POLICY TRANSFER AND STATUTORY INJURY COMPENSATION IN AUSTRALIA

By

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Thesis submitted in fulfilment of the requirements of the degree of Doctor of Philosophy

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August 2015

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ABSTRACT

Explaining the origins of legislation that modifies compensation for personal injury or death from accident in Australia is important. Compensation legislation has existed for many years, is present in all jurisdictions, benefits thousands of Australians and has significant economic and social costs. Yet, detailed explanations of origins are few and there are multiple criticisms. It is important, given these criticisms and schemes' significance, to understand why governments took the reform approaches that they did. In particular, further insights on why particular injuries were singled out for compensation and why disparities exist among Australian States are valuable. To this end, this thesis examines the contribution that policy transfer, as defined by Dolowitz and Marsh (1996, 2000), made to compensation legislation. The thesis asks: what was the contribution of policy transfer during the evolution of statutory injury compensation in Australia?.

The thesis relies upon an analysis of four case studies to address its question as there are literally thousands of examples of compensation legislation in Australia. The studies have been designed specifically to address the research question. The first case examines the contribution that policy transfer made to colonial employers' liability legislation and workers' compensation legislation enacted from 1882 to 1926. The second case examines the contribution that policy transfer made to statutory criminal injuries compensation enacted from 1967 to 30 June 2014. The third case examines the contribution that policy transfer made to legislation designed to moderate damages for personal injury or death from motor accident enacted from 1935 to 30 June 2014. The fourth case examines government deliberations about no-fault motor accident compensation that took place between 1973 and 1989.

This thesis reveals that policy transfer made a substantial contribution to the evolution of statutory injury compensation in Australia. Transfer from the United Kingdom (UK) and New Zealand (NZ) inspired the forms of statutory compensation that this thesis examined and interstate transfer became dominant subsequently. Initially, governments copied policy characteristics but as their experience grew and ties with the UK declined, governments drew inspiration from other jurisdictions' legislation only or emulated compensation characteristics. Altruistic considerations were an important factor that facilitated policy

transfer when governments first legislated but financial considerations and attempts to moderate compensation expenditure became more significant subsequently. The research revealed that governments frequently under-estimated behavioural impacts of statutory injury compensation reform. Negative lessons were also prominent as governments learned what to avoid and drew from the poor experience of statutory injury compensation in other jurisdictions. The research demonstrated that future policy makers would be advised to adopt a wider lens towards the potential sources for policy transfer. Policy makers are also recommended to better interrogate the potential financial implications and behavioural impacts of statutory injury compensation.

DECLARATION

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution. To the best of my knowledge, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

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Conan Arthur Brownbill August 2015

ACKNOWLEDGEMENTS

The supervisors of this thesis were:

- Professor Graeme Hodge, Centre for Commercial Law and Regulatory Studies, Faculty of Law, Monash University;
- Professor Alex Collie, Chief Executive Officer, Institute of Safety, Compensation and Recovery Research; and
- Dr Eric Windholz, Lecturer and Associate, Centre for Commercial Law and Regulatory Studies, Faculty of Law, Monash University.

I warmly thank my supervisors for their support and preparedness to review and comment upon draft thesis contents. Dr Windholz, in particular, became a supervisor less than a year before thesis submission and was perennially forthcoming in his willingness to provide feedback and guidance which was greatly appreciated.

Resources and/or advice were also gratefully received from Dr Genevieve Grant, Associate Professor Normann Witzleb, research librarians in the Monash University Law Library; staff in the Monash University Document Delivery service; officers in the South Australian, Western Australian and Australian Capital Territory (ACT) archival services; staff in the State libraries of all jurisdictions and in the Northern Territory (NT) and ACT libraries; staff in the Department of Health and Human Services (Tas) library; staff in the Australian Bureau of Statistics; staff in the NT Crime Victims Services Unit and parliamentary librarians and/or officers in the Western Australian, Queensland and Tasmanian parliaments.

This research was funded by the Transport Accident Commission and WorkSafe Victoria through the Institute for Safety, Compensation and Recovery Research.

CHAPTER 1
INTRODUCTION

1.1 Background

Legislation modifying compensation for personal injury or death by 'accident'[1] has a long history in Australia. The New South Wales (NSW) colonial government enacted the first example in 1847[2] and there have been laws passed in every Australian jurisdiction in almost every decade, and increasingly in every year, since. Commonly, legislation modifies the amount of court-ordered damages that individuals may recover as was the case in the *Fatal Accidents Compensation Act 1847* (NSW)). Alternatively, or in addition, legislation prescribes amounts of compensation and non-monetary assistance for accident victims. Workers' compensation legislation, criminal injuries compensation legislation and State and Territory laws that prescribe no-fault motor accident compensation are examples.[3] This thesis collectively describes legislation that modifies damages for personal injury or death from accident and legislation that prescribes compensation, as 'statutory injury compensation'.

The eligibility conditions, benefit structures and reporting obligations for statutory injury compensation in Australia are disparate as motor accident compensation legislation demonstrates. In Victoria, Tasmania and the NT, most motor accident victims, with the exception of groups such as those injured during the commission of a crime, may recover no-fault motor accident compensation.[4] However, depending on the jurisdiction, motorists' rights to also recover court-ordered damages differ. NT victims may not recover any damages for their injury as they rely exclusively upon no-fault motor accident compensation (what this thesis labels 'pure no-fault motor accident compensation'). Victoria retains limited damages entitlements for motor accident victims that satisfy an impairment requirement and/or have a 'serious injury' (what this thesis labels 'modified no-fault motor

[1] 'Accident' is defined in this thesis as a 'sudden, non-repetitive occurrence' that is not injury or death from 'natural cases'. See Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge University Press, 8th ed, 2013) 4.
[2] *Fatal Accidents Compensation Act 1847* (NSW).
[3] 'No-fault motor accident compensation' is defined in this thesis as legislated compensation for personal injury or death from motor accident that does not require proof of negligence or 'fault' by a third party as an eligibility condition. Proving fault as the proximate cause of harm is a necessary condition to recover court-ordered damages for personal injury or death from accident.
[4] See *Motor Accidents (Compensation) Act 1979* (NT) pts 2-5; *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) pt IV; *Transport Accident Act 1986* (Vic) pt 3.

accident compensation').[5] Most Tasmanian motor accident victims that prove third party fault as the cause of their injury may recover both no-fault motor accident compensation and damages (what this thesis labels 'comprehensive add-on no-fault motor accident compensation').[6]

The Victorian, Tasmanian and NT approaches contrast to the position in other Australian jurisdictions. In NSW, South Australia (SA) and the ACT, victims rely upon an approach that this thesis labels 'limited add-on no-fault motor accident compensation'. This comprises no-fault motor accident compensation for specific groups such as those with 'catastrophic injuries', child victims or victims of 'blameless accident'. Remaining victims must prove third party fault as the cause of their injury to recover compensation. In Queensland and Western Australia (WA), governments had not introduced no-fault motor accident compensation for any group from 1 July 2014. As such, motor accident victims in those States must prove fault as the cause of their injury to recover compensation (what this thesis labels 'fault-based compensation'). There have been commitments to reform, however.[7] Table 1.1 (next page) lists the five approaches towards motor accident compensation in Australia that existed at 1 July 2014:

[5] *Transport Accident Act 1986* (Vic) s 93.

[6] *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) s 22.

[7] In the 2015-16 State Budget, the WA Barnett government committed to introduce no-fault motor accident compensation for catastrophically injured motor accident victims from 1 July 2016: see Colin Barnett, Helen Morton and Mike Nahan, 'Our State Budget 2015-16: Protecting and Supporting Our Community – WA to Adopt No-Fault Catastrophic Injury Cover' (Media Release, 14 May 2015) <http://www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=9469>: The former Queensland Newman Liberal-National government reiterated that it would 'undertake work to determine the feasibility' of providing no-fault lifetime care and support for catastrophically injured motor accident victims on 12 May 2014: Letter from Tim Nicholls, Queensland Treasurer and Minister for Trade to General Manager, Social Policy Division, The Treasury, 12 May 2014 <http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2014/National%20Injury%20Insurance%20Scheme%20Motor%20Vehicle%20Accidents/Submissions/PDF/Queensland_Government.ashx> 1. However, the government made no further public announcement before 30 June 2014 and lost office on 31 January 2015. Queensland Labor did not mention no-fault motor accident compensation in the 2014 State Policy Platform and has made no further announcement.

