss of a breast (s 28LF(1)(c), (ca) and (d)).

Section 28G of the Wrongs Act restricts the maximum amount of damages that can be awarded for non-economic loss to an indexed cap of $371 380 (the cap as at 1 July 2013 was $497 780). This was based on the cap on common law damages for similar non-economic loss under the Transport Accident Act (s 93(7)(b)).

Chapters 3 and 4 examine key issues regarding the threshold and the cap for non-economic loss respectively, and evaluate options for reform.

5 Significant injury thresholds for physical and psychiatric injuries are defined in s 28LB. In addition, regard cannot be held to any psychiatric or psychological injury arising as a consequence of, or secondary to, any physical injury (s 28LJ).
2.1.6 Limitations on damages for gratuitous attendant care

Damages for costs of gratuitous attendant care by others

Damages may be awarded as compensation for the need for an injured person to be cared for by friends and relatives without payment (Negligence Review Panel 2002, 199–200). They ‘compensate the injured claimant for the claimant’s need for gratuitous services to be provided to the claimant because the claimant can no longer provide those services to him or herself’ (NSW Government 2006, 2).

Amendments made to the Wrongs Act in 2003 limit both the circumstances under which damages can be awarded for gratuitous attendant care for others, and the amount of damages.

More specifically, s 28IA(1) of the Act provides that damages are only available where:

- there is a ‘reasonable need’ for the care services
- the need has arisen solely because of the claimed injury and the services would not be provided to the claimant but for the injury.

Furthermore, s 28IA(2) provides that no damages may be awarded if the services are to be provided for less than six hours per week and for less than six months.

Section 28IB places a cap on damages that can be awarded for gratuitous attendant care, based on Victorian AWE — or a pro-rata amount where services are provided for less than 40 hours per week.

Damages for loss of capacity to care for others

Damages for gratuitous attendant care for others are paid as compensation for the loss of capacity to care, rather than for any financial loss as such (Negligence Review Panel 2002, 205).

Under s 28ID(a) of the Wrongs Act, no damages may be awarded to a claimant for any loss of the claimant’s capacity to provide gratuitous care for others unless the court is satisfied that the care:

- was provided to the claimant’s dependants
- was being provided for at least six hours per week and for at least six consecutive months before the injury to which the damages relate.7

Section 28IE places a cap on the amount of damages that can be awarded for loss of capacity to provide gratuitous care. The cap is based on Victorian AWE.8

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6 These damages are also known as ‘Griffiths v Kerkemeyer’ damages, after Griffiths v Kerkemeyer (1977) 139 CLR 161.

7 Alternatively, s 28ID(b) provides that no damages may be awarded unless there is a reasonable expectation that, but for the injury to which the damages relate, the gratuitous care would have been provided to the claimant’s dependants for at least six hours per week and for a period of at least six consecutive months.

8 Section 28IF also provides an exception from s 28ID and s 28IE for injuries resulting from dust-related conditions or from smoking, use of tobacco products or exposure to tobacco smoke. In these cases, the limitations do not apply.
Chapter 6 assesses potential issues with the limitations on damages for gratuitous
attendant care and for loss of capacity to care for others, and evaluates options for
reform.

2.1.7 Discount rate

Damages for future economic loss or expenses are generally awarded by the courts as
lump sum payments. The IPP report stated that courts have also assumed that where a
claimant is awarded damages, they:

... will invest the lump sum and receive a stream of income from the
investment. As a result, to ensure that the plaintiff does not receive too
much, the sum of the expected total future losses and expenses needs to
be reduced by using a ‘discount rate’ in order to calculate its present
value. (Negligence Review Panel 2002, 208)

The discount rate in the Wrongs Act is set at five per cent (s 28I). Prior to amendments to
the Act in 2002, the discount rate that applied to all court awards of compensation in
Victoria was three per cent (Victorian Parliamentary Debates – Legislative Assembly
2002, 143). Section 28I provides the power to vary this rate by regulation.

Chapter 5 examines potential issues with the discount rate in the Wrongs Act, and
evaluates options for reform.

2.1.8 Summary of limitations on personal injury damages

Table 2.1 summarises the limitations on personal injury damages relevant to the inquiry’s
terms of reference.
Table 2.1  Wrongs Act: summary of limitations on personal injury damages

<table>
<thead>
<tr>
<th>Caps on economic and non-economic loss for personal injury or death</th>
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</thead>
<tbody>
<tr>
<td><strong>Economic loss</strong></td>
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<tr>
<td><strong>Non-economic loss</strong></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Impairment thresholds for non-economic loss for personal injury</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Non-economic loss</strong></td>
</tr>
<tr>
<td>(1) Meeting an injury threshold:</td>
</tr>
<tr>
<td>– in the case of injury (other than psychiatric injury), whole person impairment of more than five per cent</td>
</tr>
<tr>
<td>– in the case of psychiatric injury, impairment of more than 10 per cent.</td>
</tr>
<tr>
<td>(2) Exceptions for specific events:</td>
</tr>
<tr>
<td>– loss of a foetus</td>
</tr>
<tr>
<td>– loss of a breast</td>
</tr>
<tr>
<td>– psychological or physical injury arising from the loss of a child due to an injury to the mother or foetus or child before, during or immediately after the birth.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Thresholds and caps on damages for care</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Loss of capacity to care for dependants</strong></td>
</tr>
<tr>
<td></td>
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<tr>
<td><strong>Compensation for care by others</strong></td>
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<table>
<thead>
<tr>
<th>Discount rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>• A prescribed discount rate of 5 per cent applies to the award of damages for future economic loss.</td>
</tr>
</tbody>
</table>


2.2  Role of the courts and Medical Panels

The terms of reference require the Commission to have regard to the possible impact of its recommendations on decision-making and administrative bodies, including the courts and the Medical Panels. The Commission notes that any changes to limitations on damages have the potential to impact on the workload of these bodies, particularly in regard to options to amend the impairment threshold for non-economic loss (chapter 3).
2.2.1 Roles of the County Court of Victoria and the Supreme Court of Victoria

The vast majority of writs for Wrongs Act claims are filed in the County Court. In 2012, around 400 such writs were filed in the County Court, with most of these claims for either slipping/occupiers liability or for medical negligence (LIV, sub. 13, 3). In addition, a very small number of Wrongs Act County Court cases are appealed to the Supreme Court of Victoria, with most appeals relating to a question of statutory interpretation.

2.2.2 Role of Medical Panels

Medical Panels are constituted pursuant to the Accident Compensation Act (s 63). Under the Wrongs Act, Medical Panels may be established to determine whether a claimant has satisfied a threshold test of having sustained a significant injury (s 28LZG). Chapter 8 examines issues relevant to the inquiry related to the Medical Panels process.

2.3 Risks of unmeritorious litigation

The terms of reference for the inquiry require the Commission to have regard to the risks of unmeritorious litigation. Although there is no widely agreed definition of ‘unmeritorious litigation’, the Commission takes it to include a claim:

- with virtually no chance of success, for example because the claim does not appear to disclose a recognised cause of action or there is apparently no admissible evidence to support the claim
- which discloses a cause of action and supporting evidence, but the injury suffered is trivial.

The Monash Law Students’ Society’s Just Leadership Program noted that as there are no public statistics available on unmeritorious or frivolous cases, the issue of measuring frivolous litigation itself is fraught. This submission also noted that:

... the court process is a long, arduous and often intimidating process, particularly to those with no experience of the justice system. It is also costly, both financially and in terms of the time and emotional expenditure required for such a case to proceed. (sub. 6, 7)

In addition to the cost barrier to unmeritorious litigation, the Commission notes that the rules of court in Victoria provide for a stay or judgment in cases which do not disclose a cause of action, are scandalous, frivolous or vexatious or are an abuse of the process of the court.10

That said, the Commission also understands that one of the purposes of the threshold for non-economic loss was to deter frivolous or unmeritorious small claims, which may have otherwise succeeded as it may have been cheaper for defendants to settle rather than contest in court proceedings (chapter 3).

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9 As at 1 July 2013, the fee for filing of a writ is $769.10.
10 See, for example, County Court Civil Procedure Rules 2008 (Vic) r 23.01.
2.4 Overview of differences between Victoria’s personal injury Acts

The terms of reference require the Commission, when recommending options, to have regard to consistency with other Victorian legislative regimes prescribing compensation for personal injury, such as the Accident Compensation and Transport Accident Acts, having regard to the different objectives of these regimes. As outlined below, these Acts have a number of differences which can make drawing comparisons across the Acts problematic.

2.4.1 Different objectives

There are no explicit objectives listed in the Wrongs Act. The preamble to the Wrongs Act states that it is ‘an Act to consolidate the Law relating to Wrongs’. As noted, the stated objectives of the 2002 and 2003 amendments were to ensure the availability of professional and public liability insurance for business and the wider community, while protecting the rights of people to have access to the courts to sue for personal injuries (Victorian Parliamentary Debates – Legislative Assembly 2002, 141; Victorian Parliamentary Debates – Legislative Assembly 2003a, 2076).

The Accident Compensation and the Transport Accident Acts have different objectives to the objectives of the Wrongs Act changes.¹¹ For example, both these Acts refer to reducing the cost to the community of accidents and to provide suitable and just compensation for injured people (Accident Compensation Act s 3; Transport Accident Act s 8).

2.4.2 Different degrees of government intervention

The accident compensation and transport accident schemes have high levels of government intervention relative to the Wrongs Act compensation provisions. For example, the accident compensation and transport accident legislation establish public insurance monopolies (with exceptions).¹² By contrast, both public and private insurers provide coverage for common law claims governed by the Wrongs Act (section 2.5.1).

2.4.3 Different nature of compensation

As noted, both the accident compensation and the transport accident schemes provide access for statutory compensation on a no-fault basis. In cases of serious injury, these schemes allow for access to common law damages on the basis of fault (section 2.4.4).

In contrast, almost all personal injury claims made under the Wrongs Act must establish fault (or liability) before damages can be awarded by a court.¹³

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¹¹ These objectives are set out in s 3 of the Accident Compensation Act and s 8 of the Transport Accident Act.

¹² Some employers are approved by the Victorian WorkCover Authority to self-insure, while some national employers have chosen to self-insure under Commonwealth regulation (although there is currently a moratorium on new companies joining the scheme) (SRCC 2013; VWA 2013a).

¹³ An exception is the strict liability regime for damage caused by aircraft to a person or property on land or water (chapter 9).

20 ADJUSTING THE BALANCE: INQUIRY INTO ASPECTS OF THE WRONGS ACT 1958
2.4.4 Differences in impairment thresholds for economic and non-economic loss

For common law claims under the Wrongs Act:

- there are no thresholds to access damages for economic loss
- a person must have suffered a ‘significant injury’ to be eligible to access damages for non-economic loss (table 2.1).

In contrast, access to common law damages under the Accident Compensation Act (s 134AB) and the Transport Accident Act (s 93) is restricted to persons who meet a stricter test of ‘serious injury’. This means the injury must satisfy either a deeming test or a narrative test. Under the deeming test, a person must have a whole person impairment of 30 per cent or more assessed in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition) (AMA-4 Guides). Under the narrative test in the Accident Compensation Act, a person must have suffered either:

- a permanent serious impairment or loss of bodily function
- a permanent serious disfigurement
- a permanent severe mental or permanent severe behavioural disturbance or disorder, or
- loss of a foetus.

In addition, to satisfy the narrative test for economic loss under the Accident Compensation Act, a worker must also demonstrate a permanent loss of earning capacity of 40 per cent or more (s 134AB(38)(e)).

The Accident Compensation Act imposes a monetary threshold that must be reached before a court can award common law damages:

- for economic (pecuniary) loss, the threshold is currently $56 650
- for non-economic loss, the threshold is currently $54 730 (ss 134AB(22) and 100C).

The Transport Accident Act also imposes minimum monetary thresholds for damages for pecuniary loss (including loss of earnings, loss of earning capacity and loss of value of services) and damages for non-economic loss:

- for economic loss, the threshold is currently $49 710
- for non-economic loss, the threshold is currently $49 710 (ss 93(7) and 61) (TAC 2013a).

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14 In the Transport Accident Act, this provision is referred to as a ‘serious long-term impairment or loss of a body function’ (s 93(17)).

15 In the Transport Accident Act, this provision is referred to as a ‘severe long-term mental or severe long-term behavioural disturbance or disorder’ (s 93(17)).
2.4.5 Differences in caps for economic and non-economic loss

Economic loss

Under the Wrongs Act, damages for economic loss (loss of earning capacity and expenses) are generally awarded as a lump sum, with loss of earning capacity capped on the basis of three times AWE (chapter 4). The recent Victorian Court of Appeal decision of Tuohey v Freemasons Hospital [2012] VSCA 80 confirmed that:

... a court will disregard the amount by which a person’s ‘without injury’ earnings exceed a sum equivalent to three times the average weekly wage. If a person’s post-injury earning capacity is also in excess of three times the average weekly wage, then that person will not be entitled to any damages for loss of earning capacity. (Larking and Spain 2012, 32)

The Wrongs Act’s limitations on economic loss differ from the caps applied to common law claims in the Accident Compensation and Transport Accident Acts. Under both the Accident Compensation and Transport Accident Acts, people are entitled to claim the difference between their pre- and post-injury earnings up to prescribed limits:

- The limit on damages for economic loss for work-related injury claims is presently set at about $1.3 million (ss 134AB(22) and 100C of the Accident Compensation Act).
- The limit for economic loss for transport accident claims is presently set at about $1.12 million (ss 93(7) and 61 of the Transport Accident Act).

Chapter 4 shows that these differences can lead to outcomes for Wrongs Act plaintiffs that are markedly different from the other personal injury Acts.

Non-economic loss

Under the Wrongs Act, the maximum amount that may be awarded for damages for non-economic loss is $497,780 (ss 28G, 28H). This is similar to the maximum cap for non-economic loss under the Transport Accident Act. As at 1 July 2013, the cap was $497,340 (TAC 2013a). This rate is published by the Transport Accident Commission.

Under the Accident Compensation Act, the maximum amount of lump sum benefits for non-economic loss under common law as at 1 July 2013 is $555,350 (ss 134AB(22)(b)(ii) and 100C). Chapter 4 examines these differences in more detail.

2.4.6 Differences in the treatment of remedial surgery on spinal injuries: Mountain Pine amendments

Another difference between the personal injury Acts relates to how the effects of remedial surgery on spinal injuries are taken into account. In 2007, amendments were made to the Accident Compensation and Transport Accident Acts in response to the decision of Mountain Pine Furniture v Taylor (2007) 16 VR 659 (‘Mountain Pine’). The amendments to the Accident Compensation and Transport Accident Acts restored the pre-Mountain Pine position, which was that assessments were to be based on the claimant’s post-surgery (rather than pre-surgery) condition. There is no requirement in

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16 Transport Accident and Accident Compensation Acts Amendment Act 2007 (Vic).
the Wrongs Act that assessment of impairment of spinal injuries be assessed after any remedial surgery. Chapter 6 explores this issue further.

2.4.7 Differences in discount rates

Under the Wrongs Act, the discount rate for lump sum damages for future economic loss and for medical and other expenses is set at five per cent (s 28I). In comparison, the Accident Compensation Act (s 134AB(32)) and the Transport Accident Act (s 93(13)) set the discount rate for future economic loss at six per cent. Chapter 5 examines the issue of the discount rate.

2.5 Economic perspectives on limitations on personal injury damages

From an economic perspective, tort law encourages economically efficient decision-making by addressing:

- **High transaction costs**: which effectively prevent people making private agreements on who should pay for the cost of accidents. For example, a driver cannot negotiate with other drivers on who should pay the cost of a transport accident before setting out on the road (Cooter and Ulen 2007, 310).

- **Externalities**: high transaction costs in turn create externalities, whereby people take into account only the private — and not the social — costs and benefits of their actions (Cooter and Ulen 2007, 310). For example, in the absence of tort law, a bus driver with a full load of passengers deciding on the level of precaution to take only faces the private cost of such a decision, while potentially understating the benefits to the passengers of a reduction in the probability of an accident.

By making the wrongdoer compensate the victim, tort law encourages potential wrongdoers to account for (internalize) the costs that they impose on other people. The costs are internalised through potential wrongdoers investing in safety measures at the efficient level (Cooter and Ulen 2007, 310). In other words, the prospect of being subject to a successful negligence claim provides a person with a disincentive to behaving negligently and a positive financial incentive to spend on safety measures (Ergas 2002, 4; PC 2002, 20–1).

Compensatory damages align with the normative assumption in economics whereby:

... if someone is injured through no fault of her own, she should be entitled to compensation that would restore her to her initial level of utility. If the party that causes the injury is responsible for the compensation, this compensation principle is also efficient because that party will take efficient safety precautions. If the expected damage from a risk is $x million, the party responsible for the risk will invest up to $x million to eliminate it. The outcome is efficient because the benefit from risk reduction exceeds the cost. (Abelson 2004, 130–1)

In its inquiry into a National Disability Insurance Scheme (NDIS), the Productivity Commission noted that ‘the common law is likely to have some deterrence effects in some cases’ (PC 2011, 837). However, a 2013 review casts doubt on whether tort law is an effective deterrent, while also noting the difficulties of conducting empirical research in this area (Luntz 2013, 187).
2.5.1 Insurance markets and personal injury damages

In practice, personal injury damages are seldom paid by those at fault. Rather, victims who succeed in recovering damages normally do so from:

- insurance companies — those at risk of being found responsible for common law awards can take out insurance to protect themselves from incurring the full cost of damages, thereby transferring some risk to their insurer
- agencies of the state
- ‘organisations large enough to be self-insurers and able to distribute the costs to the public generally through the prices of their goods and services’ (Luntz 2006, 12).

As such, damages are funded indirectly by the wider community, either in the form of compulsory third-party liability premiums or indirectly in the price of goods and services which include the cost of insurance, both compulsory and voluntary (Luntz 2006, 12–13). The common types of insurance which are taken out to protect against claims for personal injury damages are motor vehicle third party insurance, public liability and professional indemnity insurance.

From the point of view of injured people, those injured by others without insurance cover may have to rely on their own resources or the social welfare system to meet their treatment costs and other expenses. People also have the option to self-insure through life, disability and income protection insurance. The price and availability of this insurance varies according to factors such as age, occupation and amount of coverage sought. Chapter 4 examines income protection insurance in the context of the cap on economic loss.

2.5.2 Public liability and professional indemnity insurance

The terms of reference require the Commission in assessing options for reform to have regard to whether any such options would have an unduly adverse impact on the price and/or availability of public liability and/or professional indemnity insurance. This section provides background on these products and some recent developments in these markets.

Public liability insurance

‘Public liability insurance protects individuals, businesses and organisations against the financial risk of legal liability to third parties for death or injury, loss or damage to property’ (PC 2002, XIII). The Australian Prudential Regulation Authority (APRA) reports statistics on public liability insurance using the term ‘public and product liability’ (APRA 2013b, 4). The relevant aspects of public liability insurance for the inquiry are liability for personal injury, not property damage. While claims for property damage are generally greater in number, claims for personal injury are a greater part of the total cost of claims (ACCC 2002b, 44). For example, the Australia Competition and Consumer Commission (ACCC) estimated claims for personal injury at around 65 per cent of the total cost of public liability claims (ACCC 2002b, 54).
In 2012, gross written premiums\textsuperscript{17} for all types of public liability insurance in Victoria was approximately $333 million.\textsuperscript{18} Gross claims incurred\textsuperscript{19} were approximately $97 million (APRA 2013a).

**Professional indemnity insurance**

‘Professional indemnity insurance indemnifies professional people for their legal liability to their clients and others relying on their advice and/or services’ (ACCC 2005, 24). Professions such as architects, lawyers, engineers and accountants are amongst those groups that take out professional indemnity insurance to cover compensation claims.

**Medical indemnity insurance**

An important sub-class of professional indemnity insurance is medical indemnity insurance, which covers medical professionals for malpractice. Unlike professions such as accountants and lawyers that are normally sued for economic loss, claims against medical practitioners generally include compensation for past and future economic loss, medical expenses, attendant care costs, legal costs, and pain and suffering. In catastrophic cases, damages can be awarded in the millions of dollars.

In 2012, the gross written premium for medical indemnity insurance in Victoria for APRA-regulated insurers was approximately $74 million. Gross claims incurred were approximately $37 million (APRA 2013a). In addition, the 2013-14 VMIA premium for the Department of Health for medical indemnity insurance was $146.1 million, and in excess of 87% of the medical indemnity premium represents the expected costs of claims’ (VMIA 2013, 6).

In addition to statutory limitations on damages, medical indemnity insurance providers benefit from the Commonwealth Government’s high-cost claims scheme (HCCS), which seeks to address high-cost claims for medical incidents. The HCCS pays 50 per cent of claims costs above a threshold amount (currently $300,000). The scheme reduces the risk-premium-component of premiums and reduces ‘the amount of reinsurance needed to cover the total cost of high-cost claims’ (ACCC 2009, 36). According to the Office of the Australian Government Actuary, while a small proportion of claims are larger than $300,000, they have a noticeable impact on the total cost of medical indemnity insurance each year (Office of the Australian Government Actuary 2012, 40).\textsuperscript{20} The Insurance Council of Australia (ICA) also noted that:

... much of the moderation of medical indemnity costs for private medical practice over recent years has resulted from the ... HCCS ... We believe that the loss of the HCCS could add more than 20% to the size of the premium pool required to fund medical indemnity claims. (sub. 14, 8)

\textsuperscript{17} Gross written premium is defined as the total amount of premium received by the insurer when a policy is taken out (APRA 2013c).

\textsuperscript{18} This calculation excludes gross written premium for construction liability and product liability (pure) and product recall.

\textsuperscript{19} Gross claims incurred is ‘the total cost to the insurer of a particular claim over the relevant period’ defined as ‘the sum of payments made on the claim, and any change in the estimate of remaining payments to be made for that claim’ (APRA 2013c).

\textsuperscript{20} A number of other Commonwealth Government schemes assist medical practitioners with their insurance arrangements, such as the exceptional claims scheme, the run-off cover scheme and the premium support scheme (ACCC 2009, 13).
Factors influencing the price and availability of public liability and professional indemnity insurance

For private sector insurers, the key cost components of public liability and professional indemnity premiums are:

- cost of claims: including the cost of compensation claims and costs incurred to defend cases
- costs of underwriting expenses, such as administration and other operating expenses
- a targeted profit margin (PC 2002, xv–xvi; ACCC 2002b, 44–5; Chia 2013, 23–4).

Public sector insurers also take into account the cost of claims and underwriting expenses, but do not generally target a profit margin (Chia 2013, 24).

The Commission found limited public information detailing how public liability and professional indemnity insurance premiums are set in Australia. One relatively recent source of information is the series of ACCC monitoring reports of the medical indemnity insurance market from 2002 to 2009. The ACCC was required to report on whether medical indemnity premiums were ‘actuarially and commercially justified’ (ACCC 2009, xi). Box 2.2 sets out the ACCC’s description of the price-setting process for not-for-profit medical defence organisation-owned insurers in 2009.21

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**Box 2.2 Pricing medical indemnity insurance: MDO-owned insurers**

In 2009, the ACCC examined the setting of prices for medical indemnity insurance by five licensed insurers. Four of the insurers were owned by mutual, not-for-profit medical defence organisations (MDOs), while the fifth operated for profit. The pricing process adopted by the four MDO-owned insurers involved each insurer determining the aggregate premium pool, including:

- the expected net cost of claims issued in the current underwriting period, plus
- an appropriate risk margin on expected claim costs, plus
- expenses expected to be incurred in the current underwriting period, plus
- the gross cost of reinsurance for the current underwriting period, plus
- future expenses required to administer claims in future years, less
- investment income earned on premiums until the date of payment of claims and expenses.

Once an insurer determines the aggregate premium pool, risk relativities are used to assign premiums to medical practitioners. The higher the risk profile of the medical practitioner, the higher the premium considered necessary to cover the expected cost of future claims.

The ACCC found that the setting of insurance premiums by medical indemnity insurers was commercially and actuarially fair.

*Source: ACCC 2009, xiii; 58.*

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21 This pricing process differs from that used by the for-profit insurer QBE, which calculated individual premiums for each medical specialty, for example, obstetrics (ACCC 2009, 39).
The ACCC has remarked that in regard to pricing of insurance products:

Insurance products are unlike normal manufactured products where the cost of inputs are largely known or relatively easily determined. Instead insurance pricing requires estimates to be made of the frequency and quantum of incidents yet to occur. As a result many issues unique to insurance need to be considered when setting insurance premiums, given the considerable uncertainty involved. (ACCC 2002a, 58)

The Commission’s review of the available literature suggests that, at any point in time, a number of commercial and actuarial considerations may contribute to fluctuations in the price and/or availability of public liability and professional indemnity insurance, including:

- **Corporate objectives and pricing strategies of insurers**: including whether insurers are targeting growth or return on shareholders’ capital (ACCC 2002a, 58). In addition, pricing strategies are influenced by whether insurers have market power, that is, whether they are price setters or price takers. Insurers with a significant share of the market have greater power to set prices relative to smaller firms (ACCC 2002a, 68). These factors are related to the cyclical nature of insurance markets, whereby conditions typically cycle between high and low (or negative) profitability, ‘as providers seek to maintain both market position and profitability’ (PC 2002, 14).

- **Problems of adverse selection**: arising from the insured party knowing more about their own risk situation than the insurer (PC 2002, 39). Where adverse selection exists, an increase in insurance premiums drives out good risks while retaining bad risks (Cooter and Ulen 2007, 357). In extreme cases, no insurance is available.

- **Problems associated with ‘fat-tailed’ and ‘long-tailed’ payouts**: which can make forecasting future claims liabilities extremely difficult. Fat-tailed means that ‘the probability of very high pay-out events is large relative to the probability of such events in the case of other insured risks’ (ACCC 2002b, 73). Long-tailed means that ‘many years may pass between the period for which cover was provided and the date at which claims arising from incidents during that period are finally settled’ (PC 2002, 12–13).

- **Limited reserves**: for some insurance risks, many claims can occur at once, rapidly diminishing reserves available to pay claims (Cooter and Ulen 2007, 356).

- **Reinsurance costs**: reinsurance is a form of capital that insurers can access to manage risks (ACCC 2002a, 67). ‘Reinsurers assume all or part of the risk associated with existing insurance policies originally underwritten by other insurers’ (Chia 2013, 2).

- **Regulatory and legislative requirements**: such as the level of capital requirements imposed on insurers by APRA and the taxation system (ACCC 2002a, 6).

- **Tort law case loads and payouts**: including the level of litigation, the propensity of the general community to make a claim and precedent-setting court cases (ACCC 2002a, 71).

Some of these factors, particularly tort law case load and payouts and fat-tailed payouts, have contributed to government intervention in tort law — as evidenced by the current arrangements for medical indemnity insurance.

**Insurance markets and tort law**

There is a close relationship between tort law court judgments and the costs of professional indemnity and public liability insurance. According to the ACCC, these insurance costs are:
... positively related to the ease with which judgments can be obtained, the range of harms damages can be awarded for and the amount of damages awarded. (ACCC 2002b, 80)

This means that an increase in the probability of successful personal injury claims and/or the level of damages has the potential to significantly impact on the price and/or availability of public liability and professional indemnity insurance. For example, the ACCC noted that the tort law developments of the late 1990s and early 2000s had:

... likely increased uncertainty as to the tails of risk distributions in public liability and professional indemnity, and this may have lead to difficulties in insurance markets. (ACCC 2002b, 82)

Recent developments in public liability and professional indemnity insurance markets

Financial performance

The Commission has not comprehensively analysed the financial performance of the public liability and professional indemnity insurance sector. In the first instance, these segments make up only a small proportion of insurers’ businesses, which make it difficult to disentangle from other larger insurance segments. APRA data shows that in 2012-13, gross earned premium22 for:

- public and product liability insurance was $461 million, accounting for around seven per cent of total premium revenue
- professional indemnity insurance was $307 million, accounting for around five per cent of total premium revenue (APRA 2013d)

These relatively small figures make it difficult to separate the financial performance of the public liability and professional indemnity segments from other insurance segments. Some publicly available data is presented below.

There is also considerable volatility in the Australian public liability and professional indemnity markets relative to all insurance products over the last three years (figure 2.1). A partial indicator of insurer financial performance is the net loss ratio, which indicates the adequacy of premiums and is defined as net incurred claims (current and prior years)23 divided by net earned premium24 (APRA 2013b). A lower net loss ratio contributes to better financial performance.

Since September 2010,25 the net loss ratio for public and product liability insurance has ranged between 50 to 85 per cent, while for professional indemnity insurance it has ranged between 25 to 65 per cent (figure 2.1). According to the ACCC, a typical industry target net loss ratio would be 75 per cent or less (ACCC 2002b, 12).

22 Gross earned premium is the earned premium revenue plus fire services levy (APRA 2013d, 6).

23 Net incurred claims (current and prior years) is gross incurred claims (current and prior years) net of non-reinsurance recoveries revenue (current and prior years) and reinsurance recoveries revenue (current and prior years) (APRA 2013b).

24 Net earned premium comprises gross earned premium less outwards reinsurance expense (APRA 2013b).

25 Data from before September 2010 is not available.
A key indicator of overall insurer profitability is the net underwriting combined ratio, which adds together the net loss ratio with the underwriting expense ratio (underwriting expenses divided by net earned premium) (APRA 2013a). A combined ratio above 100 per cent indicates that premiums are not sufficient to cover costs and therefore the insurer is ‘relying on investment income in its reserves to generate profits’ (PC 2002, 45).

Table 2.2 provides a snapshot of the industry’s financial performance over the first two quarters of 2013, which shows a combined ratio of less than 100 per cent, indicating premiums are covering costs. This suggests that while subject to volatility, public liability and professional indemnity insurance has been a profitable segment for insurers over the past three years.

Table 2.2  
Selected Australian insurance industry performance ratios (per cent)

<table>
<thead>
<tr>
<th></th>
<th>Public and product liability</th>
<th>Professional indemnity</th>
<th>Total direct business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net loss ratio</td>
<td>55</td>
<td>57</td>
<td>61</td>
</tr>
<tr>
<td>Underwriting expense ratio</td>
<td>33</td>
<td>22</td>
<td>26</td>
</tr>
<tr>
<td>Combined ratio</td>
<td>88</td>
<td>79</td>
<td>87</td>
</tr>
</tbody>
</table>

Notes:  
Insurance markets can be volatile and thus point-in-time measures should be interpreted with care. Numbers may not add due to rounding. Percentages are averages of March, June and September 2013 quarters.

Source: APRA 2013a.
**Lowered premiums and more risks written**

Since the tort law changes, the quantity of public liability and professional indemnity insurance risks underwritten has increased significantly while average premium costs have fallen significantly (APRA 2013c). The Commission has not sought to analyse the reasons for these changes; they may reflect a variety of factors besides tort law changes, such as pricing strategies of insurers.

Since 2003, APRA has reported statistics on public liability insurance using the term ‘public and product liability’ (APRA 2013c). Regarding public and product liability insurance in Victoria, figure 2.2 shows that:

- in nominal terms, the average premium has fallen from approximately $1000 in 2003 to approximately $600 in 2012
- the number of risks underwritten has increased from approximately 400,000 in 2003 to around 600,000 by 2012 (APRA 2013c).

**Figure 2.2** Trends in public and product liability premiums and risks underwritten in Victoria

![Trends in public and product liability premiums and risks underwritten in Victoria](image-url)

Notes: Risks written differs from policies, one policy may have numerous risks underwritten. Data given by underwriting year.

Source: APRA 2013c.

Regarding trends in professional indemnity insurance in Victoria:

- the average premium has fallen from around $5000 in 2003 to around $2100 in 2012
- the number of risks underwritten has risen from around 40,000 in 2003 to around 127,000 in 2012 (APRA 2013c).
National disability and injury insurance schemes

The Commission understands that the recent establishment of the NDIS and the work on the development of the National Injury Insurance Scheme (NIIS) may affect the future price of public liability and professional indemnity insurance.\(^\text{26}\) The NDIS is due to have full coverage in Victoria by July 2019 (NDIA 2013).

The ICA noted that:

Both [the NDIS] and the NIIS schemes are likely to lead to the increased demand for care providers ... Such increases in demand may also lead to increased claims costs in the public liability area and dilute the quality of services and service standards until the supply of care providers increases. (sub. 14, 7)

The Monash Law Students’ Society’s Just Leadership Program also noted that:

The NDIS Act has the potential to increase the number of injured persons seeking compensation under the Act, as persons who may not have otherwise litigated may be required to do so in order to receive benefits under the scheme. (sub. 6, 9)

However, in response to the Commission’s draft report, Avant Mutual Group Limited noted that the impact of the NDIS on tort law is likely to be minimal, given it:

... will not in our view reduce claims but has the potential to increase claims because the right to sue has not been extinguished .... and in any event will only apply to the future care component. (sub. DR19, 1)

Overall, the Commission notes that the magnitude of impacts of these schemes on the operation of the Wrongs Act and insurance markets is subject to some uncertainty at this time. For example, many of the practical elements of the schemes remain to be defined or developed. For that reason, while acknowledging the relevance of the schemes in the future, the potential impacts have not been incorporated in the Commission’s assessment framework (chapter 1).

2.6 Concluding remarks

This inquiry does not seek to revisit the rationale for the Wrongs Act limitations on personal injury damages, in the form of caps, thresholds and discount rates. Rather, the inquiry focuses on perceived anomalies, inequities and/or inconsistencies that have arisen since the implementation of the reforms. Chapter 3 to 7 of the report:

- examine the nature and extent of issues, that is, the anomaly, inequity and/or inconsistency
- identify options to address issues
- evaluate options for reform against the principles of efficiency, equity and consistency with the original intent of the tort law reforms.

\(^\text{26}\) The states and territories are working with the Commonwealth Government to develop the NIIS as a federated model of separate, state-based no-fault schemes that provide lifetime care and support for people who have sustained a catastrophic injury (Commonwealth Treasury 2013).
3 Access to damages for non-economic loss

3.1 Introduction

The terms of reference require the Commission to examine the limitations on access to damages for non-economic loss under the Wrongs Act 1958 (Vic).

This chapter analyses issues associated with the provisions governing eligibility to access damages for non-economic loss. Damages for non-economic loss are paid as compensation for pain and suffering, loss of amenities of life and loss of enjoyment of life. Specifically, this chapter focuses on the thresholds that restrict access to damages for non-economic loss to persons suffering a ‘significant injury’. Significant injury is defined under the Wrongs Act as having a whole-of-person impairment (WPI), for physical or psychiatric injury, of more than five per cent or 10 per cent respectively. In addition, the Wrongs Act provides exceptions to the thresholds for specific injuries.

