

*editor's note.* The Prime Minister, Mr Hawke, announced on Tuesday 11 August that a federal-State Royal Commission would be established to examine the circumstances of the deaths of 44 Aborigines since 1 January 1980.

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## transcover

Get out with your wife and 2 point 4  
children  
Before it's too late.  
It's not home mate  
It's a coffin of chrome  
That'll crush your chest on its steering  
wheel  
Your life ebbing out  
On the twenty dollars optional carpet -

Barry Oakley,  
*Let's Hear it for Prendergast*

*background.* Mr Ken Booth, the New South Wales Treasurer, introduced the Traffic Accidents Compensation Act 1987 (NSW) at its second reading as 'the single most important reform to motor accident compensation in the history of this State'. The Act introduces TransCover which is based on the New South Wales Law Reform Commission's Traffic Accident Scheme contained in its 1984 Report, the New South Wales Government's Green Paper of 1986 together with submissions from the New South Wales Government Insurance Office (GIO) and the community.

*what is transcover?* Transcover is a new transport accident compensation scheme which replaces the third party common law action for people involved in accidents on or after 1 July 1987. It does not apply retrospectively.

The three principles of the scheme are

- equity: to provide fair and appropriate compensation for the seriously injured,
- rehabilitation: to facilitate return of the injured to a full and meaningful life, and
- responsibility: to bring costs to the community under control.

*why reform the third party common law system?* Two major reasons are given by the Government for reforming the third party common law system which has existed since 1942. They are the costs of the system and the deficiencies in its approach.

*costs of the third party system.* Mr Booth states that the fund will be exhausted in a few years under the common law. In May 1987 there were 90 000 current claims with the GIO. Over the past five years claims costs have increased by an average of 28% per annum and this is projected to continue at 25% even with the 1984 reforms, aided by 'super inflation' factors of fraud and court precedents. Without reform, premiums will be increased by over 23% per annum. The NSW government argues that its scheme will prevent the exhaustion of the fund, will be 15% cheaper overall and will only result in a 12% increase in premiums over the next five years. The NSWLRC, through its then Chairman, Professor Ronald Sackville, in 1984 raised the question whether premiums should be tied to the Fund as a matter of policy.

*deficiencies in the common law approach.* There have been many criticisms of the common law approach to accident compensation, notably the basic lack of equity and the lengthy delays in obtaining compensation. It is

perceived by the community as over-compensating minor injuries and failing to provide adequate or appropriate compensation for serious and long-term injuries. Difficulties arise with the reliance on a once-and-for-all lump sum assessment. The courts are required to predict the injured person's life expectancy, likely medical, hospital and nursing expenses, potential employment opportunities and future inflation rates. The courts must also form a financial assessment of factors that have no monetary equivalent such as the person's pain, suffering and loss of enjoyment of life. Such assessments often result in inconsistencies and inequities and there is no provision for review. No assistance with management of the award is given.

In addition the emphasis on lump sum compensation acts as a disincentive to early and effective rehabilitation, whilst it encourages exploitation through exaggeration and fraud. The legal advocacy process results in significant delays (there is an average four year wait in the District Court, longer if the case is complex) and costly legal fees.

*extent of transcover.* All 'transport accidents' involving NSW residents and interstate vehicles in NSW are covered. The scheme also covers all public transport accidents involving the State Rail Authority, the Urban Transport Authority and water ferries. 'Transport accident' is given a broad definition in the Act but may be prescribed by regulations (which are not yet available).

*fault principle.* The TransCover scheme retains the common law fault principle despite the NSWLRC's strong recommendations for a no-fault scheme. Professor Phegan, Dean of the

Law Faculty of the University of Sydney, sees this as a compromise which is 'a product of the Government's over-riding concern with cost'.

Section 40 abolishes the common law right to damages for personal injury or death in a 'transport accident' regardless of its cause. However under s 31, entitlement to compensation under the TransCover scheme only arises where the accident was caused, either wholly or partly, by the negligence of an owner or driver. Common law may be retained in situations such as the Granville train disaster or where defective vehicle repairs are the sole cause. The *Australian Torts Reporter* points out that potential problems arise where both the owner or driver and a third party, for example a traffic authority or a manufacturer, are jointly responsible. Similarly the effect of settlement of a property damage claim is unclear.

Contributory negligence is applicable in assessing compensation in situations of drink driving or failure to wear a seatbelt (15% reduction). It is modified to the extent that it does not apply to minors nor to hospital and medical charges. No compensation will be available if the person involved is convicted of a crime or the accident is self inflicted.

WorkCover, the new scheme introduced to replace workers compensation, has a no-fault basis. Where both schemes are available, the injured worker must elect which he or she will use.

*claims.* In order to qualify for compensation, an accident must be reported to the police or the relevant transport authority within 28 days, or 28 days after injuries permit. A discretion only exists to extend the period by 90 days. After that the rights to

compensation are lost. A claim may be lodged at any time within three years from the date of the accident or the date the injuries are first manifest. It may be undertaken by a third party on behalf of an accident victim but there is no provision for solicitors' costs.