Table 1.1 Motor Accident Compensation in Australia

Approach	Jurisdiction
1. Pure no-fault compensation	NT
2. Modified no-fault compensation	Victoria
3. Comprehensive add-on no-fault compensation	Tasmania
4. Limited add-on no-fault compensation	NSW, SA, ACT
5. Fault-based compensation	Queensland, WA

[Source: Original]

The significant disparities in government approaches towards statutory injury compensation beg the question - how have they arisen? Legal authors contend that government approaches stem from what Barker et al described as 'the operation of political forces' rather than 'any principled approach' to personal injury or disability.[8] Sugarman for instance acknowledged culture, history, path dependencies, patterns of accidents and political arrangements as factors that determined government approaches.[9] Atiyah argued that a rise in litigation involving workplace injury precipitated workers' compensation legislation and mandatory third party insurance legislation stemmed from an increased take-up of liability insurance.[10] O'Connell and Partlett contend that legislative restrictions upon court-ordered damages for personal injury or death from accident ('statutory damages restrictions') responded to 'costly or unavailable insurance'.[11]

These explanations are wide ranging and no legal author to date has focused upon specific explanations for statutory injury compensation or elaborated the influence of the above-mentioned factors. Indeed, the legal discipline has attracted criticism for treating '[l]egislation, and especially the study of its sources and influences …. as though outside the preserve of law as a discipline'.[12] Referencing legal academics and those in the profession alike, Dietrich has written that many lawyers 'do not like statutes'[13] and Justice Gummow

[8] Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 27.
[9] Stephen D Sugarman, 'Compensation for Accidental Personal Injury: What Nations Might Learn from Each Other' (2010-11) 38 *Pepperdine Law Review* 597, 603.
[10] P S Atiyah, 'Personal Injuries in the Twenty-First Century: Thinking the Unthinkable' in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press, 1996) 1, 5.
[11] Jeffrey O'Connell and David Partlett, 'An America's Cup for Tort Reform? Australia and America Compared' (1988) 21 *University of Michigan Journal of Law Reform* 443, 448.
[12] TT Arvind and Jenny Steele, 'Bringing Statute (Back) onto the Radar: Implications' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013) 451, 454.
[13] Joachim Dietrich, 'Teaching Torts in the Age of Statutes and Globalisation' (2010) 18 *Torts Law Journal* 141, 141.

described a perception among lawyers of legislation being 'second class law'.[14] Legal authors' approach means that those interested in explaining government approaches to statutory injury compensation must engage in learning across disciplines. However, explanations from other disciplines are similarly limited. Writing in the context of his theory on the Australian welfare state for example, Castles suggested that workers' compensation was the result of an 'obvious gap' in the federal approach to social protection that relied upon a minimum wage, full employment and trade protection.[15] Castles explained that:

> all workers might be prevented from earning their livings and supporting their dependents by industrial accidents and by disabilities, and so Australia kept up with the European pace of workers' compensation legislation.[16]

Whilst clearly relevant to workers' compensation legislation, this idea of an 'obvious gap' does not explain the rationale for other examples of statutory injury compensation such as no-fault motor accident compensation and statutory criminal injuries compensation. Similarly, although the evolution and development of public policies that underlie legislation has been a major focus of public policy disciplines, there has been little examination of the evolution of statutory injury compensation. The implication is that when Mendelsohn asserted that early Australian workers' compensation legislation 'copied' British legislation[17] and Purse wrote that workers' compensation laws were 'based' upon British legislation,[18] these were some of the few firm explanations for the origins of statutory injury compensation.

1.2 Policy transfer

Policy transfer, in the broad sense of public policies spreading from one jurisdiction to another, has attracted considerable academic attention from multiple disciplines. Writing from a comparative law perspective for example, authors have devised terms such as 'legal

[14] Justice W M C Gummow, 'Statutes: The Sir Maurice Byers Annual Address' (2005) 26 *Australian Bar Review* 121, 125.
[15] Francis Castles, 'Welfare and Equality in Capitalist Societies: How and Why Australia was Different' in Richard Kennedy (ed), *Australian Welfare: Historical Sociology* (Macmillan, 1989) 56, 66.
[16] Francis G Castles, 'The Wage Earners' Welfare State Revisited: Refurbishing the Established Model of Australian Social Protection, 1983 - 93' (1994) 29 *Australian Journal of Social Issues* 120, 124.
[17] Ronald Mendelsohn, *The Condition of the People: Social Welfare in Australia 1900 - 1975* (George, Allen & Unwin, 1979) 218.
[18] Kevin Purse, 'The Evolution of Workers' Compensation Policy in Australia' (2005) 14 *Health Sociology Review* 8, 9.

transfer',[19] 'legal transplants',[20] 'legal transposition',[21] 'legal irritants',[22] and 'legal translations'.[23] One author insisted that most legal changes in most systems were 'the result of borrowing'[24] and the 'diffusion' of law has attracted recent attention.[25] From a public policy perspective, authors have devised terms such as 'policy band wagoning',[26] policy convergence,[27] policy diffusion,[28] imitation,[29] policy learning,[30] social learning,[31] lesson-drawing[32] and policy 'assemblages, mobilities and mutations'.[33] In 2013, Graham, Shipan and Volden identified 104 terms that public policy authors had relied upon to explain why and how one government's choices influenced the choices of others.[34] The authors disclosed that between 1958 and 2000, nearly 800 articles were published in political science journals on the topic.[35] Little wonder Stone writes that the field is 'replete with conflicting jargon and competing conceptual categories'.[36]

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[19] See David Nelken, 'Comparatists and Transferability' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003) 457, 457.
[20] See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2nd ed, 1993).
[21] See Esin Örücü, 'Law as Transposition' (2002) 51 *International and Comparative Law Quarterly* 205.
[22] See Ganther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.
[23] See Máximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45 *Harvard International Law Journal* 1, 32.
[24] Watson, above n 20, 95.
[25] See, eg, William Twining, 'Diffusion of Law: A Critical Perspective' (2004) 49 *Journal of Legal Pluralism and Unofficial Law* 1; William Twining, 'Social Science and Diffusion of Law' (2005) 32 *Journal of Law and Society* 203.
[26] See G John Ikenberry, 'The International Spread of Privatization Policies: Inducements, Learning, and 'Policy Bandwagoning'' in Ezra N Suleiman and John Waterbury (eds), *The Political Economy of Public Sector Reform and Privatization* (Westview Press, 1990) 88.
[27] See Colin J Bennett, 'Review Article: What is Policy Convergence and What Causes It?' (1991) 21 *British Journal of Political Science* 215.
[28] See Erin R Graham, Charles R Shipan and Craig Volden, 'The Diffusion of Policy Diffusion Research on Political Science' (2013) 43 *British Journal of Political Science* 673.
[29] See Giandomenico Majone, 'Cross-National Sources of Regulatory Policymaking in Europe and the United States' (1991) 11 *Journal of Public Policy* 79, 80.
[30] See Peter J May, 'Policy Learning and Failure' (1992) 12 *Journal of Public Policy* 331, 332; Claire A Dunlop and Claudio M Radaelli, 'Systematising Policy Learning: From Monolith to Dimensions' (2013) 61 *Political Studies* 599.
[31] See Peter A Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain' (1993) 25 *Comparative Politics* 275.
[32] See Richard Rose, *Lesson-Drawing in Public Policy: A Guide to Learning in Time and Space* (Chatham House Publishers, 1993); Richard Rose, *Learning From Comparative Public Policy: A Practical Guide* (Routledge, 2005).
[33] Eugene McCann and Kevin Ward, 'A Multi-Disciplinary Approach to Policy Transfer Research: Geographies, Assemblages, Mobilities and Mutations' (2013) 34 *Policy Studies* 2.
[34] Graham, Shipan and Volden, above n 28, 690.
[35] Ibid 673.
[36] Diane Stone, 'Transfer and Translation of Policy' (2012) 33 *Policy Studies* 483, 489.

Given the diversity of academic notions and associated literature, it was important to select a well-developed perspective to frame this research. Criticism of the legal transplants literature for lacking a 'detailed account of how legal change occurs' was relevant in this regard.[37] Reimann concluded in 2002 that the field had failed to mature into an up-to-date, well-defined and coherent discipline'[38] and Graziadei entreated further inquiry into the legal transplant 'mechanics' in 2009, ideally by 'opening up the inquiry to the contributions of other disciplines'.[39] Linos described the failure of legal transplants literature to interrogate process and the actors involved in transplants as a 'blind spot' that it shared with political science literature on 'policy diffusion'.[40] This 'blind spot' partly explained the notion of 'policy transfer' that Dolowitz and Marsh developed. Dolowitz and Marsh defined policy transfer as:

> a process by which knowledge about policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system.[41]

The Dolowitz and Marsh definition is not the only policy transfer definition that exists[42] but it is 'one of the most frequently cited.'[43] Dolowitz and Marsh felt that researchers had to ask 'Is policy transfer involved?' when analysing policy change,[44] which was an important

[37] Toby S Goldbach, Benjamin Brake and Peter J Katzenstein, 'The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating' (2013) 20 *Indiana Journal of Global Legal Studies* 141, 146 n 16.