This chapter begins by presenting the context to the current thresholds (and exceptions to the thresholds) for non-economic loss, and goes on to:

- analyse potential anomalies, inconsistencies and inequities arising from the operation of the threshold and exceptions
- identify and evaluate options for addressing these anomalies, inconsistencies and inequities.

3.2 Context

In 2002, the Review of the Law of Negligence (the Ipp report) concluded that imposing a threshold for non-economic loss would be ‘an effective and appropriate way of significantly reducing the number and cost of smaller claims’ (Negligence Review Panel 2002, 188). The Ipp report recommended that the New South Wales motor vehicle accident scheme threshold of 15 per cent of the most extreme case be adopted (Negligence Review Panel 2002, 192). This recommendation was considered ‘more likely to be adopted and effectively implemented in all jurisdictions than one based on ... a system of objective assessment of impairment’ (Negligence Review Panel 2002, 193).

Rather than adopting the Ipp report recommendation, the Victorian Government implemented thresholds for physical and psychiatric injuries based on objective criteria, as well as a number of exceptions for certain types of injuries. In 2003, the then Minister for Finance noted that:

... the Government's aims in implementing thresholds for general damages ... are to:
- reduce the level of general damages paid in respect of minor injury claims; and in so doing, to
- increase the certainty that community groups, businesses and individuals can get access to reasonable [insurance] cover. (Victorian Parliamentary Debates – Legislative Assembly 2003a, 2081)

Section 28LE of the Wrongs Act sets a threshold that limits the damages for non-economic loss to circumstances where a person has suffered a ‘significant injury’. A significant injury means, in most cases, an injury resulting in an impairment that meets a threshold level, defined in s 28LB of the Wrongs Act as being:
• in the case of injury (other than psychiatric injury), impairment of more than five per cent
• in the case of psychiatric injury, impairment of more than 10 per cent.

Physical injury impairment is assessed by an approved medical practitioner in accordance with the American Medical Association’s Guides to the Evaluation of Permanent Impairment (Fourth Edition) (AMA-4 Guides) [other than chapter 15]. The AMA-4 Guides state that:

... impairments are defined as conditions that interfere with an individual’s “activities of daily living” ... Activities of daily living include, but are not limited to self-care and personal hygiene; eating and preparing food; communication, speaking, and writing; maintaining one’s posture, standing, and sitting; caring for the home and personal finances; walking, travelling, and moving about; recreational and social activities; and work activities. An impairment percentage derived by means of the Guides is intended, among other purposes, to represent an informed estimate of the degree to which an individual’s capacity to carry out daily activities has been diminished. (AMA 1993, 1/1–2)

Psychiatric injury impairment is assessed using the Guide to the Evaluation of Psychiatric Impairment for Clinicians (GEPIC).

In addition, the Wrongs Act provides exceptions to the significant injury impairment thresholds for the following injuries:

• loss of a foetus
• psychological or physical injury arising from the loss of a child due to an injury to the mother or foetus or child before, during or immediately after the birth
• loss of a breast (ss 28LF(1)(c), (ca) and (d)).

The concept of permanent impairment

The Wrongs Act defines ‘impairment’ as meaning ‘permanent impairment’ (s 28LB). In the AMA-4 Guides, a permanent impairment is defined as:

... one that has become static or stabilized during a period of time sufficient to allow optimal tissue repair, and one that is unlikely to change in spite of further medical or surgical therapy. (AMA 1993, 1/1)

The concept of permanent, rather than temporary, impairment is critical to the operation of the thresholds. For example, where a person is assessed by an approved medical practitioner to have made a full recovery from an injury, then there is no eligibility for compensation for non-economic loss — although eligibility for other types of damages, such as compensation for economic loss (chapter 4), is unaffected. The Wrongs Act also makes provision for the certification of a significant injury where an injury has not stabilised but is expected to do so in the future (s 28LNA).

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1 In addition to the specific injuries deemed to be ‘significant’, a further exception to the assessment process is permitted where a respondent to a claim agrees to the claimant’s request to waive the assessment requirement (chapter 8).
Impairment versus disability

The AMA-4 Guides also distinguish between the concepts of impairment and disability:

A disability arises out of the interaction between impairment and external requirements, especially those of a person’s occupation. Disability may be thought of as the gap between what a person can do and what the person needs or wants to do. (AMA 1993, 1/2)

The AMA-4 Guides’ assessment of impairment and thus eligibility to seek damages for non-economic loss is generally not influenced by a person’s age or circumstances. For example, Dr Michael Epstein has illustrated the distinction between impairment and disability using the example of the amputation of a little finger, which is:

... a 5% whole person impairment according to the AMA Guides but may lead to 100% disability for a concert pianist and 0% disability for a construction worker. (Epstein 2009, 2)

3.2.1 Access to damages for non-economic loss in other Victorian personal injury Acts

Unlike the ‘significant injury’ requirement under the Wrongs Act, common law claims under the Accident Compensation Act 1985 (Vic) and Transport Accident Act 1986 (Vic) are restricted to people who have sustained a ‘serious injury’. These Acts provide alternative gateways for people claiming a ‘serious injury’ to pursue a claim for compensation. Claimants can either meet a deeming test, or they must satisfy a narrative test. Furthermore, claims for non-economic loss must also meet a minimum monetary threshold before a court can award damages.

The deeming test under both Acts is set at a WPI of 30 per cent or more assessed in accordance with the AMA-4 Guides. The narrative test is also similar under both the Accident Compensation and Transport Accident Acts and requires that a person must have suffered either:

- a permanent serious impairment or loss of a body function
- a permanent serious disfigurement
- a permanent severe mental or permanent severe behavioural disturbance or disorder, or
- loss of a foetus.

Finally, as at 1 July 2013, the Accident Compensation Act sets a minimum monetary threshold for the value of the claim at an indexed amount of $54 730, while the Transport Accident Act sets this threshold at an indexed amount of $49 710.

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2 Subject to modifications, including the use of the GEPIC for the assessment of psychiatric impairment. In addition, amendments to the Transport Accident Act — which received Royal Assent on 19 November 2013 — may change the approach to assessment under the Guides. However, these changes are beyond the scope of this inquiry.

3 In the Transport Accident Act, this provision is referred to as a ‘serious long-term impairment or loss of a body function’ (s 93(17)).

4 In the Transport Accident Act, this provision is referred to as a ‘severe long-term mental or severe long-term behavioural disturbance or disorder’ (s 93(17)).
The Monash Law Students’ Society’s Just Leadership Program submitted that the narrative test:

… enables a comprehensive assessment of the long-term effects of an injury on an injured party’s quality of life through a consideration of the occupational, financial, social, domestic and psychological effects of a claimant’s injury. (sub. 6, 4)

According to the Transport Accident Commission (TAC) submission to the 2013 Victorian Parliamentary road safety inquiry, for an injury to be serious under the narrative threshold it:

… must have consequences that are serious for the injured person. That is, an impairment that is long-term and has serious consequences for the claimant in terms of disablement from work or interference with enjoyment of life. (TAC 2013b, 18)

The TAC also noted the scope of the narrative test is increasing:

The Court of Appeal has, in recent years, widened the narrative test under both the TA [Transport Accident] and Accident Compensation Acts … The Court in Haden Engineering5 considered that regard must be had to the worker’s experience of pain and the disabling effect of pain. (TAC 2013b, 18)

This means that the narrative test, by taking into account a person’s individual circumstances, rather than simply daily activities, has a potentially wider scope of claims compared to the definition of impairment assessed under the Wrongs Act. The vast majority of common law claims for non-economic loss under the Accident Compensation and Transport Accident Acts are made under the narrative test. Under the Transport Accident Act, around 85 per cent of common law claims for non-economic loss were made under the narrative test (TAC correspondence). Data from the Victorian WorkCover Authority (VWA) indicates that around 2500 common law applications are lodged per annum under the Accident Compensation Act and of these claims, around 95 per cent were lodged under the narrative test (VWA 2013b, 2).

3.2.2 Access to damages for non-economic loss in other Australian jurisdictions

Table 3.1 summarises the different approaches to thresholds for non-economic loss in civil liability regimes in other major Australian jurisdictions. New South Wales adopted the IPP report recommendation of a threshold at 15 per cent of the most extreme case, while Queensland and South Australia calculate damages by reference to locally-developed injury scales. Unlike Victoria, there are no legislative exceptions to the thresholds for access to non-economic loss in New South Wales, Queensland or South Australia.

Table 3.1  Thresholds for access to non-economic loss – selected Australian jurisdictions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Limitations</th>
</tr>
</thead>
</table>
| New South Wales   | • Nil damages below 15% of the most extreme case.  
                    • For general damages equalling 15% and up to 32%, a fixed percentage of the maximum to be awarded is payable. For example, a 15% assessment attracts damages equalling 1% of the maximum prescribed amount for a most extreme case, whereas 32% attracts damages at 30% of the maximum prescribed amount for a most extreme case.  
                    • Impairment assessment of 33% and upward attract an equivalent damages payout (33% = 33% of the maximum prescribed amount for a most extreme case). |
| Queensland        | • No thresholds: injuries are assessed on a ‘100 point scale’ (injury scale value (ISV)) and by reference to similar injuries in prior proceedings.  
                    • The ISV is determined by assessing the injury under any rules provided under a regulation and have regard to the injury scale values given to similar injuries in previous proceedings. |
| South Australia   | • Damages are calculated by reference to a 60 point scale, reflecting gradations of non-economic loss; the scale value is then multiplied according to a series of multipliers provided in the Act. |

Sources: Civil Liability Act 2002 (NSW); Civil Liability Act 2003 (Qld); Civil Liability Act 1936 (SA).

3.3  Key issues

The views of participants — as expressed in submissions and discussions with the Commission — focused on three areas, including:

1. thresholds restricting access to non-economic loss
2. whether a narrative test should be introduced to better align the Wrongs Act with the other Victorian injury compensation schemes
3. the application and coverage of existing exceptions.

Participants concerned about the equity impacts of the existing thresholds suggested amendments to thresholds, further exceptions and the introduction of a narrative test as an additional gateway to access damages for non-economic loss. Participants opposed to changes to the thresholds expressed concern that any changes could undermine the objectives of tort law reform by adversely affecting the price and availability of public liability and professional indemnity insurance, whilst also imposing costs associated with implementing changes to the assessment of significant injury.

3.3.1  Proposed amendments to thresholds

Some participants argued that the provisions governing access to non-economic loss under the Wrongs Act are inequitable and/or inconsistent:

• for certain types of injuries, particularly spinal injuries
• in comparison to the other Victorian personal injury Acts.

For example, the Australian Lawyers Alliance (ALA) argued that the existing provisions of the Wrongs Act are inequitable and go beyond the intention of tort law reforms, leading to some people missing out on compensation (sub. 9, 6).
The ALA, the Common Law Bar Association (CLBA) and the Law Institute of Victoria (LIV) all recommended that the significant injury threshold be reduced to at least five per cent physical impairment or at least 10 per cent psychiatric impairment (sub. 9, 7; sub. 11, 3; sub. 13, 10). The Office of the Health Services Commissioner recommended thresholds for non-economic loss be reduced by at least one percentage point on equity grounds and to increase incentives for medical practitioners to avoid injuries (sub. 7, 4).

On the other hand, the Insurance Council of Australia (ICA) supported retaining the current threshold for physical injury on the basis that:

... any proposal to amend the Wrongs Act to lower the threshold to 5% WPI [whole person impairment] or greater will affect the government’s stated aim of reducing the amount of general damages paid for minor claims. (sub. 14, 6)

Participants also raised issues with the application of the threshold to psychiatric injuries. Psychiatric impairment, under the GEPIC, is evaluated by:

- assessing six mental functions (intelligence, thinking, perception, judgement, mood and behaviour) and determining which Class (1-5) they fall into by reference to their severity (normal to slight, mild, moderate, moderately severe and severe); and
- once a class has been determined for each mental function, determining the median class. The percentage impairment which correlates with that particular class is the overall percentage impairment for the claimant. (Lander and Rogers 2013, 9)

Under GEPIC, Class One runs from zero to five per cent, while Class Two runs from 10 to 20 per cent (Epstein, Meldelson, and Strauss 2005). The CLBA submitted that a claimant who falls into Class Two should be eligible for damages for non-economic loss, given:

Whether a person is given 10 or 11% will depend upon a judgement made by the relevant clinician(s). It thus seems unusual to require that a person satisfy a level 1% higher than the minimum required for Class 2. (sub. 11, 2–3)

The CLBA also argued that there ‘seems to be a clear divide’ between Class One and Class Two psychiatric impairment under the GEPIC guide and that:

... the difference between 10 and 11% would seem much smaller, subject to judgements about which reasonable clinicians can and will differ, and has the capacity for similar cases at the lower end of Class 2 to be productive of arbitrary results. (sub. 11, 3)

In addition to concerns about the impairment thresholds for physical and psychiatric injuries, some participants identified specific inequities arising from the approach to measuring impairment resulting from spinal injuries.

Regarding the measurement of spinal injuries, the ALA noted that:

A claimant may have undergone spinal surgery to remove a disc or fuse vertebra, and after the condition has stabilised, still not be assessed at greater than 5%. (sub. 9, 7)

The LIV highlighted an example of spinal injury to illustrate how ‘the current thresholds are difficult to satisfy in many cases of substantial injury’ by highlighting an example of spinal injury where such unfairness may arise. It involved a claimant who suffered an
injury in negligent circumstances leading to ‘significant symptoms’ including ‘continuous back and recurring episodes of sciatic nerve pain’ relating to a spinal impairment. While the injury impacted significantly on the claimant’s ‘daily capacities and independence’, it was assessed at five per cent WPI and therefore the claimant was ineligible to claim compensation for non-economic loss (sub. 13, 6–7).

The Commission’s view

The Commission understands that the thresholds aim to ensure that only people who have suffered a ‘significant injury’ are eligible to access damages for non-economic loss. In assessing participants’ diverging views, the Commission found it useful to apply a statistical concept to characterise potential problems caused by the interaction of the thresholds with the objective criteria used to measure permanent impairment — the AMA-4 Guides and GEPIC in the case of physical and psychiatric injury, respectively. In statistical terminology:

- a null hypothesis states that there is no relationship between two measured variables: a person has not suffered a significant injury as a result of the negligent actions of another, that is, the person is not entitled to apply for compensation for non-economic loss
- a type 1 error (a false positive) occurs when a null hypothesis is incorrectly rejected: a person is wrongly allowed access to damages for non-economic loss as a result of the negligent actions of another, that is, a person is wrongly judged to have suffered a significant injury based on objective criteria
- a type 2 error (a false negative) occurs when a null hypothesis is incorrectly accepted: a person is wrongly denied access to damages for non-economic loss as a result of the negligent actions of another, that is, a person is wrongly judged to not have suffered a significant injury based on objective criteria.

Some participants have criticised the thresholds and exceptions to thresholds on the basis that the implementation of thresholds for non-economic loss means that some people who have suffered a ‘significant’ permanent impairment as a result of another person’s negligence are not eligible for compensation for non-economic loss — such situations would be a type 2 error.

There are a number of reasons why such situations may arise:

1. The objective criteria are imprecise, such that some types of injuries do not meet the test of ‘significant injury’ provided in the Act, despite medical opinion that they have a significant impact on a person’s daily activities. Medical practitioners are permitted to use some degree of judgement in applying the Guides, reflecting the ‘art’ — and science — of the practice of medicine (AMA 1993, 1/3). However, such judgement is restricted by the clearly defined thresholds for significant injury and the associated impairment scores provided in the Guides.

2. Assessment of impairment must be of the current, rather than the expected future, state of impairment. This affects persons with certain injuries, for example, asymptomatic diseases, such as some forms of hepatitis, where the degree of permanent impairment may not manifest for months or even years.

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6 Section 28LNA outlines the circumstances where a certificate may be provided where an injury has not stabilised.
(3) Thresholds for non-economic loss mean that some claims that fail to meet the threshold and therefore involve only economic loss may become uncommercial for plaintiff law firms to take on (Office of the Health Services Commissioner, sub. 7, 3–4).

Participants argued that to reduce the instances of people being unfairly denied damages for non-economic loss, the thresholds should be amended to be greater than or equal to five per cent and 10 per cent for physical and psychiatric injuries respectively. Therefore, the Commission has considered amending the thresholds as one of the potential options for reform (section 3.4).

To assess concerns about the impact of the threshold for psychiatric injury impairment, the Commission examined the GEPIC scoring system, particularly for mild (or Class Two) impairments, against the psychiatric threshold requirement. The GEPIC provides indicative ranges for each class of impairment (Table 3.2).

Table 3.2  Indicative ranges for psychiatric impairment (per cent)

<table>
<thead>
<tr>
<th>Class</th>
<th>Low-range</th>
<th>Mid-range</th>
<th>High-range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class One</td>
<td>0–1</td>
<td>2–3</td>
<td>4–5</td>
</tr>
<tr>
<td>Class Two</td>
<td>10–12</td>
<td>14–16</td>
<td>18–20</td>
</tr>
<tr>
<td>Class Three</td>
<td>25–30</td>
<td>35–40</td>
<td>45–50</td>
</tr>
<tr>
<td>Class Four</td>
<td>55–60</td>
<td>65–70</td>
<td>70–75</td>
</tr>
<tr>
<td>Class Five</td>
<td>75–80</td>
<td>85–90</td>
<td>95–100</td>
</tr>
</tbody>
</table>


Table 3.2 shows that a person could meet Class Two and still not meet the threshold for damages for non-economic loss. Given the nature of the scoring system, the Commission has considered amending the thresholds relating to psychiatric injuries as one of the potential options for reform (section 3.4).

As noted, several participants identified how the methodology for assessing spinal injuries is leading to some people experiencing serious spinal injuries failing to meet the current threshold. Figure 3.1 outlines the assessment process for spinal injuries under the Diagnosis-Related Estimates (DRE) model, by which the vast majority of spinal impairments are assessed.
Figure 3.1 Assessing a spinal injury under the AMA-4 Guides: Diagnosis-Related Estimates model

- Identify patient’s condition
- Determine the relevant Spine Impairment Category based on the Diagnosis-Related Estimates (DRE) model in table 70 of the AMA-4 Guides
- Where more than one symptom exists within a DRE category, the impairment percentages should be summed
- Determine the whole-person impairment percentage that corresponds with the DRE impairment category in tables 72, 73 and 74 of the AMA-4 Guides

Notes:
- The condition is based on the patient’s medical history, a physical examination, and a clinical workup.
- The DRE model evaluates impairment ‘not only on the medical history and physical examination, but also on medical data other than those that relate to the range of motion’ (AMA 1993, 3/99).
- There are three DRE categories: 1) Lumbosacral; 2) Cervicothoracic; 3) Thoracolumbar.

Sources: AMA 1993; Commission analysis.

The Guides provide categories of impairment for spinal injuries in intervals of five per cent. There is no provision to assess a percentage between the five per cent intervals. For example, for lumbosacral spine impairment, the first three categories are:

- Category I: zero per cent – complaints or symptoms
- Category II: five per cent – minor impairment – non-verifiable radicular complaints
- Category III: 10 per cent – radiculopathy – verifiable signs of radiculopathy (AMA 1993, 3/102).

The assessment of impairment includes a component for pain that may accompany musculoskeletal system impairments. Radiculopathy is the pain emanating from the nerve root in the spine and passing to the extremities. The Guides permit two different types of finding of radiculopathy – verifiable and not-verifiable. Pain that can be verified with associated findings, such as loss of reflexes, guarding or muscle wasting, can be assessed as at least up to 10 per cent. If a patient has non-verifiable radiculopathy then the permanent impairment is assessed as five per cent (Pillay 2011, 5). This means that a person with a minor permanent spinal injury showing clinical signs of lumbar injury without exhibiting, for example, nerve root impingement, is not able to claim compensation for non-economic loss. Based on evidence provided by stakeholders during consultations and the nature of the scoring system, it appears that the assessment of some spinal injuries results in some injured persons experiencing non-verifiable pain falling below the threshold for physical impairment. The Commission has therefore considered an amendment for certain spinal injuries as a potential option for reform (section 3.4).

3.3.2 Introduction of a narrative test

Several participants advocated introducing a narrative test, for example:

- The ALA recommended the introduction of a narrative test based on the serious injury test outlined in the Transport Accident Act to ‘catch some claimants whose injuries are not assessed highly under the AMA-4 Guides, yet can prove that their injuries have resulted in very significant, long-term consequences’ (sub. 9, 9).
The LIV also recommended a narrative test apply for serious long-term impairment or loss of a body function; permanent serious disfigurement; or severe long-term behavioural disturbance (sub. 13, 10). Modelling conducted by Cumpston Sarjeant for the LIV suggested introducing a narrative test — in addition to the existing threshold arrangements — would have a negligible impact on additional claims (sub. 13, addendum).

The Monash Law Students Society Just Leadership Program recommended a narrative test be introduced, in addition to amending the physical injury threshold to five per cent or more (sub. 6, 2).

On the other hand, the Municipal Association of Victoria (MAV) opposed the introduction of a narrative test on the basis that it would ‘lead to an enormous increase in legal costs and court waiting lists’ (sub. 12, 14).

As an alternative gateway to access damages for non-economic loss, the CLBA submitted that in ‘performing assessments of claimants under the Wrongs Act medical assessors be permitted to utilise chapter 15 of the AMA Guides’, which deals with the evaluation of pain (sub. 11, 4). According to the CLBA such assessment would then be similar to the narrative test approach in the Accident Compensation and Transport Accident Acts, by providing the claimant with an ability to rely on ‘pain and its consequences’ to prove significant injury under the Wrongs Act (sub. 11, 3–4).

The Commission’s view

Given the introduction of a narrative test has been raised by a number of participants, and its use in other Victorian personal injury compensation Acts, the Commission has considered a narrative test as an option for reform (section 3.4).

The Commission also considered the application of chapter 15 of the AMA-4 Guides, which provides guidance for the assessing practitioner on determining the WPI associated with pain. The Commission understands that while chapter 15 is excluded from providing guidance for WPI assessment under the Wrongs Act, impairment percentages provided throughout the rest of the AMA-4 Guides ‘include allowances for the pain that may occur with those impairments’ (AMA 1993, 15/304).

Furthermore, the other Victorian personal injury compensation Acts, consistent with this approach, also exclude chapter 15 of the AMA-4 Guides from the assessment of impairment. In discussing the exclusion of chapter 15 from assessments under the Accident Compensation Act in 1997, the then Treasurer stated:

The chapter of the guides dealing with pain will be excluded because it provides no workable methodology for ascribing a percentage impairment to the assessment of chronic pain. However, each individual chapter on a body system includes a component for pain. (Victorian Parliamentary Debates – Legislative Assembly 1997, 1077)

The Commission does not propose changing the exclusion of chapter 15 of the AMA-4 Guides from impairment assessment given that the other chapters of the AMA-4 Guides already take account of an injured person’s pain, and the express exclusion of chapter 15 from the AMA-4 Guides by the Victorian Parliament in 2003.7

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3.3.3 Further exceptions

As discussed in section 3.2, there are some exceptions to the significant injury impairment thresholds. These exceptions mean that the impairment assessment process does not apply to certain types of injuries, and thus there is no barrier to accessing damages for non-economic loss (other than proving negligence).

Participants noted that the existing exceptions have raised issues of consistency and equity. For example, the LIV noted that the exceptions relating to a child’s death only include circumstances of obstetric management or injury in the immediate neonatal period, ruling out compensation for other circumstances such as a wall collapsing on a child (sub. 13, 9). To address this and other issues, participants suggested a number of additional exceptions for:

- people who suffer a psychiatric injury due to the loss of a child, spouse or close relative
- people infected with blood-borne diseases such as hepatitis B or C or HIV
- people who undergo unnecessarily invasive treatment due to negligent misdiagnosis
- injuries necessitating surgical treatment or medical misdiagnosis resulting in symptoms of more than six months duration
- children who suffer traumatic injuries but eventually substantially recover
- Legionnaire’s disease requiring extensive periods of intensive treatment
- burns and scar injuries (ALA, sub. 9, 7; CLBA, sub. 11, 5–6; LIV, sub. 13, 12).

Stakeholders also raised the issue of the assessment of diseases where symptoms are likely to be asymptomatic, that is, symptoms are unlikely to manifest for many years after contracting a disease. Such diseases include HIV, hepatitis B and C and Q-fever. People with asymptomatic diseases are likely to need to wait for a period of years before initiating a claim for non-economic loss. In addition, as claims for economic and non-economic loss cannot be separated, such applicants will be unable to claim for economic losses — such as loss of earnings and costs of medical care — until their condition exhibits symptoms to support a claim for non-economic loss.

The Commission also heard from participants that this problem is compounded by the operation of the Limitation of Actions Act 1958 (Vic), which imposes a three-year limitation period on claims after the cause of action has arisen. Where claimants apply for an extension to the limitations of actions period, the Commission understands that the cost of an application to extend the limitation period can vary widely. Where there is disagreement between the parties and the matter must be heard in court, costs can range between, on average, $14 000 and $50 000 for both parties. However, where parties agree to extend the limitation period, costs are minimal.

In response to the Commission’s draft report, some participants did not support changes to the position regarding asymptomatic diseases (Avant Mutual Group Limited, sub. DR19, 4; ICA, sub. DR21, 2). For example, the ICA suggested that as a matter of principle, damages should only be awarded ‘for the loss suffered by a person as a result of a negligent act’ (sub. DR21, 2). The ICA also noted that claimants are able ‘to seek redress under the current common law through the specific extension of the limitation period’ (sub. DR21, 2). On the other hand, the LIV noted that assessment of

8 Some exclusions to the Limitation of Actions Act exist for minors and people with a disability.
compensation for future events is ‘common place in damages law’ and argued in favour of an exception to the threshold for asymptomatic diseases (sub. DR24, 8).

The Commission’s view

In considering further exceptions, the Commission has been guided by the underlying objectives of the provisions governing access to non-economic loss, which require that:

1. The injury is permanent, rather than temporary, in nature. Applying this criteria leads the Commission to rule out further exceptions for temporary injuries, including:
   - injuries necessitating surgical treatment or medical misdiagnosis resulting in symptoms of more than six months duration (but not permanently)
   - children who suffer traumatic injuries but eventually substantially recover
   - diseases with temporary impacts.

2. The injury is significant, based on the objective criteria outlined in the AMA-4 and GEPIC guides. Applying this criterion leads the Commission to rule out further exceptions for injuries that can be assessed on whether they meet the impairment threshold based on the objective criteria outlined in the AMA-4 Guides, including:
   - burns and scar-type injuries
   - people who suffer psychiatric injury due to the loss of a child, spouse or close relative
   - people who undergo unnecessarily invasive treatment due to negligent misdiagnosis.

Regarding the issues raised by participants about asymptomatic diseases, the Commission understands that the types of injuries from such conditions are likely to be both permanent and result in significant physical impairment. As such, the Commission’s view is that it would be inequitable for a person negligently infected with an asymptomatic disease to be denied access to damages for non-economic loss — and, by extension, economic loss.

That said the Commission has not found any evidence that people negligently affected with an asymptomatic disease have been denied access to compensation for non-economic loss. The Commission understands that, generally, a claimant is likely to meet the 10 per cent psychiatric injury impairment threshold and hence be able to access damages for non-economic loss. In addition, the Commission notes that the current system does allow for people with asymptomatic diseases to access compensation through extensions to the limitation period. In discussions with participants, the Commission was also informed that typically, an application for an extension to the limitation period is agreed between the parties and thus the court costs of an application are small. In short, the current arrangements seem to have addressed this issue in practice.

While the Commission acknowledges there may be an in-principle case for providing an exception for asymptomatic diseases, the lack of evidence of a significant problem with current processes means the Commission has not recommended this approach be implemented.
3.4 Options

The Commission assessed three options for addressing perceived deficiencies in the thresholds for non-economic loss. These options were assessed against the principles of efficiency, equity and consistency with the intent of the underlying objectives of the 2002-03 tort law reforms (figure 3.2). The relevant efficiency aspects for the provisions governing access to non-economic loss relate to:

- the impact on incentives to invest in safety
- the likelihood and costs of unmeritorious litigation
- transaction cost impacts on plaintiffs, defendants, the courts and Medical Panels.

The relevant equity principle is that people who suffer a significant injury as a result of the negligence of others should be compensated. Within this overarching principle, horizontal equity is also important such that a person suffering a significant injury should be treated equally to another person suffering a similarly significant injury.

Consistency is assessed in terms of whether the relevant provisions of the Wrongs Act are operating in accordance with the underlying objectives of the tort law reforms, including how the options impact on the price and availability of public liability and professional indemnity insurance.

**Figure 3.2 The Commission’s assessment framework**

<table>
<thead>
<tr>
<th>Options for reform in the following areas</th>
<th>Assessed against these criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thresholds on damages for non-economic loss:</td>
<td>Efficiency</td>
</tr>
<tr>
<td>- whole person impairment of more than five per cent</td>
<td></td>
</tr>
<tr>
<td>- impairment of more than 10 per cent for psychiatric injury.</td>
<td></td>
</tr>
<tr>
<td>Exceptions to the threshold.</td>
<td>- impact on incentives to invest in precaution</td>
</tr>
<tr>
<td></td>
<td>- impact on defendants of unmeritorious litigation</td>
</tr>
<tr>
<td></td>
<td>- impact on transaction costs including costs to plaintiffs, defendants, courts and the Medical Panels</td>
</tr>
<tr>
<td></td>
<td>Equity</td>
</tr>
<tr>
<td></td>
<td>- horizontal equity</td>
</tr>
<tr>
<td></td>
<td>Consistency</td>
</tr>
<tr>
<td></td>
<td>- with the underlying objectives of the tort law reforms, including the impact on the price and availability of insurance</td>
</tr>
</tbody>
</table>

Source: Commission analysis.

Three reform options were examined by the Commission:

(1) **Lowering the physical impairment threshold to be greater than or equal to five per cent and greater than or equal to 10 per cent for psychiatric impairment**

This option involves lowering the physical impairment threshold to five per cent, which would provide access to compensation to claimants with injuries including, for example, category two spinal injuries, disorders of the entire ring or little finger, amputation of the great toe, or extensive permanent scarring — all assessed at five per cent impairment under the AMA-4 Guides.
In addition, this option involves lowering the psychiatric impairment threshold to 10 per cent, which would allow all claimants assessed as having psychiatric injuries in the mild impairment category of the GEPIC — 10 to 20 per cent impairment — to be eligible for compensation.

(2) Differential treatment of spinal injuries

This option would reduce the physical impairment threshold for spinal injuries to greater than or equal to five per cent. It would be similar, but not identical, to changes made to the Accident Compensation Act in 2008\(^9\) that introduced a modified impairment assessment scale to provide workers with musculoskeletal injuries access to statutory workers compensation benefits where they are assessed as having a WPI of between five and nine per cent. The purpose of these amendments was to assist workers thought to have been ‘harshly’ disadvantaged by the introduction of the Guides as the lump sum benefit assessment tool in 1997 (Hanks 2008, 253).

For the avoidance of doubt, this option would not reduce the threshold in a situation where a spinal injury is claimed, along with other injuries, and the spinal injury is assessed at zero per cent. For example, where a person has a spinal injury assessed at zero per cent impairment, and other injuries assessed at five per cent, then the person will be unable to access damages for non-economic loss — as the threshold remains at greater than five per cent.

(3) Introduce a narrative test

This option involves introducing a narrative test into the Wrongs Act along the lines of that in the Transport Accident Act and Accident Compensation Act (section 3.2.2), such that the following injuries would exceed the threshold:

- permanent serious impairment or loss of a body function\(^10\)
- permanent serious disfigurement
- permanent severe mental or permanent severe behavioural disturbance or disorder\(^11\).

3.5 Assessing the options against the criteria

The options are assessed against the criteria of efficiency, equity and consistency with the underlying intent of the tort law reforms (figure 3.2). The assessment was made against the base case of no change. In addition, the Commission has considered the feedback received from participants on its draft report in assessing the options, for example:

- Avant Mutual Group Limited cautioned that lowering the impairment thresholds may ‘increase referrals to the Medical Panel, thereby increasing costs’ (sub. DR19, 2).
- MAV expressed concern about the impact lowering the thresholds may have on: unmeritorious claims; assessing spinal injuries with existing undiagnosed age-related

\(^9\) Compensation and Superannuation Legislation Amendment Act 2008 (Vic).

\(^10\) In the Transport Accident Act, this provision is referred to as a ‘serious long-term impairment or loss of a body function’ (s 93(17)).

\(^11\) In the Transport Accident Act, this provision is referred to as a ‘severe long-term mental or severe long-term behavioural disturbance or disorder’ (s 93(17)).
problems; and ‘complicating the assessment and subsequent litigation processes by making causation a much more contentious factor (sub. DR20, 2–4).

- A report prepared by Finity Consulting for the ICA cautioned about the uncertainty around insurance market impacts and suggested the impacts of changes to the thresholds on premiums are “probably towards the top of the range estimated’ (sub. DR21, att. A, 1).

- The LIV acknowledged the improved equity from reducing the threshold for spinal injuries and psychiatric injuries but suggested that ‘to restore equity’ more broadly the threshold for all physical injuries be reduced to five per cent and ‘be complemented by a limited narrative test’ (sub. DR24, 17).

### 3.5.1 Efficiency

**Impact of thresholds on incentives to invest in precaution**

One potential impact of thresholds is the impact on incentives to invest in safety, both for potential victims and for the potential negligent party. On one hand, the imposition of a threshold can increase the incentives for potential victims to take care in their activities to reduce the risk of being a victim of negligence (for example, wearing shoes with firm grip in a supermarket). On the other hand, the reduction in liability resulting from the introduction of thresholds can reduce incentives to invest in precaution or take reasonable care. The Office of the Health Services Commissioner noted:

> The introduction of non-economic thresholds has limited claimant’s ability to pursue non-economic damages where the level of impairment falls below the threshold. While this may reduce the number of small non-economic claims for injuries that are not significant, disconnecting the negligent act from any financial consequence may have also removed some of the incentive for health providers to improve practice and therefore to reduce reasonable care or avoid future mistakes. (sub. 7, 3)

The question of whether the thresholds have reduced incentives to invest in safety is ultimately an empirical one. The Commission is not aware of any studies which have been able to answer such a question. A meta-analysis by Professor Harold Luntz summarised the evidence on tort law and incentives to invest in safety (Luntz 2013). The paper concluded that — in the context of the National Disability Insurance Scheme — shifting costs to the negligent party would ‘have minimal, if any, deterrent effect on the behaviour of the individuals concerned’ (Luntz 2013, 207).

Further incentives to invest in safety from a business’s perspective include requirements to do so under industry-specific regulation, meeting the requirements of an accreditation or insurance scheme, or maintaining business or professional reputation. As such, it seems reasonable to conclude that the existing level of investment in precaution from both potential victims and potential negligent parties is unlikely to change under any of the options considered.

