

Issues Paper

Inquiry into aspects of the *Wrongs Act 1958*

July 2013



About the Victorian Competition and Efficiency Commission

The Victorian Government established the Victorian Competition and Efficiency Commission to provide the Government with independent advice on business regulation reform and opportunities for improving Victoria's competitive position.

The Commission has three core functions:

- (1) reviewing regulatory impact statements, measurements of the administrative burden of regulation, and business impact assessments of significant new legislation
- (2) undertaking inquiries referred to it by the Treasurer
- (3) operating Victoria's Competitive Neutrality Unit.

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Contents

1	About this inquiry	1
1.1	Context	1
1.2	Purpose and scope of the inquiry	1
1.3	The Commission's proposed approach to assessing reforms to personal injury damages	3
2	The personal injury damages provisions of the Wrongs Act	5
2.1	Limitations on damages for economic loss	6
2.2	Limitations on damages for non-economic loss	6
2.3	Limitations on damages for gratuitous attendant care	7
2.3.1	Damages for costs of gratuitous attendant care by others	7
2.3.2	Damages for loss of capacity to care for others	8
2.4	Discount rate	8
2.5	Summary	9
2.6	Potential issues regarding limitations on personal injury damages	10
2.6.1	Potential anomalies, inconsistencies and inequities between the personal injury Acts	11
2.6.2	Other potential anomalies	14
3	Strict liability regime for damage by aircraft	16
3.1	The Commission's proposed approach to assessing the strict liability regime	17
4	How to engage with the Commission	18

About this issues paper



This issues paper aims to assist those wishing to contribute to the inquiry into aspects of the *Wrongs Act 1958* (Vic) by outlining the Victorian Competition and Efficiency Commission's (the Commission) initial views on the scope of the inquiry and the key issues (see attachment A for the inquiry terms of reference). Participants are invited to make written submissions to respond to these views and address the issues and questions outlined in the paper. This issues paper is intended to guide, but not to limit, the issues addressed in submissions. The Commission will consider any issues raised that are within its terms of reference.

Key Inquiry Dates

Submissions due:	6 September 2013
Consultation:	June to September 2013
Draft report released for further consultation:	November 2013
Draft report submissions due:	December 2013
Further consultation on the draft report:	November 2013 to January 2014
Final report to government:	28 February 2014

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1 About this inquiry

On 30 May 2013, the Treasurer directed the Victorian Competition and Efficiency Commission (the Commission) to conduct an inquiry into aspects of the *Wrongs Act 1958 (Vic)* (the Act). The terms of reference for the inquiry are at attachment A. This issues paper sets out the Commission's initial views on the scope of the inquiry and requests information from participants on key issues. Submissions on the Issues Paper are due by 6 September 2013. In line with the terms of reference, the Commission intends to consult widely, including with the legal and insurance sectors, academic institutions, business and relevant Victorian, Commonwealth and other jurisdictions' government departments and agencies.

1.1 Context

In 2002 and 2003, major reforms were made to the Wrongs Act 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 reforms 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 reforms restricted some common law rights to compensation for the negligent acts of others. An important part of the reforms was the introduction of limitations (in the form of thresholds and caps) on liability for damages arising from negligence claims, with the aim of limiting liability and the quantum of damages arising from personal injury and death.

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. For example, Victorian County Court statistics show a decline in the number of personal injury matters filed (Victorian County Court 2013). Insurance data also suggests that since tort law reform, there has been a flat claim frequency, an increase in average claim size and falling or flat insurance premiums (Lee 2012, 22; NPCD 2013).

Aspects of the reforms have, however, 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.

1.2 Purpose and 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 Act relating to personal injury damages.

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).

The terms of reference specifically exclude the Commission from revisiting the underlying objectives of tort law reforms. These were to limit some common law rights to compensation with the aim of reducing the price of, and increasing the availability of, public liability and professional indemnity insurance. Accordingly, in undertaking its task, the Commission proposes to take as given the need for certain limitations (in the form of impairment thresholds and caps), but to clarify or alter the circumstances in which it is applied to address any anomalies, inconsistencies and inequities. An example of this approach is to accept the need for an impairment threshold to be met, while assessing whether the threshold has created any anomalies, inconsistencies and/or inequities in its application.

The terms of reference also exclude the Commission from inquiring into the operation of the provisions of the Act dealing with proportionate liability for economic loss and property damage. Other aspects of the Act not relevant to the inquiry include criminal defamation, seduction, occupiers' liability, Good Samaritan protection, contributory negligence and liability of public authorities.