[38] Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 *American Journal of Comparative Law* 671, 685.

[39] Michele Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge' (2009) 10 *Theoretical Inquiries in Law* 723, 725.

[40] Katerina Linos, *The Democratic Foundations of Policy Diffusion: How Health, Family, and Employment Laws Spread Across Countries* (Oxford University Press, 2013) 16. Examples of some foundational policy diffusion studies are Jack L Walker, 'The Diffusion of Innovations Among the American States' (1969) 63 *American Political Science Review* 880; Virginia Gray, 'Innovation in the States: A Diffusion Study' (1973) 67 *American Political Science Review* 1174; David Collier and Richard E Messick, 'Prerequisites Versus Diffusion: Testing Alternative Explanations of Social Security Adoption' (1975) 69 *American Political Science Review* 1299.

[41] David Dolowitz and David Marsh, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making' (2000) 13 *Governance* 5, 5. See also David Dolowitz and David Marsh, 'Who Learns What From Whom: A Review of the Policy Transfer Literature' (1996) XLIV *Political Studies* 343.

[42] See discussion in Mauricio I Dussauge-Laguna, 'On the Past and Future of Policy Transfer Research: Benson and Jordan Revisited' (2012) 10 *Political Studies Review* 313, 315.

[43] David P Dolowitz and David Marsh, 'The Future of Policy Transfer Research' (2012) 10 *Political Studies Review* 339, 339.

[44] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 21.

analytical contribution. Importantly though, the authors rejected any suggestion that policy transfer was the 'sole explanation of any, let alone most, policy development'.[45]

Policy transfer, as Dolowitz and Marsh understand the concept, has been examined in the context of various policy fields, including stormwater management,[46] criminal justice,[47] welfare policy[48] and global health partnerships.[49] In an Australian context, studies have examined policy transfer and fields such as welfare policy,[50] policing[51] and climate change mitigation.[52] As section 1.1 mentioned, Mendelsohn and Purse have suggested that workers' compensation was 'copied' or 'based' upon British legislation and there have been wider claims about the influence of policy transfer in Australia more generally. In 1971, Bennett and Forbes asserted that Australian attitudes 'had so settled into imported nineteenth century "traditions" that the stimulus to legal "experiment" often comes from other countries'.[53] Nelson noted in 1985 that no State has 'struck out on a legislative path that the other States have not followed'.[54] In 1992, former Victorian Premier John Cain reflected that '[i]deas, innovations and programmes [in a federation like Australia] undergo a 'comparison scrutiny' and events in other States were 'often a critical external factor' to reform.[55]

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[45] Ibid.

[46] See David Dolowitz, Melissa Keeley and Dale Medearis, 'Stormwater Management: Can We Learn from Others?' (2012) 33 *Policy Studies* 501.

[47] See Trevor Jones and Tim Newburn, *Policy Transfer and Criminal Justice: Explaining US Influence Over British Crime Control Policy* (Open University Press, 2007).

[48] See Timothy Legrand, 'Overseas and Over Here: Policy Transfer and Evidence-Based Policy-Making' (2012) 33 *Policy Studies* 329.

[49] See Michael Zisuh Ngoasong, 'Transcalar Networks for Policy Transfer and Implementation: The Case of Global Health Policies for Malaria and HIV/ AIDS in Cameroon' (2011) 26 *Health Policy and Planning* 63.

[50] See Chris Pierson and Francis G Castles, 'Australian Antecedents of the Third Way' (2002) 50 *Political Studies* 683; Chris Pierson, 'Learning from Labor? Welfare Policy Transfer between Australia and Britain' (2003) 41(1) *Commonwealth and Comparative Politics* 77.

[51] See Stefan Petrow, 'The English Model? Policing in Late Nineteenth-Century Tasmania' in Barry S Godfrey and Graeme Dunstall (eds), *Crime and Empire 1840-1940: Criminal Justice in Local and Global Context* (Willan Publishing, 2005) 121.

[52] See Robyn Hollander, 'Borrowing from the Neighbours: Policy Transfer to Tackle Climate Change in the Australian Federation' in Peter Carroll and Richard Common (eds), *Policy Transfer and Learning in Public Policy and Management: International Contexts, Content and Development* (Routledge, 2013) 128.

[53] J M Bennett and J R Forbes, 'Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century' (1971) 17 *University of Queensland Law Journal* 172, 194.

[54] Helen Nelson, 'Policy Innovation in the Australian States' (1985) 20 *Politics* 77, 77.

[55] John Cain, 'Achievements and Lessons for Reform Governments' in Mark Considine and Brian Costar (eds), *Trials in Power: Cain. Kirner and Victoria 1982 - 1992* (Melbourne University Press, 1992) 265, 279.

These assertions imply that policy transfer has played a substantial role in the development of policy within Australia which is a thesis that Carroll advanced. Carroll asserted in 2012 that 'much of what is regarded as Australian policy is copied, usually in part, occasionally in its entirety, from elsewhere'[56] and concluded that 'statutory transfer' has followed four phases from European settlement. Table 1.2 (next page) describes the phases and the characteristics of transfer in each.

[56] Peter Carroll, 'Policy Transfer Over Time: A Case of Growing Complexity' (2012) 35 *International Journal of Public Administration* 658, 659.

Table 1.2 Policy Transfer in Australia

Phases	Characteristics of Transfer in the Phase
Phase One (1788 – 1850)	**Significant Imperial Transfer** - '[S]ignificant transfer from the Imperial, British power' - '[G]rowth of policy innovation sometimes incorporating significant local invention' - '[B]eginning of intra-colonial transfer' - '[S]ubstantial transfer in regard to the content of the new constitutions developed in the colonies'
Phase Two (1851 – 1901)	**Increasing Policy Innovation** - Trends from Phase One continued - '[I]ncreasing extent of local policy invention as local expertise was developed and policy was modified to better suit local circumstances' - '[F]urther growth in the extent of intra-colonial transfer' - A 'major example of transfer' at the phase conclusion was the design of the federal Constitution and federal system of government which drew upon influences from the UK and the United States (US)
Phase Three (1902 – 1945)	**Continued Interstate Transfer** - Short term, co-operative transfer from the States to the Commonwealth - '[D]ecreasing, but still substantial reliance on transfer from the UK' - '[C]ontinuing intra-State transfer' - Growth of multilateral or 'managed' policy transfer based upon intergovernmental agreement, initially somewhat coercive, such as the River Murray Waters Agreement of 1914.
Phase Four (1946 – 2012)	**Increasing International Transfer** - Continued decline in policy transfer from the UK in favour of transfer from other jurisdictions, local innovation and transfer from international organisations such as the European Union, the World Trade Organisation and the Organisation for Economic Cooperation and Development - A distinct acceleration in collective or 'managed' transfer as the Commonwealth became more dominant in policy making - Rapid growth in policy transfer based upon international agreement - Continuation in the long-established tradition of transfer between the State governments.

[Source: Compiled from Carroll (2012)) [57]

The Carroll contribution is insightful. However, as Carroll himself noted, it would benefit from empirical studies testing its veracity. Hollander put it well in 2013 when she commented that 'further, detailed empirical work' is necessary 'to establish the extent of policy transfer in the Australian federation'.[58] This research takes up that challenge.

[57] Ibid 659, 663.
[58] Hollander, above n 52, 142.

1.3 Research aims

This research addresses the question: *what was the contribution of policy transfer during the evolution of statutory injury compensation in Australia?* It draws upon the framework to assist policy transfer researchers that Dolowitz and Marsh developed. The framework comprises seven questions that include: Why do actors engage in policy transfer? Who are the key actors involved in the policy transfer process? What is transferred? From where are lessons drawn? What are the different degrees of policy transfer? and What restricts or facilitates the policy transfer process?. Chapter 2 (Theoretical Foundations) has more detail on the framework and policy transfer definition. The research also tests the appropriateness of the Carroll segmentation of policy transfer in Australia as it relates to the evolution of statutory injury compensation.