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12 For example, the Food Act 1984 (Vic) regulates the food industry.

13 For example, the Productivity Commission suggested ‘workers compensation insurance goes hand-in-hand with compliance with occupational health and safety standards; and medical indemnity insurers finance clinical risk management programs’ (PC 2011, 833).
Impact on defendants of unmeritorious claims and the transaction costs of small claims

Transaction costs

Recent experience with the adoption of a narrative test under the Accident Compensation and Transport Accident Acts highlights how the introduction of such a test under the Wrongs Act may affect transaction (including legal) costs. The MAV noted that the process for dealing with contested serious injury applications under the narrative test under both Acts costs around $100 000 for both parties (sub. 12, 14). As a further guide, the TAC reported that costs for contested serious injury applications made under the narrative test averaged around $40 000 for plaintiffs and around $26 000 for defendants in 2012-13, a total cost of around $66 000 (TAC correspondence).

The Commission considers that introducing a narrative test to the Wrongs Act (option 3) could increase the number of claims by up to 20 per cent, or 200 a year, representing an average of TAC and VWA narrative test claims with levels of impairment below current Wrongs Act thresholds (VWA 2013b, 6; TAC correspondence). If this is true, the legal costs alone of these claims would therefore be significant — between $13 million to $20 million per annum — before considering the award of damages. From consultations with stakeholders, the Commission understands that transaction costs for plaintiffs, defendants, the courts and the Medical Panels would be significantly increased, due to an expansion in what is accepted as a serious injury under the narrative test over time and the costs of disputes about serious injury.

The Commission also notes the recent judgment of Justice Maxwell in the case of TAC v Zepic [2013] VSCA 232 commenting on the burden of the narrative test under the Transport Accident Act:

The significant policy question which arises, however, is whether the current system is a satisfactory way of differentiating between those who can sue and those who cannot. Despite the best efforts of the judges of the County Court, and of this Court, litigation of this kind places an ever-heavier burden on the judicial resources of this State. At the same time, there are reasons to doubt whether it is possible to fulfil the requirement of the rule of law that like cases be treated alike, given the imprecision of the narrative test, the intrinsic difficulty of assessing — and comparing — degrees of pain and suffering, and the near-impossibility of separating out psychological from organic causes of pain and disability. [147]

Changes to the threshold (option 1) and changes specific to spinal injuries (option 2) are likely to result in a smaller number of additional claims than under a narrative test (option 3), so would therefore have a relatively smaller impact on transaction costs. Furthermore, reducing the threshold (option 1) — and to a lesser extent lowering the threshold for spinal injuries (option 2) — removes some complexity from the assessment process. For example, claimants assessed in the mild psychiatric impairment category would be clearly eligible to pursue compensation, as compared to the current situation where an assessment between 10 and 11 per cent would need to be established. Also, physical injuries such as category two spinal injuries, disorders of the entire ring or little finger, amputation of the great toe, or extensive permanent scaring would clearly meet the threshold as significant injuries.

Finally, the Commission considered improvements to the Medical Panels and court processes (chapter 8). Such improvements are likely to lead to a more efficient
assessment process, reduce uncertainty, and therefore partially offset increased transaction costs associated with the options.

**Unmeritorious claims**

In general, the Commission notes that the potential for unmeritorious claims is restricted by issues of cost and other safeguards (chapter 2). One of these safeguards is the Guides themselves, which provide information and procedures for medical practitioners to follow in making an impairment assessment. For example, if a claimant is being assessed for a spinal injury by a medical panel, the panel would need to consider pre-existing conditions, patient history, and common developmental findings in making their assessment.\(^\text{14}\) In addition to the directions of the Guides, s 28LL(3) of the Wrongs Act prescribes that for the purposes of assessing eligibility to access damages for non-economic loss, ‘impairments from unrelated injuries or causes are to be disregarded’.

From discussion with the Medical Panels, the Commission understands that some people are likely to have an underlying spinal condition due to age and this may be documented through medical records — that is, a person with such a condition may have sought medical treatment at some stage in their life. As such, in keeping with s 28LL(3) of the Wrongs Act, pre-existing or unrelated injuries will, if considered to result in an impairment, be disregarded (Medical Panels correspondence). These safeguards mitigate risks of increased unmeritorious litigation.

Recent data from the TAC and VWA illustrates that those persons with relatively small permanent impairment scores — less than five per cent — are accessing the narrative gateway (option 3) (TAC and VWA correspondence). While many of these claims are likely to be meritorious, the potential for persons without a significant injury being incorrectly compensated if such a test were introduced into the Wrongs Act is likely to be higher, given costs of contesting small claims for defendants. Therefore, the number of unmeritorious claims is likely to be lower under reducing the thresholds (option 1) and lowering the threshold for spinal injuries (option 2) than under introducing a narrative test (option 3).

**3.5.2 Equity**

Achieving horizontal equity means persons with a similar degree of permanent impairment are treated in similar ways. Therefore, all people with a significant injury, as measured by objective criteria, should be able to access compensation.

In this context, the Commission has identified that the existing thresholds restrict some individuals with significant injuries accessing compensation. The LIV suggested injuries which would be captured under option 1 include the ‘amputation of the great toe, ankylosis of the knee ... at 20-29° flexion, amputation of the little or ring finger of either hand, serious scarring, and ankylosis of a shoulder at 20-50° abduction (sub. DR 24, 7). As options 1 to 3 are likely to increase the number of claimants with a significant injury being eligible to access damages for non-economic loss, horizontal equity is likely to be improved. That said the relative impact could be greater under option 1 when compared to option 2, given the potential for more people to be compensated for

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\(^{14}\) Common developmental findings include: ‘spondyloysis, found normally in seven per cent of adults; spondylolisthesis, generally found in three per cent of adults; ‘herniated disk without radiculopathy, found in more than 30 per cent of individuals by age 40 years’; and ‘aging changes, common in 40 per cent of adults after age 35 years’ (AMA 1993, 3/100).
non-economic loss. This also assumes that all injuries at the five per cent level are considered to be significant.

The Commission considers that introducing a narrative test (option 3) may improve horizontal equity, as it is likely almost all claimants with significant injuries would be compensated. The narrative test would, in addition to the impairment itself, determine the impact of that impairment on the person’s daily life and the extent to which compensation can be sought to return them to their pre-injury position. That said, there is also a greater potential for situations to arise over time where people are wrongly receiving compensation without meeting the intended threshold. Such situations may arise as a narrative test allows a wider set of factors to guide assessment of impairment, including subjective judgements about pain and suffering. These situations would violate the concept of vertical equity, which requires that people in different circumstances be treated differently.

3.5.3 Consistency with the underlying objectives of tort law reform

Impact on price and/or availability of insurance

The introduction of thresholds in 2003 appears to have reduced the number of claims, particularly smaller claims. This reduction in small claims is in line with the original intention of tort law reforms (chapter 2). In turn, this appears to have contributed to a decline in the cost and a rise in the number of policies, for public liability and professional indemnity insurance (chapter 2).

That said, the Commission was limited in its capacity to analyse the impacts of options on the price and/or availability of public liability and professional indemnity insurance by the lack of data on the impairment assessment of injuries relating to Wrongs Act claims. The Medical Panels do not collect data on the impairment values assessed in their determinations as they are only required under the Wrongs Act to determine whether a claimant either meets or does not meet the threshold. The MAV, for example, noted that the Medical Panels do:

... not provide a specific impairment score, simply determining whether a person exceeds the current threshold or not. As such, there would appear to be no way for the VCEC to quantify for the Government the impact such a change to the current 5% threshold might have on future claim numbers and their cost. (sub. 12, 14)

From discussions with the Medical Panels, the Commission understands it is unlikely that a five per cent impairment threshold for spinal injuries (option 2) would result in a significant spike in claims, given the trend for claims to have multiple or complex injuries — which are unlikely to be affected by this new threshold (Medical Panels correspondence).

Given data limitations, the Commission sought to understand the indicative impact on insurance markets based on its own understanding of how insurance markets work (chapter 2), data sourced from APRA, VWA and the TAC, modelling conducted by the Victorian Managed Insurance Authority (VMIA) and material provided by participants (appendix B). Increases in the price of insurance would reflect additional claims costs from a greater number of claims.
The Commission’s analysis suggests that introducing a narrative test (option 3) would have the greatest impact on claim numbers and therefore insurance premiums. Lowering the threshold (option 1) would in turn have a greater impact than lowering the threshold for spinal injuries only (option 2) (table 3.3).

### Table 3.3 Estimated impact on premiums – changing access to damages for non-economic loss (2012)

<table>
<thead>
<tr>
<th>Calculation</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impact on claims costs (A)</td>
<td>From table B.2, appendix B</td>
<td>$1.2m to $8.5m</td>
<td>$0.6m to $4.0m</td>
</tr>
<tr>
<td>Gross written premium(^a) (B)</td>
<td>APRA data</td>
<td>$406.3m</td>
<td></td>
</tr>
<tr>
<td>Weighted average premium(^b) (C)</td>
<td>APRA data</td>
<td></td>
<td>$1391</td>
</tr>
<tr>
<td>Percentage increase in premiums (D)</td>
<td>(A)/(B)</td>
<td>0.3% to 2.1%</td>
<td>0.1% to 1.0%</td>
</tr>
<tr>
<td>Increased cost per premium (C) x (D)</td>
<td></td>
<td>$4 to $19</td>
<td>$2 to $9</td>
</tr>
</tbody>
</table>

Notes:  
\(^a\) The amount received by the insurer when a policy is taken out. Includes premium pool for public liability (excluding product liability and construction liability) and medical indemnity insurance.  
\(^b\) Gross written premium divided by the number of risks written.

Sources: APRA 2013b; Commission analysis from appendix B.

The VMIA\(^{15}\) modelled the potential impacts of the Commission’s options on public sector medical indemnity insurance premiums. Modelling of options 1, 2 and 3 found that while there was insufficient data to determine the precise impact on the price of insurance, the likely increase in insurance premiums could be in the vicinity of three to five per cent. It is important to note that these estimates are only based on the VMIA’s medical indemnity premium pool and may not reflect the broader private insurance market. That said, the VMIA suggested that ‘the impact of lowering the thresholds to 5% and 10% (option 1) is likely to be at the lower end of the estimated range, as opposed to the introduction of a narrative test which would be at the higher end’ (VMIA 2013, 11).

### 3.6 Summary assessment

The assessment of options suggests that amending the threshold to be greater than or equal to five per cent and 10 per cent for physical and psychiatric impairment respectively (option 1) and reducing the threshold to five per cent for spinal injuries (option 2) would have the greatest positive impacts on equity and smallest likely adverse impact on efficiency (in particular, transaction costs). They would also appear to be broadly consistent with the underlying objectives of tort law changes in ensuring compensation is targeted to the most seriously injured.

The options potentially affect three groups: insurers, the insured and injured people. Injured people are likely to be better off, while the insured end up paying for the additional compensation awarded. From an efficiency perspective, this represents a transfer from one group to another. The overall wellbeing of society is therefore unaffected. So ultimately the choice comes down to a judgement about the relative

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\(^{15}\) The VMIA is the insurer for, and provides insurance products and risk management services to, the State of Victoria.
merits of improving equity for injured people against the impact on premiums and hence, policy holders.

On balance, reducing the thresholds would be a positive step towards relaxing government intervention in a market that seems to have stabilised. While the Commission attempted to measure the potential impact on the price of insurance, the uncertainties around such estimates suggests a cautious approach to addressing the identified inconsistencies or anomalies is warranted. A worthwhile first step is to address the anomalies created by the way the impairment assessment is conducted under the relevant guides for spinal injuries and psychiatric impairment.

The Commission’s preferred option involves a combination of options 1 and 2:

- amending the psychiatric impairment threshold to greater than or equal to 10 per cent, while maintaining the physical impairment threshold at greater than five per cent
- introducing another exception to the threshold, such that spinal injuries assessed at greater than or equal to five per cent impairment become eligible for damages for non-economic loss.

This option should improve horizontal equity by helping to ensure that people with significant injuries are able to access to damages for non-economic loss. This approach is also expected to lead to a small increase in insurance premiums — between 0.1 and 1.0 per cent (table 3.3). Therefore, this option is included in the Commission’s recommended package of reforms to limitations on personal injury damages (chapter 7).
4 Caps on damages for economic and non-economic loss

This chapter examines the caps imposed on economic and non-economic loss as part of the tort law changes of 2002-03. At the time of the reforms, the then Premier explained that the purpose of capping court-awarded damages was to provide:

... increased certainty to the public liability insurance market. [The reforms] define potential claimants’ rights more clearly in terms of their potential claim while also providing insurers with greater certainty with respect to potential claim costs. (Victorian Parliamentary Debates – Legislative Assembly 2002, 142)

The Commission, in considering the caps, was required to have regard to:

- whether any options for amendment would have an unduly adverse impact on the price and/or availability of public liability or professional indemnity insurance in Victoria
- consistency with other legislative regimes prescribing compensation for personal injury, having regard to the different objectives of those schemes.

4.1 Cap on economic loss

Under the Wrongs Act, limitations on damages for economic loss apply to the award of damages for loss of earnings, the deprivation or impairment of earning capacity, or the loss of expectation of financial support (s 28F(1))1. Section 28F(2) states that the court must disregard any amount ‘by which the claimant’s gross weekly earnings would (but for the death or injury) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award’. The effect of this provision is to impose a cap on the amount of damages for economic loss of three times average weekly earnings (AWE). Typically, these damages are awarded as a lump sum (chapter 5).

Subject to statutory limitations, loss of earnings is calculated at common law as the difference between:

- the net earnings a person would have had, had they not suffered the injury (their ‘pre-injury’ earnings)
- ‘the net earnings they have had, and will now continue to have’ (their ‘post injury’ earnings) (Heath and Plover 2008, 2).

In determining damages for loss of earnings, several factors are taken into account, including:

- taxation, as gross earnings amounts must be converted to net earnings with reference to historical taxation rates (s 28A)
- discounting of future economic loss to reflect the present value of the loss (chapter 5)

1 Loss of expectation of financial support compensates dependants of deceased persons.
• deductions for vicissitudes — that is, deductions for risks that earnings would not have continued, due to unexpected variations, until the assumed retirement age (for example, due to death, illness, unemployment and strikes). A court will normally apply a 15 per cent discount for vicissitudes (Heath and Plover 2008, 11)

• in the case of dependant claims, the personal expenses of the deceased are deducted from expected earnings (LIV, sub. 13, 6).

The Ipp report’s recommendation

The Ipp report recommended a cap on damages for economic loss on the basis that it provides ‘high earners with a desirable incentive to insure against loss of the capacity to earn more than the amount of the cap’ (Negligence Review Panel 2002, 197). It recommended capping damages for economic loss at two times AWE. This was justified on the basis that it was an amount, which, at the time, only 2.4 per cent of employees earned above and would thus affect a very small proportion of claimants (Negligence Review Panel 2002, 198).

Comparison with other Victorian personal injury Acts

The method used to set the cap on economic loss under the Wrongs Act differs from that used in the Accident Compensation Act 1985 (Vic) and the Transport Accident Act 1986 (Vic) in common law claims. The Wrongs Act caps are set on the basis of AWE, whereas the other personal injury Acts have an absolute (indexed) cap. Under both the Accident Compensation and Transport Accident Acts, persons are entitled to claim the difference between their pre- and post-injury earnings up to their prescribed limit, namely:

• The limit on damages for pecuniary (economic) loss for work-related injury claims is $1,275,540 (as at 1 July 2013) (ss 134AB(22) and 100C of the Accident Compensation Act).

• The limit for pecuniary (economic) loss for a transport accident is $1,119,060 (as at 1 July 2013) (ss 93(7)) and 61 of the Transport Accident Act).

In addition, both the Accident Compensation and Transport Accident Acts require a claimant to meet a threshold of monetary loss before being able to claim for economic loss.

• Under the Accident Compensation Act, a worker must demonstrate a permanent loss of earning capacity of 40 per cent or more and meet a pecuniary threshold of $56,650 at 1 July 2013 (ss 134AB(22) and 100C).

• Under the Transport Accident Act the threshold is $49,710 at 1 July 2013 (ss 93(07) and 61).

Different treatment for plaintiffs who experience total loss of earnings

The two different methods of setting limits on economic loss prescribed by the personal injury Acts in Victoria result in different levels of compensation for plaintiffs of similar age suffering similar injuries and a total loss of earnings. For example, figure 4.1 highlights the different levels of compensation payable under Victoria’s three personal injury Acts for two hypothetical, catastrophically injured plaintiffs for a range of income levels up to three times AWE. Both plaintiffs in this example are assumed to have had their future earning capacity extinguished as a result of their injury. One is aged 25 and the other is aged 45. While the analysis is not strictly comparable (due to different discount rates used across the Acts (chapter 5) and does not make allowance for deductions such as taxes and allowances for premature mortality), it does highlight some differences between the schemes. In particular, the comparison shows how a catastrophically
injured person on a high income (three times AWE) is likely to be better off under the Wrongs Act relative to the other compensation Acts (figure 4.1). This reflects the impact of the Accident Compensation and Transport Accident Acts on people with high or long term earning potential.

**Figure 4.1** Maximum payments for complete loss of earning capacity for catastrophically injured persons by age and income ($ million)\(^a\)

<table>
<thead>
<tr>
<th>Pre-Injury earnings</th>
<th>Lump sum awarded</th>
<th>25 year old</th>
<th>45 year old</th>
</tr>
</thead>
<tbody>
<tr>
<td>AWE</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>2 x AWE</td>
<td>2</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>3 x AWE</td>
<td>3</td>
<td>6</td>
<td>8</td>
</tr>
<tr>
<td>3 x AWE</td>
<td>3</td>
<td>6</td>
<td>8</td>
</tr>
</tbody>
</table>

Notes: \(^a\) Simplifying assumptions: no deductions for vicissitudes, taxation etc.; does not allow for future promotions; five per cent discount rate used for Wrongs Act and six per cent for Transport Accident and Accident Compensation Act payouts; retirement age of 67; date of award 1 July 2013.

Source: Commission analysis.

**Different treatment for plaintiffs who experience partial loss of earning capacity**

In contrast to the example above, a plaintiff with a relatively high post-injury earning capacity is likely to be worse off under the Wrongs Act relative to the other schemes. To illustrate, assume that the plaintiff is a 45 year old with pre-injury earnings of five times AWE, again without allowance for deductions. Table 4.1 outlines the damages potentially payable under a range of post-injury earning capacities. The analysis shows that the plaintiff could be significantly worse off under the Wrongs Act once their weekly post-injury earnings exceed around 1.7 times AWE. Where post-injury earnings exceed three times AWE, a plaintiff is not entitled to any compensation. This issue is further discussed in section 4.1.2. In general, the Commission’s analysis demonstrates that the cap under the Wrongs Act tends to result in lower compensation than other Victorian personal injury schemes for seriously injured plaintiffs with relatively high post-injury earnings.
Table 4.1  Indicative maximum payments for economic loss for partial loss of earning capacity ($ million)a

<table>
<thead>
<tr>
<th>Post-injury earnings</th>
<th>Lost earnings</th>
<th>Wrongs Act</th>
<th>Transport Accident Act</th>
<th>Accident Compensation Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 x AWE</td>
<td>2 x AWE</td>
<td>0</td>
<td>1.12</td>
<td>1.20</td>
</tr>
<tr>
<td>2 x AWE</td>
<td>3 x AWE</td>
<td>0.74</td>
<td>1.12</td>
<td>1.20</td>
</tr>
<tr>
<td>AWE</td>
<td>4 x AWE</td>
<td>1.47</td>
<td>1.12</td>
<td>1.20</td>
</tr>
</tbody>
</table>

Notes: a Simplifying assumptions: 45-year-old plaintiff; retirement age of 67; pre-injury earnings of five times AWE; no deductions such as for vicissitudes, taxation etc.; does not allow for future promotions or increases in award wages; five per cent discount rate used for Wrongs Act and six per cent for Transport Accident and Accident Compensation Act payouts; date of award 1 July 2013.

Source: Commission analysis.

Comparison with other jurisdictions

In line with the Ipp report, all Australian jurisdictions — with the exception of South Australia — apply an earnings-based cap on economic loss. South Australia applies a maximum award cap, similar to the approach used in Victoria’s Accident Compensation and Transport Accident Acts.2

4.1.1 The Commission’s approach

The Commission’s approach involves assessing options for reform to the caps placed on damages for economic loss using the following framework:

(1) Identify the key issues, that is, the anomalies, inequities and/or inconsistencies.
(2) Identify options to address the issues.
(3) Assess options against the principles of efficiency, equity and consistency with the underlying objectives of the tort law reforms (figure 4.2).

2 The Civil Liability Act 1936 (SA) ss 3 and 54 sets an indexed maximum award of $2.2 million (as at 1 September 2001).
The key issues raised by participants concerning the cap on economic loss under the Wrongs Act were:

1. the impact of the cap on people who earn above three times AWE pre-injury and experience partial loss of earnings
2. the impact of the cap on dependants of deceased high-income earners claiming for loss of expectation of financial support.

4.1.2 The impact of the cap on economic loss for people who experience partial loss of income

Participants noted the impact of the cap on economic loss on high-income earners with residual earning capacity, as illustrated by the 2012 Supreme Court decision in Tuohey (Tuohey v Freemasons Hospital [2012] VSCA 80 (‘Tuohey’)) (box 4.1). This decision determined that the cap does not apply to the difference between pre- and post-injury earnings. Rather, a court must disregard the amount by which a person’s pre-injury earnings exceed the cap of three times AWE. This means that where the plaintiff’s capacity to earn is diminished as a result of negligence, if that ‘person’s post-injury earning capacity is also in excess of three times the average weekly wage, then that person will not be entitled to any damages for loss of earning capacity’ (Larking and Spain 2012, 32).
The plaintiff in *Tuohey v Freemasons Hospital* [2012] VSCA 80 was an engineer in his late forties, who was admitted to the Freemasons Hospital in 2005 for minor surgery. During his recovery, a nurse, after assisting the plaintiff to stand, left his side to attend to another part of the room. While unattended, the plaintiff fell to the floor and injured his right eye.

Prior to his injury, the plaintiff had a gross weekly earning capacity of $10,548. Due to the damage to his eye, his post-injury earning capacity was reduced to $6,442. This meant that the plaintiff had suffered a $4,106 loss of gross weekly earning capacity. At the time, the cap of three times gross average weekly earnings (AWE) was agreed by the parties to be $2,836.

The matter was originally listed in the County Court of Victoria. During a directions hearing, the parties advised the judge that the interpretation of s 28F(2) of the Wrongs Act was of such significance to the dispute that the unsuccessful party was likely to appeal on this point. This section states that:

> In the case of any award to which this section applies, the court is to disregard the amount (if any) by which the claimant’s gross weekly earnings would (but for death or injury) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.

The matter hinged on whether s 28F(2) required the court to disregard:

1. The amount by which the difference between the plaintiff’s ‘pre-injury’ earnings and the plaintiff’s ‘post-injury’ earnings exceeded the sum of $2,836 per week; or
2. The amount by which the plaintiff’s ‘pre-injury’ earnings exceeded the sum of $2,836 per week.

The plaintiff argued that the cap applied to actual loss ((1) above); while the defendant argued that it applied to pre-injury earnings ((2) above). The Court of Appeal unanimously rejected the plaintiff’s argument. The lead judgment explained that the relevant ‘amount’ in s 28F(2) is the total of a person’s pre-injury earnings before their post-injury earnings are deducted. Contrary to the plaintiff’s submission, the term ‘amount’ in s 28F(2) did not refer to the difference between pre- and post-injury earnings.

In effect, as the plaintiff’s pre-injury earning capacity of $10,548 was well in excess of three times AWE, an amount of $7,713 had to be disregarded for the purpose of calculating the plaintiff’s loss of earning capacity. The plaintiff’s post-injury earnings of $6,442 were also in excess of three times AWE. This meant that the plaintiff was not entitled to an award of damages for loss of earning capacity, due to the restriction imposed by s 28F(2).

Source: *Tuohey v Freemasons Hospital* [2012] VSCA 80.

A number of participants, including the LIV, the Common Law Bar Association (CLBA) and the Australian Lawyers Alliance (ALA), expressed the view the application of the cap is anomalous and inequitable (sub. 13, 5; sub. 11, 12; sub. 9, 10). For example, the LIV submitted that:

Section 28F, as presently framed and interpreted, introduces an arbitrary aspect to the proper assessment of loss, rather than imposing a cap on the extent of an award of damages for any year (or other period) of economic loss caused by the unlawfulness the damages are awarded to compensate for. (sub. 13, 6)
The LIV also argued that the current operation of s 28F(2) acts as a disincentive to and disproportionately penalises above average earners who obtain well-remunerated employment despite their injuries. For example:

A surgeon who suffers a compensable hand injury resulting in an inability to operate would not, under this legislation, be entitled to claim any damages for loss of earnings as they would be able to work as a general medical practitioner. (sub. 13, 15)

In assessing the issues raised by participants, the Commission therefore considered whether income protection insurance is available and adequately covers the full range of potential losses arising from personal injury due to negligence.

There are two main types of insurance products available to protect against loss of earning capacity:

- **Income protection insurance**: insures a person for a set level of income for a certain length of time. In the event that a person cannot work due to illness or injury, income protection insurance will provide an income stream at the agreed level and for the agreed length of time (Canstar 2013).

- **Total and permanent disablement (TPD)**: pays a person a lump sum if he or she becomes permanently and totally disabled (Canstar 2013).

**Income protection insurance**

As noted, an important justification for imposing a cap on economic loss was to provide incentives for high-income earners to self-insure their income (Negligence Review Panel 2002, 198).

The Commission tested the ability of high-income earners to obtain income protection insurance and found variation in the price, availability and coverage of this type of insurance. Coverage depends on a range of factors, including:

- age
- occupation
- the type of injury suffered
- the length of time for which coverage is required.

All policies examined by the Commission entitle the claimant to 75 per cent of their pre-injury earnings, up to a monthly cap. However, those with a higher degree of risk or a high proportion of manual labour inherent in their employment (such as a farmer operating heavy machinery) are generally limited to a lower maximum award of benefits for a shorter period.

Table 4.2 outlines indicative premium prices, coverage and exclusions for three income protection insurance providers for a 45-year-old male earning $300,000 per annum (or approximately five and a half times AWE) as a financial adviser.
Table 4.2  Costs and features of selected income protection policies

<table>
<thead>
<tr>
<th></th>
<th>Policy A</th>
<th>Policy B</th>
<th>Policy C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monthly premium</td>
<td>$213</td>
<td>$220</td>
<td>$221</td>
</tr>
</tbody>
</table>
| Monthly coverage|• In the event that this individual is only able to work 10 hours or less per week, they may receive up to $18 750 per month (about four times AWE) until the age of 65.  
• If the individual has a partial capacity of more than 10 hours per week, the income benefit payable is a fixed percentage$ of the maximum benefit payable.  
• In the event of a claim, income benefit will be offset by amount paid for by workers’ compensation or other legislated benefits|
| Waiting period | 90 days  |           |          |
| Exclusions     | Common exclusions include injuries or illness which occur as a result of:  
• a pre-existing condition  
• an intentional self-inflicted act  
• uncomplicated pregnancy or childbirth  
• war or war-like activities.|

Notes: Indicative quotes for a 45-year-old male, earning $300 000 per year working as a financial adviser, with no pre-existing conditions. * Table 4.3 provides an example of the formula for calculating this fixed percentage.

Source: Commission analysis based on selected income protection policies.

Total and permanent disablement insurance

The Commission also found that TPD insurance products offer limited cover for partial loss of income. Some TPD products allow for workers to insure against disablement for partial disability that prevents them from undertaking their own specific occupation (rather than any/all occupations). For example, a surgeon who is injured but is still able to work as a GP would be compensated for his or her inability to work as a surgeon. However, the Commission found that this option is restricted to a limited list of occupations consisting of predominantly white collar workers (for example, office managers).

Other policies not allowing for the ‘own occupation’ definition of disability will provide a partial disability benefit for a limited list of injuries — generally loss of sight in one eye, loss of the use of one hand or of one foot. However these policies do not appear to cover all types of injuries which may result in partial loss of income.

Table 4.3 summarises the typical level of coverage available under the different insurance products. The Commission tested the availability of income protection insurance for high-income earners. The Commission found that in broad terms the policy intent appears to have been met, given that substantial income protection insurance is available in cases of catastrophic injury. On the other hand, the Commission also found that there are significant restrictions on insurance benefits in the case of partial loss of income. This supports the case for providing a capped entitlement to damages for economic loss for high income earners with residual earning capacity.
### Table 4.3  Summary of coverage for loss of income

<table>
<thead>
<tr>
<th></th>
<th>Total loss of income</th>
<th>Partial loss of income</th>
</tr>
</thead>
</table>
| Income Protection Insurance    | Total disability benefit is up to 75% of pre-tax income                                | If conditions\(^a\) specific to occupation are met, then partial benefits calculated by reference to the following formula: \[
\frac{A - B}{A} \times C
\] where:  
A equals the pre-injury income.  
B equals post-injury income.  
C is the monthly benefit specified in insurance plan. |
| TPD Insurance (any occupation) | If conditions\(^b\) for TPD are met, then benefit is the agreed amount up to a maximum of $5 million. | If the injury is permanent and results in the loss of sight in one eye; loss of use of one hand; or loss of use of one foot, then the benefit is equal to the lower of $500 000 or 25% of TPD cover. |
| TPD Insurance (own occupation) | If conditions\(^b\) for TPD are met, then the benefit is the agreed amount, up to a maximum of $5 million. | If conditions\(^c\) for TPD of ‘own’ occupation are met, then benefit is the agreed amount up to a maximum of $5 million. |

**Notes:**  
\(^a\) Conditions for partial disability generally include: being unable to do one or more duties that are important in the pre-injury occupation, earning less than 75% of pre-injury income and under medical care.  
\(^b\) Conditions for TPD include: being unlikely to ever follow your occupation or other occupation for which you are reasonably suited, which would pay greater than 25% of pre-injury income, suffering specific injuries or meeting certain care requirements.  
\(^c\) Conditions for TPD under ‘own’ occupation plan is that you are unlikely ever to be able to work in your defined ‘own occupation’.

**Source:** Commission analysis based on a selection of insurance product disclosure statements.

### Method for setting the cap on economic loss

Participants highlighted the different methods used to set caps on economic loss under the three Victorian personal injury Acts and the different treatment of partial loss of earnings.

The Municipal Association of Victoria (MAV) highlighted that the maximum award method does not create the same anomaly for people who experience partial loss of earnings. The MAV submission recommended that:

> ... consideration should be given to replacing the current s.28F Wrongs Act method of capping economic loss damages with a method consistent with that applied under the Accident Compensation and Transport Accident Acts, i.e. an absolute indexed cap. (sub. 12, 13)

The Commission does not favour the maximum award approach, given it would be likely to significantly curtail the award of damages for younger people with a long-term earning capacity (figure 4.1). As Avant noted:

> The maximum award approach favours a plaintiff who may have a short period of high earnings over a plaintiff who has high long term earning potential. (sub. 16, 2)
The Commission has therefore only considered one option for reform to address the Tuohey decision, namely applying the cap to the gap between pre- and post-injury earnings.

Under this option, s 28F(2) of the Wrongs Act would be amended to allow a plaintiff to claim for damages for economic loss up to a cap based on three times AWE, even if their post-injury earnings exceeded this amount. That is, the cap would apply to the ‘gap’ between pre- and post-injury earnings, rather than disregarding pre- or ‘without injury’ earnings which exceed the cap. This would effectively reverse the impact of the Tuohey decision. Applying this approach to the hypothetical examples in table 4.1 would mean that the claimant would receive higher compensation at all levels of post-injury earnings than at present. For example, if the claimant had pre-injury earnings of five times AWE and post-injury earnings of three times AWE, he or she would be entitled to around $1.5 million (two times AWE), instead of $0.

This approach was adopted in Queensland in 2006 following the case of Doughty v Cassidy [2005] 1 Qld R 462, where the court also held that the cap applied to the assessment of pre-injury earning capacity. Aside from Queensland and South Australia (which sets an absolute indexed cap), all other Australian jurisdictions take the same approach as Victoria in requiring the court to disregard pre-injury earnings which exceed a cap of three times AWE.4

Assessment of option

The Commission assessed the option of applying the cap to the gap between pre- and post-injury earnings against the criteria of efficiency, equity and consistency with the underlying intent of the tort law reforms against the base case of no change (figure 4.2).

Efficiency

The Commission considers any efficiency impacts of the option are likely to be minor, given:

- the number of plaintiffs affected by the option is likely to be small (see below), thus the impact on transaction costs for defendants, plaintiffs, the Medical Panels and the courts is expected to be minor
- the option is unlikely to impact the incentive to invest in safety, given regulatory requirements and claims trends (chapter 3).

Equity

The Commission considers the relevant equity dimensions are:

- Vertical equity, reflecting the notion that persons in different situations should be treated differently according to their level of need or loss. In this context, it reflects the different treatment of low- and high-income earners.

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3 See Civil Liability Act 2002 (Qld) s 54.

4 See Civil Law (Wrongs) Act 2002 (ACT) s 98, Civil Liability Act 2002 (NSW) s 12(2), Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 20, Civil Liability Act 2002 (Tas) s 26(1), Civil Liability Act 2002 (WA) s 11(1). By contrast, South Australia sets a cap on total damages for loss of earning capacity (Civil Liability Act 1936 (SA) s 54) of $2.2 million, indexed for inflation (s 3).
Horizontal equity, meaning treating people in similar situations in similar ways. It means treating individuals who suffer the same level of injury equally, regardless of where or how they were injured.

In general, the option for reform does not affect people earning less than three times AWE, but does improve access to compensation for people earning more than this amount. The Commission sees this as having a relatively minor negative impact on vertical equity, as high-income earners with greater capacity to self-insure will now have additional access to damages for economic loss funded by the wider community.

The option would promote horizontal equity by providing all injured people with capped access to compensation for economic loss, regardless of whether they were injured in a transport accident, a workplace accident or in circumstances to which provisions of the Wrongs Act apply.

Consistency

The Commission assessed the option for reform for consistency with:

- the original intent of the 2002-03 tort law changes, including:
  - the likely impacts on the price and/or availability of public liability and professional indemnity insurance
  - the impacts on the incentive for high-income earners to self-insure
- other jurisdictions.