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

IN	OUT
<ul style="list-style-type: none"> • Anomalies, inconsistencies and inequities in regard to Part III, VA and VB of the Wrongs Act including: <ul style="list-style-type: none"> – limitations on damages for economic loss (s 28A; s 28F) – limitations on damages for non-economic loss (s 28G; s 28LE; s 28LF) – limitations on damages for gratuitous attendant care (s 19; s 19A; s19B; s 28IA; s 28IB) – limitations on loss of capacity to care for others (s 28ID; s 28IE; s 28IF) – discount rates used for calculating lump sum damages for future economic loss (s 28I). • The appropriateness of the existing strict liability regime for damage by aircraft (s 31). 	<ul style="list-style-type: none"> • The underlying objectives of the tort law reforms of the early 2000s, including the need for limitations on some common law rights. • Parts of the Wrongs Act that relate to: <ul style="list-style-type: none"> – criminal defamation (Part I) – publishers (Part IA) – seduction (Part II) – occupiers liability (Part IIA) – negligence – intoxication and illegal activity (Part IIB) – apologies (Part IIC) – contribution (Part IV) – proportionate liability (Part IVAA) – abolition of doctrine of common employment (Part IVA) – contributory negligence (Part V) – structured settlements (Part VC) – Good Samaritan protection (Part VIA) – food donor protection (Part VIB) – abolition of liability in tort for maintenance or champerty (Part VII) – volunteer protection (Part IX) – negligence (Part X) – mental harm (Part XI) – liability of public authorities (Part XII).

Sources: *Wrongs Act; terms of reference.*

Information request

Is the Commission's proposed focus on specific provisions of the Wrongs Act (as outlined in table 1.1) and opportunities to address anomalies, inequities and inconsistencies reasonable and complete, taking into account the terms of reference? If not, why?

1.3 The Commission's proposed approach to assessing reforms to personal injury damages

The terms of reference require the Commission to develop, evaluate and recommend options for the Act to operate more efficiently and equitably, consistent with the objectives of the tort law reforms of 2002 and 2003.

In recommending options for amendment to the Act, the terms of reference also require the Commission 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
- consistency with other legislative regimes prescribing compensation for personal injury, including the *Accident Compensation Act 1995 (Vic)* and *Transport Accident Act 1986 (Vic)*, and interstate regimes, having regard to the different objectives of these regimes.

Accordingly, the Commission proposes to use the following framework in making recommendations

- (1) Identify the nature and extent of the 'problem', that is, the anomaly, inequity and/or inconsistency.
- (2) Identify options to address the 'problem', including options presented by stakeholders, and informed by interstate practice.
- (3) Assess options against the principles of efficiency, equity and consistency with the intent of the tort law reforms.

Assessing efficiency, equity and consistency

The Commission considers that the relevant efficiency aspects for the inquiry relate to:

- impacts on the price and availability of public liability and professional indemnity insurance, including the impact of greater harmonisation with other jurisdictions on the cost and availability of insurance
- impacts on incentives for persons to take care to avoid injuries
- cost impacts on defendants of unmeritorious litigation
- cost impacts on the courts and Medical Panels.

In regards to equity, the Commission considers that the relevant concepts are horizontal and vertical equity, whereby:

- horizontal equity is defined as the equal treatment of equals

- vertical equity is defined as the unequal but equitable ('fair') treatment of unequals (SCRGSP 2013, 1.18).