1.4 Research approach

The research approach is an analysis of four case studies drawn from the near 170 year history of statutory injury compensation in Australia. The case studies examine the contribution that policy transfer made to legislation enacted during discrete periods in the evolution of workers' compensation; criminal injuries compensation and motor accident compensation legislation in Australia. Chapter 3 (Methodology) elaborates case studies' design; why a case study method was adopted and limitations.

1.5 Importance of this subject

Understanding how statutory injury compensation evolves and where it comes from matters for four critical reasons as the following subsections explain.

1.5.1 Therapeutic significance

Statutory injury compensation is an integral component of government responses to accidental injury. For many recipients, the support is their sole source of income and fills a space that would otherwise be occupied by less generous social security assistance and/ or private charity. It is important, given this therapeutic function, to understand the origins of statutory injury compensation and why particular forms of injury were singled out for compensation and why governments pursued the specific compensatory approaches that they did. That is the first aspect of this research that makes it worthwhile. Existing

approaches draw criticism about compensation amount, form and eligibility condition disparity.[59]

1.5.2 Financial cost

The second aspect of statutory injury compensation that makes this research worthwhile is the immense cost that it represents. In 2013-14, the Australian Bureau of Statistics estimated that $10.2 billion was paid nationally in workers' compensation benefits[60] and workers' compensation premiums exceeded $10 billion alone.[61] Table 1.3 (next page) outlines equivalent expenditure information for mandatory third party insurance premiums revenue and claims paid, and statutory criminal injuries compensation. It is important, given this significant cost, to understand why particular decisions about compensation design were made.

[59] See, eg, Productivity Commission, *Disability Care and Support*, Report No 54 (2011) vol 2, 790; Cane, above n 1, 372; National Insurance Brokers Association, Submission to David Murray, Chairman, Financial System Inquiry, *Financial System Inquiry,* 31 March 2014, 17; Suncorp General Insurance, Submission to David Murray, Chairman, Financial System Inquiry, *Financial System Inquiry,* 31 March 2014, 21.
[60] Australian Bureau of Statistics, *Australian System of National Accounts* (31 October 2014) Conclusion <http://www.abs.gov.au/ausstats/abs@.nsf/PrintAllPreparePage?>.
[61] Ibid.

Table 1.3 Statutory injury compensation expenditures 2013-14

($M)	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	Total
Motor accident compensation									
Claims paid	1,421[62]	1,112[63]	762[64]	494[65]	360[66]	79[67]	96[68]	43[69]	4,367
Premium received	2,110[70]	1,711[71]	1,470[72]	496[73]	523[74]	150[75]	148[76]	77[77]	6,685
Criminal injuries compensation									
Claims paid	77[78]	48[79]	11[80]	34[81]	8[82]	2[83]	1[84]	*4*[85]	185

[Source: Original]

1.5.3 Incomplete historic explanations

The third aspect of statutory injury compensation that makes this research worthwhile is the at times conflicting academic explanations for its origins. As section 1.2 noted, explanations vary between disciplines and there have been some suggestions in passing that policy transfer made a significant contribution. No author has examined this subject in a systematic way or applied a detailed research framework. Given the aforementioned therapeutic function and immense cost of statutory injury compensation, this research examines that aspect.

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[62] Motor Accidents Authority, *2013-14 Annual Report* (2014) 4.
[63] Transport Accident Commission, *2013-14 Annual Report* (2014) 34.
[64] Motor Accident Insurance Commission, *Annual Report 2013-14* (2014) 5.
[65] Insurance Commission of Western Australia, *Annual Report 2014* (2014) 75.
[66] Motor Accident Commission, *2013-14 Annual Report* (2014) 10.
[67] Motor Accidents Insurance Board, *Annual Report 2013-14* (2014) 31.
[68] Simon Corbell, *Report under Part 15.2 of the Civil Law (Wrongs) Act 2002: General Reporting Requirements of Insurers* (ACT Government, 2014) 2.
[69] Territory Insurance Office (TIO), *Annual Financial Report 2013-14* (2014) 23.
[70] Motor Accidents Authority, above n 62.
[71] Transport Accident Commission, above n 63.
[72] Motor Accident Insurance Commission, above n 64.
[73] Insurance Commission of Western Australia, above n 65, 43.
[74] Motor Accident Commission, above n 66, 42.
[75] Motor Accidents Insurance Board, above n 67.
[76] Corbell, above n 68.
[77] Territory Insurance Office (TIO), above n 69, 49.
[78] Department of Police and Justice (NSW), *2013-14 Annual Report* (2014) 202.
[79] Victims of Crime Assistance Tribunal (Vic), *2013-14 Annual Report* (2014) 35.
[80] Department of Justice and Attorney General (Qld), *Annual Report 2013-2014* (2014) 28.
[81] Department of the Attorney-General (WA), *Annual Report 2013-14* (2014) 19.
[82] Government of South Australia, *Strong Government, Strong Business, Strong Community: 2013 - 14 Final Budget Outcome and Consolidated Financial Report* (2014) 45.
[83] Department of Justice (Tas), *2013-14 Annual Report* (2014) 24.
[84] Justice and Community Safety Directorate (ACT), *Annual Report 2013 - 2014* (2014) vol 1, 252.
[85] Unconfirmed amount provided by the Crime Victims Services Unit (CVSU), Department of the Attorney General and Justice (NT) from the yet to be published 2013-14 CVSU Annual Report.

1.5.4 Future reform

Finally, and importantly, this research is worthwhile to identify potential improvements of government approaches to policy transfer and statutory injury compensation going forward. By identifying potential biases in the sources that governments have transferred compensation characteristics from or potential over-reliance upon policy transfer for example, this research may identify some revisions that could improve future transfer and reform.

1.6 Thesis structure

This thesis is structured into nine chapters. Chapter 1 is this Introduction, and Chapter 2 (Theoretical Foundations) outlines the Dolowitz and Marsh policy transfer definition, associated research framework and related research findings. Chapter 3 (Methodology) explains the research methodology, which includes the rationale for the case study method and case study characteristics. The chapter also outlines the data examined in the case studies and some study limitations.

Chapter 4 (Employers' Liability and Workers' Compensation) examines the contribution that policy transfer made to employers' liability and workers' compensation legislation enacted in Australia from 1882 to 1926. The chapter also tests assertions that early workers' compensation legislation was 'copied' from or 'based' upon British legislation.

Chapter 5 (Criminal Injuries Compensation) examines the contribution that policy transfer made to statutory criminal injuries compensation legislation enacted in Australia from 1967 to 30 June 2014. Its analysis includes consideration of transfer from the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and interstate transfer from two approaches to statutory criminal injuries compensation that developed in Queensland and Victoria.

Chapter 6 (Fault-based Motor Accident Compensation) examines the contribution that policy transfer made to legislation moderating damages for personal injury or death from motor accident enacted in Australia from 1935 to 30 June 2014. Specifically, the chapter examines the contribution that policy transfer made to the evolution of provisions that abolished trial by jury in motor accident claims and statutory damages restrictions.

Chapter 7 (No-fault Motor Accident Compensation) examines the contribution that policy transfer and non-transfer made to government deliberations about no-fault motor accident compensation in the period from 1973 to 1989. Specifically, the chapter examines the international and interstate transfer that precipitated no-fault motor accident compensation in Tasmania, Victoria and the NT and then examines the factors that discouraged transfer of the notion to other jurisdictions.

Chapter 8 (Discussion) consolidates findings from the four case studies discussed in Chapters 4 – 7. The chapter is segmented into sections that reflect questions from the Dolowitz and Marsh research framework. The chapter also assesses whether there is any evidence to support the assertions about policy transfer in Australia from Carroll.

Chapter 10 (Conclusion) provides a concluding response to the research question, focusing particularly upon implications of the study findings for future policy deliberations about statutory injury compensation.

CHAPTER 2
THEORETICAL FOUNDATIONS

2.1 Introduction

The academic notion of policy transfer is central to the research question *what was the contribution of policy transfer during the evolution of statutory injury compensation in Australia?*. As such, this chapter elucidates the Dolowitz and Marsh policy transfer definition that Chapter 1 introduced. Section 2.2 explains the definition, some limitations that authors have identified and two minor qualifications that this thesis relies upon. Section 2.3 then outlines the associated research framework that Dolowitz and Marsh developed and what other authors have found. As section 1.3 noted, this framework comprises seven questions that policy transfer researchers should ask. The Dolowitz and Marsh findings and findings from other authors provide a foundation for the case studies examined in Chapters 4- 7.