Impact on the price and availability of public liability and professional indemnity insurance

The option is considered unlikely to have a significant impact on the price and/or availability of public liability and professional indemnity insurance. Under the option, the award of damages would increase for a small group of plaintiffs. Therefore, all other things being equal, this option would be likely to place slight upward pressure on the price of insurance. According to the ABS, in 2012 only around 2.5 per cent of Victorians earned over three times AWE (ABS 2012). It is therefore unlikely that the impact of this option on the price of insurance would be significant. The Commission therefore considers this impact is likely to be minor. As the LIV submitted:

... in the broad range of experience of some LIV members, claims from sufficiently high earners to attract the application of the cap are extremely rare, and as such [reform to section 28F] should have no significant impact on the price and availability of public liability and/or professional indemnity insurance in Victoria. (sub. 13, 14)

Impact on incentives for high-income earners to self-insure

The Commission notes that one of the original objectives of the cap on economic loss was to provide incentives for high-income earners to self-insure (Negligence Review Panel 2002, 197–98).

In general, the Commission notes that given the lack of full insurance coverage for economic loss, changing the method for applying the cap is unlikely to have any significant impact on incentives to self-insure. Rather, changing the method provides for compensation for risks that are difficult to insure.
The option will likely have a minor negative impact on the incentive for high-income earners to self-insure by improving access to damages for economic loss for a small group of plaintiffs. This group would still have some incentive to insure against economic loss, given that the maximum amount of damages they would be able to receive from the result of injury would be limited to three times AWE.

Summary assessment

In the draft report, the Commission recommended that to improve compensation to people incurring income losses arising from injuries sustained due to the negligence of others, the cap on economic loss apply to the gap between pre- and post-injury earnings. In response to the draft report, this recommendation was supported by the LIV, while MAV ‘noted VCEC’s reasoning behind its recommendation’ (sub. DR24, 9; sub. DR20, 6).

Given that only a small number of additional people are expected to be able to access damages for economic loss, the Commission considers the change would have a very small effect on the price and availability of insurance, and has therefore included this option in its recommended package of reforms to limitations on personal injury damages (chapter 7).

4.1.3 Loss of expectation of financial support

A further issue raised by the LIV was the application of the cap on damages for economic loss where the claimant is the dependant of a deceased. Section 28F(2) requires the court to disregard earnings of the deceased which are in excess of three times AWE. The court is then required to deduct the deceased person’s expenses in order to calculate the financial support that would have been available to the dependants (Skelton v Collins (1966) 115 CLR 94, 114). In the case of a deceased person with assumed earnings in excess of the cap, the court will disregard this excess and deduct the deceased person’s expenses from the level of the cap. The LIV submitted that:

Above average earners are more likely to have higher personal expenses to deduct, resulting in there being less available of the cap to distribute to the dependants. This leads to dependants of above average earners being treated unfairly and unjustly, as they will receive substantially less by way of damages for loss of support than other dependants. (sub. 13, 6)

The Commission’s analysis supports this claim. Figure 4.3 demonstrates how the application of the cap results in dependants that have a high loss of expected financial support receiving little to no compensation as a result of being dependants of high income earners. This is because of the interaction of the cap with the requirement to deduct expenses, whereby the cap is applied before deducting expenses. This anomaly does not affect those who had lower expectation of support or those whose parents were lower income earners.

Figure 4.3 plots a dependant’s level of expected financial support — gross weekly earnings of the deceased minus expenses — against the damages paid for this loss. For example, assume a deceased person earned $2500 per week with $875 of expenses. After deducting expenses the dependant had expected financial support of $1625 per week (example A) and would receive full compensation by the courts for this. However, if the deceased was earning $4000 and had personal expenses of $1400 the court would deduct expenses from the earnings cap (three times AWE), resulting in a payment of $1630 compared to the $2600 of financial support the deceased might otherwise have expected (example B).
Figure 4.3 Impact of s 28F on award of damages for dependants

![Figure 4.3 Impact of s 28F on award of damages for dependants](image)

Notes: Expenses assumed to be 35 per cent of gross weekly earnings. Actual damages awarded to dependant is the lower value of gross weekly earnings or three time AWE minus expenses.  
Source: Commission analysis.

This outcome disadvantages dependants of high-income earners with high personal expenses relative to dependants of people with lower expenses. This appears to be an unintended consequence of the cap on economic loss — which aimed to provide incentives for self-insurance rather than penalise dependants.

**Option for addressing impact on dependants of deceased high-income earners**

The impact of the cap on dependants of high income earners could be addressed by amending s 28F to provide that the court should first deduct expenses from earnings, and then apply the cap to the remainder. For example, if a deceased person had earned $6000 per week and had personal expenses of $2000 per week, the court would first deduct $2000 then apply the cap. Since $4000 is above the cap, $3138 would be awarded.

**Assessment of option**

The Commission assessed the option of applying the cap to post-expense earnings against the criteria of efficiency, equity and consistency (figure 4.2).
**Efficiency**

The Commission considers any efficiency impact of the option is likely to be negligible, as only the amount of damages are affected, rather than the volume of claims. As such, there are not expected to be impacts on transaction costs, incentives to invest in safety or the potential for unmeritorius claims.

**Equity**

This would improve horizontal equity, as under the current arrangements, dependants with similar levels of loss of expected financial support will get compensated differently based on the income and expenses of the deceased individual (figure 4.3). A dependant would now receive damages for loss of financial support closer to the actual amount of loss.

**Consistency with underlying objectives of tort law reform**

In terms of the award of damages for dependants of high income earners, this option is also likely to have a negligible impact on the price and availability of public liability and professional indemnity insurance. The Commission understands very few claims are lodged by dependants for loss of financial support. As discussed in section 4.1.2, a very small proportion of the population earns more than three times AWE (ABS 2012), therefore the Commission understands that this change would be likely to affect very few claims, although they could be of high value.

**Summary assessment**

The Commission considers that to address the problem of under-compensation for dependents, the deceased’s personal expenses should first be deducted from income before applying the cap. This would improve horizontal equity and address a clear anomaly. This option would provide increased compensation for a greater number of dependents and would also bring Victoria into line with the Queensland approach. This option is included in the Commission’s recommended package of reforms to limitations on personal injury damages (chapter 7).

**4.1.4 Impact on insurance markets**

Based on stakeholder feedback, the Commission estimated the combined impact of the option to address the Tuohey problem and the option to address compensation for dependants. The overall impact of both options is estimated indicatively to increase the average cost of public liability and professional indemnity insurance by between 0.25 and 0.5 per cent, based on one additional claim of $2 million every one to two years.\(^5\) A report prepared by Finity Consulting for the ICA (the Finity report) stated that:

> Changes to the order of calculations for the cap on economic loss would not have a material impact...The expected cost of this change is very minor, and VCEC’s allowance of $2m per annum is likely to be an overstatement. (sub. DR21, att. 1, 2, 4)

\(^5\) The technical assumptions underpinning this estimate are set out in appendix B.
4.2 Cap on non-economic loss

Damages for non-economic loss are awarded for pain and suffering, loss of amenities and loss of expectation of life. ‘Underlying the award of damages for non-economic loss is the idea that money can provide the plaintiff with some consolation for having been injured’ (Negligence Review Panel 2002, 186). The Ipp report recommended a cap on damages for non-economic loss of $250,000, on the basis that it would proportionally decrease the size of awards in all cases (Negligence Review Panel 2002, 194).

Section 28G of the Wrongs Act restricts the maximum amount of damages that can be awarded for non-economic loss to an indexed cap of $371,380 (the Commission has calculated that the cap as at 1 July 2013 was equal to $497,780). The cap was based on the cap on common law damages for non-economic loss under the Transport Accident Act (Victorian Parliamentary Debates – Legislative Assembly 2002, 142).

Caps on non-economic loss are broadly similar across the three Acts. As at 1 July 2013, the cap under the Transport Accident Act was $497,340 (TAC 2013a). Under the Accident Compensation Act, the maximum amount of lump sum benefits for non-economic loss under common law is $555,350 (as at 1 July 2013) (s 134AB(22)(b)(ii)).

There is some variance in the caps on non-economic loss that apply in other jurisdictions. For example, the New South Wales’ Civil Liability Act 2002 (NSW) sets a cap on non-economic loss similar to that of Victoria at $551,500, while the Queensland Civil Liability Regulations 2003 (Qld) awards general damages (damages for non-economic loss) based on an injury scale to a maximum of $337,300 (r 6A(5))7.

4.2.1 Key issues

Some participants considered that the cap on damages for non-economic loss under the Wrongs Act should be raised to be consistent with the higher cap under the Accident Compensation Act. For example, the CLBA submitted that:

There is no apparent justification for the maximum award for non-economic loss under the Wrongs Act being less than that under the ACA, particularly given that the ACA provides other no-fault benefits where claims governed by the Wrongs Act will involve no such entitlement. An amendment should be made to provide an equivalent maximum award. (sub. 11, 9)

The Commission therefore considered the efficiency, equity and consistency effects of raising the cap on damages for non-economic loss to an indexed amount of $555,350 (as at 1 July 2013) (figure 4.2).

4.2.2 Assessment of option

Efficiency

The Commission considers that the effect of this option on the incentives to invest in safety is negligible, given existing regulatory requirements and claim trends (see chapter 3). In addition, as only the cap is being increased, there would be no increase...
in transaction costs — that is, costs to claimants, defendants, courts or Medical Panels — associated with additional claims.

**Equity**

This option would improve vertical equity, as it would provide greater benefits to more severely injured (particularly catastrophically injured) persons. The impacts on horizontal equity would be mixed, given:

- the treatment of persons injured in circumstances where the provisions of the Wrongs Act apply would align more closely with those injured in circumstances where the Accident Compensation Act applies, but
- there would still be differences between the three Victorian personal injury Acts in terms of the cap on non-economic loss (that is, the cap in the Transport Accident Act would be lower).

**Consistency with the underlying objectives of the tort law reform**

The Commission considered how this option would impact on the price and availability of public liability and professional indemnity insurance.

By increasing the award of damages to significantly injured claimants, this option would put some upward pressure on the price of public liability and professional indemnity insurance.

The estimated impact on the award of damages, and therefore insurance premiums depends on the behavioural response that an increase in the cap would induce. Stakeholder feedback on the draft report suggested that increasing the cap may lead to an increase in the award of damages only for those severely injured claimants who reach the cap, rather than for all claimants (LIV, sub. DR24, 5).

On the other hand, the Ipp report and Victorian Managed Insurance Authority (VMIA) modelling suggested that increasing the cap on damages for non-economic loss would be likely to proportionately increase all awards of damages for non-economic loss (Negligence Review Panel 2002, 194). For example, the VMIA, in modelling the effects of changes in the cap on public sector insurance premiums, assumed that a 10 per cent increase in the cap on damages for non-economic loss leads to a 10 per cent increase in the award of damages for non-economic loss in all instances (VMIA 2013, 9). Using this assumption, the VMIA estimated that increasing the cap for damages to non-economic loss to align with the Accident Compensation Act would impact public sector medical indemnity premiums by around two per cent (VMIA 2013, 3).

The Commission’s draft report estimated the impact on insurance premiums based on applying the increase in the cap across all payouts. The Commission also sees merit in the argument that only maximum awards would increase. On this basis, the Commission has used both methods of estimation to assess upper and lower bound impacts on private sector insurance premiums (appendix B). Based on 2012 data, the increase in public liability and professional indemnity premiums is estimated to be between 0.1 and 2.3 per cent (table 4.4).
Table 4.4  Estimated impact on premiums – increasing the cap for non-economic loss (2012)

<table>
<thead>
<tr>
<th></th>
<th>Calculation</th>
<th>Lower bound</th>
<th>Upper bound</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impact on claims costs (A)</td>
<td>From appendix B</td>
<td>$0.6m</td>
<td>$9.3m</td>
</tr>
<tr>
<td>Gross written premium(^a) (B)</td>
<td>APRA data</td>
<td>$406.3m</td>
<td></td>
</tr>
<tr>
<td>Weighted average premium(^b) (C)</td>
<td>APRA data</td>
<td>$1391</td>
<td></td>
</tr>
<tr>
<td>Percentage increase in premiums (D)</td>
<td>(A)/(B)</td>
<td>0.1%</td>
<td>2.3%</td>
</tr>
<tr>
<td>Increased cost per premium(^c) (E)</td>
<td>(C) x (D)</td>
<td>$1</td>
<td>$21</td>
</tr>
</tbody>
</table>

Notes:  Numbers may not equate due to rounding.  \(^a\) Gross written premium is defined as the total amount of premiums written by insurers in a particular underwriting year (APRA 2013c). Includes premium pool for public liability (excluding product liability and construction liability) and medical indemnity insurance.  \(^b\) Gross written premium divided by the number of risks written.  \(^c\) Assumes additional costs would be spread equally across the public liability and medical indemnity insurance markets.

Source:  APRA 2013a; APRA 2013c; Commission analysis.

Submissions on the draft report indicated that stakeholders did not believe this recommendation would have a large effect on premiums. The Finity report suggested that increasing the cap on non-economic loss ‘would mean slightly more than a 1% increase in premiums which is in the middle of VCEC’s estimates’ (sub. DR21, att. 1, 4). In supporting an increase in the cap the LIV stated:

... that the estimated potential increased impact on insurance premiums for an increased cap on non-economic loss damages would be negligible (sub. DR24, 6)

4.2.3  Summary assessment

The Commission’s preferred option is to increase the cap on damages for non-economic loss to align with the Accident Compensation Act. While this option is likely to have some impact on the price and availability of insurance, the Commission considers the effect will be small, and thus will not undermine the original intent of tort law changes, whilst improving vertical equity for severely injured claimants. This option is therefore included in the Commission’s package of recommended reforms to limitations on personal injury damages (chapter 7).
5 Discount rate

The terms of reference direct the Commission to examine the discount rate applied to lump sum damages awarded for future economic loss and expenses (such as medical expenses). They also specify that the Commission is to have regard to:

- whether any options for amendment would have an unduly adverse impact on the price and/or availability of public liability or professional indemnity insurance in Victoria
- consistency with other legislative regimes prescribing compensation for personal injury, having regard to the different objectives of those schemes.

5.1 Context

Damages for future economic loss or expenses are generally awarded by the courts as lump sum payments. The Ipp report noted that courts have also assumed that where a claimant is awarded damages, they:

... will invest the lump sum and receive a stream of income from the investment. As a result, to ensure that the plaintiff does not receive too much, the sum of the expected total future losses and expenses needs to be reduced by using a ‘discount rate’ in order to calculate its present value. (Negligence Review Panel 2002, 208)

The Ipp report noted three significant factors need to be taken into account in determining an appropriate discount rate for a lump sum payment, namely:

1. likely future tax rates
2. the expected rate of return on investment of the lump sum

In 1981, the High Court of Australia decided that the appropriate discount rate for personal injury and death claims was three per cent (Todorovic v Waller (1981) 150 CLR 402, 424, 451, 460, 478). The Ipp report also recommended that the discount rate be fixed at three per cent, based on:

- advice from the Australian Government Actuary that ‘a realistic after-tax discount rate might be in the order of 2 to 4 per cent’
- the desirability of maintaining a stable discount rate for plaintiffs, defendants and insurers (Negligence Review Panel 2002, 211).

5.1.1 The Wrongs Act discount rate

The discount rate prescribed in the Wrongs Act 1958 (Vic) is five per cent. This rate may be varied by regulation (s 28I). At the time the discount rate was set, the then Premier of Victoria stated that:

This [discount rate] reflects the five-year average return on 10-year Commonwealth bonds (the best proxy for risk free investment) since the Australian financial markets were deregulated in the 1980s. It is the Government’s policy that any such regulation will specify a rate based on the average real rate of return, over at least the previous five years, on
Box 5.1 provides a brief overview of the application of the discount rate to Victorian awards of lump sum damages. In brief, the calculation of lump sum damages includes a provision for both the discount rate of five per cent and life expectancy through the use of multiplier tables based on the award of $1 per week of damages.

### Box 5.1 Applying the discount rate to awards of lump sum damages

Australian courts have generally awarded damages for future economic loss or expenses on the basis of weekly, rather than annual losses or costs (Luntz 2002b, 358). The value of these future expenditures is determined as a present value at the time of the award and no explicit allowance is made for expected inflation or general wage increases. However, promotion and/or projected increases in award wages may be allowed for (Heath and Plover 2008, 3).

These weekly awards are then converted to a lump sum by discounting the awarded stream of cashflows to a present value using a real rate of return on the investment. The use of a real rate of return implicitly allows for the difference between expected inflation and investment returns. Multiplier tables based on the award of $1 per week of damages have been developed to assist the courts with these calculations.

Where the lump sum is intended to compensate the plaintiff for the remainder of their life, the calculation takes account of the different life expectancies for men and women published by the Australian Bureau of Statistics.

For example, if a 25-year-old plaintiff was awarded damages to compensate for future medical expenses of $100 per week until age 65, the lump sum awarded based on the multiplier tables would be: $100 \times 917.6 = $91,760.

**Sources:** Cumpston Sarjeant 2013; Heath and Plover 2008; Luntz 2002b.

### 5.1.2 The discount rate in other personal injury Acts and jurisdictions

The discount rate prescribed in the Wrongs Act is less than the rate set for both the Accident Compensation Act 1985 (Vic) and the Transport Accident Act 1986 (Vic) (six per cent). All three schemes discount future economic losses. However, the statutory personal injury schemes provide for ongoing coverage for medical and care expenses for all people injured in traffic or workplace accidents, irrespective of fault. These expenses are paid at the time the expense is incurred rather than as an upfront lump sum. In contrast, the Wrongs Act provides an upfront lump sum to meet future medical and care needs.

The discount rate used in civil liability schemes is broadly similar across Australian jurisdictions (Table 5.1). Victoria’s discount rate for the Wrongs Act is the same as for New South Wales, Queensland, South Australia, Tasmania and the Northern Territory, but greater than the Australian Capital Territory and less than Western Australia. Four jurisdictions — New South Wales, Queensland, Western Australia and the Australian Capital Territory — apply the same discount rate to their civil liability, workers’ compensation and transport accident schemes.
Table 5.1  The discount rate in personal injury regimes across Australia (per cent)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Civil liability schemes</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Prior to tort law reform</td>
<td>Post tort law reform</td>
<td>Workers’ compensation</td>
<td>Transport accidents</td>
</tr>
<tr>
<td>Victoria</td>
<td>3</td>
<td>5</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>New South Wales</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Queensland</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Western Australia</td>
<td>6</td>
<td>6</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>South Australia</td>
<td>3</td>
<td>5</td>
<td>N/A</td>
<td>5</td>
</tr>
<tr>
<td>Tasmania</td>
<td>7</td>
<td>5</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Australian Capital Territorya</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>5</td>
<td>5</td>
<td>N/A</td>
<td>6</td>
</tr>
</tbody>
</table>

Notes: N/A: indicates that common law economic loss claims are not allowed under these Acts. a The Australian Capital Territory is the only jurisdiction not to have prescribed a discount rate for future economic loss lump sum damages, so the three per cent discount rate set by the High Court in 1981 still applies.


A discount rate serves only to adjust future payments to an equivalent lump sum amount valued in current prices. In the absence of possible differential taxation treatment of the payments among schemes, there is no apparent economic reason for applying different discount rates to value a future stream of payments. Therefore any reduction in the discount rate applied in the Wrongs Act by itself would increase the current inconsistency between that Act and the Accident Compensation and Transport Accident Acts.

5.2  Participant views

Participant views focused on:

- whether the real rate of return an injured person should expect to receive on the investment of the lump sum should be based on the risk free rate or a portfolio of assets
- the need for the discount rate to be periodically adjusted to take into account variation in the factors which determine the real rate of return
- the need for consistency across Victoria’s personal injury Acts with regards to the discount rate.

5.2.1  The expected nominal rate of return and the resetting of the discount rate

Participants argued that a key factor affecting the choice of discount rate is the expected nominal rate of return on investment of the lump sum. For a given inflation rate, the higher the expected nominal rate of return, the higher the discount rate and the lower the lump sum.1

1 Leaving aside taxation, the formula for calculating the discount rate is based on the Fisher equation, that is, 
\[ \frac{(1+n)}{(1+p)} - 1 \], where n is the nominal rate of return and p is the inflation rate. That is, if the nominal rate is 15 per cent and the inflation rate is 10 per cent, then the real rate of return is 4.5 per cent (Luntz 2002b, 410).
In supporting the current discount rate of five per cent, Avant Mutual Group Limited stated that compensation funds are routinely invested in a range of assets including property and shares (sub. 16, 5). One such example is the Supreme Court Common Fund No. 3. The fund invests on behalf of certain categories of persons (for example, minors) in a portfolio of listed Australian shares with a small balance also invested in cash. Avant Mutual Group noted the nominal rate of return achieved by this fund since its inception in 1992 is 11.7 per cent (sub. 16, 5).²

Similarly, the Insurance Council of Australia (ICA) argued:

Historical longer term investment rates have averaged higher than the current discount rate. A shorter term view should mean that in times of high inflation/investment return that discount rates should be adjusted upwards. We do not believe that such an approach is appropriate to provide the stability that stakeholders require. (sub. 14, 7)

The ICA also expressed reservations about changing the discount rate, stating:

As the discount rate reflects a longer term average cost of funds over the life of a claim the ICA believes that this should remain stable in the public liability scheme in Victoria. We also believe that changes to the discount rate will reduce this consistency and create greater uncertainty in reserving claims, which in turn will potentially impact overall scheme costs. (sub. 14, 7)

By contrast, the Law Institute of Victoria (LIV) argued that the current five per cent discount rate is “unfairly high, does not reflect a realistic rate of return in the current environment and requires regular review” (sub. 13, 10). The Australian Lawyers Alliance (ALA) supported that view, arguing that “taking into account the current interest rate and other investment returns … the present rate of 5% is unfairly high and does not reflect a realistic rate of return” (sub. 9, 12). The ALA recommended that “the discount rate be reset every five years with reference to the 5 year average return on 10 year Commonwealth bonds, rounded to the nearest whole number” (sub. 9, 12).

5.2.2 Consistency with other personal injury Acts

The Municipal Association of Victoria (MAV) argued for a higher discount rate (of six per cent) on the grounds of consistency with other personal injury Acts, rather than based on the rate of return that may be received from investment of a lump sum, stating that:

… there is no reason why the discount rate applied under the Wrongs Act should be different to that under the Accident Compensation and Transport Accident Acts. As such the MAV submits that the discount rate under all three Acts should be consistent. The current difference leads to confusion, inequity and inefficiency in applying varying discount rates simply based on the circumstances surrounding each compensable situation. (sub. 12, 18)

² The Commission has been advised that the Supreme Court’s Funds in Court Office invests 82 per cent of beneficiaries’ funds in Common Fund No. 2, which invests predominantly in cash and fixed interest investments. Since 2002, the combined average real rate of return of Common Fund No. 2 and Common Fund No. 3 has been 3.6 per cent (Supreme Court Correspondence).
5.3 The Commission’s view

The Commission notes three issues in addressing the question of the discount rate. First is the question of what is the conceptually appropriate discount rate. The second issue is how to measure the discount rate in practice, particularly in the face of the impact on financial markets of events such as asset booms, the global financial crisis, taxation changes (such as introducing the Goods and Services Tax (GST)) and economic management responses by governments to those events. The third issue is the terms of reference: in particular the need for the Commission to consider the effect of changes in the discount rate on insurance premiums and consistency with other compensation regimes.

On the first point, economic theory says the discount rate should be the real rate of return on a risk-free investment. Legal analysis supports this view, given that:

Injured plaintiffs are not like ordinary investors. They cannot take the risk that the stock market will be down just when they need to realise some of their investments in order to eat or pay for their care. (Luntz 2002b, 410–411)

The return on a long-term Commonwealth bond is typically considered to be a risk-free nominal return because of the Commonwealth’s taxation power, its AAA credit rating and the absence of default by the Commonwealth since Federation. This nominal return needs to be adjusted for the rate of inflation in general prices to give the real return — that is, the discount rate.

On the second point, the Commission has chosen to use the yield on a 10-year Commonwealth bond adjusted for actual inflation as measured by the underlying rate of inflation in the Consumer Price Index. In particular this approach assumes that over long periods of time the actual inflation rate is a reasonable proxy for the expected inflation rate. Some adjustments have been made to the measure of the inflation rate in accordance with the treatment by the Australian Bureau of Statistics to remove the influence of specific events, such as the introduction of the GST. In addition, given the impact of the global financial crisis since the Wrongs Act reforms in 2002 and 2003, the Commission considers a longer period than five years is appropriate for measuring average risk-free real returns.

The upshot of these calculations is presented in figures 5.1 and 5.2. Figure 5.1 shows the quarterly real yield on a 10-year Commonwealth bond for the roughly thirty years since financial deregulation. Figure 5.2 shows the five-year rolling average of real yield on a 10-year Commonwealth bond. Both figures show similar patterns of marked differences in real bond rates over the past thirty years, with high real rates in the period prior to the mid-1990s contrasting with the reduced real rates in the first decade of the 2000s. Indeed, for parts of the period during the global financial crisis the real return was negative, presumably reflecting a flight to risk-free assets. This volatility may be smoothed in part by taking an average for the period as a whole, which suggests a real rate of return of approximately four per cent.

These calculations suggest the discount rate currently in the Wrongs Act is too high, and might be reduced to four per cent.

3 These calculations do not take into account tax, which would be paid on the investment returns of the lump sum. Tax would vary according to the total investment return, which in turn is affected by the total lump sum. For example, a $1 million lump sum invested at five per cent would result in a return of $50 000 and an average tax rate of 25 per cent, whereas a $100 000 lump sum would result in a return of $5 000, below the tax-free threshold. Allowing for tax would result in a lower discount rate.
Figure 5.1  Real return on Commonwealth bonds, 1983-2013

Notes: Nominal return on ten-year Commonwealth bonds as at each quarter; inflation taken as average of quarterly trimmed mean and weighted median inflation.
Sources: RBA 2013a; RBA 2013b; Commission analysis.

Figure 5.2  Five year average real return on 10-year Commonwealth bonds

Notes: Nominal return on 10-year Commonwealth bonds as at each quarter; inflation taken as average of quarterly trimmed mean and weighted median inflation.
Sources: RBA 2013a; RBA 2013b; Commission analysis.
The general impact of reducing the discount rate would be to:

- advantage younger claimants whose lump sum would be increased relative to older persons, all other things being equal
- advantage severely or catastrophically injured persons.

The third issue that the Commission has considered in looking at the discount rate is the terms of reference; in particular, the effect of changes in the discount rate on insurance premiums and consistency with other compensation regimes.

On the matter of consistency, reducing the discount rate to (say) four per cent would increase the inconsistency between the Wrongs Act and the Accident Compensation and Transport Accident Compensation Acts (table 5.1). On the matter of cost, by increasing the size of lump sum payments (all other things being equal), cutting the discount rate would increase the cost of premiums. It may also have some impact on the availability of insurance, although such an outcome seems unlikely.

The Commission has very limited information on the cost implications for insurance premiums of a reduction in the discount rate. The following sub-section sets out some indicative calculations by the Commission to assess the impact of reducing the discount rate to (say) four per cent. The Commission has benefited from the assistance of the Victorian Managed Insurance Authority (VMIA), which has estimated the possible impacts on their business of such a change (VMIA 2013). The Commission has extrapolated some of that information and used technical assumptions in applying it to private sector public liability and medical indemnity insurance premiums.

### Impacts on the price and availability of public liability and professional indemnity insurance

VMIA modelling suggests that changes to the discount rate are likely to have significant impacts on public sector medical indemnity claim payouts and premiums (table 5.2). For example, a discount rate of four per cent could increase VMIA premiums by around 8 per cent (or around $10 million) (VMIA 2013, 3). On the other hand, aligning the discount rate with the Accident Compensation and Transport Accident Acts could reduce premiums by around six per cent (or around $7 million) (VMIA 2013, 3). The Commission assumed a similar impact could reasonably be expected across the private sector medical indemnity insurance market.

<table>
<thead>
<tr>
<th>Head of damage</th>
<th>3%</th>
<th>4%</th>
<th>6%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expected impact on the cost of claims</td>
<td>22%</td>
<td>9%</td>
<td>(7%)</td>
</tr>
<tr>
<td>Resulting impact on VMIA premiums</td>
<td>19%</td>
<td>8%</td>
<td>(6%)</td>
</tr>
</tbody>
</table>

Source: VMIA 2013, 12.

The significant impact of changes to the discount rate on the cost of claims can be largely attributed to the high level of damages awarded for future care in catastrophic medical indemnity claims (VMIA 2013, 11).

Only damages for future economic loss, medical and care expenses are subject to discounting. There appear to be differences in the composition of damages between medical indemnity claims costs relative to public liability personal injury claims.
To account for these differences, the Commission attempted to estimate the impact on the price of public liability insurance by extrapolating the VMIA estimates to the different relative structure of payouts for public liability based on Australian Competition and Consumer Commission data.

Based on the ratios of discounted to non-discounted damages, the impact of changing the discount rate to four per cent for public liability could be to increase premiums by around four per cent (appendix B).

### 5.4 Summary assessment

Based on thirty years’ experience, the historical data on real risk-free returns from long-term government bonds suggests a case for reducing the discount rate in the Wrongs Act from five per cent to four per cent. The Commission considers there are compelling reasons for not using shorter periods of data — say five-year averages — that have been strongly influenced by the global financial crisis. Such a reduction would increase payouts, particularly for younger and catastrophically injured persons.

In response to the Commission’s draft report, some participants suggested that lowering the discount rate to four per cent would have an unduly adverse impact on the price of public liability and professional indemnity insurance premiums (MAV, sub. DR20, 7; Avant, sub. DR19, 2-3; ICA, sub. DR21, 2-3). Avant Mutual Group Limited supported maintaining the current discount rate, as a reduction in the rate ‘would have a significant impact on the cost of claims and cost of professional indemnity insurance’ (sub. DR19, 2). The ICA also highlighted ‘that many different types of personal injury schemes across Australia have legislated specifically to mandate the discount rate at 5%’ (sub. DR21, 3).

On the other hand, the LIV maintained that the five per cent discount rate applicable under the Wrongs Act ‘is a fundamental inequity and should be reviewed’ (sub. DR24, 9). The LIV suggested that unlike the Accident Compensation and Transport Accident Acts that provide ongoing entitlements on a ‘no fault’ basis, claimants under the Wrongs Act ‘must currently carry both the risk of predicting what further treatment may be required and the burden of the management of funds for their future treatment needs’ (sub. DR24, 9).

As best the Commission can judge, given the available information, change the Wrongs Act discount rate to four per cent might increase medical indemnity insurance premiums by up to eight per cent, and public liability insurance premiums by up to four per cent. In addition, such a change would also further increase the inconsistency between the discount rate used in the Wrongs Act and the rate used in the Accident Compensation and Transport Accident Acts for lump sum benefits. Were the discount rates in the Wrongs Act be made consistent with the other Acts, there would be a reduction in the costs of medical indemnity and public liability premiums.

As outlined in chapter 7, while the historical data on risk-free returns supports a four per cent discount rate, the Commission does not recommend a change at this time given:

- the potential for an unduly adverse impact on insurance premiums — up to eight per cent for medical indemnity premiums
- it would result in greater inconsistency between discount rates across Victorian personal injury Acts.
6 Other personal injury damages issues

The terms of reference require the Commission to recommend options for the Wrongs Act 1958 (Vic) to operate more efficiently and equitably, consistent with the objectives of the tort law changes of the early 2000s. This chapter examines the following issues that were raised by stakeholders concerning the operation of the personal injury damages provisions of the Wrongs Act, namely:

- the interpretation by the courts of the threshold regarding damages for costs of gratuitous attendant care by others
- whether the Wrongs Act should provide for an entitlement to damages for loss of capacity to care for others
- differences in the treatment of remedial surgery on spinal injuries arising from Mountain Pine Furniture Pty Ltd v Taylor (2007) 16 VR 659 (‘Mountain Pine’)
- a particular inconsistency arising from the interaction of the Wrongs Act and the Transport Accident Act 1986 (Vic), whereby claims made under s 94 of the Transport Accident Act are not subject to the limitations on personal injury and death imposed by the Wrongs Act.

6.1 Damages for costs of gratuitous attendant care by others

Under common law, damages may be awarded as compensation for the need for an injured person to be cared for by friends and relatives without payment (Negligence Review Panel 2002, 199–200). These damages are known as damages for gratuitous attendant care. They 'compensate the injured claimant for the claimant’s need for gratuitous services to be provided to the claimant because the claimant can no longer provide those services to him or herself' (NSW Government 2006, 2). A report prepared for the Insurance Council of Australia (ICA) by Finity Consulting (the Finity report) estimated that damages for gratuitous attendant care ‘make up less than 10% of bodily injury claim costs’ (sub. DR21, att. A).

Wrongs Act provisions

Amendments made to the Wrongs Act in 2003 limit both the circumstances under which damages can be awarded for gratuitous attendant care, and the amount of damages. At the time, the then Minister for Finance noted in the second reading speech that:

The purpose of limiting the power of the court to award damages [for gratuitous attendant care] is to limit excessive awards in these cases, particularly having regard to the fact that the plaintiff suffers no actual financial loss as the services are provided gratuitously. (Victorian Parliamentary Debates – Legislative Assembly 2003a, 2082)

These changes were based on the findings of the Ipp report, which recommended both thresholds and caps on gratuitous attendant care to minimise the cost of small claims and address community beliefs that:

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1 These are also known as ‘Griffiths v Kerkemeyer’ damages after Griffiths v Kerkemeyer (1977) 139 CLR 161.
... damages for gratuitous services are sometimes excessive, particularly having regard to the fact that the plaintiff suffers no actual financial loss. (Negligence Review Panel 2002, 204)

Section 28IA(1) of the Wrongs Act provides that damages are only available where:

- there is (or was) a ‘reasonable need’ for the care services
- the need has arisen (or arose) solely because of the claimed injury and the services would not be provided to the claimant but for the injury.

Section 28IB places a cap on damages that can be awarded for gratuitous attendant care. The maximum amount is limited to payment for no more than 40 hours per week at an hourly rate that does not exceed one-fortieth of total average weekly earnings (AWE).

The IPP report also proposed that thresholds for gratuitous attendant care operate cumulatively, so that eligibility depends on care being ‘provided for more than six hours per week and for more than six consecutive months’ (Negligence Review Panel 2002, 205). However, as discussed below, the drafting of the relevant provision of the Wrongs Act allowed for the thresholds to operate alternatively so that eligibility essentially depends on the number of hours per week or the duration of the care.

**Court decisions**

In *Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority* (2007) 18 VR 146 (‘Alcoa v VWA’), the Court of Appeal held that s 28IA only precluded damages for gratuitous attendant care that was required for both less than six hours per week and for less than six months (box 6.1).

The effect of *Alcoa v VWA* is that the thresholds for eligibility operate alternatively, meaning that a claim for at least six hours a week (but less than six months) or for more than six months (but less than six hours per week) could be successful. This is opposed to a cumulative requirement, where a plaintiff would only be eligible if the two conditions applied concurrently — that is, the care is required for at least six hours per week and for a period of at least six months.