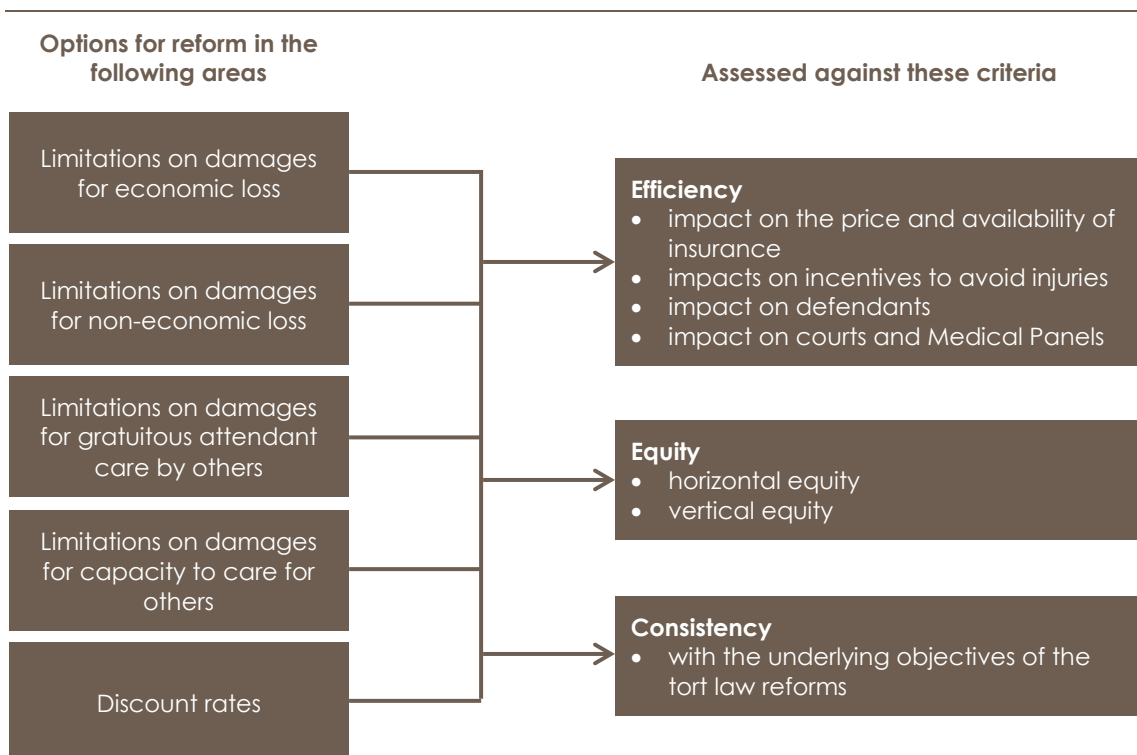
The concept of horizontal equity is relevant for assessing differences between the Wrongs Act and other personal injury Acts in respect to the award of damages. These differences can mean that 'a claimant may receive a different award for the same injury, regardless of whether the injury was sustained at work, in a motor accident or in the course of some other activity' (Ipp 2007, 5). The Commission considers that the 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 (see section 2).

The concept of vertical equity is relevant for assessing the fairness of provisions within the Wrongs Act that treat injured persons differently. For example, under the Wrongs Act, high-income earners are treated differently from low-income earners through an earnings-based cap on damages for economic loss.

The Commission considers that consistency should be assessed in terms of whether the relevant provisions of the Wrongs Act are operating in accordance with the underlying objectives of tort law reform. For example, have anomalies or inconsistencies arisen that are contrary to the intent of reform?

The Commission's proposed approach to assessment is summarised in figure 1.1.

Figure 1.1 The Commission's proposed approach to assessing reforms



Source: Commission analysis.

2 The personal injury damages provisions of the Wrongs Act

The Wrongs Act is the principal statute governing claims for damages for economic and/or non-economic loss arising from personal injury and death in Victoria, in cases other than workplace injuries or transport accidents, for which there is specific legislation.¹ 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.

The Wrongs Act reflects legislative intervention in the 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 cases where negligence has been proved for personal injury or death (excluding transport and workplace accidents) include slips or falls in a public place, and harm as a result of medical treatment. Where negligence is established by a court, damages can be awarded for the injuries sustained.

Section 28B of the Wrongs Act defines damages as including 'any form of monetary compensation', while personal injury damages are defined as 'damages that relate to the death of or injury to a person caused by the fault of another person'.

Historically, the key principle used by the courts to award damages for personal injury or death under common law was the compensatory principle, which 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).²

By the early 2000s, there was concern that the award of damages for personal injury by the courts had become unaffordable and unsustainable (Luntz 2002, 18). There was a perception that it was too easy for plaintiffs to establish liability for negligence, which in turn led to extremely high insurance premiums, the exit of some insurers from the market, and limitations on the types of insurance available (Ipp 2007, 3). Overall, the community was 'no longer prepared to pay for the level of compensation which the judiciary, and the legal profession generally, had come to regard as appropriate' (Spigelman 2002, 2).

As such, a key task of the Ipp report was to 'develop and evaluate options to limit liability and quantum of award for damages' (Negligence Review Panel 2002, 181). The Ipp report challenged the application of the compensatory principle to modern awards of personal injury damages, including on the grounds that:

¹ 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.