2.2 Policy transfer

Dolowitz and Marsh developed their policy transfer definition across two articles published in 1996 and 2000.[86] As section 1.2 noted, the definition was in part a response to perceived inadequacies in the related academic notions of policy diffusion and lesson-drawing. According to Dolowitz and Marsh, policy diffusion studies failed to examine the content of transferred policies, relied upon quantitative analysis and 'sought explanation of diffusion based on timing, geographic propinquity and resource similarities' alone.[87] Similarly, the academic concept of 'lesson-drawing' that Rose developed[88] focused upon voluntaristic transfer as a result of the free choice of actors. Dolowitz and Marsh insisted that 'an important category of policy transfer involves one government or supra-national institution pushing, or even forcing, another government to adopt a particular policy'.[89] As section 1.2 noted, Dolowitz and Marsh defined policy transfer as:

[86] Dolowitz and Marsh, 'Who Learns What From Whom', above n 41; Dolowitz and Marsh, 'Learning from Abroad', above n 41.
[87] Dolowitz and Marsh, 'Who Learns What From Whom', above n 41, 344. For a more contemporary criticism of policy diffusion research see Graham, Shipan and Volden, above n 28, 689.
[88] See Richard Rose, 'What is Lesson-Drawing?' (1991) 11 *Journal of Public Policy* 3; Rose, *Lesson-Drawing in Public Policy*, above n 32.
[89] Dolowitz and Marsh, 'Who Learns What From Whom', above n 41, 344.

> a process by which knowledge about policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system.[90]

Dolowitz and Marsh explained that their definition encompassed lesson-drawing although the concepts were not interchangeable as lesson-drawing focused upon voluntary transfer.[91] Policy transfer was also not interchangeable with the further academic concept of 'policy convergence', which was the 'tendency of societies to grow more alike, to develop similarities in structures, processes and performances' or to move 'from different positions to some common point'.[92] This is because convergence could occur coincidentally whereas policy transfer always focused upon the 'transfer of specific policies as a result of strategic decisions'.[93]

A key strength of the Dolowitz and Marsh policy transfer definition is that it accommodates transfer of a wide range of objects by a wide class of actors. However, this characteristic has drawn criticism. James and Lodge suggested that the definition was 'very difficult to disentangle from other forms of policy-making' and recommended focusing upon certain examples of transfer.[94] The authors endorsed narrowing the transfer perspective to 'the transportation of 'policies' and 'practices' already in operation in one system to another, rather than [the transfer of] 'ideas' or 'knowledge' for example.[95] Separately, Evans and Davies noted that, without qualification, the Dolowitz and Marsh definition would encompass the situation when a policy maker 'draws instinctively and deliberately upon some fragment of his/her past experience'.[96] Evans and Davies required some 'action-oriented intentional activity' to exist before policy transfer occurred.[97] This requirement for intentional activity and transfer of policies or practices already in operation

[90] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 5.
[91] Dolowitz and Marsh, 'Who Learns What From Whom', above n 41, 344.
[92] Bennett, above n 27, 219.
[93] Dolowitz and Marsh, 'Who Learns What From Whom', above n 41, 343.
[94] Oliver James and Martin Lodge, 'The Limitations of 'Policy Transfer' and 'Lesson Drawing' for Public Policy Research' (2003) 1 *Political Studies Review* 179, 190.
[95] Ibid.
[96] Mark Evans and Jonathan Davies, 'Understanding Policy Transfer: A Multi-Level, Multi-Disciplinary Perspective' (1999) 77 *Public Administration* 361, 366.
[97] Ibid.

or clearly identifiable were two qualifications upon the Dolowitz and Marsh definition that this research adopted.

2.3 Framework

Dolowitz and Marsh coupled their policy transfer definition with a framework to assist researchers that the authors labelled 'heuristic'.[98] The framework comprises seven questions that the authors felt had been 'raised explicitly or implicitly' in past research.[99] Dolowitz and Marsh provided responses to these questions based upon their analysis of past research, which the following subsections explain together with findings from other authors. Six of the seven questions are asked in the case study analysis.

2.3.1 Why do actors engage in policy transfer?

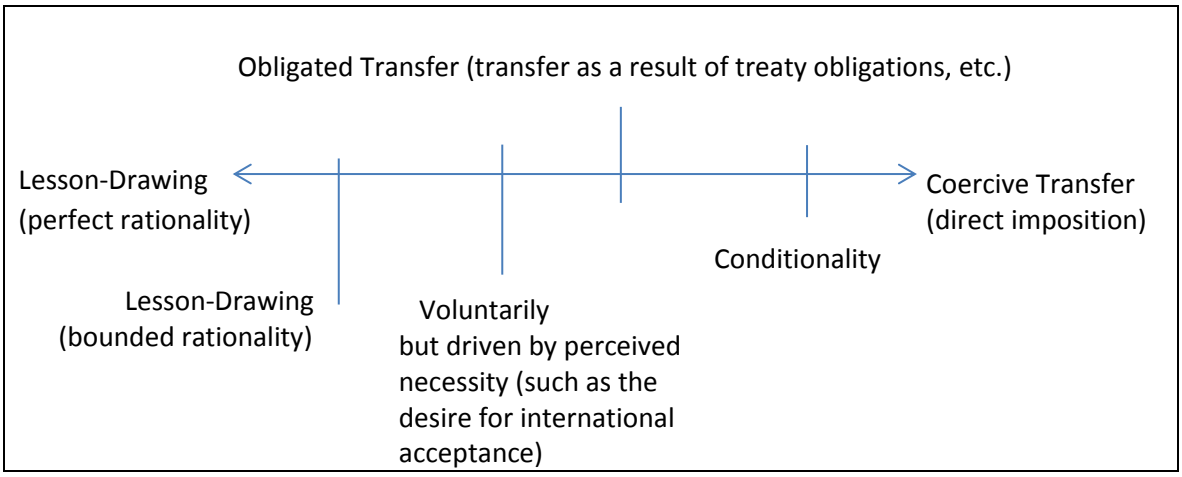
Dolowitz and Marsh identified three explanations for policy transfer in their 1996 article based upon past research. They were 'voluntary transfer', 'indirect coercive transfer' and 'coercive transfer'. Stressing that policy transfer was 'not inevitably, or perhaps even usually, a rational process',[100] the authors explained that *voluntary transfer* was motivated by dissatisfaction with the status quo, most typically due to a 'perception' of 'policy failure'.[101] *Indirect coercive transfer* arose from factors such as jurisdictional interdependence, technological change, 'economic pressures', an emerging 'international consensus' or a perception by government that a nation was 'falling behind its neighbours or competitors'.[102] *Coercive transfer*, in its 'most direct' form, existed when one government forced another to adopt a policy, although the authors noted that 'supra-national institutions' such as the World Bank could also exercise coercion.[103]

Dolowitz and Marsh revised their tri-partite policy transfer explanation in their second article with the introduction of a 'policy transfer continuum' (see Figure 2.1 (next page)). At one end of the continuum is the idealised scenario of lesson-drawing with perfect rationality which is rare. At the other end is direct imposition of policy. In between, Dolowitz and Marsh explain that actors draw lessons based upon limited information ('bounded

[98] Dolowitz and Marsh, 'The Future of Policy Transfer Research', above n 43, 339.
[99] Dolowitz and Marsh, 'Who Learns What from Whom', above n 41, 344.
[100] Ibid 356.
[101] Ibid 347.
[102] Ibid 349.
[103] Ibid, 348.

rationality').[104] There is also voluntary transfer motivated by a perceived need such as the desire for acceptance ('voluntarily'). Transfer pursuant to international obligation was a fourth explanation for policy transfer or transfer could occur pursuant to conditions that had to be satisfied as part of governmental responsibilities ('conditionality').

Figure 2.1 Dolowitz and Marsh policy transfer continuum



[Source: Dolowitz and Marsh (2000)]

Adopting a public policy lens, James and Lodge criticised this continuum, arguing that it 'obscures differences that the conventional public policy literature suggests are important'.[105] Their sentiment has been supported by other authors.[106] The response from Dolowitz was his acknowledgement in 2009 that the continuum can indeed be criticised for being an 'oversimplification'.[107] However, Dolowitz added that it also represented an improvement on models that claimed policy transfer arose from a 'single factor' which is 'the emergence of a problem'.[108] Dolowitz and Marsh explained that researchers could use the continuum to 'capture some of the subtleties involved in the transfer process' and acknowledged that 'many cases' could involve both 'voluntary and coercive elements'.[109] The continuum is seen as having merit and informs the case study analyses and discussion in Chapter 8.