Similar judgments have been made in New South Wales (NSW) in the case of *Harrison v Melhem* (2008) 72 NSWLR 380 (‘Harrison v Melhem’), and in Queensland in the case of *Grice v State of Queensland* (2006) 1 Qd R 222. In 2008, in response to the decision in *Harrison v Melhem*, the NSW Parliament amended personal injury legislation to clarify:

... that damages are to be awarded for gratuitous attendant care services only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months. The amendment overcomes the effect of the Court of Appeal decision in *Harrison v Melhem* ... (NSW Parliament 2008)
The implications of Alcoa v VWA

The case of Alcoa v VWA concerned the interpretation of s 28IA(2) of the Wrongs Act, which provides that:

... no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided—

(a) for less than 6 hours per week; and

(b) for less than 6 months.

The Victorian WorkCover Authority argued that both conditions must be satisfied in order for the claim to be precluded. This argument was based on the ‘ordinary and natural meaning’ of s 28IA(2) and would result in an ‘alternative’ operation of the thresholds — that is, eligibility could follow from care requirements of at least six hours a week (but less than six months) or for at least six months (but less than six hours per week).

Alcoa argued that the claim should be precluded if either one of conditions (a) or (b) were satisfied, which would result in a cumulative operation of the thresholds — that is, eligibility would require care for at least six hours per week and for a period of at least six months.

Alcoa’s argument was not based on the literal meaning of s 28IA(2); it sought interpretive assistance in the ‘extrinsic materials’, namely the Ipp report and the second reading speech. In particular, Alcoa highlighted the then Premier’s characterisation of s 28IA(2) as conforming with the Ipp recommendation to require care ‘for at least six hours a week for at least six months’.

The Court of Appeal found that the literal meaning of s 28IA(2) prevailed against the indication of a different intention in the extrinsic materials. In addition, the Court did not accept that the words of a Minister could determine the meaning of a statute:

That the Premier misdescribed the operation of the provision and erroneously assumed that it was reflecting the ... recommendation in the Ipp Report is not to the point ... what matters in the end is the language of Parliament ...

The implication of this decision is that if a plaintiff requires care for at least six hours per week or for at least six months, then his or her claim will not be precluded.

Source: Commission analysis based on ‘Alcoa v VWA’.

Provisions in other Victorian personal injury Acts

Both the Accident Compensation and Transport Accident Acts exclude common law damages for gratuitous attendant care. However, these Acts also provide for a no-fault system of ‘medical and like benefits’, which includes provision for costs of care by others. The Commission understands these statutory benefits are generally accessed by eligible plaintiffs prior to seeking common law damages. The limitations on these benefits are also substantially different from the limitations on gratuitous attendant care under the Wrongs Act. For example, under s 60 of the Transport Accident Act, rather than being provided for gratuitous services, benefits are only provided where a cost has been incurred for a home service; and, unlike the Wrongs Act, services must be performed by an ‘authorised person’.

OTHER PERSONAL INJURY DAMAGES ISSUES
6.1.1 **Key issues**

Participants raised issues with both the thresholds and caps applying to damages for gratuitous attendant care.

- **Thresholds**: Avant Mutual Group Limited supported the continuation of thresholds on the basis that they minimise transaction costs by restricting small claims for care services, and argued in favour of amending the Wrongs Act to provide for cumulative thresholds (sub. 16, 3-4). The Municipal Association of Victoria (MAV) argued damages for gratuitous attendant care should either be excluded from the Wrongs Act or restricted to catastrophic injuries (sub. 12, 15-18). In contrast, the Law Institute of Victoria (LIV) submitted that on equity grounds, the Commission should clarify that the thresholds are alternative and not cumulative, in order to provide equitable outcomes for persons injured for less than six months but requiring extensive periods of care or periods of long-term but low care needs (sub. 13, 9).

- **Caps**: The Australian Lawyers Alliance submitted that the cap ‘unfairly disadvantages the families of catastrophically injured claimants, many of whom require 24 hour care, 7 days per week’ (sub. 9, 13-14).

6.1.2 **Options**

In response to the issues raised by participants, the Commission examined three options for changes to the limitations on gratuitous attendant care:

(1) Restricting access to damages for gratuitous attendant care to the most severe cases of catastrophic injuries.

(2) Requiring that damages for gratuitous attendant care only be allowed if the care has been provided, or is likely to be provided, for at least six hours per week and for at least six consecutive months. That is, cumulative rather than alternative operation of the thresholds.

(3) Removing the cap on gratuitous attendant care for catastrophically injured claimants.

6.1.3 **Assessment of options**

**Efficiency**

Given existing market incentives and regulatory requirements, none of the options identified above is likely to affect incentives to invest in safety (chapter 3).

Restricting access to damages for gratuitous attendant care to the most severe cases of catastrophic injuries (option 1) and providing for cumulative operation of the thresholds (option 2) may reduce some transaction costs for insurers and the courts, given that fewer claims for gratuitous attendant care would be made. However, restricting access to damages for gratuitous attendant care is also likely to provide an incentive for people to instead pay for professional carers — rather than family members — to provide care services (Negligence Review Panel 2002, 2011). Any savings in transaction costs are likely to be minor, given that professional care claims would also need to be assessed by insurers.

**Equity**

Restricting access to damages for gratuitous attendant care to the most severe cases of catastrophic injuries (option 1) and providing for cumulative operation of the
thresholds (option 2) would have a negative impact on equity, given that injured persons would receive less compensation for their injuries than under the current limitations. However, this impact would be offset if injured persons substituted professional care claims for gratuitous care claims, and this care was perceived to be of equal quality to injured persons. Therefore, the equity impacts of tightening access to thresholds are unclear.

Removing caps on gratuitous care for catastrophically injured people (option 3) would improve equity by providing additional compensation for the costs of gratuitous care.

Consistency with the underlying objectives of tort law reform

As noted, the purpose of introducing limitations on gratuitous attendant care was to ‘limit excessive awards’ for this type of damages. Removing the cap on damages for gratuitous attendant care for catastrophically injured persons (option 3) would appear inconsistent with this underlying objective and would likely lead to significant rises in claims costs (see below).

The other two options involve tightening access to damages for gratuitous attendant care, and so do not appear to align with the purpose of ‘limiting excessive awards’. Rather, they would lead to fewer claims being made for gratuitous attendant care, although this effect would likely to be minor (see above).

Impact on price and availability of public liability and professional indemnity insurance

Restricting access to severe injuries (option 1) would see access to damages restricted to a small group of plaintiffs. In the first instance, this would reduce transaction costs and place downward pressure on insurance premiums. However, those people denied access to damages for gratuitous attendant care may have a strong incentive to retain professional carers rather than family members to provide the services, perhaps leading to an increase in total damages awarded, and thus insurance premiums (Negligence Review Panel 2002, 201).

Adopting a cumulative threshold (option 2) would tighten eligibility for access to gratuitous damages and is likely to result in fewer claims. This would place some downward pressure on insurance premiums, potentially reduce transaction costs and bring Victoria into line with most other jurisdictions. The Finity report suggested that the effect of this option on premiums would be very small — it was estimated that option 2 would reduce the amount of gratuitous attendant care damages by about 10 per cent, reducing insurance premiums by no more than 0.4 per cent (sub. DR21, att. A, 6).

Removing the cap for catastrophic injuries (option 3) would result in additional benefits to a small group of plaintiffs. The Productivity Commission has reported that around 1000 people are catastrophically injured across Australia each year, with 11 per cent arising from medical incidents and 32 per cent from general injuries (PC 2011, 793). Assuming uniform distribution of injuries across Australia, this suggests around 250 people are catastrophically injured in Victoria, with about 40 per cent (or around 100) of these people suffering medical and general injuries — which would be likely to be covered by the Wrongs Act. If each of those people is assumed to have been injured as a result of the negligence of another and received additional (uncapped) damages for gratuitous attendant care of say $100 000, then there would be a $10 million impact on payouts. Thus, there is the potential for this option to have a significant impact on the price and/or availability of public liability and professional indemnity insurance.
6.1.4 The Commission’s view

The Commission’s draft report supported adopting a cumulative threshold for access to compensation for gratuitous care (option 2), based on two considerations:

(1) That such a threshold best reflected the original intention of the Government.

(2) That despite the move to a cumulative threshold disadvantaging some claimants, such a measure could alleviate the upward pressure on insurance premiums resulting from the package of measures recommended in the draft report.

In submissions responding to the draft report, a cumulative threshold was supported by Avant Mutual Group Limited and the MAV on the grounds that it best reflected the Ipp report’s recommendations and the intention of the Victorian Government (sub. DR19, 3; sub. DR20, 7). The ICA also supported this recommendation on the basis of national consistency and as a means of addressing the growing proportion of claims costs for gratuitous attendance care (sub. DR21, 2). On the other hand, the LIV opposed the recommendation on the grounds of equity and the ‘strong financial health’ of insurance markets (sub. DR24, 11).

Since the release of the draft report the Commission has reconsidered its approach to limitations on damages for gratuitous care. In particular, the Finity reported suggested that the impact on insurance premiums will be very small — as little as 0.4 per cent (sub. DR21, att. A). In addition, further work on the package of reforms and the aggregate impact on premiums of other changes considered in this report, suggest the need for countervailing measures is much less than previously considered. In short, there would be appear to be little benefit in the way of efficiency or equity from changing the current thresholds.

The Commission does not support any of the other options considered in this section:

- Restricting access to damages for gratuitous attendant care to people suffering catastrophic injuries (option 1) is not favoured, given it would appear to be inconsistent with the intention of the tort law changes.

- Removing the cap on damages for gratuitous attendant care for catastrophically injured persons (option 3) is not proposed, due to the potentially unduly adverse impacts on the price of public liability and professional indemnity insurance.

The Commission notes concerns expressed by some participants about the potential growth in claims for gratuitous care. The Commission also notes that the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme —discussed in chapter 2 — may impact on the award of damages for gratuitous attendant care. As discussed later in this report, it would therefore be sensible to revisit limitations on these damages at the time of full rollout of the NDIS, expected to be in 2019 (chapter 7).

6.2 Damages for loss of the capacity to care for others

Prior to a 2005 High Court of Australia decision, a separate head of damages for loss of capacity to care for others (family members or dependants) was available at common law (see below). These damages were paid as compensation for the ‘loss of capacity, rather than financial loss as such’ (Negligence Review Panel 2002, 205).
Under s 28ID(a) of the Wrongs Act, no damages may be awarded to a claimant for any loss of the claimant’s capacity to provide gratuitous care for others unless the court is satisfied that the care:

- was provided to the claimant’s dependants
- was being provided for at least six hours per week and for at least six consecutive months before the injury to which the damages relate.3

Section 28IE places a cap on the amount of damages that can be awarded for loss of capacity to provide gratuitous care. The cap is based on Victorian AWE.4

In the case of CSR Ltd v Eddy (2005) 226 CLR 1 (‘CSR Ltd v Eddy’), the High Court held that damages for the loss of capacity to care for others5 should not be recoverable as a specific head of damages. The court also held that this type of damages should be part of an award for non-economic loss, reflecting the loss of amenity and enjoyment of life the plaintiff had derived from providing assistance (Hunt 2010, 3).6

### 6.2.1 Key issues

While s 28ID of the Wrongs Act provides limitations on the amount of damages that can be awarded for loss of capacity to care for others, it does not provide a statutory entitlement for these damages. This potentially leaves claimants under-compensated for their losses. A number of jurisdictions — NSW, Queensland, South Australia and the Australian Capital Territory — have enacted statutory provisions to partially restore the common law right to damages for loss of capacity to care for others (NSW Government 2006, 3). This reflects the view expressed by the High Court in CSR Ltd v Eddy that the legislature, rather than the courts, should determine whether and in what circumstances these damages should be awarded (Queensland Parliamentary Debates 2009, 2607).

### 6.2.2 Option

The NSW approach provides an example of how a limited entitlement to damages for loss of capacity to care for others could be implemented in the Wrongs Act. The NSW reforms were designed to ensure that damages are payable in the cases of greatest need, such as in cases where the claimant was providing significant care for dependants with a physical or mental incapacity (NSW Government 2006, 5).

Section 15 of the Civil Liability Act 2002 (NSW) provides an entitlement to compensation for the loss of capacity to care for others, provided that:

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3 Alternatively, s 28ID(b) provides that no damages may be awarded unless there is a reasonable expectation that, but for the injury to which the damages relate, the gratuitous care would have been provided to the claimant’s dependants for at least six hours per week; and for a period of at least six consecutive months.

4 Section 28IF also provides an exception from s 28ID and s 28IE for injuries resulting from dust related conditions or from smoking, use of tobacco products or exposure to tobacco smoke.

5 These are also known as ‘Sullivan v Gordon’ damages, after Sullivan v Gordon (1999) 47 NSWLR 319.

6 To be eligible for damages for non-economic loss, a claimant under the Wrongs Act needs to meet the ‘significant injury’ threshold, and this type of damages are subject to a cap of around $500 000 (chapters 3 and 4).
• there is a reasonable expectation that, if the claimant had not been injured, the claimant would have provided the services for at least six hours per week and for at least six consecutive months
• the claimant’s dependants must not be capable of performing the services themselves by reason of their age or physical or mental incapacity
• the services are needed and that need is reasonable in all the circumstances.

6.2.3 Assessment of option

Efficiency

For the reasons outlined in chapter 3, the Commission considers that providing a limited entitlement to compensation for the loss of capacity to care for others will not have an effect on incentives to invest in safety or the price and/or availability of insurance. Depending on how many claims are made for this type of damages, there may be an impact on transaction costs, given the need for defendants and courts to form a view about claims made for this type of damages. Evidence from other jurisdictions suggests that it is unlikely that many claims will include this head of damages.

Equity

Providing an entitlement to damages for the loss of capacity to care for others would address a potential inequity in that persons injured through no fault of their own would be entitled for the loss of their ability to care for family members and others. And if the damages were targeted to those with the greatest need, vertical equity would also be improved. The exact impact would depend on how many persons were eligible to access such damages.

Consistency with the underlying objectives of the tort law reform

While s 28ID of the Wrongs Act provides limitations on the amount of damages that can be awarded for loss of capacity to care for others, it does not provide a statutory entitlement for these damages. There is limited public information about the Parliament’s view about entitlement to these damages. For example, the second reading speech for the Wrongs and Other Acts (Law of Negligence) Bill stated that:

The purpose of limiting the circumstances in which an award of damages may be made is to limit the number of claims for loss of capacity to provide care for others. The purpose of limiting the level of damages that may be awarded is to prevent excessive awards of damages for these types of claims. (Victorian Parliamentary Debates – Legislative Assembly 2003b, 1429)

The Commission considers it reasonable to conclude that the original intention of the reforms was to limit, but not completely deny, the availability of this type of damages at common law. This suggests that providing a limited entitlement to this head of damage would be consistent with the underlying objectives of tort law reform.

6.2.4 The Commission’s view

In its draft report, the Commission found a prima facie equity case to provide a limited entitlement to damages for loss of capacity to care for others, given the original intention of the tort law changes was to limit, but not completely deny, access to this type of damages. The Commission suggested that the New South Wales approach
would allow for claimants with the greatest need to access damages, while ensuring restrictions are in place to avoid frivolous or speculative claims.

In response to the draft report, this position was supported by the LIV, who argued that abolition of this head of damages:

... represents a defacto discrimination against some of the most vulnerable members of our community – those who dedicate themselves to their own detriment (loss of wages and free time) to care for the children and disabled persons in the community. (sub. DR24, 11)

The Commission sought to understand the likely impacts on insurance markets of the introduction of a limited entitlement to damages for loss of capacity to care for others. The LIV cited anecdotal feedback from NSW practitioners (solicitors and counsel) that claims for this head of damages were not common in the public liability and medical indemnity areas, and that ‘a flood of claims has not been observed’ (LIV correspondence). On the other hand, modelling by the Victorian Managed Insurance Authority on the impact on public sector medical indemnity premiums of allowing damages for the loss of capacity to care for others suggested that ‘introducing a statutory entitlement to Sullivan v Gordon damages could be in the order of magnitude of 5% to 10%’. (VMIA 2013, 13)

The ICA submitted that it is not possible to establish a reasonable cost estimate of this option given:

- uncertainties over the specific wording of the legislation
- uncertainties over the judicial interpretation of this wording
- the ‘limited availability of historical data’ about this head of damage, given it was only established in 1999, then limited in 2002-03 and abolished by the High Court in 2005 (sub. DR21, 1).

The Commission also obtained data from NSW and Queensland authorities on the number and value of damages paid for loss of capacity to care for others. The available data suggests very few claims include provision for this head of damages. If a similar impact was observed in Victoria, the Commission estimates a maximum increase in claims costs of up to $4.1 million (appendix B). Given these findings, the Commission considers this option is likely to improve equity but without an unduly adverse impact on insurance premiums. This option is included in the Commission’s recommended package of reforms to limitations on personal injury damages (chapter 7).

6.3 Differences in the treatment of remedial surgery on spinal injuries

The Wrongs, Accident Compensation and Transport Accident Acts take account of the effects of remedial surgery on spinal injuries differently. In 2007, amendments were made to the Accident Compensation and Transport Accident Acts in response to the Victorian Court of Appeal’s decision in Mountain Pine. The court reversed the VWA’s approach to the assessment of spinal injuries, ‘holding that workers should have their

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7 The NSW Self Insurance Corporation provided data on payments for loss of capacity to care for others arising from health liability claims. The Queensland Government Insurance Fund provided data on payments for loss of capacity to care for others arising from motor vehicle insurance claims.

8 Transport Accident and Accident Compensation Acts Amendment Bill 2007.
spinal injuries assessed prior to having surgery rather than after surgery’ (Victorian Parliamentary Debates – Legislative Assembly 2007, 3125).

The 2007 amendments omitted the following paragraph on the assessment of spinal impairments from the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition) (AMA-4 Guides):

With the Injury Model, surgery to treat an impairment does not modify the original impairment estimate, which remains the same in spite of any changes in signs or symptoms that may follow the surgery and irrespective of whether the patient has a favourable or unfavourable response to treatment. (AMA 1993, 3/100)

In introducing these amendments the then Minister for Finance, WorkCover and the Transport Accident Commission (TAC) noted that the:

… [Mountain Pine] decision threatens to create significant inequities among those Victorians supported by the TAC and VWA schemes. It is not fair that a person whose spinal injury improves as a result of surgery be entitled to the same compensation as a person whose injury worsens as a result of the same treatment. (Victorian Parliamentary Debates – Legislative Assembly 2007, 3125)

6.3.1 Participant views

In supporting amendments to the Wrongs Act to make it consistent with the other personal injury Acts, the Australian Medical Association (Victoria) Ltd noted that:

This situation has led to difficulties for Medical Panels when assessing spinal injuries as … Medical Panels must imagine the patient’s condition prior to treatment in order to determine the level of impairment. (sub. 17, 2)

The ICA also supported restoring the pre-Mountain Pine position, noting that making an assessment based on the likely level of impairment after treatment:

… would also help remove the perverse incentive of not undertaking such treatment to maximise benefits. (sub. 14, 6)

On the other hand, the Common Law Bar Association (CLBA) submitted that given claimants are unable to access a narrative test under the Wrongs Act (chapter 3), it would be unfair to amend the Wrongs Act in line with the Accident Compensation and Transport Accident Acts to overturn the Mountain Pine decision (sub. 11, 8). The CLBA also noted that:

… the Wrongs Act already requires that the injury suffered be stabilised. Provision is also made if 6 months pass since the first assessment, and the clinician is satisfied the threshold will be met once the injury has stabilised: s 28LNA. It is submitted that this is sufficient to ensure injuries are properly assessed, without limiting the ability of an assessor to use the [Diagnosis-Related Estimates] DRE Model without having regard to surgery used to treat impairment: section 3.3(d) of the AMA Guides. (sub. 11, 8)
6.3.2 The Commission’s view

The Commission’s draft report recommended the Wrongs Act be brought into line with the other personal injury Acts, such that the impairment assessment of spinal injuries takes into account a claimant’s post-surgery condition. Such an amendment would:

- address an inequity created by the Mountain Pine decision, whereby a person whose spinal injury improves as result of surgery is currently entitled to the same compensation as a person whose spinal injury does not improve or worsens as a result of the same treatment
- be in line with Parliament’s intention that the impairment assessment process for physical injuries be similar to the process applied under the Accident Compensation and Transport Accident Acts
- be likely to have a negligible impact on insurance premiums, given the experience in the accident compensation scheme (VWA correspondence).

In response to the draft report, the MAV, ICA and Avant Mutual Group Limited supported the Commission’s recommendation. On the other hand, the LIV opposed the recommendation, on two main grounds:

1. Under the Wrongs Act, there is no scheme to approve or fund the cost of surgery, meaning that claimants without private health cover or who cannot pay the cost of surgery are subject to delays in elective public hospital waiting lists of one to two years. In turn, this can lead to increased legal costs as settlement of a claim is delayed.

2. If treatment is delayed, then the outcome of surgery may be negatively affected, leading to greater pain and suffering and a higher cost of claim (LIV, sub. DR24, 10).

The Commission notes the LIV’s position, particularly the potential impact on claimants who have limited capacity to pay for treatment. However, the Commission also recognises that this situation may currently occur for all types of injuries — not just spinal injuries — subject to the Wrongs Act. The Commission’s recommendation would assist in ensuring that all types of injuries subject to the Wrongs Act injuries are assessed in a consistent, equitable manner.

This option is included in the Commission’s recommended package of reforms to limitations on personal injury damages (chapter 7).

6.4 Inconsistency arising from the interaction of personal injury Acts

6.4.1 Context

The Commission was advised of an apparent anomaly arising from the interaction of the Wrongs Act and the Transport Accident Act. This issue appears in Hynes v Hynes (2007) 15 VR 475 (‘Hynes v Hynes’). In this case, the plaintiff brought a common law claim in the County Court against the defendant for negligent use of a motor car by removing the cap from the overheated radiator, allowing boiling water to suddenly erupt and injure the plaintiff. The Court of Appeal dealt with a question of law which the County Court referred to it.

The plaintiff’s case in Hynes v Hynes was brought under s 94 of Part 6 of the Transport Accident Act, which applies to claims arising from the use of a motor vehicle. The Court
of Appeal noted Part VBA of the Wrongs Act provides that claims made under s 94 of the Transport Accident Act are not subject to the limitations on personal injury damages imposed by the Wrongs Act (s 28C(2)(b))9.

6.4.2 Key issues

In Hynes v Hynes, the Court of Appeal decided that the plaintiff’s claim for damages was not restricted by the thresholds, caps and discount rate in the Wrongs Act by virtue of the exceptions in s 28C and s 28LC for claims brought under s 94 of the Transport Accident Act. This decision means that in situations where a person is injured through the negligent use of a motor vehicle, there is no threshold for common law claims, claims are uncapped and damages awards are not discounted as they are in other cases brought under the Wrongs Act. In addition, the TAC is potentially liable to indemnify defendants in these claims.

6.4.3 Option

The anomaly could be addressed by amending the Wrongs Act to ensure that claims made under s 94 of the Transport Accident Act are subject to the limitations of the Act.

6.4.4 The Commission’s view

The Commission’s draft report found that the decision in Hynes v Hynes appeared to be inconsistent with the underlying intention of tort law changes to restrict access to common law rights for injured persons for personal injury incidents covered by the Wrongs Act. The Commission recommended an amendment to the Wrongs Act to address this anomaly and this position was supported by the MAV (sub. DR20, 7). On the other hand, the LIV opposed this amendment, arguing that:

The preservation of unrestricted common law rights for this category of claims was deliberate. This is appropriate because these claims are made in a public insurance not private insurance context – those on risk for these claims have no choice on whether to insure or to choose between competing policies – they must insure with the TAC at the set rate. (sub. DR24, 13)

The Commission has not found any policy reasons — for example, within Victorian Parliamentary debates or the IPP report — to support an exclusion for these types of TAC claims for people who suffer personal injuries or death as a result of another person’s negligent use of a motor vehicle. The Commission also notes that while the original TAC legislation did not seek to limit common law rights for ‘use of’ transport injuries, it also pre-dated the IPP report, which recommended limitations on common law rights for all but a small number of injuries. The Commission is also not aware of any comparable liability in other Australian jurisdictions.

In addition, from an equity perspective, the option for reform would improve horizontal equity, as it would mean that a person injured in incidents arising out of the use of a motor vehicle would no longer have access to uncapped damages. For the avoidance of doubt, a person suffering injuries subject to s 94 would not have their common law rights completely removed. Rather, they would have the same rights and be subject to the same limitations as other claimants subject to the Wrongs Act.

9 Section 28C(2)(b) of the Wrongs Act provides that claims made under Parts 3, 6 and 10 of the Transport Accident Act are not subject to the caps, thresholds and discount rates of Part VBA of the Wrongs Act.
7 Likely impacts on insurance markets

This chapter brings together options identified across the preceding chapters regarding limitations on damages for personal injury and death and recommends specific changes.

The terms of reference require the Commission, in recommending options for amendment to the Wrongs Act 1958 (Vic), to have regard to whether any such options would have an unduly adverse impact on the price and/or availability of public liability or professional indemnity insurance in Victoria. This has guided the Commission’s view that its task is to adjust the balance between ensuring those injured as a result of the negligence of others receive fair compensation, and meeting the community’s expectation that public liability and professional indemnity insurance be both available and affordable.

This chapter sets out a package of options that, in the Commission’s view, seem likely to improve community wellbeing without an ‘unduly adverse’ impact on the cost of insurance. ‘Unduly adverse’ is a quite imprecise term. Having regard to the substantial reductions in public liability and professional indemnity insurance premiums over the past decade (chapter 2), the Commission has made the technical assumption that this means an aggregate increase in insurance premiums of about five per cent. An increase at the upper end of this range would represent a small real increase in premiums. Ultimately, decisions about the appropriate balance between victims of negligence and insurance policy holders is a judgement for Government, underpinned by good information about the possible effects on various groups.

The chapter sets out all of the preferred options identified in chapters 3 to 6, together with the technical assumptions that underpin estimates of cost impacts. It also outlines a recommended package of options that is within the Commission’s definition of ‘not unduly adverse’, noting the imprecision of the cost estimates. The chapter concludes with some observations on the possible — but as yet unknown — implications of the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS).

7.1 Options and assumptions

The Commission has sought to estimate the impacts of changes to the Wrongs Act in chapters 3 to 6. This work has been assisted by an analysis by the Victorian Managed Insurance Authority (VMIA) and a range of other information. A number of simplifying technical assumptions were necessary to make these estimates — they are set out in box 7.1 and appendix B.

Following the release of its draft report, the Commission tested its assumptions with stakeholders and refined estimates where possible. The participants (plaintiff and defendant lawyers and insurance bodies) generally considered the Commission’s overall approach to quantification to be reasonable, and provided some additional information and insights that have improved the Commission’s estimates.
Box 7.1 Key assumptions and limitations

Changes to limitations on personal injury damages are assumed to lead to impacts on claims costs. In turn, increases in claims costs are assumed to be fully passed on to insurance customers through premiums, rather than absorbed by insurance companies. No allowance has been made for increased underwriting expenses associated with claims costs.

In estimating premium impacts, the Commission drew on estimates of likely changes to public sector medical indemnity premiums provided by the Victorian Managed Insurance Authority. The Commission also used data and information from submissions, the Victorian WorkCover Authority, the Transport Accident Commission and the Australian Prudential Regulation Authority.

The impact on insurance premiums is based on spreading estimated additional claims costs evenly over 2012 Victorian public liability insurance premium revenue of $333 million, and medical indemnity insurance premium revenue of $74 million (APRA 2013a).

Importantly, average insurance premium changes do not take into account that some changes are likely to impact more on either the public liability or the medical indemnity markets. For example, changing the threshold for non-economic loss will likely have a greater impact on public liability premiums relative to medical indemnity premiums, which are generally smaller on average.

Averages also do not take into account how insurers would allocate additional costs across their customers. For example, riskier groups would pay more, and thus could face significant premium increases or be unable to access insurance. For example, the Australian Competition and Consumer Commission estimated that the real average medical indemnity premium was around $5400 in 2007-08, down from $7500 in 2002-03 (a drop of around 28 per cent) (ACCC 2009, 25). There were vast differences in premiums by specialty — for example, real average premiums ranged from around $2700 for a non-procedural general practitioner to around $48 900 for an obstetrician in 2008-09 (ACCC 2009, 27). The Commission does not have access to data to estimate how these additional costs would be allocated across groups.

Private sector medical indemnity premiums may also not rise by the expected amount, given that some of the additional claim costs would be absorbed by the Commonwealth Government’s High Cost Claims Scheme, which covers 50 per cent of the cost of claims over $300 000 (ACCC 2009, 36).

The Commission’s analysis was also limited by a lack of recent data about the profile of current and expected claims, in terms of:

- breakdowns of heads of damages for private sector claims, for example: non-economic loss, future economic loss, future care, legal costs
- data on the profile of injuries relating to Wrongs Act claims, for example, how many claims were at or around impairment thresholds for non-economic loss.

Sources: Commission analysis; ACCC 2009; VMIA 2013; APRA 2013a.

Table 7.1 sets out all the preferred options identified in chapters 2 to 6 and the estimated impact on insurance premiums.

Consistent with the terms of reference, the Commission has proposed a package of modest measures to address clear anomalies, inconsistencies and inequities, within the Commission’s definition of ‘not unduly adverse.’ The Commission estimates that its recommended package is likely to increase public liability and professional indemnity...
premiums by, on average, between around two per cent to five per cent. VMIA modelling suggests similar impacts could be expected for Victorian public sector premiums.

Table 7.1 Summary of options and likely impacts

<table>
<thead>
<tr>
<th>Area</th>
<th>Additional claims costs ($m)</th>
<th>Likely average impact on insurance premiums (%)</th>
<th>Lower bound</th>
<th>Upper bound</th>
<th>Lower bound</th>
<th>Upper bound</th>
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<tbody>
<tr>
<td><strong>Recommended package</strong></td>
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<tr>
<td>Eligibility to access damages to non-economic loss</td>
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<tr>
<td>• Adjust the threshold level for eligibility to access damages for non-economic loss for psychiatric injury to impairment of greater than or equal to 10 per cent</td>
<td>0.6</td>
<td>4.0</td>
<td>0.1</td>
<td>1.0</td>
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<tr>
<td>• Provide that spinal injuries assessed at greater than or equal to five per cent impairment are eligible to access damages for non-economic loss</td>
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<tr>
<td>Cap on economic loss</td>
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<td>• Provide that the cap on damages for economic loss applies to the gap between pre- and post-injury earnings</td>
<td>1.0</td>
<td>2.0</td>
<td>0.3</td>
<td>0.5</td>
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<td>• Provide that in claims of loss of expectation of financial support, deductions for the deceased person’s expenses are to be made before applying the cap on economic loss</td>
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<tr>
<td>Cap on non-economic loss</td>
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<tr>
<td>• Increase the maximum amount of damages that may be awarded to a claimant for non-economic loss to align with the cap under the Accident Compensation Act</td>
<td>0.6</td>
<td>9.3</td>
<td>0.1</td>
<td>2.3</td>
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<tr>
<td>Limitations on damages for loss of capacity to care for others</td>
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<tr>
<td>• Provide a limited entitlement for loss of capacity to care for others, in line with the New South Wales approach</td>
<td>4.1</td>
<td>4.1</td>
<td>1.0</td>
<td>1.0</td>
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<td>Other issues</td>
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<tr>
<td>• Provide that the impairment assessment for spinal injuries take into account the claimant’s post-surgery, rather than pre-surgery, condition</td>
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<td>n.e b</td>
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<tr>
<td>• Provide that common law claims arising from the use of a motor vehicle are subject to the limitations of the Wrongs Act in regards to caps, thresholds and the prescribed discount rate</td>
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<tr>
<td><strong>Total recommended package</strong></td>
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<td>19.4</td>
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**Likely Impacts on Insurance Markets**
<table>
<thead>
<tr>
<th>Area</th>
<th>Additional claims costs ($m)</th>
<th>Likely average impact on insurance premiums (%)&lt;sup&gt;a&lt;/sup&gt;</th>
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</thead>
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<tr>
<td></td>
<td>Lower bound</td>
<td>Upper bound</td>
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<tr>
<td>Additional option</td>
<td>16.3</td>
<td>32.5</td>
</tr>
</tbody>
</table>

**Discount rate**

- Set the discount rate applicable to damages for future economic loss and expenses at four per cent

<sup>a</sup> The average impact on insurance premiums is based on spreading estimated additional claims costs evenly over 2012 Victorian public liability and medical indemnity premium revenue. b n.e: not estimated. No data is available to estimate the impact of this change, although it is assumed to reduce claims costs and thus place downward pressure on insurance premiums.

Source: See relevant chapters.

Under the recommended package, six measures are likely to result in an increase in insurance premiums, namely:

- adjusting the threshold level for eligibility to access damages for non-economic loss for psychiatric injury to impairment of greater than or equal to 10 per cent
- provide that spinal injuries assessed at greater than or equal to five per cent impairment are eligible to access damages for non-economic loss
- providing that a plaintiff be permitted to claim for damages for economic loss up to a cap based on three times average weekly earnings, even if their post-injury earnings exceed this amount
- providing that dependants of a deceased person be permitted to claim up to the cap of three times average weekly earnings, after deducting the deceased’s personal expenses from their actual earnings
- increasing the maximum amount of damages that may be awarded to a claimant for non-economic loss to align with the current Accident Compensation Act cap of around $555 000
- providing a limited entitlement for loss of capacity to care for others, in line with the New South Wales approach.

Another two measures are likely to place minor downward pressure on premiums:

- providing that the impairment assessment for spinal injuries must take into account the claimant’s post-surgery, rather than pre-surgery, condition
- providing that common law claims arising from the use of a motor vehicle are subject to the limitations of the Wrongs Act in regards to caps, thresholds and the prescribed discount rate.

The Commission’s approach also takes into account falls in average premiums since tort law reform. The expected increase in premiums is small relative to overall falls in premiums since 2003:

- the average premium for public liability insurance has fallen from approximately $1000 to approximately $600 in 2012, or around 40 per cent
- the average premium for professional indemnity insurance has fallen from around $5000 to around $2200 in 2012, or around 56 per cent (APRA 2013a).
Moreover, the number of insured risks has increased substantially (chapter 2).

In addition to the proposed reforms, the Commission also sees merit in reducing the discount rate to four per cent. However, this would not meet the test of not having an unduly adverse impact on insurance premiums (as defined by the Commission). For example, reducing the discount rate to four per cent could increase premiums by between four and eight per cent alone (table 7.1). That said, it is clearly open to the Victorian Government to take a different view on ‘not unduly adverse’ and to take up this option, whose benefits would be broadly shared amongst successful claimants.