² The courts also recognised that where a serious injury has been suffered, it can be impossible to restore a person to the position that 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 principle developed before the modern welfare state, which provides a safety net in the form of social security benefits for injured persons.
- There are high transaction costs in personal injury claims, and therefore 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).

Following the Ipp report, the Victorian Government placed thresholds and caps³ on compensation for economic and non-economic loss — as well as on payouts for gratuitous attendant care and care for others — that can be awarded by the courts for personal injury cases under the Wrongs Act.

2.1 Limitations on damages for economic loss

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).

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)). While there is no threshold test for access to damages for economic loss resulting from death or injury, the Act restricts the maximum amount of damages that can be awarded by the courts for loss of earnings to three times total average weekly earnings (AWE) for all employees in Victoria (s 28F).⁴

2.2 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. At the time, the then Minister for Finance stated that:

General damages are an important factor in the cost of claims, and hence in premiums, for claims below the catastrophic injury level. For small claims - that is, \$50 000 or below - half of the damages paid are general damages.

Some groups, businesses and professionals, concerned about the cost of meeting a succession of minor claims, or if they can't obtain insurance, not willing to operate without it, are withdrawing their services, to the detriment of themselves, their communities and their customers. (Victorian Parliamentary Debates, Legislative Assembly 2003, 2077)

³ Thresholds mean that compensation is only received if the plaintiff satisfies a minimum level, defined in terms of monetary value or degree of impairment. Caps limit the maximum amount of damages that can be awarded by courts.

⁴ Section 28F 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 at the date of the award.

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 these thresholds, some injuries are deemed to be 'significant' (without the need for medical assessment). These are:

- 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 (s 28LF(1)(c)(ca) and (d)).

For other types of injuries, a determination of whether an injury is 'significant' requires an assessment of the degree of impairment by an approved medical practitioner. An exception to this process occurs where a respondent agrees to a claimant's request to waive the assessment requirement. Where an assessment is undertaken, the respondent can either accept the assessment or refer a medical question in relation to the assessment to a Medical Panel for determination.⁶

Section 28F 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 approximately \$500 000). This was based on the cap on common law damages for similar non-economic loss under the Transport Accident Act.

2.3 Limitations on damages for gratuitous attendant care

2.3.1 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).⁷ 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, and the amount of damages. At the time, the then Minister for Finance stated that:

⁵ 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).

⁶ A Medical Panel is constituted under the Accident Compensation Act and is usually comprised of two or more medical practitioners who have been appointed to a list of eligible practitioners by the Governor-in-Council.

⁷ These damages are also known as '*Griffiths v Kerkemeyer*' damages.

The purpose of limiting the power of the court to award damages 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 2003, 2082)

More specifically, section 28IA of the Act provides that damages are only available where:

- there is a 'reasonable need' for the care services
- where the need has arisen solely because of the claimed injury and the services would not be provided to the claimant but for the injury
- where the services are to be provided for not less than six hours per week and for not 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).

2.3.2 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
- had been provided for at least six consecutive months before the injury to which the damages relate.

Alternatively, section 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
- for a period of at least six consecutive months.

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.

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.

2.4 Discount rate

Damages for future economic loss or expenses have traditionally been awarded by the courts as lump sum payments. According to the Ipp report, 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 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 that 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
- (3) likely real growth (inflation-adjusted) in wages (Negligence Review Panel 2002, 208).

The Ipp report also noted that in practical terms, the higher the discount rate the smaller is the lump sum awarded for future economic losses (Negligence Review Panel 2002, 209). In addition, the higher the discount rate the greater the negative impact on damages payouts to younger claimants relative to older claimants.

In the 1981 case of *Todorovic v Waller*, the High Court of Australia decided that the appropriate discount rate for personal injury and death claims was three per cent. The Ipp report also recommended that the discount rate be set 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', and the importance for plaintiffs, defendants and insurers for maintaining 'stability and uniformity in the discount rate' (Negligence Review Panel 2002, 211).

The discount rate in the Act is set at 5 per cent. Prior to amendments to the Act in 2002, the discount rate that applied to all court awards of compensation was 3 per cent (Victorian Parliamentary Debates, Legislative Assembly 2002, 143). Section 28I provides the power to vary this rate by regulation.