[104] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 14.
[105] James and Lodge, above n 94, 184.
[106] See, eg, Monder Ram, Nick Theodorakopoulos and Ian Worthington, 'Policy Transfer in Practice: Implementing Supplier Diversity in the UK' (2007) 85 *Public Administration* 779, 782.
[107] David P Dolowitz, 'Learning by Observing: Surveying the International Arena' (2009) 37 *Policy & Politics* 317, 319.
[108] Ibid.
[109] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 14.

2.3.2 Who are the key actors involved in the policy transfer process?

Nine 'main categories' of actor were likely to be involved in policy transfer according to Dolowitz and Marsh. The nine are: (1) elected officials; (2) political parties; (3) bureaucrats/ civil servants; (4) pressure groups; (5) policy entrepreneurs and experts; (6) transnational corporations; (7) think tanks; (8) supra-national governmental and nongovernmental institutions; and (9) consultants.[110] This research examined the evidence for involvement of these actors although, having identified these nine categories, Dolowitz and Marsh clearly wanted to discourage researchers explaining transfer solely in terms of actor decisions. The authors insisted that researchers should recognise that 'political actors operate within structural constraints' derived from the 'political institutions' within which they operate and economic constraints.[111] More recently, Stone has criticised an undue focus upon dynamics within the nation-State of policy transfer research (what she labels 'methodological nationalism').[112] Stone stressed that international organisations and non-State actors such as interest groups and non-government organisations (NGOS), think-tanks, consultancies, law firms and banks are 'key actors in the mechanics of policy transfer'.[113] Separately, Stone has also highlighted the contribution of task forces, commissions of inquiry, media,[114] corporations,[115] academics[116] and the 'third sector'.[117] The writings of Stone and Dolowitz and Marsh highlight the wide class of actors potentially involved in policy transfer.

2.3.3 What is transferred?

The policy 'objects' that may be transferred are plausibly quite broad and in their articles of 1996 and 2000, Dolowitz and Marsh identified eight. They were policy goals, content, instruments, programs, institutions, ideologies, ideas/ attitudes, and 'negative lessons'.[118]

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[110] Ibid 10.
[111] Dolowitz and Marsh, 'Who Learns What From Whom', above n 41, 356.
[112] Diane Stone, 'Transfer Agents and Global Networks in the 'Transnationalization' of Policy' (2004) 11 *Journal of European Public Policy* 545, 549.
[113] Ibid 550.
[114] Diane Stone, 'Learning Lessons and Transferring Policy Across Time, Space and Disciplines' (1999) 19 *Politics* 51, 55.
[115] Diane Stone, 'Learning Lessons, Policy Transfer and the International Diffusion of Policy Ideas' (Working Paper No 69/01, Centre for the Study of Globalisation and Regionalisation, April 2001) 17.
[116] Ibid 29.
[117] Stone, 'Learning Lessons and Transferring Policy Across Time', above n 114, 55.
[118] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 12. 'Negative lessons' exist when policy makers explicitly decide to leave aspects of a foreign policy out of the transferred model or deliberately implement a borrowed model differently in response to others' experience: David P Dolowitz, 'Policy Transfer: A New Framework of Policy Analysis' in David P Dolowitz et al (eds), *Policy Transfer and British Social Policy: Learning from the USA?* (Open University Press, 2000) 9, 23-4.

Wolman and Page added 'policy labels', which they defined as names applied to a 'wide range of policies reflecting ambiguous and loosely bundled ideas (i.e. privatization, enterprise zones)'.[119] Stone lists 'regulatory, administrative or judicial tools' and personnel as examples of what she labelled 'modalities' of transfer.[120] Evans and Davies differentiated between the 'soft' transfer of ideas and ideologies and 'hard' transfer of objects such as institutions and programs.[121] Reflecting upon the scope of transferable objects, Benson and Jordan surmised in 2011 that 'there is a sense in which almost any form of knowledge transfer … could be considered a form of policy transfer.[122] This research focuses upon transfer of statutory injury compensation characteristics, which typically means legislative provisions that modify compensation for personal injury or death from accident.

2.3.4 From where are lessons drawn?

Three levels of 'governance' could be the source of lessons for policy transfer according to Dolowitz and Marsh. They were the 'international level' (international organisations such as the United Nations (UN) and World Bank); 'national' level (national governments, both domestic and foreign) and 'local' level (sub-national governments such as States, cities and local authorities).[123] The authors emphasised that all three levels could draw lessons from and between one another.[124] Recognising this fact, Evans and Davies reasoned that policy transfer could occur through at least 25 transfer pathways across transnational, international, national, regional and local spatial levels.[125] Stone has stressed that transfer may occur simultaneously from separate jurisdictions so that actors take away a 'multiplicity of lessons'.[126] Further, as Carroll noted, transfer from the UK to Australia has been identified as particularly significant.[127] This research adopts a broad perspective on the locations from where lessons may be drawn and tests some of the assertions from past research about the sources of policy transfer in Australia.

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[119] Harold Wolman and Ed Page, 'Policy Transfer Among Local Governments: An Information-Theory Approach' (2002) 15 *Governance* 477, 480.
[120] Stone, 'Transfer and Translation of Policy', above n 36, 486.
[121] Evans and Davies, above n 96, 382.
[122] David Benson and Andrew Jordan, 'What Have We Learned from Policy Transfer Research? Dolowitz and Marsh Revisited' (2011) 9 *Political Studies Review* 366, 371.
[123] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 12.
[124] Ibid.
[125] Evans and Davies, above n 96, 368.
[126] Stone, 'Transfer and Translation of Policy', above n 36, 486.
[127] Carroll, above n 56, 659. See also Pierson, 'Learning from Labor?', above n 50, 80.

2.3.5 What are the different degrees of policy transfer?

The 'degree' of policy transfer is the extent to which an object is transferred intact or varied from its initial form. Dolowitz and Marsh identified five transfer 'degrees' in their 1996 article, which were 'copying', 'emulation', 'hybridisation', 'synthesis' and 'inspiration' but then 'hybridisation' and 'synthesis' were consolidated into 'combinations' in their 2000 article.[128] This implied four degrees of policy transfer, which were: copying, emulation, hybridisation and combinations. Clearly, these degrees are not exhaustive and could be criticised for being arbitrary. However, the categorisation is useful and thus is relied upon in the case study analysis. Dolowitz explained that 'emulation' involved 'transfer of the ideas behind, but not the details of, the policy or programme'; 'combinations' involved 'mixtures of several different policies or programmes'; and 'inspiration' existed when policy in another jurisdiction inspired change but the final outcome bore 'relatively little relationship or similarity to the original'.[129] Adding to these ideas, Dussauge-Laguna suggested a further degree of 'contested' policy transfer. This produces an outcome that is 'significantly different from the original "model" because of conflicts and negotiations between (and within) the key bureaucratic actors involved in the endeavour'.[130]

Various factors influence the degree of policy transfer according to past research. Dolowitz and Marsh argued that actors' identity was relevant. Politicians seeking a 'quick fix' may pursue copying or emulation but bureaucrats were more likely interested in combinations for example.[131] Dwyer and Ellison concluded that the transfer object was relevant. The authors insisted that transfer of 'soft' objects such as ideas and ideologies was more likely associated with 'inspiration' whereas transfer of 'hard' objects was more likely associated with 'copying'.[132] Characteristics of the recipient jurisdiction also affected transfer degree. Karch has implied, for example, that copying is more likely if decision-makers are uncertain about the impact of a policy and particularly if there is 'intense partisan disagreements

[128] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 13.
[129] Dolowitz, 'Policy Transfer: A New Framework of Policy Analysis', above n 118, 25.
[130] Mauricio I Dussauge-Laguna, 'Policy Transfer as a "Contested" Process' (2013) 36 *International Journal of Public Administration* 686, 688.
[131] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 13.
[132] Peter Dwyer and Nick Ellison, ''We Nicked Stuff from All Over the Place': Policy Transfer or Muddling Through?' (2009) 37 *Policy & Politics* 389, 392.

about the policy's underlying merits'.[133] Robertson and Waltman have suggested that the political strength of a borrowing nation, capacity of the government and similarity of the context into which the borrowed program is inserted affect the capacity to copy.[134] Thus, there is no consistent factor that determines policy transfer degree. Rather, past research has suggested that it may be influenced by transferee characteristics, transfer object characteristics and characteristics of the actors and contexts involved.