The GIO must make a determination on eligibility, including liability, within 8 weeks or an automatic appeal to the District Court will lie.

*administration of the fund.* TransCover will be administered by the GIO as agent for the government. The GIO is obliged to do everything possible to ensure the claimant is fully compensated. This is a substantial change, as under the common law adversary system the GIO generally acted for the defendant and, after July 1984, was named as the defendant.

*loss of income.* The Act contains a wide definition of 'earner' which generally covers those who have been in employment for more than 26 weeks in the previous two years, are self employed or have firm arrangements to re-enter the workforce. The maximum (gross) award is set at \$500 per week, subject to indexation. This is based on the fact that current [Nov '86] average weekly earnings are \$430 and that an estimated 70% of workers earn under \$500 per week. All benefits are subject to taxation. No benefits are paid for the loss of the first five working days.

If injured earners are assessed as totally incapacitated, they receive 80% of their pre-accident earning capacity up to maximum of \$500 (gross). For those assessed as partially incapacitated, 80% of the difference between their pre and post-accident earning capacity is paid.

Non-earners qualify for all benefits except loss of earning capacity for the first two years. If they are assessed as long term incapacitated, that is incapacitated for more than two years after the accident, then they are entitled to compensation for loss of earning capacity at 'notional' rates eg 50% of average weekly earnings if over 21. Long term incapacity can be subject to reassessment for advancement factors. This applies to people such as students, apprentices, minors, part-timers, casuals and unemployed.

Payment ceases when the injured persons are fit for work, on their death, when they are eligible for the age pension or when they would have left the workforce.

*medical and hospital benefits.* All reasonable medical, hospital, ambulance, nursing, rehabilitation, pharmaceutical and dental costs are paid by the GIO less \$100 excess for certain medical and pharmaceutical benefits.

*rehabilitation.* Rehabilitation is an integral part of TransCover, aiming to restore, as speedily and as fully as possible, a person's capacity. The scheme includes all medical, social and vocational rehabilitation and counselling. It also includes house, car and work-place modifications and devices. If a person is assessed as long-term incapacitated, TransCover will arrange attendant care and household services. Co-ordination and integration with the New South Wales Department of Health, Work care and the Commonwealth is envisaged.

*permanent impairment.* Lump sums for permanent impairment where injuries are assessed at more than 4% are available under the TransCover

scheme. These are scaled up to a maximum of \$120 000, with full compensation to the age of 25, declining by 1% per year until the age of 65 where compensation remains at 60% of the relevant sum.

Assessment is based on the 'whole person' approach developed by the American Medical Association and used by the Commonwealth and Victoria. Loss of any body part, system or function, loss of mental capacity, disfigurement and pain, in the context of the injured person's lifestyle, is assessed by a medical practitioner and reviewed by the GIO.

*death due to transport accident.* If death due to the accident occurs within three years, the dependants are entitled to a lump sum of up to \$80 000 less any amount paid under a permanent impairment assessment. Periodic payments may be made for up to five years for income support (assessed at 50% of (the lesser of) the lost income or average weekly earnings), funeral expenses and household assistance.

*appeals and reviews.* All appeals are initially assessed by a GIO review officer or an approved doctor. The legislation provides that questions of law, liability and administration be heard by the District Court and then, for questions of law only, the Court of Appeal. Disputes over medical assessments (eg permanent impairment) go before the Medical Review Panel only. Administrative avenues of review may also be available. A TransCover Review Committee is also established to monitor and review the effectiveness of the scheme and advise the Minister.

*delays and fraud.* The TransCover scheme aims to reduce delays and provide disincentives to fraud. Through prompt and ongoing payment to the

injured, payment directly to service providers and provision of extra resources provided by the District Court, delays are reduced. Similarly, exaggeration and fraud are discouraged through the 28 day reporting condition, three year limitation, use of objective medical tests, provision of penalties and removal of incentives for a 'pot of gold' mentality.

*advantages.* The NSW government claims that the advantages of Transcover include increased equity, an extensive range of benefits and ongoing support for the long term incapacitated, reduction in delays and minimisation of potential for fraud.

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## odds and ends

• *copyright discussion paper.* Although a ring pulley might not strike a beholder as a work of art it may, if it is a reproduction in three-dimensional form of a design drawing, attract the extensive protection given by the Copyright Act 1968 to artistic works rather than the lesser and perhaps more appropriate degree of protection given to articles produced from designs registered under the Designs Act 1906. Manufacture of the ring pulley not authorised by the owner of the copyright in the drawing might also constitute infringement of copyright, even though the manufacturer did not use a copy of the design plan. These possibilities result from the operation of the Copyright Act, in particular the width of the definitions of 'artistic work' and 'drawing', the interaction of the Copyright Act and the Designs Act and decisions of the courts on what constitutes copying. Their existence may well result in increased costs to manufacturers and