At the time that 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 10-year commonwealth bonds. (Victorian Parliamentary Debates, Legislative Assembly 2002, 143)

2.5 Summary

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

Caps on economic and non-economic loss for personal injury or death	
Economic loss	For the purposes of calculating damages for economic loss, a cap of three times total average weekly earnings (AWE) for all employees in Victoria applies.
Non-economic loss	The maximum amount of damages that may be awarded to a claimant for non-economic loss is an indexed cap of \$371 380. As at 1 July 2013, the cap was approximately \$500 000.
Impairment thresholds for non-economic loss for personal injury	
Non-economic loss	<p>The person injured must establish that they had suffered a 'significant injury'. 'Significant injury' comprises one or more of:</p> <ul style="list-style-type: none"> • 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 • 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	
Loss of capacity to care for dependants	<ul style="list-style-type: none"> • Threshold: provision of gratuitous care to dependants for at least six hours per week for six months prior to the injury or death. • 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 for all employees in Victoria. There is no cap on the duration for which damages can be awarded.
Compensation for care by others	<ul style="list-style-type: none"> • Threshold: at least six hours per week for six months after the injury being suffered. • 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 for all employees in Victoria. There is no cap on the duration for which damages can be awarded.

Source: Wrongs Act.

2.6 Potential issues regarding limitations on personal injury damages

The Commission has identified a number of potential anomalies, inconsistencies and inequities in the operation of the Act that are likely to be worthy of further consideration. This list is not exhaustive and stakeholders are encouraged to provide information on these and other issues.

In broad terms, potential issues involve consideration of:

- differences in the limitations on what would have been recoverable at common law for personal injury, between the Wrongs Act, the Accident Compensation and the Transport Accident Act
- whether the Wrongs Act is operating in a manner consistent with the underlying objectives of tort law reform.

2.6.1 Potential anomalies, inconsistencies and inequities between the personal injury Acts

The terms of reference require the Commission to have regard to consistency with other Victorian legislative regimes prescribing compensation for personal injury, including the Accident Compensation and Transport Accident Acts, having regard to the different objectives of these regimes.

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 above, the objectives of the amendments made to the Wrongs Act in 2002 and 2003 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 2003, 2076).

The objectives of the Accident Compensation Act relevant to the inquiry appear to be:

- to reduce the incidence of accidents and diseases in the workplace
- to provide adequate and just compensation to injured workers
- to ensure workers compensation costs are contained so as to minimise the burden on Victorian businesses
- to improve the health and safety of persons at work and reduce the social and economic costs to the Victorian community of accident compensation (s 3A).

The objectives of the Transport Accident Act relevant to the inquiry appear to be:

- to reduce the cost to the community of compensation for transport accidents
- to provide, in the most socially and economically appropriate manner, suitable and just compensation in respect of persons injured or who die as a result of transport accidents
- to determine claims for compensation speedily and efficiently (s 8).

Approach to assessing claims for personal injury

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 as to who was at fault for the injury' (Hanks 2008, 15).

Payments awarded on a no-fault basis under statutory compensation schemes are generally referred to as 'benefits' (Hanks 2008, 15). For example, benefits for workers compensation are awarded in four categories: weekly benefits (income replacement); lump sum benefits (for permanent impairment); medical treatment; and benefits for death of a worker (Hanks 2008, 17).

In addition, both the Accident Compensation and Transport Accident Acts allow for access to common law damages for more serious injuries on the basis of fault. As such, these schemes have been referred to as 'hybrid schemes', in that they provide for both

statutory no-fault compensation and for legal action to recover damages from a party whose negligence has caused the injury (Hanks 2008, 15).

There are a number of differences in the limitations on economic and non-economic loss for common law claims made under the different personal injury Acts. Some of these differences are outlined below.

Differences in impairment thresholds for economic and non-economic loss

For common law claims under the Wrongs Act:

- There are no impairment or monetary thresholds for damages for economic loss.
- A 'significant injury' threshold applies for damages for non-economic loss. The impairment threshold is set at more than five per cent for whole person physical impairment, or more than 10 per cent for psychiatric impairment. There is no monetary threshold for claims for non-economic loss.

In 2003, the then Minister for Finance stated that the thresholds in the Wrongs Act for non-economic loss were not directly comparable to those applying in statutory schemes due to:

... the no-fault nature of the statutory schemes and the existence of statutory scales of benefits, rather than court-determined damages, for most injuries under those schemes. (Victorian Parliamentary Debates, Legislative Assembly 2003, 2079)

For common law claims made under the Accident Compensation and Transport Accident Acts, access to common law damages is restricted to persons who have sustained a '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, (4th Edition)* (AMA-4 Guides). Under the narrative test, a person must have suffered either:

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

According to Pillay, the existence of a narrative test under the Accident Compensation and Transport Accident Acts leads to an anomaly between these Acts and the Wrongs Act in relation to damages claims for non-economic loss. Using the narrative test, subjective reporting of pain can be used to support a finding of 'serious injury', even where the whole person impairment is less than 30 per cent. There is no such narrative test in the Wrongs Act available to prove 'significant injury' (Pillay 2011).