2.3.6 What restricts or facilitates the policy transfer process?

Like the evidence on policy transfer degree, past research has identified multiple factors that restrict or facilitate policy transfer. In 2009 for example, Dolowitz identified six 'broad categories' of *restrictions*. They were policy 'complexity'; institutional constraints; structural constraints; feasibility constraints; past relationships between the transferor and transferee; and language constraints.[135] Benson and Jordan offered a more succinct four-type categorisation of 'demand side', 'programmatic', 'application' and 'contextual' constraints in 2011.[136] The authors explained that 'demand side' constraints existed because policy makers were 'often unwilling to move beyond the status quo unless forced to by unexpected shocks'.[137] Dolowitz and Medearis note, for example, that 'cultural filters' may influence policy makers to see their location as 'distinctive and exceptional' and therefore unlikely to benefit from policy transfer.[138] 'Programmatic' constraints included the perception that a policy is unique and unsuited to transfer. 'Application' constraints included the 'high transaction costs of institutional adjustment, the scale of domestic change required and whether policies themselves must undergo modification'.[139] 'Contextual' constraints included path dependency, historical background, institutional

[133] Andrew Karch, 'Emerging Issues and Future Directions in State Policy Diffusion Research' (2007) 7 *State Politics and Policy Quarterly* 54, 64.
[134] David Brian Robertson and Jerold L Waltman, 'The Politics of Policy Borrowing' in David Finegold, Laurel McFarland and William Richardson (eds), *Something Borrowed, Something Learned?: The Transatlantic Market in Education and Training Reform* (Brookings Institution, 1993) 21, 25.
[135] Dolowitz, 'Policy Transfer: A New Framework of Policy Analysis', above n 118, 25-26.
[136] Benson and Jordan, above n 122, 372.
[137] Ibid.
[138] David P Dolowitz and Dale Medearis, 'Considerations of the Obstacles and Opportunities to Formalizing Cross-National Policy Transfer to the United States: A Case Study of the Transfer of Urban Environmental and Planning Policies from Germany' (2009) 27 *Environment and Planning C: Government and Policy* 684, 688.
[139] Benson and Jordan, above n 122, 372.

structure, political context, ideological or cultural incompatibilities, bureaucratic and economic resources and interest group pressure.[140]

Factors that *facilitate* policy transfer are similarly broad to the factors that restrict policy transfer. They include characteristics of the specific policy. Policies that are perceived to have been successful are more likely to transfer than policies for which knowledge of success is less certain for example.[141] An 'international movement' towards reform also facilitates policy transfer[142] together with geographic proximity. This is due to increased communication networks, overlapping media markets and heightened cultural and demographic similarities.[143] Stone reasoned that a new government, political conflict, absence of scientific consensus, lack of information and 'policy disasters may facilitate policy transfer.[144] Further, Bray, Taylor and Scrafton concluded that the political disincentive of having to 'defend a unique approach' may have facilitated interstate transfer in their Australian study.[145]

Evidence that shared history,[146] language,[147] culture, legal practice',[148] political ideology[149] and 'political aspirations'[150] facilitates policy transfer is particularly significant to this research. This is because of the historical connections between Australia, the UK and other Commonwealth nations. Pierson asserted that the search for alternative policy solutions in Australia 'is likely to be begun with those States which are seen to be most similar' like the

[140] For further examples of contextual constraints see Dolowitz and Marsh, 'Who Learns What From Whom', above n 41, 354; Pierson, 'Learning from Labor?', above n 50, 94; Benson and Jordan, above n 122, 372; Stone, 'Transfer and Translation of Policy', above n 36, 485.
[141] Hal Wolman, 'Policy Transfer: What We Know About What Transfers, How it Happens, and How to Do It' (Working Paper No 38, George Washington Institute of Public Policy, 6 October 2009) 6.
[142] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 17.
[143] Karch, above n 133, 57. See also Wolman, above n 141, 14; Dolowitz, 'Policy Transfer: A New Framework of Policy Analysis', above n 118, 27-8.
[144] Stone, 'Learning Lessons and Transferring Policy Across Time', above n 114, 54. See also Mark Evans, 'Policy Transfer in Critical Perspective' (2009) 30 *Policy Studies* 243, 258.
[145] David J Bray, Michael A P Taylor and Derek Scrafton, 'Transport Policy in Australia – Evolution, Learning and Policy Transfer' (2011) 18 *Transport Policy* 522, 530.
[146] See Kurt Weyland, 'Learning from Foreign Models in Latin American Policy Reform: An Introduction' in Kurt Weyland (ed), *Learning from Foreign Models in Latin American Policy Reform* (Woodrow Wilson Center Press, 2004) 1, 11.
[147] See David Dolowitz, Stephen Greenwold and David Marsh, 'Policy Transfer: Something Old, Something New, Something Borrowed, But Why Red, White and Blue?' (1999) 52 *Parliamentary Affairs* 719, 726; Dolowitz, 'Policy Transfer: A New Framework of Policy Analysis', above n 118, 28.
[148] Pierson, 'Learning from Labor?', above n 50, 94-5.
[149] Dolowitz, 'Policy Transfer: A New Framework of Policy Analysis', above n 118, 27.
[150] Jamie Peck and Nik Theodore, 'Exporting Workfare/ Importing Welfare-to-Work: Exploring the Politics of Third Way Policy Transfer' (2001) 20 *Political Geography* 427, 431.

UK, NZ, Canada and the USA for example.[151] Castles has argued that the UK, Australia, NZ, Canada and the USA are a 'family' of nations that facilitates policy transfer.[152] There is also some evidence of increased transfer within the Commonwealth. Writing from a comparative law perspective in 2009 for example, Spamann found that diffusion of corporate law among Commonwealth nations was 'continuing on a massive scale'.[153] There has been little historical evidence of transfer from nations or jurisdictions without a historical or cultural nexus to Australia.

2.3.7 How is the process of policy transfer related to policy 'success' or policy 'failure'?

Dolowitz and Marsh introduced this final question of their framework in their article of 2000. It is not specifically addressed in this research as the case studies examine the transfer of multiple objects over time and an emphasis upon the conditions for policy 'success' or 'failure' would require specific attention in its own right. That said, there is some mention in passing of whether a transferred object was reported to have succeeded or failed. Dolowitz and Marsh outlined three factors that they felt had an impact upon policy 'failure', being 'uninformed transfer', 'incomplete transfer' and 'inappropriate transfer'.[154] McConnell defines a policy as being 'successful insofar as it achieves the goals that proponents set out to achieve'.[155]

2.4 Conclusion

The Dolowitz and Marsh policy transfer definition and associated research framework is a valuable intellectual structure that this thesis relies upon to address its research question. This chapter has explained the definition, including two minor qualifications, and also outlined the intellectual contribution that Dolowitz and Marsh and other authors made in response to six questions from the research framework. As the chapter noted, Dolowitz and Marsh contend that policy transfer is explained by a set of factors that lie along a policy transfer continuum from lesson-drawing (perfect rationality) at one end to coercive transfer (direct imposition) at the other end. Multiple actors may be involved in transfer including

[151] Pierson, 'Learning from Labor?', above n 50, 95.
[152] Francis G Castles, 'Introduction' in Francis G Castles (ed), *Families of Nations: Patterns of Public Policy in Western Democracies* (Dartmouth, 1993) xiii, xvii.
[153] Holger Spamann, 'Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law' [2009] *Brigham Young University Law Review* 1813, 1831.
[154] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 17.
[155] Allan McConnell, *Understanding Policy Success: Rethinking Public Policy* (Palgrave Macmillan, 2010) 39.

both State and non-State actors, with the potential objects of transfer ranging from hard objects such as programs and institutions to soft objects such as ideas and ideologies. In other words, policy transfer may occur between many levels of government, different policy 'fields' and between government and non-government actors. Dolowitz and Marsh identified four degrees of policy transfer from copying to relying upon an object for inspiration and variations in between in their analyses. Characteristics of the transfer object; characteristics of the transferee and characteristics of the transferor may influence these transfer degrees according to past research. In addition, these characteristics may also restrict or facilitate policy transfer. As the chapter noted, there is considerable evidence that shared language, history, culture and legal system facilitates policy transfer. That finding is significant because of the ties between Australia, Anglosphere nations and within the Commonwealth. Research summarised in this chapter informed the case study analysis.

CHAPTER 3
METHODOLOGY

3.1 Introduction

This thesis relied upon the case study method to address the research question *what was the contribution of policy transfer during the evolution of statutory injury compensation in Australia?*. It is not feasible to examine the contribution that policy transfer made to every instance of legislation modifying accidental injury compensation as there have been literally thousands in Australia. As such, the case study method was adopted. This chapter elaborates the rationale for using the case study method; the characteristics for an optimal case study and the approach towards designing case studies (section 3.2). Section 3.3 outlines the information sources that provide data for this research and section 3.4 explains the processes used to examine those sources ('data'). Section 3.5 outlines some limitations of the research approach and section 3.6 is the conclusion.