**Recommendation 7.1**

To address anomalies, inequities and inconsistencies in the limitations on damages for personal injury and death, the Victorian Government amend the Wrongs Act 1958 (Vic) to:

- provide that spinal injuries assessed at greater than or equal to five per cent impairment are eligible to access damages for non-economic loss
- adjust the psychiatric injury impairment threshold for eligibility to access damages for non-economic loss to greater than or equal to 10 per cent
- provide that the cap on damages for economic loss applies to the gap between pre- and post-injury earnings
- provide that in claims of loss of expectation of financial support, deductions for the deceased person’s expenses are to be made before applying the cap on economic loss
- increase the maximum amount of damages that may be awarded to a claimant for non-economic loss to align with the cap under the Accident Compensation Act
- provide a limited entitlement for damages for loss of capacity to care for others, in line with the New South Wales approach
- provide that the impairment assessment for spinal injuries take into account the claimant’s post-surgery, rather than pre-surgery, condition
- provide that common law claims arising from the use of a motor vehicle are subject to the limitations of the Wrongs Act in regards to caps, thresholds and the prescribed discount rate.

**7.2 Assessing the possible impact of the NDIS**

The Commission understands that the recent establishment of the NDIS and the work on the development of the NDIS may impact on the award of damages for negligence and thus the future price and/or availability of public liability and professional indemnity insurance. The Commission notes that the magnitude of impacts of these schemes is subject to significant uncertainty at this time. For example, many elements of the program remain to be defined or developed.

That said, the NDIS can be expected to be highly relevant to seriously or catastrophically injured people. As a result, it would seem sensible to reconsider the limitations on damages for personal injury and death in the Wrongs Act closer to the full implementation of the NDIS (expected to be July 2019). Such a reconsideration could also be an opportunity to consider the issue of the discount rate applied across the Wrongs Act, the Accident Compensation Act 1985 (Vic) and the Transport Accident Act 1986 (Vic), given recent falls in the risk-free real interest rate and the impacts of the discount rate on equity (chapter 5).
8 Medical Panels processes

The terms of reference require the Commission to develop, evaluate and recommend options for the Wrongs Act to operate more efficiently and equitably, consistent with the objectives of the tort law changes of 2002 and 2003. Medical Panels were introduced to the Wrongs Act to provide an efficient means of determining whether the significant injury threshold for non-economic loss claims has been met (chapter 3). Participants have highlighted a number of issues that hinder the efficient operation of Medical Panels under the Wrongs Act.

The terms of reference also require the Commission to have regard to the impact of its recommendations on the workload of the Medical Panels and the courts. The Commission’s recommendations on access to damages for non-economic loss are likely to increase the workload of the Medical Panels. The Commission has sought to alleviate this impact by identifying opportunities to improve the operation of Medical Panels under the Wrongs Act — by improving efficiency and by reducing the current disproportionate allocation of time to Wrongs Act cases by the Medical Panels (Medical Panels correspondence).

8.1 Overview

8.1.1 History and purpose of Medical Panels under the Wrongs Act

In 2003, the Victorian Parliament introduced Medical Panels to the Wrongs Act to determine disputes between claimants and respondents about whether the ‘significant injury’ threshold for non-economic loss damages had been met. Parliament intended this measure to:

1. streamline the pre-litigation ‘procedure for determining the threshold for recovery of damages for non-economic loss’

2. shift responsibility for determining ‘significant injury’ from the courts to independent panels of medical experts (Victorian Parliamentary Debates – Legislative Assembly 2003a, 2081, 2078).

The design of the process under the Wrongs Act was adapted from the Medical Panels process that has been in operation since 1992 under the Accident Compensation Act (Victorian Parliamentary Debates – Legislative Assembly 2003a, 2078).1 The Medical Panels process under that Act is highly structured and standardised. For example, conciliation officers facilitate pre-litigation dispute resolution and oversee the referral of disputed medical questions to the Medical Panel, with judges accorded similar powers should a matter proceed to court.2 These oversight mechanisms are absent from the operation of Medical Panels under the Wrongs Act, which devolves responsibility for the claims and referral process to the claimant and the respondent.

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1 In 1997, the Accident Compensation Act was amended to make the opinion of the Medical Panel binding, ‘final and conclusive’ in order to overcome the problem of ‘duelling experts’ escalating and driving up the costs of litigation (Victorian Parliamentary Debates – Legislative Assembly 1997, 1080). This is a key element of the operation of Medical Panels under the Wrongs Act.

2 Medical Panels are established under s 63 of the Accident Compensation Act for the purposes of providing opinions in relation to medical questions concerning, for example, a worker’s medical condition or capacity for work (s 5). The functions of Medical Panels and the roles of the County Court and conciliation officers in relation to them are set out in ‘Part III — Dispute Resolution’ of the Accident Compensation Act.
8.1.2 Overview of the Medical Panels process

Typically, a Medical Panel is only involved in a claim for non-economic loss damages when a respondent disputes a claim following service of a Certificate of Assessment (Certificate), in which a medical doctor certifies that the degree of impairment suffered by the claimant meets the significant injury threshold (chapter 3).

Figure 8.1 depicts the process described below.

The role of the claimant

The claimant initiates the claims process by obtaining an assessment of physical and/or psychiatric impairment from an approved medical practitioner (chapter 3). If the requisite degree of impairment is certified, the claimant may then choose to serve the Certificate on the respondent (s 28LT). This must be accompanied by ‘prescribed information’, which includes, among other things, personal details and descriptions of the incident and the injury, including its impact on the claimant (s 28LT(2)).

To assist claimants and their legal representatives, the Department of Justice provides some general guidelines and templates on its website (DOJ 2013).

The role of the respondent

When served with a Certificate and the prescribed information, the respondent has 60 days to reply in one of four ways:

- accept the claim
- request further information
- dispute whether he or she is the correct respondent
- dispute the claimed degree of impairment by referring a ‘medical question’ to the Medical Panel (s 28LW).

Failure to respond in writing within 60 days results in a deemed acceptance of the claim (s 28LW(4)).

If the respondent disputes the Certificate supporting the claim, he or she is required to refer a medical question to the Medical Panel, which favours the following wording: ‘Does the degree of impairment resulting from the injury to the claimant alleged in the claim satisfy the threshold level?’ (Medical Panels 2008, 4).

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3 The claimant may also seek the respondent’s agreement to waive the requirement for a medical assessment (s 28LO(1)).

4 The Wrongs Act also provides for Certificates to be issued when the injury has not stabilised, provided that, among other things, the medical practitioner is satisfied that the degree of impairment will satisfy the threshold once the injury has stabilised (s 28LNA).

5 Regulation 6 of the Wrongs (Part VBA Claims) Regulations 2005 prescribes, among other things, the following information: details of the incident and resulting injury; details of any resulting pain and suffering, loss of amenities or enjoyment of life; details of any report of the incident on which the claimant intends to rely; details of any medical practitioner who has treated the injury of the claimant.
Claimant serves Certificate of Assessment and prescribed information on respondent.

Respondent decides whether to:
(a) Accept the claim
(b) Request further information
(c) Dispute whether they are the correct respondent
(d) Refer ‘medical question’ to Medical Panel.

Respondent has 60 days in which to respond to the claimant. Respondent can request more information from the claimant within the 60 days.

Where (d) occurs, the respondent provides the prescribed information, a copy of Certificate of Assessment and the medical question to the Medical Panel.

The Medical Panel favours a generic wording of the medical question, as follows: ‘Does the degree of impairment resulting from the injury to the claimant alleged in the claim satisfy the threshold level?’.

The Convenor of Medical Panels decides whether to convene a Panel based on information provided in the referral, including the medical question.

The Convenor may request:
- The respondent to amend medical question to comply with s 28LB
- Further documentation from the respondent or claimant (for example, medical records).

If a Medical Panel is convened, it considers relevant medical information, including the claimant’s medical history, to determine the degree of impairment. The Medical Panel must disregard unrelated injuries or causes.

The Medical Panel may ask the claimant to supply all documents in their possession that relate to the medical question, to meet and answer questions, and to submit to a medical examination.

The Medical Panel makes a determination on whether the injury meets the ‘significant injury’ test.

Source: Commission analysis.
The respondent must also provide the Medical Panel with the Certificate and with prescribed information, which, like that provided by the claimant, includes personal details and descriptions of the incident and the injury (s 28LZA(1), Wrongs (Part VBA Claims) Regulations 2005 r 7). The Commission understands that respondents may use this as an opportunity to contest the claimed impairment, and to submit any material that they consider relevant to the medical question (Medical Panels correspondence).

To assist respondents to make an effective referral, the Medical Panel publishes guidance material and templates on its website (also available on the Department of Justice website) (Medical Panels 2013; DOJ 2013).

Finally, respondents are responsible for the costs which follow the referral of a medical question (s 28LX).

The role of Medical Panels

Part VBA of the Wrongs Act sets out the procedures that a Medical Panel must follow to determine whether a claimant meets the significant injury threshold. 6 In keeping with Parliament’s intention for a streamlined, non-judicial pre-litigation process, Medical Panels are required to ‘act informally, without regard to technicalities or legal forms and as speedily as a proper consideration of the reference allows’ (s 28LZ(2)).

Upon receiving a referral, the Convenor of Medical Panels Victoria decides whether to convene a Medical Panel, based on information contained in the referral. The Convenor may request the respondent to amend the medical question to comply with s 28LB, and may request further documentation from the respondent and/or the claimant (for example, medical records).

Once convened, a Medical Panel determines whether the claimant’s degree of impairment satisfies (or will satisfy when the injury has stabilised) the threshold level, but must not state the specific degree of impairment (s 28LZG). In doing so, all unrelated injuries or causes must be disregarded. This determination must be accepted by a court in any proceeding in relation to the claim (s 28LZH). 7

The Medical Panel’s decision therefore functions as a gateway to one of two outcomes, depending on whether the significant injury threshold is met:

1. If not met, a claimant’s entitlement to non-economic loss damages is terminated.
2. If met, the claimant’s entitlement is partially established, with the ultimate outcome depending on settlement or the resolution at trial of various other issues, such as negligence and causation.

Number of Wrongs Act referrals

From 2010-11 to 2012-13, the Medical Panels received 1377 Wrongs Act referrals. Of these referrals, 731 or around 55 per cent were categorised as ‘slips/trips and falls’, while 315 or around 25 per cent were medical-related claims for ‘failed or injurious treatment by practitioner or consultant’ (table 8.1).

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6 Section s 28LZL also incorporates relevant provisions of the Accident Compensation Act 1985 (Vic).
7 No appeal on the merits may be made to a court from an assessment or determination of a Medical Panel (s 28LZI(1)). The only right of appeal is by way of judicial or administrative law review (Pillay 2010, 4–12).
Table 8.1  Wrongs Act referrals by type of event: 2010-11 to 2012-13

<table>
<thead>
<tr>
<th>Type of event</th>
<th>Number</th>
<th>Percentage of all events (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Slips/trips and falls</td>
<td>731</td>
<td>56</td>
</tr>
<tr>
<td>Failed or injurious treatment by practitioner or consultant</td>
<td>315</td>
<td>24</td>
</tr>
<tr>
<td>Impact by object</td>
<td>56</td>
<td>4</td>
</tr>
<tr>
<td>Care/custody/control</td>
<td>55</td>
<td>4</td>
</tr>
<tr>
<td>Traumatic event, witness or exposed to</td>
<td>39</td>
<td>3</td>
</tr>
<tr>
<td>Physical assault</td>
<td>27</td>
<td>2</td>
</tr>
<tr>
<td>Sport/recreation</td>
<td>19</td>
<td>1</td>
</tr>
<tr>
<td>Faulty product</td>
<td>15</td>
<td>1</td>
</tr>
<tr>
<td>Fire</td>
<td>14</td>
<td>1</td>
</tr>
<tr>
<td>Fall from height</td>
<td>11</td>
<td>1</td>
</tr>
<tr>
<td>Collapse of building/structure</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Discrimination/harassment</td>
<td>10</td>
<td>1</td>
</tr>
</tbody>
</table>

Notes: A number of other categories had less than 10 referrals: abuse/molestation; accidental breakage; animal bite/attack; dog bite/attack; electric shock; environmental contamination or pollution; equipment breakdown; explosion and/or vibration; exposure to or contact with substance; faulty workmanship; impact by animal; impact or damage by vehicle; lifting; carrying or putting down objects; long term exposure to sound or noise; machinery use; negligent advice; other causes; other contamination; repetitive/overuse injury; subsidence/landslide; water. The following categories had zero referrals: asbestos; defamation/slander; excavation/drilling damage; exposure to sudden sound or noise; lease liabilities; mould; other financial loss; rusting/oxidation/discolouring; spray drift; trapped by machinery or equipment; weakening and/or removal of supports; welding; worker to worker injury.

Source: Medical Panels correspondence.

8.2  Key issues

In submissions and discussions with the Commission, participants raised issues concerning, in particular:

(1) the commencement of the claim by the claimant
(2) the referral of the medical question by the respondent.

Participants also raised other issues in relation to multiple respondents and the cost of general damages claims.

8.2.1  Commencement of the claim by the claimant

Participants raised two sets of issues concerning the commencement of the claim by the claimant, relating firstly to the prescribed information that the claimant must serve on the respondent and secondly to the timing of service.
Prescribed information

The Commission identified four issues concerning the provision of prescribed information by the claimant to the respondent:

(1) The prescribed information may be incomplete. According to Norton Rose Fulbright (NRF), it is ‘not uncommon for claimants to serve Certificates without’ prescribed information, such as medical information or the details of treating medical practitioners (sub. 8, 3). Wotton + Kearney (WK) supported this submission (sub. 18, 2). NRF submitted that this ‘hamper[s] a respondent’s ability to gauge whether or not a medical question should be referred to the Medical Panel’ (sub. 8, 3). It also increases the workload of the Medical Panel, which must then make further requests of the claimant for missing information (trans. 2, 1). For NRF, the provision of incomplete information ‘undermines the efficiency of the Medical Panel referral process’ (sub. 8, 4).

(2) The prescribed information may arrive in a piecemeal fashion, which delays the progress of the claim and hampers the respondent’s ability to decide whether to refer (trans. 2, 2). It can also lead to disputes between claimants and respondents about whether the prescribed information has been provided (trans. 2, 2).

(3) According to WK, the prescribed information is not accompanied by a warning to the respondent about the 60 day time limit for responding to a claim (sub. 18, 4). This ‘has caused significant prejudice to some respondents’, particularly where the respondent has no prior litigation experience, or where the claims department of an insurance company is located interstate and is not entirely familiar with the requirements of the Wrongs Act (sub. 18, 4; trans. 2, 2). WK submitted that they have experienced ‘many occasions’ where respondents’ lack of awareness of this time limit has led to a failure to refer the claim to their insurer within the 60 days. In some cases, this has ‘compromised the respondent’s right to indemnity because late notice of the claim has prejudiced the insurer’s rights’ (sub. 18, 4).

(4) The Municipal Association of Victoria (MAV) submitted that ‘the current process does not ensure that the Medical Panel has all the relevant material before it to assist in its decision-making’ because the claimant is not required to provide ‘material regarding relevant pre-existing conditions or prior injuries’ (sub. 12, 14).

The Commission’s view

The Commission’s view is that issues ‘1’ and ‘2’ could be addressed by requiring the claimant to serve the prescribed information in a prescribed form. The Law Institute of Victoria (LIV) supported this approach, adding that it should incorporate the ‘prescribed information set out at s 28LT(3) and Regulation 6’ (sub. DR24, 14). Presently, the claimant is not required to provide the prescribed information in a single document, such as a pro forma. This permits information to be provided in a piecemeal fashion, as it allows for information about the injury and incident to be provided by way of, for instance, a statement of claim or a letter of demand, alongside other prescribed information included in other documents (trans. 2, 1).

In the Commission’s view, requiring the claimant to provide the prescribed information in a prescribed form, completion of which is a statutory prerequisite for effective service by the claimant, would address issues ‘1’ and ‘2’. Issue ‘3’ could be addressed by

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8 WK supported this point, submitting that the absence of clear guidelines regarding prescribed information can lead to costly and time-consuming litigation, citing as an example the case of Redline Towing & Salvage Pty Ltd v The Convenor of Medical Panels [2012] VSC 472 (sub. 18, 5).
including a front-page warning on the prescribed form to respondents on the time limits for replying.

Ideally, the prescribed form needs to be available to fill out electronically on the Medical Panels Victoria website, and should be accompanied by a step-by-step guide to assist claimants to complete it correctly.

Regarding options for addressing issue ‘4’, some participants expressed concern about combining a prescribed form requirement with a further requirement for claimants to provide respondents with exhaustive materials, such as medical reports and records (trans. 2, 2). The LIV submitted that this ‘would result in an onerous and unnecessary front-loading of claims in terms of both costs and delay’ (sub. DR24, 14). By contrast, Avant submitted that the referral process could be expedited by requiring the claimant to supply the respondent with a ‘schedule listing all health information that the claimant has in his or her possession power or control’, which would then allow the respondent to obtain the information if considered relevant (sub. DR19, 4-5).

On balance, the Commission considers that the introduction of a prescribed form will improve the efficiency of the claims and referral process, and that further changes risk increased costs and delay, particularly if claimants are required to provide exhaustive materials.

**Timing and interaction of Medical Panels with the courts**

Several participants noted that the Wrongs Act does not require the claimant to serve the respondent with the Certificate and prescribed information within a specified time. WK submitted that ‘the Certificate can be served at any stage of the [Court] Proceeding’, with NRF adding that ‘it is not uncommon for a claimant to provide a respondent with a Certificate after a period of unacceptable delay or at an opportunistic juncture in a litigated proceeding’ (sub. 18, 2; sub. 8, 3). Avant proposed ‘that a certificate should be required to be served before or at the time of serving the statement of claim, so as to give certainty to the defendants as to what head of damage the plaintiff will pursue’ (sub. 16, 3).

To illustrate their submission, WK cited the County Court matter of *Pickering v Killians* Walk Owners Corporation [2013] VCC 1206 (‘*Pickering v Killians*’), in which they acted for the respondent. The claimant sought to fix a trial date for her claim for damages, without declaring whether she intended to claim both non-economic loss and economic loss (*Pickering v Killians*, [6]). The respondent sought a stay of proceedings so that the claimant’s potential entitlement to non-economic loss damages could be determined, thus avoiding preparation of a potentially unnecessary defence [6-7]. The claimant indicated that she may not presently be able to satisfy the significant injury threshold for her non-economic loss claim. She indicated that she would ‘not make the decision whether to abandon a claim for non-economic loss until … the date for trial is impending (*Pickering v Killians*, [8]). In his written judgment, Judge Misso noted that there was no power under the Wrongs Act for him to stay the proceedings, which he described as ‘a very unsatisfactory position which I think was an unintended consequence of Part VBA’ and emphasised the importance of both parties creating ‘certainty so that the real issues to be tried come to the surface as soon as that is practicable’ (sub 18, 3; *Pickering v Killians*, [13, 17]).

The consequence of this, according to WK, can be ‘considerable uncertainty for a respondent’ which can prejudice the preparation of the case and can hinder the prospects of settlement between parties (sub. 8, 3).

The LIV commented that any response to this issue should not require the claimant to serve the Certificate before proceedings commence: in some cases, particularly those
involving medical negligence, this could delay commencement beyond the expiry of the three-year limitations period, an eventuality which would prejudice the claimant’s right to seek compensation (sub. DR24, 14).

The Commission’s view

The absence of a timing requirement becomes an issue when litigation progresses to the point where a trial date must be set. If a claimant continues to indicate an intention to claim for non-economic loss at this point, but does not serve the respondent with a Certificate, the respondent is required to prepare a potentially unnecessary defence, which is costly and time-consuming.

The Commission understands that in related personal injury matters, the court has an inherent jurisdiction to order a plaintiff in a personal injuries case to submit to a medical examination by a medical expert chosen by the defendant (LexisNexis 2013, 325-8250). A court may then grant a stay of proceedings if ‘a [claimant] unreasonably fails, refuses or neglects to attend a medical examination as directed by the court’ (Thomson Reuters 2012, 5.3.95). Depending on the jurisdiction, courts also have other sanctions available to them, such as dismissing the claim or suspending any entitlement to damages until the plaintiff submits to the medical examination (LexisNexis 2013, 325-8265).

Some participants submitted that it might be possible for court Practice Notes to be changed so that the trial date would not be set until the Certificate and the prescribed information were served (trans. 2, 3). According to the LIV, ‘the incorporation of an order for service of a certificate of assessment in the usual Court timetable would present little difficulty’ (sub. DR24, 15).

However, the Commission notes that Judge Misso was unable to make such an order because his power to do so was limited by the provisions of Part VBA of the Wrongs Act:

I cannot order that the plaintiff take the steps set out in Part VBA, because there is no power under the Act for me to make such an order. If I had the power, I would not hesitate to make that order. [Pickering v Killians, [13]]

The Commission notes that the terms of reference require it to have regard to the impact of its recommendations on the workload of courts. The Commission therefore considers that an amendment to Part VBA is required in order to grant the court the discretionary authority to manage a relevant Wrongs Act proceeding by:

1 ordering the claimant to serve the respondent with the Certificate and the prescribed information
2 staying the proceedings until service has occurred.

9 In this context, inherent jurisdiction refers to the authority of a superior court to prevent abuse of and to manage its own process, without the assistance of an authorizing statutory provision.

10 Examples include Uniform Civil Procedure Rules 2005 (NSW) r 23.1, 23.2; Supreme Court (General Civil Procedure) Rules 2006 (Vic) r 33.02, 33.03, 33.04(1); and, Rules of the Supreme Court 1971 (WA) O 28 r 1.

11 Examples include Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 33.04(2), Rules of the Supreme Court 1971 (WA) O 28 r 1(3), and Supreme Court Civil Rules 2006 (SA) r 154(1).

12 Dismissing the claim is available in the Uniform Civil Procedure Rules 2005 (NSW) r 23.9 and the Rules of the Supreme Court 1971 (WA) O 28 r 1(3). Suspending the claimant’s entitlement is provided for by the Supreme Court Civil Rules 2006 (SA) r 154(2).
This measure would introduce greater certainty to the pre-trial process by encouraging, when appropriate, the timely disclosure of the ‘real issues to be tried’ (Pickering v Killians, [17]). This may deny some claimants the advantage of withholding disclosure of their intention to claim non-economic loss damages. However, in the Commission’s view, this cost is outweighed by the benefits to the dispute resolution process as a whole — namely, reduced delay and increased certainty. The Commission notes that these benefits are also consistent with Parliament’s intention for the Medical Panels process to operate as a streamlined pre-litigation procedure.

8.2.2 Referral of the medical question by the respondent

Participants raised three issues concerning the referral of the claim to the Medical Panel by the respondent, relating to passing on the claimant’s prescribed information to the Medical Panel, incomplete information, and the wording of the medical question.

Passing on the prescribed information received from the claimant

The respondent is not required to provide the Medical Panel with copies of all of the prescribed information provided by the claimant. This means that, in the majority of cases, the Medical Panel incurs an additional administrative burden once the referral has been submitted, because it must contact the claimant and/or respondent to obtain the claimant’s prescribed information (trans. 2, 3; Medical Panels correspondence). This also delays the processing of the claim.

Incomplete information provided by respondent

Based on discussions with Medical Panels Victoria, the Commission understands that the prescribed information that the respondent is required to provide in the referral is sometimes incomplete. The Panel must then request the missing information, which adds to its administrative burden and to the time taken to make an assessment (Medical Panels correspondence).

The medical question

According to Medical Panels Victoria, there has been an increased incidence of referrals that ask the Medical Panel to consider the issue of causation when assessing impairment (Medical Panels correspondence). This is problematic because the Medical Panel is not permitted to consider causation as an element of the medical question: s 28LB defines the medical question as ‘a question as to whether the degree of impairment resulting from injury to the claimant alleged in the claim satisfies the threshold level’ of significant injury. This definition was introduced in 2003:

... to make it clear that the panel’s assessment is based on the injuries that the claimant has cited in his or her claim, and that issues relating to causation are therefore left to the parties or a court to determine. (Victorian Parliamentary Debates – Legislative Assembly 2003b, 1425)

This problem typically arises in medical negligence cases, which are more likely to require complex distinctions between the injury at the basis of the claim and the unrelated injuries or causes for which the claimant originally sought treatment. Section 28LL(3) requires the Medical Panel to disregard such unrelated injuries and causes (trans. 2, 3–4).

The wording of the medical question becomes problematic when it asks the Panel to consider issues — like causation — that Part VBA does not permit it to consider. This arises because although s 28LB defines the medical question conceptually, it does not set out the permissible phrasing of the question.
To ensure that it makes a determination in response to a permissibly phrased medical question, the Panel has developed an administrative workaround. The Deputy Convenor’s Directions state that if the medical question:

... is phrased in a way that does not come within the meaning of section 28LB of the Act, [the Deputy Convenor] will advise the respondent that the correct medical question should be: ‘Does the degree of impairment resulting from the injury to the claimant alleged in the claim satisfy the threshold level?’ (Medical Panels 2008, 4)

This issue adds to the administrative burden on the Medical Panel and delays the assessment of referrals. In addition, from discussions with Medical Panels Victoria, the Commission understands that each year about one to two disputes about the form of the medical question progress to litigation (judicial review). This further adds to the administrative burden on the Medical Panel, and to the legal costs incurred by the Medical Panel and the respondent.

The Commission’s view

The Commission considers that these three issues can be addressed by standardising the referral process along similar lines to those outlined above for claimants. Like claimants, respondents are not presently required to provide their prescribed information in a prescribed form. In the Commission’s view, a prescribed form should be available to fill out electronically on the Medical Panels Victoria website, and should be accompanied by a step-by-step guide to assist respondents to complete it correctly.

A prescribed form with the following features would in the Commission’s view be a low-cost solution to the three issues discussed above:

(1) **Passing on the prescribed information received from the claimant** — including this as a required step in the completion of the prescribed form would relieve the Medical Panel of the need to chase up this information after they receive the referral. The LIV considered this requirement to be necessary (sub. DR24, 14).

(2) **Incomplete information** — obliging respondents to complete the prescribed form, assisted by a step-by-step guide, is likely to minimise the provision of incomplete information and the consequential administrative burden.

(3) **The medical question** — the definition of the medical question in s 28LB, reinforced by the second reading speech quoted above, is unequivocal in denying the Medical Panel the authority to consider causation when making an assessment. The Commission considers that the outcome of the current workaround — that is, a generically phrased medical question — could be achieved with greater efficiency by requiring the respondent to ask the medical question in the generic form when making the referral. To achieve this, the prescribed form could include a section requiring the respondent to tick a box marking the appropriate generic medical question, depending on whether the claimed impairment was physical or psychiatric. From discussions with Medical Panels Victoria, the Commission understands that a generic medical question would not prevent respondents from making separate submissions regarding whether or not the alleged injury of the claimant was potentially compensable. Nor would a generic medical question

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13 This requirement follows on from the recent judgment of Mitchell v Malios [2013] VSC 480, which requires separate Certificates for physical and for psychiatric impairments. This overruled the case of McAlister v Leitch [2011] VSC 51, which required a Medical Panel to be convened to assess physical and psychiatric impairments, even when the Certificate only alleged a physical impairment.
open the door to the Medical Panel including pre-existing injuries in their assessments: s 28LL(3) requires ‘impairments from unrelated injuries or causes ... to be disregarded in making an assessment’. According to the LIV, this restriction of the Medical Panel’s powers ensures that their ‘involvement is properly limited to the threshold question and does not become a de facto hearing of the causation and assessment of damages question’ (sub. DR24, 15).

8.3 Estimate of efficiency improvements

Based on consultation with Medical Panels Victoria, the Commission understands that the changes discussed above and consolidated in recommendation 8.1 would reduce their administrative workload. Presently, about 20 per cent of the Panel’s administrative time is spent on Wrongs Act referrals, which currently represent about 13 per cent of total referrals received (Medical Panels correspondence). According to Medical Panels Victoria, the above changes could bring the administrative workload closer to the percentage of referrals received, resulting in potential efficiencies for salaries and on-costs of about $67 000 per year (Medical Panels correspondence; table 8.2).

In addition, the requirement for a generically worded medical question would eliminate the need for litigation about the wording of the medical question. The Commission understands that this type of litigation occurs on average one to two times per year, with each dispute involving external legal costs of more than $100 000. A reduction in legal fees would result in efficiencies for the Department of Justice, who are responsible for paying the legal fees in respect of the Convenor’s involvement in the litigation, of about $100 000 per year (Medical Panels correspondence).

The Commission understands that many of these efficiencies would be mirrored by costs savings for the legal representatives of claimants and respondents. For example, reducing disputes about medical questions would result in a similar reduction in the costs incurred by respondents in those cases. Similarly, reducing the time spent by the Medical Panel contacting claimants and respondents to correct incomplete claims and referrals will inevitably reduce the time spent by legal representatives responding to these requests. Finally, granting courts the authority to manage their proceedings with respect to service of a Certificate is also likely to lead to a reduction in litigation costs incurred by the parties and the courts in cases such as Pickering \( v \) Killians.

These reductions should offset the potential increase in the workload of the Medical Panels arising from proposed changes to the thresholds (chapter 3).

<table>
<thead>
<tr>
<th>Position</th>
<th>Days-per-week saving</th>
<th>Full-time equivalent saving</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Manager</td>
<td>0.75</td>
<td>0.15</td>
</tr>
<tr>
<td>Legal Administration Officer</td>
<td>1.00</td>
<td>0.20</td>
</tr>
<tr>
<td>Administration Officer</td>
<td>1.50</td>
<td>0.30</td>
</tr>
<tr>
<td><strong>Total estimated administrative savings</strong></td>
<td></td>
<td><strong>$67 000</strong></td>
</tr>
<tr>
<td>Plus total estimated savings of legal costs</td>
<td></td>
<td><strong>$100 000</strong></td>
</tr>
<tr>
<td><strong>Total Estimated Savings</strong></td>
<td></td>
<td><strong>$167 000</strong></td>
</tr>
</tbody>
</table>

Note: Values may not equate due to rounding.

Source: Medical Panels correspondence.
**Recommendation 8.1**

To reduce transaction costs and improve equity, the Victorian Government amend Part VBA of the Wrongs Act 1958 (Vic) and the Wrongs (Part VBA Claims) Regulations 2005 (Vic) to:

- require the claimant to serve the prescribed information in a prescribed form
- grant courts the discretionary authority to:
  - order the claimant to serve the respondent with the Certificate of Assessment and the prescribed information in the prescribed form
  - stay proceedings until service has occurred
- require the respondent to refer the medical question to the Medical Panel using a prescribed form which:
  - includes a field for selecting the appropriate, generically worded medical question
  - must be accompanied by a copy of the prescribed information provided by the claimant.

To assist claimants and respondents to comply with the prescribed form requirement, Medical Panels Victoria should provide downloadable form templates and user guides on its website.

In the long term, if these changes are successful, the Victorian Government could reduce the time for a respondent to reply to a claim from 60 days to 45 days to ensure quicker access to justice.

### 8.4 Other issues

Participants brought two other issues to the attention of the Commission:

1. Two law firms identified problems in relation to whether a Certificate can bind multiple respondents (NRF, sub. 8; WK, sub. 18). This issue arises when one respondent accepts a claimant’s Certificate and another respondent refers the claim to the Panel; if the Panel determines that the degree of impairment does not satisfy the threshold level, an incongruous situation potentially arises where the claimant can assert an entitlement to general damages against the respondent who accepted the Certificate, but not against the respondent who referred the Certificate (NRF, sub. 8, 4). Participants suggested that any approach to the question of whether a determination of the Medical Panel should bind multiple respondents is likely to be fraught with difficulties (trans. 2, 4; sub. DR24, 15).

2. WK submitted that over the past five years there has been a disproportionately large increase in the costs of general damages claimed by plaintiff lawyers in relation to the amount of general damages sought (sub. 18, 4).

The Commission considers these two issues to be outside its terms of reference.
9 Strict liability regime for damage by aircraft

The terms of reference require the Commission to make recommendations relating to the appropriateness of, and possible reforms to, the existing strict liability regime for damage caused by aircraft to a person or property on land or water.

Strict liability removes the requirement for the claimant to prove negligence, intention or any other cause of action. It treats damage caused by aircraft to persons or property on the ground as if it were caused intentionally or negligently by the aircraft owner and/or operator.

This regime is governed by s 31 of the Wrongs Act 1958 (Vic), which applies to intrastate flights where the liable party (owner and/or operator) is:

- an unincorporated entity, such as a sole trader, partnership, or person (DITRDLG 2009a, 14; Bartsch 2013, 18.45); or
- a corporation which is not a foreign, trading or financial corporation under the Australian Constitution.\(^1\)

The corresponding Commonwealth statute governs the remainder — being the vast majority — of aviation operations in Australia, notably the overlapping categories of interstate and international flights and flights conducted by foreign, trading or financial corporations.

This chapter is organised into three sections. The first section examines the economic and historical rationales for the strict liability regime and sets out the relevant Commonwealth and Victorian statutory frameworks. The second section summarises the three key issues raised by participants in relation to the strict liability regime for damage by aircraft: the appropriateness of strict liability; the inclusion of ‘pure mental harm’ (box 9.2) within this regime; and inconsistencies between Commonwealth and Victorian legislation. Finally, the third section evaluates the options for reform and sets out the Commission’s recommended option.

9.1 Context

9.1.1 Rationale for strict liability: key concepts and history

Strict liability has a long history in international and domestic aviation (Bartsch 2013, 18.05). The adoption of strict liability in the aviation sector reflects three main considerations:

1. Strict liability as an appropriate way to balance the interests of the developing aviation industry and the interests of potential victims of surface damage caused by aircraft.

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\(^1\) Section 31 of the Wrongs Act only applies to aircraft owners or operators who fall outside of the Commonwealth’s power to legislate in relation to foreign, trading or financial corporations (s 51(xxi)). A corporation is, relevantly, a trading corporation when trading forms a ‘significant proportion of its overall activities’ in \(R \text{ v Federal Court of Australia; Ex parte WA National Football League (1979) 143 CLR 190, 233}\) (Mason J).
Strict liability as an efficient, equitable and cost effective way to manage the risk of damage to the surface in the context of a mature aviation industry.

The desirability of regulatory consistency between state, national, and international regimes given the continual border-crossing involved in the aviation industry.

Securing the development of the aviation industry: an early compromise

In the early twentieth century, the issue of damage by aircraft to third parties on the ground threatened the development of the infant aviation industry. Countries’ concerns about safeguarding the rights of ‘landowners suffering damage as a result of aircraft over-flight’ meant they were reluctant to sign international agreements granting foreign aircraft freedom of passage through their air space (Bartsch 2013, 18.10).