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

- For economic loss, the threshold is set to an indexed amount of \$52 220 (s134AB(22)(a)(i)).

- For non-economic loss, the threshold is set to an indexed amount of \$50 440 (s134AB(22)(a)(ii)).

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 set to an indexed amount of \$30 520 (s 93(7)(a)(i))
- For non-economic loss, the threshold is set to an indexed amount of \$32 520 (s 93(7)(b)(i))

Difference 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 awarded as a lump sum, with loss of earning capacity capped on the basis of three times AWE. In addition, the recent Victorian Court of Appeal decision of *Tuohey v Freemasons Hospital* confirmed that 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 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, persons are entitled to claim the difference between their pre and post-injury earnings up to their prescribed limit:

- the limit on damages for pecuniary loss for work-related injury claims is in excess of \$1.1 million (s 134AB(22) of the Accident Compensation Act)
- the limit for pecuniary loss for transport accident is in excess of \$680 000 (s 93(7) of the Transport Accident Act).

This difference in the treatment of limitations on economic loss means that:

... higher-income earners may be able to receive a more substantial award of damages if their claim is made under the Accident Compensation Act or the Transport Accident Act, as opposed to the Wrongs Act. (Larking and Spain 2012, 35)

Non-economic loss

Under the Wrongs Act, the maximum amount that may be awarded for damages for non-economic loss is set to an indexed cap of \$371 380. This is the same as the maximum cap for non-economic loss under the Transport Accident Act. As at 1 July 2013, the cap was approximately \$500 000.

Under the Accident Compensation Act, the maximum amount of lump sum benefits for non-economic loss under common law is set to an indexed cap of \$511 920 (s 134AB(22)(b)(ii)). As at 1 July 2013, this cap was equal to approximately \$540 000.

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 Acts⁸ in response to a decision from the Victorian Court of Appeal — *Mountain Pine Furniture v Taylor (Mountain Pine)*. The court reversed the Victorian WorkCover Authority's approach to the assessment of spinal injuries, 'holding that workers should have their spinal injuries assessed prior to having surgery rather than after surgery' (Victorian Parliamentary Debates, Legislative Assembly 2009, 3125). 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.

No such amendments have been made to the Wrongs Act. This means that personal injury claimants under the Wrongs Act are likely to be treated differently to claimants under the Transport Accident and Accident Compensation Act. That is, there is no requirement in the Wrongs Act that assessment of impairment of spinal injuries take into account the effect of any remedial surgery.

Differences in discount rates

Under the Wrongs Act, the discount rate for lump sum damages for future economic loss or expenses is set at five per cent, reflecting a government policy determination made in 2003. In comparison, the Accident Compensation and Transport Accident Acts set the discount rate for future economic loss at six per cent. The real risk-free discount rate used in the *Victorian Guide to Regulation* is 3.5 per cent (Victorian Government 2007, appendix C).

2.6.2 Other potential anomalies

Deductions for personal expenses for high income earners

In death claims made by dependants under the Wrongs Act, the key head of damage normally relates to the economic loss to the dependants (Luntz 2006, 71). As noted in section 2, annual damages for economic loss are capped on the basis of three times total AWE. In addition, the court must also deduct the personal expenses of the deceased from any award (Luntz 2006, 75).

As high-income earners generally have higher expenses, this can lead to the anomalous situation where damages awarded to the dependants of a high-income earner may be lower than those awarded to the dependants of an average-income earner, despite their actual loss being greater. This outcome is likely to occur in rare circumstances.

Impact of relatively high discount rates on younger claimants

As noted in section 2, higher discount rates have a greater negative impact on young catastrophically-injured claimants relative to older claimants. This may be contrary to one of the principles of the tort law reforms, whereby 'compensation for negligently

⁸ *Transport Accident and Accident Compensation Acts Amendment Act 2007 (Vic)*

caused personal injury and death should be allocated in such a way as to provide support and assistance where it is most needed' (Negligence Review Panel 2002, 181).

Definition of 'significant injury'

Under the Wrongs Act, the definition of 'significant injury' includes a whole person physical impairment of greater than five per cent. This may disadvantage certain persons who suffer spinal injuries, as these injuries are assessed in increments of five per cent under the AMA-4 Guides. That is, these claimants need to prove impairment of at least 10 per cent (rather than five per cent) in order to be eligible for damages for non-economic loss.

Damages for loss of the capacity to care for others

In 2005, the High Court of Australia (HCA) decision in the case of *CSR Limited v Eddy* held that damages for the loss of capacity to care for others (*Sullivan v Gordon* damages) should not be recoverable as a separate head of economic (or special) damages. Rather, the court held that this type of damages should be considered as 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; Quinlan-Miller & Treston Lawyers 2006, 2). As noted above, to be eligible for damages for non-economic loss, a claimant under the Wrongs Act needs to meet the 'significant injury' threshold, and any damages would be subject to a cap.

A number of jurisdictions — New South Wales, Queensland, South Australia and the Australian Capital Territory — have enacted statutory provisions to at least partially restore the common law right to damages for loss of capacity to care for others (NSW Government 2006, 3). The New South Wales amendments also included a provision for partial reinstatement of these types of damages for dust disease claims (NSW Government 2006, 7). This reflects the view expressed by the HCA in *CSR Limited 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).

In preliminary consultations with stakeholders, it has been suggested to the Commission that Victoria should follow the approach in other jurisdictions to restore the common law right to damages for loss of capacity to care for others.

Information request

What are the anomalies, inequities or inconsistencies in the operation of the personal injury damages provisions of the Wrongs Act that need to be examined to improve efficiency, equity and consistency? Has the Commission identified the main issues?

What reforms are needed to address these anomalies, inconsistencies and inequities?

What is the likely impact of these reforms on:

- the price and availability of public liability and/or professional indemnity insurance in Victoria
- the risk faced by potential defendants of unmeritorious litigation
- incentives for persons to take care to avoid injuries
- decision-making and administrative bodies, including courts and the Medical Panels
- horizontal and vertical equity
- consistency with the underlying objectives of the tort law reforms?

3 Strict liability regime for damage by aircraft

In addition to considering the operation of the Wrongs Act in relation to personal injuries, the Commission has been directed to make recommendations relating to the appropriateness of, and possible reforms to, the existing strict liability regime for damage by aircraft. This strict liability removes the requirement for the claimant to establish either negligence or fault, and attaches liability to the aircraft owner, or to a person for which the aircraft has been demised, chartered, let or hired for more than 14 days (see below).

Commonwealth Government regulation

The Commonwealth *Damage by Aircraft Act 1999* (Cth) (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. (Parliament of Australia Library 2012, 7)

Both the aircraft owner and operator are potentially liable for third party surface damage caused by certain aircraft (s 10 DBA Act). In some circumstances an aircraft owner is not liable, including where there was a lease arrangement in force under which another person had the exclusive right to use the aircraft (s 10(2A) DBA Act).

Damages are recoverable from both the owner and the operator of the aircraft without the injured person having to prove that the injury was caused by their wilful actions, negligence or default (s 11 DBA Act).

Liability under the DBA Act may be reduced in cases where the owner or operator can establish that the claimant contributed to the injury or loss (s 11A). In addition, in cases

where an owner or operator has paid damages in respect of injury or loss under the Act, that person has a right to contribution from any other person who is jointly and severally liable or who caused or contributed to the injury or loss (s 11B).

Victorian Government regulation

The application of the DBA Act is 'limited by the constitutional powers of the Commonwealth, and so the Act does not apply to unincorporated intra-state operations' (DITRDLG 2009, 14). Separate state and territory Acts apply to these operations.

In Victoria, Part VI of the Wrongs Act governs liability for loss or damage to a person or property on land or water caused by aircraft or by an article or person falling from an aircraft, and attaches that liability to the aircraft owner.

Under s 31(1), a strict liability regime applies, whereby liability for damage caused by aircraft to persons or property on the ground are recoverable from the aircraft owner without the need for the person who has suffered damage to prove negligence (unless the loss or damage was caused, or contributed to, by the negligence of the person by whom it was suffered). Although liability is strict, 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.

An aircraft owner is not liable where the aircraft has been demised⁹, 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)). In this case, liability attaches to the person to whom the aircraft has been demised, chartered, let or hired.