The first successful attempt to address this problem was the Rome Convention 1952, which imposed a regime of strict liability for damage caused by aircraft to third parties on the ground. The Convention provided that liability attached to the ‘operator’ of the aircraft unless the sole operational control of another party could be proved. It also placed limits on the amount of compensation available to victims.

Australia was an early signatory to the Convention. Presently, the Rome Convention has 49 signatories, including countries such as the United Kingdom, France, and the United Arab Emirates. Other countries, such as New Zealand and Singapore, adopt a strict liability regime without being signatories (DITRDLG 2009a, 14).

Box 9.1 The cost of strict liability

Strict liability for damage by aircraft under s 31 of the Wrongs Act derives from s 9 of the Air Navigation Act 1920 (UK), which attached strict liability to aircraft owners and/or operators for damage caused by aircraft ‘to any person or property on land or water ... without proof of negligence or intention’. However, potential victims obtained this benefit at a cost, for s 9 also removed the common law right of landowners to sue aircraft owners and operators for trespass and nuisance. This afforded ‘an aggrieved person a remedy, at least as effective as his abolished common law remedy, in respect of the same activities [which caused nuisance or trespass] if they caused material damage to him or his property’ (Leith v Medhurst [1991] 2 VR 362, 365-6 (Ormiston J)).

Balancing interests in the mature aviation industry

In the second half of the twentieth century, the focus of strict liability shifted away from protecting the early development of the aviation industry and towards adequate compensation for victims. In 1999, the Commonwealth Parliament passed the Damage by Aircraft Act 1999 (Cth) (DBA Act), which increased the compensation limits set by the Rome Convention. The Minister for Trade said that these limits were ‘mainly due to the survival of the infant industry argument into the 1950s, when [the Rome Convention] was being drawn up’ (Commonwealth Parliamentary Debates - House of Representatives 1999, 4163). Fifty years later, this ‘argument has long since lost any force and is especially inappropriate when prompt and adequate compensation for the innocent victims of air accidents is being considered’ (Commonwealth Parliamentary Debates - House of Representatives 1999, 4163).

At the same time, the policy rationale shifted from the protection of an infant industry to the maintenance of a ‘sustainable and financially viable aviation industry’ (DITRDLG 2009b, 87). According to the Commonwealth Department of Infrastructure and Transport, the retention of strict liability benefits the aviation industry by promoting
certainty and by reducing court costs and ‘onerous litigation’ (sub. 5, 4). In this respect, the focus shifts to the promotion of efficient transaction costs.

Importantly, strict liability also promotes efficient risk management by incentivising those best placed to take responsibility for the safe operation of aircraft (Day v Trans-World Airlines Inc 528 F 2d 31 (1975), 34), while ensuring prompt and adequate compensation for ‘those members of the non-flying public unfortunate enough to be included among the victims of an air accident, through no choice or action of their own’ (Commonwealth Parliamentary Debates - House of Representatives 1999, 4164–5).

To summarise, in the context of a mature aviation industry, strict liability is viewed as the best way to achieve three main outcomes:

1. Prompt and adequate compensation for victims.
2. Efficiency, certainty and the minimisation of transaction costs for the industry.
3. Distributing the costs associated with risk in a way that incentivises those best placed to assume responsibility for safety.

Consistency

Until relatively recently, third party victims of air accidents in Australia were subject to an inconsistent patchwork of state, territory and Commonwealth laws. This situation has now improved. Prior to 2000, aircraft flying within the territories, South Australia and Queensland, for example, were not subject to strict liability. This meant that a victim would need to prove negligence at common law in order to obtain redress for any damage suffered in these jurisdictions.

Variation across jurisdictions in access to compensation can undermine the rationale for strict liability by creating ‘uncertainty for the plaintiff’ and by increasing ‘the costs on the judicial system and the plaintiff through the increased levels of litigation necessary to obtain better compensation’ (Commonwealth Parliamentary Debates - House of Representatives 1999, 4163). As Corrs Chambers Westgarth (Corrs) submitted, inconsistency can also give rise to costly and time-consuming constitutional arguments, as plaintiffs and defendants seek the most favourable jurisdiction for their cases (sub. 15, 5; section 9.2.3).

By creating uncertainly and inefficiency, inconsistent legislation can undermine the policy rationale for strict liability. This problem has been addressed to a large extent by the introduction of the DBA Act, amendments to state regimes and the expansion of Commonwealth jurisdiction into areas traditionally viewed as the domain of the states (section 9.1.2).

9.1.2 Regulation in the Commonwealth and Victoria

Commonwealth Government regulation

In Australia, liability for damage caused by aircraft is governed by two different statutory regimes. For passengers and their baggage, the Civil Aviation (Carriers’ Liability) Act 1959 (Cth) imposes a regime of strict liability for death or bodily injury of a passenger, or destruction or loss of, or damage to, checked baggage. This Act dates back to the Warsaw Convention 1929.

However, if an aviation accident covered by Commonwealth legislation results in damage to a person or property on the surface, this falls under the DBA Act. The DBA Act applies broadly to most aircraft operations in Australia (s 9), with only a small class of
aircraft lying outside of the constitutional limits of the Commonwealth’s legislative powers, and therefore coming within state legislation (see below).²

Section 10(1) of the DBA Act establishes liability for damage caused by certain aircraft to third parties on the ground or in water. The DBA Act applies:

... where a person or property, on, in or under land or water suffers personal injury, loss of life, material loss, damage or destruction caused by an impact with an aircraft, part of an aircraft or something dropped from an aircraft.

The DBA Act restricted the scope of article 1 of the Rome Convention (as enacted), which applied to ‘damage … caused by an aircraft.’ Section 10(1) refers instead to ‘personal injury, loss of life, material loss, damage or destruction caused by’ impact with the aircraft (s 10(1)(a)), or parts of it (s 10(1)(b)), or with something that drops from the aircraft (s 10(1)(c)), or finally with something that results from one of the preceding impacts (s 10(1)(d)). This restriction from causation to actual impact was intended ‘as a balance against [the] comprehensive and relatively rigorous application of liability’ in the rest of the DBA Act (Commonwealth Parliamentary Debates - House of Representatives 1999, 4164).

Section 10(2) attaches liability for such damage jointly and severally to the owner and operator of the aircraft. Section 11 imposes strict liability, meaning that damages are recoverable from both the owner and/or the operator of the aircraft without the injured person having to prove that the injury was caused by their wilful actions, negligence or default. In 2002, sub-s 10(2A) was inserted to protect owners of aircraft who did not have an active role in the operation of the aircraft and where another person had an exclusive right to use the aircraft under some form of lease.

In 2012, three important amendments were made to the DBA Act:

(1) Sub-section (1A) was added to s 10 to deny a victim the right to sue for ‘mental injury … unless the person, or property owned by the person, suffers other personal injury, material loss, damage or destruction’.

(2) Section 11A was added to allow for a reduction of damages where the defendant can prove the victim’s contributory negligence.

(3) Section 11B was added to establish a right of contribution whereby a defendant could recover an amount, by way of contribution, from another liable party.³

Significantly, these provisions for right of contribution and contributory negligence introduced greater consistency between the DBA Act and its Victorian counterpart, which already made such allowances. However, the Victorian strict liability regime for damage to third parties on the surface does not limit mental injury.

² Aside from an express exception for Defence Force aircraft, the DBA Act applies to: all Commonwealth aircraft; aircraft owned by corporations; aircraft engaged in international air navigation; aircraft engaged in air navigation in relation to trade or commerce with other states or countries; air navigation from, to or within the territories; and aircraft landing at or taking off from a place acquired by the Commonwealth for public purposes (s 9).

³ In response to ACQ Pty Ltd v Cook (2009) 237 CLR 656 (Bartsch 2013, 18.50).
Victorian Government regulation

Like its Commonwealth counterpart, liability for damage caused by aircraft in Victoria is governed by two different statutory regimes. The Civil Aviation (Carriers' Liability) Act 1961 (Vic) applies to damage caused to passengers and/or their luggage. In the interests of uniformity, this Act applies the relevant parts of its Commonwealth equivalent to Victoria.

The situation is different for aviation accidents that cause damage to a person or property on the surface. Such incidents are covered by Part VI of the Wrongs Act. As discussed above, this part has limited application in Victoria because the DBA Act makes such extensive use of the Commonwealth’s constitutional power, in particular its power to legislate in relation to corporations, external affairs, and in relation to commerce with other countries and among the states.

Part VI of the Wrongs Act picks up the remainder, being:

- unincorporated intrastate operations — that is, ‘purely intrastate flights’ — where the owner and/or operator are not corporations and do not fall under some other head of Commonwealth power
- intrastate flights where although the owner and/or operator are corporations, they are not foreign, trading or financial corporations under s 51(xx) of the Australian Constitution, and which do not fall under some other head of Commonwealth power.

The Commission understands that these categories represent a comparatively small percentage of aircraft operations in Victoria.

Unlike the DBA Act, Part VI of the Wrongs Act does not refer back to the Rome Convention 1952. Part VI was first enacted in Victoria as the Wrongs (Damage by Aircraft) Act 1953 (Vic), which was repealed and inserted into the Wrongs Act in 1958. Section 31 of Part VI is cast in virtually identical terms to s 9 of the Air Navigation Act 1920 (UK).

Though the drafting style of s 31 reflects its early-twentieth-century origins, it nevertheless applies to a range of incidents similar to that of its modern Commonwealth counterpart:

> Where material loss or damage is caused to any person or property on land or water by or by a person in or by an article or person falling from an aircraft while in flight taking off or landing … (s 31(1))

Two significant differences, however, should be noted:

(1) Section 31(1) adopts the concept of causation rather than the narrower concept of impact. Although the DBA Act compensates for this to a degree by allowing for something that results from an impact (s 10(1)(c)), the Victorian Wrongs Act is still likely to apply to a broader range of incidents. This is illustrated by the case of Southgate v Commonwealth of Australia (1987) 13 NSWLR 188, where a helicopter that flew too close to a woman riding a horse was held to have caused the injuries she suffered when the horse reared, despite the absence of physical impact.

(2) Where s 10(1) of the DBA Act refers to ‘personal injury, loss of life, material loss, damage or destruction’, s 31(1) of the Wrongs Act refers somewhat less precisely to ‘material loss or damage’.

Section 31(1) creates a strict liability regime, whereby the aircraft owner may be held liable for damage caused by aircraft to persons or property on the ground without the
need for the person who has suffered damage to prove negligence. This regime is, however, qualified in several important ways:

- The aircraft owner is not liable where the aircraft has been demised, chartered, let or hired for more than 14 days and where no crew member of the aircraft is employed by the owner (s 31(2)).
- An aircraft owner can claim indemnity from any person who is legally liable to pay damages in respect of the loss or damage. For example, where a plane is poorly maintained by a lessee and that leads to damages, the owner can recover from the lessee (s 31(1)).
- Damages may be reduced as a result of the victim’s contributory negligence, which is now also a feature of the DBA Act.

In addition, s 31 lacks an ‘exclusive remedy’ clause which expressly excludes the common law right to sue for negligence. As Corrs submitted:

... nothing in the statutory provisions imposing strict liability on an aircraft owner absolves that owner from liability at common law for any negligence by the owner which can be proved. (sub. 15, 1)

In addition, s 31 does not exclude pure mental harm from its operation – that is, unlike s 10(1A) of the DBA Act, it does not limit liability to cases where ‘the person, or property owned by the person, suffers other personal injury, material loss, damage or destruction’.

9.2 Key issues

Inquiry participants raised three issues in relation to the strict liability regime for damage by aircraft:

1. The appropriateness of strict liability as opposed to fault-based liability in relation to surface damage by aircraft.
2. Whether pure mental harm or injury — unaccompanied by physical injury or loss of property caused by an aircraft accident — should be recoverable.
3. Other inconsistencies between the Victorian and the Commonwealth statutes.

9.2.1 The appropriateness of strict liability

Some participants objected to the principle of strict liability for damage to the surface caused by aircraft. The Aircraft Owners and Pilots Association of Victoria (AOPA), for example, expressed concern that ‘liability can arise against an aircraft owner without the owner being present at the relevant incident or even being aware of it occurring’ (sub. 10, 1). Similarly, the Royal Victorian Aero Club (RVAC) commented that a ‘completely innocent aircraft owner can be required to pay damages to anyone who suffers damage as a result of an aircraft accident’ (sub. 2, 2). Nevertheless, the RVAC did concede that the protection of victims from ‘physical injury or property damage’ was appropriate ... provided insurance for this exposure can be procured at a reasonable cost’ (sub. 2, 3) (section 9.2.2). For the AOPA, strict liability is a ‘repressive and unfairly onerous’ regime, especially in light of liability for pure mental harm (sub. 10, 2) (section 9.2.2).

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4 Demised means transferred, usually by way of lease.
On the other hand, some participants endorsed the strict liability regime. The Australian Aviation Insurance Forum (AAIF) wrote that ‘[t]here is general recognition that the imposition of a strict liability regime is appropriate’ and also that the:

… aviation insurance industry recognises that the application of usual common law provisions of liability attaching to a negligent party is inappropriate and may well also prove more costly for the industry than a strict liability regime. (sub. 4, 1)

In commenting on the Commonwealth regime, the Department of Infrastructure and Transport remarked that a strict liability framework strikes the ‘best balance’ between victims’ needs for ‘timely and sufficient compensation’ and aircraft operators’ needs to ‘carry out their daily activities, with limited concern for both parties of costly and onerous litigation’ (sub. 5, 4).

9.2.2 Pure mental harm

The second issue raised by participants concerned the availability of strict liability for pure mental harm.

<table>
<thead>
<tr>
<th>Box 9.2</th>
<th>Pure mental harm defined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pure mental harm is defined in s 67 of the Wrongs Act as ‘mental harm other than consequential mental harm’, which is itself defined in the same section as ‘mental harm that is a consequence of an injury of any other kind’.a</td>
<td></td>
</tr>
<tr>
<td>However, s 10(1A) of the DBA Act applies to a broader range of mental harms than those that are a direct consequence of another injury. Under s 10(1A), it is sufficient that a person’s ‘mental injury’ is accompanied by other ‘personal injury, material loss, damage or destruction’ caused by an aircraft.</td>
<td></td>
</tr>
</tbody>
</table>

Notes: a See also Tame v State of New South Wales (2002) 211 CLR 317.
Source: Wrongs Act and Damage by Aircraft Act.

Victoria allows for strict liability for pure mental harm, whereas the Commonwealth requires ‘mental injury’ to be accompanied by other personal or property damage caused by an aircraft.

This inconsistency received more attention than any other aspect of the strict liability regime. According to Corrs, aircraft owners are unable ‘to insure themselves against strict liability for pure mental harm’ (sub. 15, 1). This is also supported by the direct experience of RVAC (sub. 2, 2) and by the Commission’s examination of the policy conditions of two aviation insurers (section 9.3.2). For Corrs, risks arising from the unavailability of insurance are compounded by the increasing number of potential claimants for damages for pure mental harm. Corrs argued that this is due to the increasing ability of the medical profession to identify mental harm, coupled with the ‘increase in the number of commercial and private aircraft operating in Australia’ (sub. 15, 6). In their view, the strict liability regime ‘would be commercially acceptable if aircraft owners were able to obtain insurance in relation to this risk’ (sub. 15, 2). However, given the unavailability of insurance for pure mental harm, Corrs advocated ‘clear limitations’ with respect to mental harm, so as to prevent the ‘arbitrary assignment of responsibility’ (sub. 15, 6). Corrs also submitted that these limitations should be ‘equivalent to those in section 10(1A) of the [DBA] Act’ (sub. 15, 7).

The AOPA also identified the absence of physical injury as a limiting factor as the basis for its objection to strict liability for pure mental harm (sub. 10, 1). Likewise, the AAIF
argued that mental harm should not be recoverable in the absence of other ‘personal
injury, loss or damage’ (sub. 4, 1).

The RVAC was concerned that, without available insurance, many small operators ‘do
not have the resources to fund the expensive defence of litigation claims, let alone any
ability to fund damages claims’ (sub. 2, 2). The consequence of this is twofold: for many
aircraft owners, ‘exposure to mental harm claims under s 31 can be disastrous’ and for
victims, ‘any ability ... to recover damages for pure mental harm is largely
illusory’ (sub. 2, 2–3). To this may be added Corrs’ observation that the consequence of
this is to undermine the rationale for the strict liability regime:

[A] regime with the object of providing swift and comprehensive
compensation to the public may lead defendant aircraft owners to
insolvency and plaintiffs to inadequate recovery. (sub. 15, 6)

RVAC submitted that an ‘amendment consistent with s 10(1A) of the [DBA] Act would
be appropriate’ (sub. 2, 3).

To summarise, a strong concern that emerges from the submissions stems from the
unavailability of insurance to cover for strict liability for pure mental harm. The broad
class of potential claimants for this type of damage therefore creates a commercially
unacceptable degree of exposure. There is concern that claims for damages for pure
mental harm could lead to insolvency. Consequently, such operators would be un
able to adequately satisfy pure mental harm claims, which would undermine a key purpose
of the legislation.

9.2.3 Consistency with the DBA Act

A number of submissions highlighted the need for greater consistency between the
Victorian and Commonwealth legislation. Specific inconsistencies highlighted by
submissions are as follows:

- Section 31 of the Wrongs Act attaches strict liability to the aircraft owner unless the
aircraft has been ‘bona fide demised chartered let or hired out for a period
exceeding fourteen days to any other person’, in which case references to the
owner will be read as references to that person. The DBA Act treats this situation
differently with respect to the terms ‘operator’ and ‘employee.’ The AAIF identified
this inconsistency and proposed that the Victorian provision adopt the same wording
as the DBA Act, the potential effect of which is to make employers liable when an
employee uses an aircraft in the course of his or her employment (sub. 4, 1).
However, the AAIF did not identify any incidents in which this situation has either
arisen or is likely to arise.

- While the State and Commonwealth provisions addressing right of contribution and
contributory negligence are similar in substance, their wording differs. The AAIF
proposed that the wording should be the same as that used in the DBA Act (sub. 4, 1).

- Corrs submitted that the inconsistent treatment of mental harm in the two regimes
might motivate a party to mount a costly and time-consuming constitutional
challenge on the issue of which regime should prevail (sub. 15, 5). For example, in a
pure mental harm case, a defendant might be motivated to contest the validity of
the Wrongs Act in order to take advantage of the DBA Act’s limitations on mental
harm claims (sub. DR23, 2). Corrs also identified ‘significant injury’ thresholds in the
Wrongs Act, which are absent from the DBA Act, as another potential incentive for
a constitutional challenge (sub. 15, 5). For example, a plaintiff whose impairment
fell below the significant injury threshold under the Wrongs Act might seek to
overcome this bar to general damages by commencing proceedings under the
DBA Act, which lacks such a threshold. The defendant might respond by arguing that the Wrongs Act is the applicable Act in the circumstances (sub. DR23, 2–3). Such constitutional challenges might also involve uncertainty about whether, the activities of an aircraft owner or operator fell within one of the heads of legislative power in the Australian Constitution. While Corrs recommended a limitation of mental harm equivalent to that found in s 10(1A) of the DBA Act, it acknowledged that ‘without equivalent measures being taken at a Federal level, the potential for costly constitutional challenge will remain’ (sub. 15, 7) (section 9.3.3).

In addition, under the DBA Act, liability is strict and unlimited, whereas claims under the Wrongs Act are subject to the caps that limit compensation for economic and non-economic loss and, as above, to the threshold of significant injury (chapters 3 and 4).

9.3 Options for reform

In examining the issues raised by participants and opportunities for improvement, the Commission focused on the issue of strict liability for pure mental harm. This is on the basis that the Commission supports continuation of the application of strict liability for damage by aircraft to third parties on the ground.

9.3.1 The appropriateness of strict liability

The Commission considers that removing strict liability would lead to the following adverse efficiency and equity impacts:

- By removing strict liability, victims could only seek redress for damage suffered by proving negligence at common law, leading to an increase in costly and time-consuming litigation for aircraft owners and operators and for claimants.
- Removing strict liability could inefficiently shift some risk away from the party best placed to manage that risk (that is, the aircraft owner/operator) and onto potential victims. Potential victims are not in a position to diminish the risk of damage by aircraft.
- It would also create inequity in that the availability of compensation to a victim would differ depending on whether the aircraft that caused the damage came under Commonwealth or Victorian law. Consequently, the same damage could either result in prompt access to adequate compensation under a strict liability regime, or potentially, to costly and onerous litigation at common law.

The efficiency and equity effects of removing strict liability would, however, be very small, mainly because the broad legislative powers of the Commonwealth mean that s 31 of the Wrongs Act applies by default only to a small set of intrastate operations, which represent a very small fraction of the aviation operations in Victoria. In addition, the Commission understands that the owners and operators to whom the Wrongs Act applies are able to obtain insurance cover, except in relation to claims for pure mental harm (section 9.3.2). The inconsistent treatment of victims could also add to costs for owners/operators and claimants by creating incentives for parties to seek out the jurisdiction most favourable to their interests.

9.3.2 Pure mental harm

As previously noted, the main issue raised by participants was the potential for owners and operators to whom the Wrongs Act applies to be strictly liable for pure mental harm. An option for addressing this issue is to limit the scope of s 31 of the Wrongs Act by excluding recovery for damages for pure mental harm. This could be achieved by
inserting a new sub-section into s 31 that limits the section’s application to mental harm that is accompanied by personal or property damage caused by an aircraft. This is in line with the recommendations of Corrs and RVAC to adopt an approach that is consistent with the DBA Act.

The Commission’s view

The Commission understands that limiting strict liability for pure mental harm has several efficiency effects:

- The cost impacts on defendants of pure mental harm claims are potentially disastrous. This is principally due to the potential for multiple claimants (for example, an accident at an air show) coupled with the unavailability of insurance to cover this risk. Large pure mental harm claims could therefore bankrupt small operators.
- Aircraft owners and operators are already motivated to maintain appropriate safety standards in relation to the insurable risk of physical damage by aircraft. Therefore it is unlikely that excluding pure mental harm from strict liability will discourage responsible risk management.
- In the event of insolvency, claimants’ access to compensation is likely to be slow and inadequate.
- Limiting mental harm would result in greater consistency in the operation of the Commonwealth and Victorian Acts. This would reduce the incentive to challenge the application of either Act on constitutional grounds.

The Commission has considered whether limiting claims for pure mental harm against aircraft owners and operators would lead to inconsistent treatment of pure mental harms sustained through other types of accidents. The Commission is of the view that any difference in treatment is reasonable in light of:

- The different rationale for strict liability for damage by aircraft, in contrast to fault-based liability. The strict liability regime exposes aircraft owners and operators to a larger number of potential claimants than under a fault-based regime. In the case of pure mental harm, this exposure increases to the point where, the Commission understands, the risk is uninsurable. Limiting strict liability for mental harm would address this problem.
- The availability of a common law negligence action where a victim’s pure mental harm is the result of negligent conduct.5

In the draft report, the Commission concluded that it would be appropriate to exclude recovery for damages for pure mental harm from the strict liability regime, and recommended that damages for mental harm should only be recoverable under this regime if the mental harm is accompanied by personal or property damage. The Law Institute of Victoria (LIV) did not support this proposal, arguing that ‘to remove such an entitlement would effectively create a sub-class of disentitled victims within the well-established personal injuries common law and legislative regimes’ (sub. 24, 16). The LIV also submitted that this ‘represents an extraordinarily small class of potential claimants’, noting that the need for change was ‘driven by a modest number of interested stakeholders’ (sub. DR24, 16). Nevertheless, the Commission considers that:

5 Subject to the limitations set out in the Wrongs Act, Part XI-Mental Harm, which apply to ‘any claim for damages resulting from negligence’ (s 69).
The change will not create a sub-class within the common law because it will not limit the rights of victims to sue for negligence for pure mental harm at common law. And although the change does represent a departure from the historical strict liability regime governed by statute, this departure now represents the norm in Australia as a result of the 2012 amendments to the DBA Act (section 9.1.2).

The status quo already makes compensation for potential pure mental harm claims unlikely, because of the unavailability of insurance cover, coupled with the limited financial resources of non-commercial aircraft owners and operators.

In its response to the draft report, RVAC submitted that the recommended ‘amendment should provide a satisfactory legislative resolution’ to the problem of being unable to insure against pure mental harm claims (sub. DR25, 1). However, RVAC qualified this submission, noting that ‘a practically workable outcome is also dependent on … the insurance underwriters’ … agreement to insure the risk at an affordable cost’ (sub. DR25, 1).

The Commission’s examination of the aviation insurance policies of QBE and Allianz confirms this, with each policy only providing coverage for psychological injuries that are accompanied and caused by a physical injury. 6 This means that neither policy would cover three scenarios, each of which falls within the scope of the DBA Act’s limitation on mental harm:

1. where a psychological injury is accompanied and/or caused by property damage in the absence of physical injury
2. where a psychological injury is accompanied but not caused by a physical injury
3. where a psychological injury is not accompanied by the physical injury that caused it — for example, the delayed onset of post-traumatic stress disorder.

Recommending a stricter limitation on mental harm would not overcome the problem of inconsistency between the State and Commonwealth regimes, leaving the door open for costly constitutional challenges. As Corrs submitted in its response to the draft report, ‘the inconsistency between State and Federal legislation represents a commercially unacceptable risk for non-profit aero clubs and flight schools with limited resources’ (sub. DR23, 3).

While it is beyond the Commission’s terms of reference to make any recommendations concerning the policies of aviation insurers, the Commission understands that amending the Wrongs Act to bring it in line with the DBA Act would bring greater commercial certainty to the risk assessment of potential mental harm claims. This, the Commission understands, would place the aviation industry in a stronger position to negotiate with insurers for the incorporation of this risk into their aviation insurance policies.

Finally, the Commission has been unable to find any evidence of litigation in Australia of a pure mental harm claim due to damage by aircraft. 7 This indicates that very few people are likely to be affected by such a change.

---

6 QBE’s policy covers ‘bodily injury’, which ‘excludes nervous shock or psychological injury unaccompanied by, or not caused by, physical injury’ (QBE Insurance (Australia) Limited 2014, 4). Allianz’s policy adopts different wording to the same effect: ‘bodily injury excluades nervous shock or psychological injury unless accompanied by and directly caused by physical injury (Allianz Australia Insurance Limited 2014, 3).

7 However, the Commission notes the case of Mikhman v Royal Victorian Aero Club [2012] VSC 42, which was a judicial review of a medical panel decision relating to a pure mental harm claim, which itself did not proceed to court.
In conclusion, the Commission maintains its view that the most appropriate way of balancing the principles of consistency and efficiency, as well as the rights and interests of victims and aviation operators, is to exclude recovery for damages for pure mental harm from the strict liability regime set out in s 31. For the sake of clarity, this exclusion should be confined to the strict liability regime and should not extend to negligence claims.

**Recommendation 9.1**

That the Victorian Government amend section 31 of the Wrongs Act 1958 (Vic) to provide that damages for mental harm caused by an aircraft accident are only recoverable – under a strict liability regime – if the mental harm is accompanied by personal or property damage caused by the aircraft.

### 9.3.3 Consistency with the DBA Act

As noted, several participants identified a number of inconsistencies between the Victorian and Commonwealth legislation dealing in liability of aircraft owners and operators. The Commission is of the view that removing pure mental harm from the strict liability regime addresses the most serious of these inconsistencies.

In relation to other inconsistencies in the wording of the strict liability provision in the Wrongs Act, the Commission notes that it is not clear what the practical consequences of these inconsistencies would be.

The Commission also acknowledges Corrs’ submission that without amendments to the DBA Act in relation to the significant injury threshold — the same point applies to caps — no amendment to s 31 could hope to completely eliminate the incentive for constitutional challenge. This is outside of the inquiry’s terms of reference.

For all of these reasons, the Commission is of the view that no requirement for further amendments to the wording of s 31 has been demonstrated.
Appendix A: Consultation

A.1 Introduction

The Victorian Competition and Efficiency Commission (the Commission) received the terms of reference for an inquiry into aspects of the Wrongs Act on 30 May 2013. The Commission published an issues paper in July 2013, which outlined:

- the scope of the inquiry
- how to make a submission
- the Commission’s consultation process
- the inquiry timetable.

The issues paper invited participants to register an interest in the inquiry and to make submissions. The Commission received 28 registrations of interest and 18 written submissions before the release of the draft report. A further seven submissions were received following the release of the draft report (section A.2).

The Commission consulted widely (including meetings, visits, email correspondence and telephone conversations) with Commonwealth, state and local government departments and agencies, representatives of the insurance sector, legal practitioners, associations, academics and clubs (section A.3). The Commission also engaged with inquiry participants through Facebook and Twitter.

The Commission thanks those people and organisations that participated in its consultation process and/or made a submission to the inquiry. The Commission appreciates the quality of the submissions, reflecting the thought and effort which has been put into their preparation. The Commission also thanks Dr Genevieve Grant, Monash University, for providing comments on a draft of chapter 3 prior to release of the draft report.

A.2 Submissions

All submissions that are public documents can be viewed on the Commission’s website (Table A.1).

Table A.1 Submissions received

<table>
<thead>
<tr>
<th>No.</th>
<th>Participant</th>
<th>No.</th>
<th>Participant</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Confidential</td>
<td>2</td>
<td>Royal Victorian Aero Club (1)</td>
</tr>
<tr>
<td>3</td>
<td>Confidential</td>
<td>4</td>
<td>Australian Aviation Insurance Forum</td>
</tr>
<tr>
<td>5</td>
<td>The Department of Infrastructure and Transport (Cth)</td>
<td>6</td>
<td>Monash Law Students’ Society’s Just Leadership Program</td>
</tr>
<tr>
<td>7</td>
<td>Health Services Commissioner</td>
<td>8</td>
<td>Norton Rose Fulbright</td>
</tr>
<tr>
<td>9</td>
<td>Australian Lawyers Alliance</td>
<td>10</td>
<td>Aircraft Owners and Pilots Association of Australia</td>
</tr>
<tr>
<td>11</td>
<td>Common Law Bar Association of Australia</td>
<td>12</td>
<td>Municipal Association of Victoria (1)</td>
</tr>
<tr>
<td>13</td>
<td>Law Institute of Victoria (1)</td>
<td>14</td>
<td>Insurance Council of Australia (1)</td>
</tr>
<tr>
<td>No.</td>
<td>Participant</td>
<td>No.</td>
<td>Participant</td>
</tr>
<tr>
<td>-----</td>
<td>-----------------------------------------------</td>
<td>-----</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>15</td>
<td>Corrs Chambers Westgarth (1)</td>
<td>16</td>
<td>Avant Mutual Group Limited (1)</td>
</tr>
<tr>
<td>17</td>
<td>Australian Medical Association (Victoria) Ltd</td>
<td>18</td>
<td>Wotton + Kearney</td>
</tr>
<tr>
<td>DR19</td>
<td>Avant Mutual Group Limited (2)</td>
<td>DR20</td>
<td>Municipal Association of Victoria (2)</td>
</tr>
<tr>
<td>DR21</td>
<td>Insurance Council of Australia (2)</td>
<td>DR22</td>
<td>Australian Risk Policy Institute</td>
</tr>
<tr>
<td>DR23</td>
<td>Corrs Chambers Westgarth (2)</td>
<td>DR24</td>
<td>Law Institute of Victoria (2)</td>
</tr>
<tr>
<td>DR25</td>
<td>Royal Victorian Aero Club (2)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

A.3 Stakeholder consultations

The Commission consulted with a wide range of stakeholders including representatives from government, universities, courts, private industry and associations. In total the Commission met, had email correspondence or conducted telephone discussions, with around 30 organisations and individuals (table A.2).