From preliminary consultations with stakeholders, the Commission understands that the key issue in relation to the strict liability regime is whether there is sufficient justification for the Wrongs Act to attach liability to an aircraft owner for damage, rather than the usual common law provisions of liability attaching to a negligent party.

3.1 The Commission's proposed approach to assessing the strict liability regime

In assessing options regarding the liability of unincorporated Victorian aircraft owners for loss or damage to persons, the Commission proposes to have regard to:

- equity considerations, including the appropriateness of attaching liability to the aircraft owner irrespective of the cause of the loss or damage and the need to continue to provide fair and prompt compensation for damage by aircraft
- efficiency considerations, including ensuring that those best placed to assume the risk of an accident have the incentive to take efficient safety precautions, the minimisation of compliance costs and impacts on the aviation industry
- consistency with other state and territory regimes governing third party surface damage by aircraft.

⁹ Demised means transferred, usually by way of lease.

Information request

What are the problems or issues arising from the Victorian strict liability regime of attaching liability to an aircraft owner for damage or loss caused by an aircraft on the ground?

What reforms are needed to address problems or issues?

What is the likely impact of these reforms on:

- equity
- efficiency
- consistency with other jurisdictions?

4 How to engage with the Commission

The Commission encourages interested parties to respond to the information requests contained in this Issues Paper.

Individuals and organisations can participate in the inquiry by:

- contributing a written submission to the inquiry (via mail or email)
- meeting with Commissioners and staff
- contributing comments on this issues paper or on any other matters within the scope of the inquiry through the Commission's Facebook page and/or Twitter feed.

Interested parties are strongly encouraged to register an interest in the inquiry by emailing your contact details to: wrongsaactinquiry@vcec.vic.gov.au. The Commission's website: www.vcec.vic.gov.au will also be regularly updated on the consultation process, and with copies of publications relevant to the inquiry and public submissions. The Commission has also established a Twitter feed twitter.com/VCEC_victoria (join the conversation using #WrongsAct) and Facebook page (www.facebook.com/WrongsActInquiry). This provides a convenient way for interested parties to engage with the Commission and to provide an interactive forum for participants.

The Commission will consider submissions received throughout the inquiry; submissions in response to this issues paper are invited by **6 September 2013**.

There will also be an opportunity for interested parties to comment on the Commission's initial analysis and views by responding to a draft report, which is expected to be released in November 2013.

Following a further round of consultation and submissions the Commission will submit its final report to the Treasurer by 28 February 2014. Under the Order in Council establishing the Commission, the Treasurer should release the final report and the Victorian Government should release its response, within six months of receipt of the final report.

How to make a submission

Anyone may make a submission (in written, electronic or audio form) to the Commission. To facilitate publication and accessibility, we request electronic submissions in Word format.

The Commission has a strong interest in promoting informed debate on the issues arising in its inquiries and accordingly wishes to publish the submissions it receives to the greatest extent possible. Nonetheless, materials may be submitted in confidence. They

must be clearly marked 'CONFIDENTIAL', either in part or in full, and provide an explanation of the reason for claiming confidentiality. If the Commission feels that a claim for confidentiality has not been substantiated, it will contact the author to discuss the reason for the claim. If the discussion does not resolve the issue, the Commission will return the submission to its author. Confidential materials which are accepted will be read only by Commissioners and Commission staff and will not be referred to in the Commission's report.

The Commission publishes on its website all relevant written submissions unless a claim for confidentiality is justified or, in its discretion, the Commission considers that publication is not in the public interest. This could be because a submission may be defamatory or otherwise unlawful or reflect on an individual or organisation in a way the Commission considers an abuse of the process. Contact details will be removed from submissions before they are uploaded to the website.

You should be aware that the Commission's documents, including the unpublished submissions it accepts, are subject to the *Freedom of Information Act 1982* (Vic). The Commission develops policies in the light of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which recognises that human rights are essential in a democratic and inclusive society.

Attachment A

Terms of Reference – Inquiry into Aspects of the Wrongs Act 1958

I, Michael O'Brien MP, Treasurer, 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 insurance 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,¹⁰ and develop, evaluate and recommend options for the Act to operate more efficiently and equitably, consistent with the objectives of the tort law reforms of 2002 and 2003.

¹⁰ The Commission is **not** to inquire into the operation of the provisions dealing with proportionate liability for economic loss and property damage.

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 of 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 different objectives of these regimes.

Inquiry process

In undertaking the 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

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