Table A.2 Consultation participants

<table>
<thead>
<tr>
<th>Organisation or Individual</th>
<th>Organisation or Individual</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney-General</td>
<td>Monash University</td>
</tr>
<tr>
<td>Australian Medical Association (Victoria) Ltd</td>
<td>Municipal Association of Victoria</td>
</tr>
<tr>
<td>Avant Mutual Group Limited</td>
<td>NSW Self Insurance Corporation</td>
</tr>
<tr>
<td>Mr Daniel Masel S.C., Barrister</td>
<td>Office of the Health Services Commissioner</td>
</tr>
<tr>
<td>County Court of Victoria</td>
<td>QBE Aviation</td>
</tr>
<tr>
<td>Department of Justice</td>
<td>Queensland Government Insurance Fund</td>
</tr>
<tr>
<td>Department of Premier and Cabinet</td>
<td>Mr Robert Dyer, Barrister</td>
</tr>
<tr>
<td>Department of Treasury and Finance</td>
<td>Royal Victorian Aero Club</td>
</tr>
<tr>
<td>Essential Services Commission</td>
<td>Supreme Court of Victoria</td>
</tr>
<tr>
<td>Insurance Council of Australia</td>
<td>Transport Accident Commission</td>
</tr>
<tr>
<td>Lander and Rodgers Lawyers</td>
<td>University of Melbourne</td>
</tr>
<tr>
<td>Law Institute of Victoria</td>
<td>University of Sydney</td>
</tr>
<tr>
<td>Medical Panels Victoria</td>
<td>Victorian Managed Insurance Authority</td>
</tr>
<tr>
<td>Minister responsible for the Aviation Industry</td>
<td>Victorian WorkCover Authority</td>
</tr>
</tbody>
</table>

A.4 Stakeholder group meetings

The Commission held stakeholder group meetings with:

- Insurance Council of Australia – 6 August 2013 (table A.3)
- Supreme Court of Victoria – 21 August 2013 (table A.4)
- Common Law Bar Association – 28 August 2013 (table A.5)
- County Court of Victoria – 17 September 2013 (Table A.6)
Table A.3  Insurance Council of Australia meeting

<table>
<thead>
<tr>
<th>Participant</th>
<th>Title and Organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eva Urban</td>
<td>Stakeholder Management Advisor, Suncorp Group</td>
</tr>
<tr>
<td>Justine Hall</td>
<td>Senior Policy Advisor, Insurance Council of Australia</td>
</tr>
<tr>
<td>Nicholas Scofield</td>
<td>General Manager of Corporate Affairs, Allianz Australia</td>
</tr>
<tr>
<td>Troy Browning</td>
<td>Managing Director, Medical Indemnity Protection Society</td>
</tr>
<tr>
<td>Vicki Mullen</td>
<td>General Manager, Insurance Council of Australia</td>
</tr>
</tbody>
</table>

Table A.4  Supreme Court of Victoria meeting

<table>
<thead>
<tr>
<th>Participant</th>
<th>Title and Organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Hon Justice Jack Forrest</td>
<td>Supreme Court of Victoria</td>
</tr>
<tr>
<td>The Hon Justice David Beach</td>
<td>Supreme Court of Victoria</td>
</tr>
<tr>
<td>The Hon Associate Justice Rita</td>
<td>Supreme Court of Victoria</td>
</tr>
<tr>
<td>Zammit</td>
<td></td>
</tr>
<tr>
<td>Claire Downey</td>
<td>Law Reform Policy Officer, Department of Justice</td>
</tr>
<tr>
<td>Clare Bradin</td>
<td>Common Law Division Legal Policy Officer, Department of</td>
</tr>
<tr>
<td></td>
<td>Justice</td>
</tr>
</tbody>
</table>

Table A.5  Common Law Bar Association meeting

<table>
<thead>
<tr>
<th>Participant</th>
<th>Title and Organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>David Martin</td>
<td>Secretary, Common Law Bar Association</td>
</tr>
<tr>
<td>Andrew Keogh S.C.</td>
<td>Council Member, Common Law Bar Association</td>
</tr>
<tr>
<td>Patrick Over</td>
<td>Council Member, Common Law Bar Association</td>
</tr>
<tr>
<td>Stephen O’Meara S.C.</td>
<td>Council Member, Common Law Bar Association</td>
</tr>
<tr>
<td>Arushan Pillay</td>
<td>Council Member, Common Law Bar Association</td>
</tr>
<tr>
<td>Matthew Hooper</td>
<td>Council Member, Common Law Bar Association</td>
</tr>
</tbody>
</table>

Table A.6  County Court of Victoria meeting

<table>
<thead>
<tr>
<th>Participant</th>
<th>Organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Hon Judge Frank Saccardo</td>
<td>County Court of Victoria</td>
</tr>
<tr>
<td>The Hon Judge James Parrish</td>
<td>County Court of Victoria</td>
</tr>
</tbody>
</table>

A.5  Roundtables

The Commission held two roundtables following the release of its draft report. The first roundtable was held to discuss the draft recommendations and the Commission’s assumptions and estimates on the impacts of the draft recommendations on insurance premiums. The participants are listed in table A.7 below. The second roundtable was held to discuss ways to improve medical panels processes. The participants are listed in table A.8 below.
### Draft recommendations and estimates roundtable – 4 December 2013

<table>
<thead>
<tr>
<th>Name</th>
<th>Organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nick Lyons</td>
<td>Law Institute of Victoria</td>
</tr>
<tr>
<td>Dina Tutungi</td>
<td>Law Institute of Victoria</td>
</tr>
<tr>
<td>Vicki Mullen</td>
<td>Insurance Council of Australia</td>
</tr>
<tr>
<td>Justine Hall</td>
<td>Insurance Council of Australia</td>
</tr>
<tr>
<td>Tim Tobin S.C.</td>
<td>Common Law Bar Association</td>
</tr>
<tr>
<td>Gemma-Jane Cooper</td>
<td>Common Law Bar Association</td>
</tr>
<tr>
<td>Dr Genevieve Grant</td>
<td>Monash University</td>
</tr>
</tbody>
</table>

### Medical panels roundtable – 17 December 2013

<table>
<thead>
<tr>
<th>Name</th>
<th>Organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ross Sicilia</td>
<td>Medical Panels Victoria</td>
</tr>
<tr>
<td>Dr John Malios</td>
<td>Medical Panels Victoria</td>
</tr>
<tr>
<td>Rachel Gualano</td>
<td>Medical Panels Victoria</td>
</tr>
<tr>
<td>Dimitra Dubrow</td>
<td>Law Institute of Victoria</td>
</tr>
<tr>
<td>Nicholas O’Bryan</td>
<td>Law Institute of Victoria</td>
</tr>
<tr>
<td>Kate Hughes</td>
<td>Avant Mutual Group Limited</td>
</tr>
<tr>
<td>Georgie Haysom</td>
<td>Avant Mutual Group Limited</td>
</tr>
<tr>
<td>John Smith</td>
<td>Municipal Association of Victoria</td>
</tr>
<tr>
<td>Ivan Ciardullo</td>
<td>Municipal Association of Victoria</td>
</tr>
<tr>
<td>Noa Zur</td>
<td>Wotton + Kearney</td>
</tr>
<tr>
<td>Andrew Seiter</td>
<td>Wotton + Kearney</td>
</tr>
<tr>
<td>Allison Hunt</td>
<td>Norton Rose Fulbright</td>
</tr>
<tr>
<td>Jack Prettejohn</td>
<td>Norton Rose Fulbright</td>
</tr>
<tr>
<td>Roisin Annesley S.C.</td>
<td>Common Law Bar Association</td>
</tr>
<tr>
<td>Michelle Britbart</td>
<td>Common Law Bar Association</td>
</tr>
</tbody>
</table>
Appendix B: Key assumptions and calculations: insurance market impacts

This appendix details the assumptions and calculations used by the Commission to estimate the impacts of changes to limitations on personal injury damages on private sector insurance markets.

The Commission emphasises that the estimates are indicative only. They have been made on the basis of public information and submissions, estimates by stakeholders on impacts on their business and analysis by the Commission, which is alone responsible for the final calculations. The Commission thanks contributors for information and comments.

Table B.1 sets out the baseline insurance market data from the Australian Prudential Regulation Authority (APRA) used by the Commission to estimate premium impacts. The most recent APRA data is from 2012. In establishing this baseline, the Commission has assumed that additional claim costs:

- are fully passed on through insurance premiums (as opposed to increased costs being partially or fully absorbed by insurers)
- do not result in increases in underwriting expenses
- would be spread equally across the public liability and medical indemnity insurance markets (in reality, impacts will vary across insurance products).

Table B.1

Baseline data – public liability and professional indemnity insurance (2012)

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross public liability premium writtena</td>
<td>332.6m</td>
</tr>
<tr>
<td>Gross medical indemnity premium writtenb</td>
<td>73.7m</td>
</tr>
<tr>
<td>Combined gross written premium = gross public liability premium written +</td>
<td>406.3m</td>
</tr>
<tr>
<td>gross medical indemnity premium written</td>
<td></td>
</tr>
<tr>
<td>Average public liability premiumc</td>
<td>633</td>
</tr>
<tr>
<td>Average medical indemnity premiumd</td>
<td>2149</td>
</tr>
<tr>
<td>Weighted average premiume</td>
<td>897</td>
</tr>
</tbody>
</table>

Source: APRA 2013a.

Explanation and assumptions of table B.1:

a. The amount received by the insurer when a public liability policy is taken out. Comprises premium pool for public liability (pure) and other public liability products (excludes product liability and construction liability).

b. The amount received by the insurer when a medical indemnity policy is taken out. Comprises premium pool for medical indemnity/malpractice (excludes directors’ and officers’ liability & employment practices and other professional indemnity products).

c. Given that data on risks written for the relevant public liability policies were not available, gross written premium for the whole public liability pool was divided by
the total number of risks written. In 2012, the whole public liability premium pool was worth $383,277,000 and there were 605,214 risks written.1

(i) Calculation: 383,277,000 / 605,214 = $633.

d. Given that data on risks written for medical indemnity policies were not available, gross written premium for the whole professional indemnity pool was divided by the total number of risks written. In 2012, the whole professional indemnity premium pool was worth $273,421,000 and there were 127,261 risks written.2

(i) Calculation: 273,421,000 / 127,261 = $2149.

e. Weighted average premium cost of public liability and professional indemnity insurance. Premiums are weighted by the number of risks written.

(i) Calculation: \[\frac{(605,214 \times 633.29) + (127,261 \times 2148.51)}{605,214 + 127,261}\] = $896.55 (rounded to $897)

**B.1 Access to damages for non-economic loss (chapter 3)**

The Commission estimated the impact on insurance premiums of three options for amending provisions governing access to damages for non-economic loss:

1. Lowering the impairment threshold to greater than or equal to five per cent and 10 per cent for physical and psychiatric impairment, respectively.
2. Lowering the physical impairment threshold for spinal injuries to greater than or equal to five per cent impairment.
3. Introducing a narrative test.

In finalising its estimates, the Commission has taken into account feedback from participants about the estimates outlined in its draft report. For example:

- Some participants highlighted that the Transport Accident Commission (TAC) data used by the Commission was likely to be based on the combined physical and psychiatric impairment scores, as permitted under the TAC scheme. Upon further investigation, additional data was provided by the TAC on the physical components of their claims.
- There were differing views about whether the characteristics of Wrongs Act claimants are different to those under the other compensation schemes:
  1. The Law Institute of Victoria (LIV) suggested that the differences are likely to be greater between the Wrongs Act and Victorian WorkCover Authority (VWA) scheme, in that ‘the injury profile for Wrongs Act claimants is more heavily weighted towards physical injuries other than spinal injuries due to the nature of the injuries’ (sub. DR24, 6).
  2. The Municipal Association of Victoria (MAV) suggested that ‘the Accident Compensation Act experience provides a sound basis to assess the likely implications of reducing the injury thresholds’ (sub. DR20, 4).

---

1 Includes the premium pool and risks for public liability (pure), other public liability products, product liability, and construction liability.

2 Includes the premium pool and risks for medical indemnity/malpractice, directors’ and officers’ liability & employment practices, and other professional indemnity products.
In the absence of information on the characteristics of Wrongs Act claimants, and conflicting views on which compensation scheme provides the best comparison to the Wrongs Act, the Commission averaged claims across the two schemes.

- A report prepared by Finity Consulting for the Insurance Council of Australia (ICA) (the Finity report) suggested that while there is uncertainty in the estimates and therefore a risk the impact on premiums could be outside the range, ‘on balance we [Finity Consulting] think that the cost would be toward the top end of the range given by VCEC’ (sub. DR21, att. A, 3).

- The MAV suggested that inadequate data and significant disparity in the Commission’s estimates ‘illustrates the uncertainty of the data and the potential extent of the proposed changes’ (sub. DR20, 5).

Table B.2 estimates the number of additional claims for each option, using the experience of the VWA and the TAC schemes as proxies for potential claims under the Wrongs Act.

### Table B.2 Estimated additional claims – changing access to damages for non-economic loss

<table>
<thead>
<tr>
<th>Option 1 – Greater than or equal to five per cent physical impairment threshold^</th>
<th>Total common law claims</th>
<th>Claims equal to five per cent impairment</th>
<th>Ratio (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>VWA Scheme</td>
<td>2500</td>
<td>600a</td>
<td>24</td>
</tr>
<tr>
<td>TAC Scheme</td>
<td>1000</td>
<td>91b</td>
<td>9</td>
</tr>
<tr>
<td>Average ratio across the two schemes</td>
<td>17</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wrongs Act</td>
<td>1000e</td>
<td>1000 x 17% = 170f</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Option 2 – Greater than or equal to five per cent threshold for spinal impairments</th>
<th>Total common law claims</th>
<th>Spinal impairments equal to five per cent</th>
<th>Ratio (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>VWA Scheme</td>
<td>2500</td>
<td>300c</td>
<td>12</td>
</tr>
<tr>
<td>TAC Scheme</td>
<td>1000</td>
<td>38d</td>
<td>4</td>
</tr>
<tr>
<td>Average ratio across the two schemes</td>
<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wrongs Act</td>
<td>1000e</td>
<td>1000 x 8% = 80g</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Option 3 – Introduce a narrative test</th>
<th>Total common law claims</th>
<th>Claims equal to or under five per cent impairment</th>
<th>Ratio (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>VWA Scheme</td>
<td>2500</td>
<td>1000h</td>
<td>40</td>
</tr>
<tr>
<td>TAC Scheme</td>
<td>1000</td>
<td>300i</td>
<td>30</td>
</tr>
<tr>
<td>Average ratio across the two schemes</td>
<td>35</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wrongs Act</td>
<td>1000e</td>
<td>1000 x 35% = 350j</td>
<td></td>
</tr>
</tbody>
</table>

Notes: Data are for 2011. Values may not equate due to rounding. ^ The Commission assumes no additional claims would eventuate from lowering the threshold for psychiatric injury to greater than or equal to 10 per cent, as stated in the assumptions of table B.3.

**Sources:** VWA 2013b; TAC correspondence; VWA correspondence; Commission analysis.

Assumptions and calculations of table B.2:

a. Of the approximately 850 VWA claims with impairment from five to nine per cent, 70 per cent are equal to five per cent (VWA data and correspondence).
Calculation: $850 \times 70\% = 595 \text{ (rounded to 600).}$

b. Includes impairment assessments at one to five per cent. The Commission has assumed that all these claims are equal to five per cent (TAC correspondence). The LIV suggested that this approach is incorrect and that a proportionate distribution of claims is more appropriate (sub. DR24, 4). However, the Commission maintained this conservative assumption given the lack of available data on the distribution of impairments.

c. According to the VWA, 50 per cent of claims equal to five per cent impairment are coded as soft tissue or spinal.

Calculation: $595 \times 50\% = 298 \text{ (rounded to 300).}$

d. Includes impairment assessment for musculoskeletal injuries. The Commission has assumed that all claims assessed as musculoskeletal injuries are spinal related (TAC correspondence). The LIV suggested that this approach is incorrect and that a proportionate distribution of claims is more appropriate (sub. DR24, 4). However, the Commission has maintained this conservative assumption, given the lack of available data on the distribution of impairments.

e. The Commission estimated the number of Wrongs Act claims per annum by considering a number of different pieces of information:

(i) A report by Cumpston Sarjeant prepared for the LIV suggested there are around 600 to 1000 claims made per annum for personal injury or death that would fall under the Wrongs Act (sub. 13, att. B). In responding to the draft report, the LIV suggested the Commission use the mid-point of this range to estimate insurance impacts (sub. DR24, 4).

(ii) In discussions with stakeholders, it was suggested that there is generally a 50/50 split between litigated and un-litigated claims. County Court data provided by the LIV suggested there were about 500 writs issued per annum for Wrongs Act type claims (sub. 13, att. A). This suggests a total of about 1000 claims per annum.

(iii) The Finity report suggested there were approximately 1700 to 2000 claims per annum. This is based on APRA data that about 20 to 25 per cent of total public liability claims (equal to 6800) are for personal injury (sub. DR21, att. A, 3).

(iv) Unpublished data from the APRA National Claims and Policies Database (NCPD) show the number of bodily injury claims finalised in Victoria has averaged around 850 claims per annum from 2007 to 2012 (APRA correspondence). The NCPD does not include all Wrongs Act claims as it excludes some insurance types such as marine liability insurance.

(v) On balance, the Commission estimates 1000 claims per annum to be the most likely representation of the number of Wrongs Act claims relevant to the inquiry.

f. To determine final estimates of additional claims with a five per cent impairment threshold, the estimated number of Wrongs Act claims was multiplied by the average ratio across the two schemes.

Calculation: $\frac{24 + 9}{2} = 17\% \times 1000 = 170.$

g. To determine final estimates of additional claims where spinal impairments assessed at five per cent are eligible, the estimated number of Wrongs Act claims was multiplied by the average ratio across the two schemes.

Calculation: $\frac{12 + 4}{2} = 8\% \times 1000 = 80.$

h. VWA data shows that of its total common law claim lodgements (2500), around 400 are below five per cent impairment. In addition, as estimated above, there are approximately 600 claims equal to five per cent.
Calculation: 400 + 600 = 1000.

i. TAC data shows that of its total common law claim lodgements (1000), around 300 are below or equal to five per cent impairment.

j. To determine final estimates of additional claims where claims may become eligible under a narrative test, the estimated number of Wrongs Act claims was multiplied by the average ratio across the two schemes.

(i) Calculation: (40 + 30)/2 = 35% x 1000 = 350.

**Potential impact on claims costs**

To determine the estimated additional impact on claims costs, the estimated number of additional claims were multiplied by estimates of average damages awarded for non-economic loss (table B.3).

**Table B.3 Estimated additional claims costs – changing access to damages for non-economic loss**

<table>
<thead>
<tr>
<th>Option</th>
<th>Additional claims</th>
<th>Additional damages awarded</th>
<th>Potential increase in claims costs ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lowering the impairment threshold to greater than or equal to five per cent and 10 per cent for physical and psychiatric impairment, respectively (option 1)</td>
<td>40 to 170&lt;sup&gt;a&lt;/sup&gt;</td>
<td>$30,000 to $50,000&lt;sup&gt;d&lt;/sup&gt;</td>
<td>1.2 to 8.5</td>
</tr>
<tr>
<td>Differential treatment for spinal injuries (option 2)</td>
<td>20 to 80&lt;sup&gt;b&lt;/sup&gt;</td>
<td>$30,000 to $50,000&lt;sup&gt;d&lt;/sup&gt;</td>
<td>0.6 to 4.0</td>
</tr>
<tr>
<td>Introducing a narrative test (option 3)</td>
<td>350&lt;sup&gt;c&lt;/sup&gt;</td>
<td>$30,000 to $50,000&lt;sup&gt;d&lt;/sup&gt;</td>
<td>10.5 to 17.5</td>
</tr>
</tbody>
</table>

Source: Commission analysis.

Assumptions of table B.3:

a. The lower bound estimate was based on the lower bound of claims as modelled by Cumpston Sarjeant for the LIV (sub. 13, addendum). The upper bound estimate is from table B.2 and assumes no additional psychiatric impairment injuries on the basis that the difference between 10 and 11 per cent impairment can produce arbitrary results (CLBA, sub. 11, 3). The Finity report also agreed with the Commission’s approach to the impact of amending the psychiatric impairment threshold on the basis of ‘the relative scarcity of claims for primary psychiatric injuries in the civil liability arena’ (sub. DR21, att. A, 3).

b. The upper bound estimate is from table B.2. The upper bound estimate for option 2 is approximately 50 per cent of that for option 1. Therefore, the Commission has estimated the lower bound estimate for option 2 at 50 per cent of the lower bound estimate in option 1.

(i) Calculation: (80 / 170) x 100 = 47% x 40 = 19 (rounded to 20).

c. The estimate for option 3 is from table B.2.

d. The Commission estimated the average award for non-economic loss damages of Wrongs Act claims by considering a number of different pieces of information:
Modelling by Cumpston Sarjeant for the LIV suggested average damages for non-economic loss are generally between $30,000 and $50,000 per claim (sub. 13, att. B).

VWA data showed that the average award for damages settlements for pain and suffering is around $80,000 (VWA 2013b, 5).

Victorian Managed Insurance Authority (VMIA) claim summary data suggests the average award for non-economic loss was about $100,000 per claim (VMIA 2013, 6). However, this may overstate the additional damages for impairment’s around five per cent as it is an average of all types of claims.

The LIV submission responding to the draft report suggested average damages under the VWA scheme were much higher than Wrongs Act claims, as:

i. the much higher serious injury test applied under that scheme means non-economic loss damages are generally higher

ii. the existence of a minimum threshold of $54,730 (as at July 2013) under the VWA scheme means claims below this amount are not possible, inflating the average payout. Under the Wrongs Act there is no minimum and the average is therefore about $50,000 (sub. DR24, 4–5).

In discussions with stakeholders, it was suggested that the award of damages for non-economic loss used in table B.3 should be commensurate with the types of additional claims estimated. This means that damages should reflect average awards for claims where the injury is around five per cent impairment. However, the Commission was unable to find any data to make such estimates.

On balance, the Commission considered a range of $30,000 to $50,000 to be the most likely representation of the average non-economic loss damages paid under the Wrongs Act for claims relevant to table B.3.

Impact on private sector insurance premiums

Table B.4 summarises the impact on insurance premiums of the three options.

<table>
<thead>
<tr>
<th>Calculation</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impact on claims costs (A)</td>
<td>From table B.3</td>
<td>$1.2m to $8.5m</td>
<td>$0.6m to $4.0m</td>
</tr>
<tr>
<td>Combined gross written premium (B)</td>
<td>From table B.1</td>
<td>$406.3m</td>
<td></td>
</tr>
<tr>
<td>Weighted average premium (C)</td>
<td>From table B.1</td>
<td>$897</td>
<td></td>
</tr>
<tr>
<td>Percentage increase in premiums (D)</td>
<td>(A)/(B)</td>
<td>0.3% to 2.1%</td>
<td>0.1% to 1.0%</td>
</tr>
<tr>
<td>Average premium increase per policy</td>
<td>(C) x (D)</td>
<td>$3 to $19</td>
<td>$1 to $9</td>
</tr>
</tbody>
</table>

Notes: Option 1 is to lower the impairment threshold to greater than or equal to five per cent and 10 per cent for physical and psychiatric impairment, respectively. Option 2 is to provide for differential treatment for spinal injuries. Option 3 is to introduce a narrative test.

Sources: APRA 2013b; Commission analysis.
B.2 Caps on damages for economic and non-economic loss (chapter 4)

B.2.1 Cap on economic loss

The Commission estimated the possible impact on insurance premiums of:

- applying the cap on damages for economic loss to the gap between pre- and post-injury earnings to address the decision in *Tuohey v Freemasons Hospital* [2012] VSCA 80 ("Tuohey")
- providing that in claims of loss of expectation of financial support, deductions for the deceased’s personal expenses are to be made before applying the cap on economic loss.

The Commission understands the proposed changes to the application of the cap on economic loss would only apply to very few cases per annum (chapter 4). For example, the Finity report suggested that ‘the expected cost of this change is very minor’ and that the Commission’s ‘allowance of $2m per annum is likely to be an overstatement’ (sub. DR21, att. A, 4).

The overall impact of both options is estimated indicatively to increase the average cost of public liability and professional indemnity insurance by between 0.25 and 0.5 per cent, based on one additional claim of $2 million every one to two years (table B.5).

### Table B.5 Estimated impact on premiums – changes to the cap on economic loss (2012)

<table>
<thead>
<tr>
<th>Calculation</th>
<th>Lower bound</th>
<th>Upper bound</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost to insurance market (A)</td>
<td>From section B.3</td>
<td>$1.0m</td>
</tr>
<tr>
<td>Combined gross written premium (B)</td>
<td>From table B.1</td>
<td>$406.3m</td>
</tr>
<tr>
<td>Weighted average premium (C)</td>
<td>From table B.1</td>
<td>$897</td>
</tr>
<tr>
<td>Percentage increase in premiums (D)</td>
<td>(A)/(B)</td>
<td>0.3%</td>
</tr>
<tr>
<td>Average premium increase per policy</td>
<td>(C) x (D)</td>
<td>$2</td>
</tr>
</tbody>
</table>

Notes: Numbers may not equate due to rounding.
Sources: APRA 2013b; Commission analysis.

B.2.2 Cap on non-economic loss

The Commission estimated the impact on insurance premiums of increasing the cap for non-economic loss in the Wrongs Act ($497 780 as at 1 July 2013) to align with the Accident Compensation Act ($555 350 as at 1 July 2013).

During consultations, participants suggested there are two ways that an increase in the cap for non-economic loss may flow through to the price of public liability and professional indemnity insurance:

1. Increasing the cap may lead to an increase in the award of damages only for those severely injured claimants who reach the cap (LIV, sub. DR24, 5).
2. Increasing the cap on damages for non-economic loss may proportionately increase all awards of damages for non-economic loss (VMIA 2013, 7).
Given the uncertainty as to which method may yield the most representative result, the Commission has chosen to apply both methods of estimation and use them as an upper and lower bound of impacts on private sector insurance premiums.

Given the lack of 2013 insurance market data, the estimates in table B.6 are based on 2012 data, where the Wrongs Act cap was equal to $487,528 and the Accident Compensation Act cap was equal to $543,920.

**Table B.6**

<table>
<thead>
<tr>
<th>Estimated additional claims costs – increasing the cap for non-economic loss to align with the Accident Compensation Act</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Percentage increase in cap</strong></td>
</tr>
<tr>
<td><strong>Increase in non-economic loss damages</strong></td>
</tr>
<tr>
<td><strong>Number of Wrongs Act claims</strong></td>
</tr>
<tr>
<td><strong>Potential increase in claims costs</strong></td>
</tr>
</tbody>
</table>

Notes: Numbers may not equate due to rounding. ^ Assumes the increase only affects those impacted by the existing cap for non-economic loss damages. * Assumes a proportionate increase in awards of damages for non-economic loss.

Source: Commission analysis.

Assumptions and calculations of table B.6:

a. An increase in the Wrongs Act cap to align with the Accident Compensation Act increases the cap by 11.57 per cent.
   
   (i) Calculation: $543,920 - $487,528 = $56,392 / $487,528 = 11.57%

b. The dollar value of the increase in the cap.
   
   (i) Calculation: $543,920 - $487,528 = $56,392

c. As the upper bound estimate assumes the impact of increasing the cap is proportionate across all payouts for non-economic loss, this represents the average increase in average payouts. The average payout of $80,000 is based on the average non-economic loss damages awarded under the VWA scheme (VWA 2013b, 5). This figure differs from that used in table B.3, as this calculation aims to capture the average of payouts across the scheme, rather than just those around five per cent impairment.
   
   (i) Calculation: $80,000 x 11.57% = $9,256 (rounded to $9,300)

d. A lower bound has been determined based on unpublished data from the APRA NCPD on the number of bodily injury claims finalised in Victoria. These data show that on average, between 2007 and 2012, less than one per cent of bodily injury insurance claims submitted to the NCPD were reported with general damages which reached the cap. As estimated in table B.2, there are 1000 claims made per annum for personal injury or death that would fall under the Wrongs Act.
   
   (i) Calculation: 1\% x 1000 = 10

e. The upper bound figure used the assumption that the increase in the cap leads to an increase in damages paid to all claims. The upper estimate of this figure is used in table B.6.
f. The number of cases impacted by the existing cap was multiplied by the increased value of the cap on the assumption that all of these cases would be eligible for the full increase in the cap.

   (i) Calculation: $10 \times 56,392 = $563,920 (rounded to $0.6m)

g. Assuming a proportionate increase in all payouts, the total number of Wrongs Act claims was multiplied by the increase in the average payout.

   (i) Calculation: $9,256 \times 1000 = $9,256,000 (rounded to $9.3m)

**Impact on private sector insurance premiums**

Table B.7 summarises the impact on insurance premiums of increasing the cap for non-economic loss.

<table>
<thead>
<tr>
<th>Table B.7 Estimated impact on premiums – increasing the cap for non-economic loss (2012)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Calculation</strong></td>
</tr>
<tr>
<td>Cost to insurance market (A)</td>
</tr>
<tr>
<td>Combined gross written premium (B)</td>
</tr>
<tr>
<td>Weighted average premium (C)</td>
</tr>
<tr>
<td>Percentage increase in premiums (D)</td>
</tr>
<tr>
<td>Average premium increase per policy (E)</td>
</tr>
</tbody>
</table>

Notes: Numbers may not equate due to rounding.

Sources: APRA 2013b; Commission analysis.

**B.3 Discount rate (chapter 5)**

The Commission estimated the impact on premiums of lowering the discount rate in the Wrongs Act from five per cent to four per cent.

Modelling conducted by the VMIA for the inquiry indicated that setting a discount rate of four per cent would increase public sector medical indemnity insurance premiums by approximately eight per cent. This was estimated by re-calculating recent awards using a four, rather than a five per cent discount rate (VMIA 2013, 12). The discount rate was applied to the following heads of damage:

- future economic loss
- future medical and hospital care
- future care: predominantly comprised of attendant and nursing care, which may be required on a full time basis (VMIA 2013, 6).

Due to differences in the composition of damages between medical indemnity and public liability claims, the impact of lowering the discount rate is also likely to be different. The Commission attempted to estimate the impact on public liability insurance premiums by adjusting VMIA estimates for medical indemnity premiums to reflect this difference.

The Australian Competition and Consumer Commission has estimated a breakdown of claims costs for public liability personal injury claims (figure B.1) (ACCC 2002b, 58). The costs that are discounted are assumed to relate to future economic loss, care and...
medical expenses. It was assumed that this breakdown is representative of the current market breakdown. More recent data were not available.

**Figure B.1 Cost of public and property liability claims (2001)**

![Pie chart showing the distribution of costs: Property 35%, Damages 22%, Past economic loss 5%, Future economic loss 9%, Care 4%, Medical 4%, Other 1%, Legal 20%]

Source: ACCC 2002b, 58.

The Commission used the ACCC data to estimate the percentage of public liability personal injury claims costs that are subject to discounting. The Commission:

- removed the 35 per cent of costs which were attributed to property damage
- assumed that 35 per cent of legal costs were also attributed to claims for property damage, with the remaining 65 per cent of legal costs related to personal injury public liability claims.

Therefore, personal injury claim costs and legal costs attributable to public liability claims sum to 58 per cent of the total costs in figure B.1.

(i) Calculation: $22\% + 5\% + 9\% + 4\% + 4\% + 1\% + (20\% \times 65\%) = 58\%$

On this basis, total costs for future economic loss, care and medical expenses were estimated at approximately 29 per cent of public liability claims costs.

(i) Calculation: $9\% + 4\% + 4\% = 17\%/58\% = 29\%$

VMIA modelling indicated that reducing the discount rate to four per cent would see an increase in premiums of eight per cent, on the basis that 53 per cent of their total claims payable are for future loss or expenses (VMIA 2013, 6). Comparably, the Commission assumed 29 per cent of public liability claims to be for future economic loss or care expenses. Therefore, the Commission calculated the ratio of discounted claims between the two insurance markets, indicating that discounted costs in the private
The market represented approximately 55 per cent of the discounted costs under the public medical indemnity insurance scheme.

(i) Calculation: 29/53 = 55%

Applying this ratio to the VMIA estimate of an eight per cent increase in medical indemnity premiums, gives an indicative estimate of a four per cent increase in public liability premiums (table B.8).

(i) Calculation: 55% x 8% = 4.4% (rounded to 4%)

### Table B.8 Estimated percentage impact on public liability premiums – four per cent discount rate

<table>
<thead>
<tr>
<th>Discounted costs distribution</th>
<th>Non-discounted costs distribution</th>
<th>Impact on premiums</th>
</tr>
</thead>
<tbody>
<tr>
<td>VMIA estimate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>53%</td>
<td>47%</td>
<td>8%</td>
</tr>
<tr>
<td>ACCC estimate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>29%</td>
<td>71%</td>
<td>4%</td>
</tr>
</tbody>
</table>

Sources: ACCC 2002b, 58; VMIA 2013, 6; Commission analysis.

### Impact on private sector insurance premiums

Table B.9 estimates the impact on insurance premiums of reducing the discount rate to four per cent.

### Table B.9 Estimated impact on insurance premiums - four per cent discount rate (2012)

<table>
<thead>
<tr>
<th>Calculation</th>
<th>Lower bound</th>
<th>Upper bound</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage increase in premiums (A)</td>
<td>From table B.8</td>
<td>4.0%</td>
</tr>
<tr>
<td>Combined gross written premium (B)</td>
<td>From table B.1</td>
<td>$406.3m</td>
</tr>
<tr>
<td>Cost to insurance market (A) x (B)</td>
<td>(A) x (B)</td>
<td>$16.3m</td>
</tr>
<tr>
<td>Weighted average premium (C)</td>
<td>From table B.1</td>
<td>$897</td>
</tr>
<tr>
<td>Average premium increase per policy (A) x (C)</td>
<td>(A) x (C)</td>
<td>$36</td>
</tr>
</tbody>
</table>

Note: Numbers may not equate due to rounding.

Sources: APRA 2013b; Commission analysis.
B.4 Other personal injury damages issues (chapter 6)

B.4.1 Damages for loss of capacity to care for others

The Commission estimated the impact of providing a limited statutory entitlement to damages for the loss of capacity to care for others, similar to the New South Wales (NSW) approach.

The Commission was unable to ascertain the impact of this change using Victorian data. Instead, the Commission used NSW data and applied this to the Victorian market to determine the potential impact (table B.10).

Table B.10 Estimated impact on claims costs – providing a limited entitlement to damages for the loss of capacity to care for others

<table>
<thead>
<tr>
<th>Description</th>
<th>Upper bound</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales (NSW) awards for damages for loss of capacity to care for others</td>
<td>$0.4m</td>
</tr>
<tr>
<td>Ratio of damages to total awards in NSW health claims</td>
<td>1%</td>
</tr>
<tr>
<td>Combined gross written premium</td>
<td>$406.3m</td>
</tr>
<tr>
<td>Potential increase in claims costs</td>
<td>$4.1m</td>
</tr>
</tbody>
</table>

Source: Commission analysis based on NSW data.

Assumptions and calculations of table B.10:

a. The Commission sought data from the NSW Self Insurance Corporation on the value of damages for loss of capacity to care for others. The NSW Government partially reinstated this head of damage in 2006. The data provided was drawn from NSW health liability claims. From 2007 to 2012, total damages paid for loss of capacity to care for others averaged around $0.4 million per annum.

b. Only some claims for damages included provision for loss of capacity to care for others. For those claims, damages for loss of capacity to care for others made up about one per cent of total settlements. From 2007 to 2012, the value of those settlements averaged $36.9 million per annum.

(i) Calculation: $0.4 million / $36.9 million = 1.08% (rounded to 1%)

c. The combined value of gross public liability premiums and gross medical indemnity premiums (table B.1).

d. The Commission assumed that providing a limited entitlement to damages for loss of capacity to care for others in Victoria is likely to have a similar impact to the NSW experience. In the absence of comparable Victorian data, the Commission has made a simplifying assumption that all Wrongs Act claims will in future include these type of damages. This provides an upper bound estimate on premium impacts from this change. Under these assumptions, Victorian claims costs would increase by one per cent or $4.1 million. Given uncertainty as to the likely impact, a different lower bound has not been estimated.

(i) Calculation: 1% x $406.3 million = $4.06 million (rounded to $4.1 million)
**Impact on private sector insurance premiums**

Table B.11 estimates the impact on insurance premiums of providing a limited statutory entitlement to damages for the loss of capacity to care for others.

**Table B.11** Estimated impact on premiums – providing a limited entitlement to damages for loss of capacity to care for others (2012)

<table>
<thead>
<tr>
<th>Calculation</th>
<th>Upper bound</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost to insurance market (A)</td>
<td>From table B.10</td>
</tr>
<tr>
<td>Combined gross written premium (B)</td>
<td>From table B.1</td>
</tr>
<tr>
<td>Weighted average premium (C)</td>
<td>From table B.1</td>
</tr>
<tr>
<td>Percentage increase in premiums (D)</td>
<td>(A)/(B)</td>
</tr>
<tr>
<td>Average premium increase per policy</td>
<td>(C) x (D)</td>
</tr>
</tbody>
</table>

Note: Numbers may not equate due to rounding.

Sources: APRA 2013b; Commission analysis.


Lander and Rogers. 2013. ‘Pulse - Issue 3 - June.’


VMIA (Victorian Managed Insurance Authority). 2013. ‘VMIA advice to the Victorian Competition & Efficiency Commission Inquiry into Aspects of the Wrongs Act 1958 (Vic).’

VWA (Victorian WorkCover Authority). 2013a. ‘Self-Insurance.’

——— 2013b. ‘Legal Liaison Group Information Paper - 22 March - Item No 2(a),’