3.2 Case study approach

In concept, there are numerous ways in which a research question on the contribution that policy transfer made during the evolution of statutory injury compensation could be investigated. Approaches could include techniques drawn from history, anthropology, political science, public policy, administration or law and encompass statistical methods, textual analysis, interviews, surveys or case studies. Examining the contribution that policy transfer made to every legislative provision that modifies compensation would have provided the most comprehensive explanation. However, given the number of modifications, the approach would have been intractable, impractically expensive and prohibitively time consuming. Further analytical options such as surveys or interviews again were theoretically possible. However, the periods under analysis are lengthy and many individuals involved in the examples of policy transfer for consideration are no longer alive. Thus, the case study method was adopted.

The case study method incorporated four case studies that were examined in detail, which accorded with the Eisenhardt recommendation of between four and ten cases.[156] Supporting reliance upon the case study method, George and Bennett note that this

[156] Kathleen M Eisenhardt, 'Building Theories from Case Study Research' (1989) 14 *Academy of Management Review* 532, 545.

approach allows for a 'detailed consideration of contextual factors' that are not necessarily possible with statistical studies'.[157] That was important. Further, whereas statistical research requires the variables for analysis to be identified in advance of the study,[158] the case study method permitted multiple variables that influenced policy transfer to be identified during the analysis.

3.2.1 Case study design and description

The cases studies for this research were chosen purposefully. The object was to select cases best suited to addressing the research question rather than select cases that provided a statistically representative sample. As Neuman explains, the object of 'sampling' in qualitative analysis such as this research is to "shine light into" the subject under examination'.[159] That is, researchers need to 'select cases that give a maximum amount of information about the research objective at stake' rather than being representative necessarily.[160] Flick reasons that 'it is their relevance to the research topic rather than their representativeness' which determines case selection in qualitative research.[161] Further, Yin identified five general characteristics of an 'exemplary' case study.[162] They are that studies must: (1) be significant;[163] (2) be 'complete';[164] (3) consider alternative perspectives; (4) display sufficient evidence; and (5) be written in an 'engaging manner'. These characteristics informed case study design.

Building on these recommendations, three additional criteria shaped the case studies examined in this research. The **first** criterion was a requirement that the studies examine the contribution that policy transfer made to the most significant examples of statutory injury compensation in Australia. 'Most significant' in this context meant schemes that had existed or been countenanced in all States and Territories, and that involved the most detailed legislative interventions in terms of length and number. They were assessed to be

[157] Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) 19.
[158] Ibid 21.
[159] W Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Pearson, 7th ed, 2011) 241.
[160] Inge Bleijenbergh, 'Case Selection' in Albert J Mills, Gabrielle Durepos and Elden Wiebe (eds), *Encyclopaedia of Case Study Research Volume 1* (SAGE Publications, 2010) 61,61.
[161] Uwe Flick, *An Introduction to Qualitative Research* (Sage, 1998) 41.
[162] Robert K Yin, *Case Study Research: Design and Methods* (SAGE Publications, 5th ed, 2014) 201-6.
[163] For a case study to be 'significant', it must be 'unusual', 'of general public interest' and involve 'underlying issues' that were 'nationally important in theoretical terms or in policy or practical terms': Ibid 201.
[164] A case study is 'complete' if its boundaries, such as time and geographic limits, are explicit. Ibid 203.

workers' compensation; statutory criminal injuries compensation and legislation modifying compensation for personal injury or death from motor accident.

Some notable examples of statutory injury compensation did not satisfy this 'most significant' criterion. The research did not examine the contribution that policy transfer made to State and federal legislation capping aircraft carriers' liability in the event of an air accident for example.[165] Also, the research did not examine legislation modifying damages for personal injury or death from medical negligence. Further, the *Social Security Act* 1991 (Cth) has been acknowledged as the 'most comprehensive scheme for providing a bare minimum of financial support' for injured Australians.[166] However, it was not examined. As section 1.1 noted, the definition of statutory injury compensation focuses upon compensation for victims of accident. Social security support assists individuals that have acquired injury or disability from natural causes in addition to assisting accident victims so it was not analysed.

The **second** key criterion that informed case study design was a requirement that the studies incorporate a 'negative case' (or example of non-transfer of statutory injury compensation characteristics). Within the boundary set by the 'most significant' criterion, the examination of no-fault motor accident compensation was an obvious choice for this purpose. As section 1.1 outlined, only some governments have introduced no-fault motor accident compensation for most motor accident victims and then victims' rights to also recover court-ordered damages differ. One of the case studies examines the reason(s) why, in the period from 1975 to 1989, only some governments enacted no-fault motor accident compensation when at different stages in the period it seemed that all governments would legislate.

The **third** key criterion that informed case study design was another that dictated characteristics of a single case study. For most forms of statutory injury compensation, there has been limited literature on the contribution that policy transfer made. However, as Chapter 1 noted, some authors have asserted in passing that policy transfer made a major

[165] See *Civil Aviation (Carriers' Liability) Act 1959* (Cth); *Civil Aviation (Carriers' Liability) Act 1967* (NSW); *Civil Aviation (Carriers' Liability) Act 1964* (Qld); *Civil Aviation (Carriers' Liability) Act 1962* (SA); *Civil Aviation (Carriers' Liability) Act 1963* (Tas); *Civil Aviation (Carriers' Liability) Act 1961* (Vic)*; Civil Aviation (Carriers' Liability) Act 1961* (WA).

[166] R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 405.

contribution to initial workers' compensation legislation.[167] The third criterion, therefore, was a requirement to test the accuracy of these assertions. The case study on workers' compensation focused its attention on the contribution that policy transfer made to legislation enacted around the turn of twentieth century specifically. The period begins from 1882, which is the year that the first example of colonial employers' liability legislation was made. The period ends with the enactment of the *Workers' Compensation Act 1926* (NSW).

The remaining two case studies examined the contribution that policy transfer made to statutory criminal injuries compensation and legislative attempts to moderate damages for personal injury or death from motor accident (labelled 'fault-based motor accident compensation'). Their research periods were from the first example of legislation for each study until the research end date 30 June 2014. This followed criticism that past studies had failed to consider the implications of policy transfer over time.[168] The case studies examined policy transfer during three phases of policy transfer that Carroll identified as Table 3.1 outlines.

Table 3.1 'Cases' and the Carroll phases

	Phase 1 (1788 – 1850)	Phase 2 (1851 – 1901)	Phase 3 (1902 – 1945)	Phase 4 (1946 – 2012)
Case 1: workers' compensation				
Case 2: fault-based motor accident compensation				
Case 3: criminal compensation				
Case 4: 'no-fault' compensation				

[Source: Original]

[167] See Mendelsohn, above n 17, 218; Purse, above n 18, 9.

[168] Mauricio I Dussauge-Laguna, 'The Neglected Dimension: Bringing Time Back into Cross-National Policy Transfer Studies' (2012) 33 *Policy Studies* 567, 578. See also Dolowitz and Marsh, 'Learning from Abroad', above n 41, 16.

Final case study characteristics are the following:

- **Case study 1** examines the contribution that policy transfer made to colonial employers' liability legislation and State and federal workers' compensation legislation enacted from 1882 to 1926. The research period commencement coincides with the year that the first example of colonial employers' liability legislation was enacted and ends in 1926 when the NSW Lang government enacted the *Workers' Compensation Act 1926* (NSW).
- **Case study 2** examines the contribution that policy transfer made to statutory criminal injuries compensation enacted in all States and Territories from 1967 to 30 June 2014. The commencement year is the year that the first criminal injuries compensation statute, the *Criminal Injuries Compensation Act 1967* (NSW), was made.
- **Case study 3** examines the contribution that policy transfer made to State and Territory legislative attempts to moderate damages for personal injury or death from motor accident in Australia. The research period begins in 1935, which was the year that the first provision banning trial by jury in motor accident claims was made. The research period ends on 30 June 2014.
- **Case study 4** examines the contribution that policy transfer and non-transfer made to State and Territory deliberations about no-fault motor accident compensation between 1973 and 1989. Specifically, the study examines the circumstances that led the governments in Victoria, Tasmania and the NT to enact no-fault motor accident compensation and the factors that discouraged other governments from transferring this notion. The research period end year is 1989 which represented a final opportunity to implement a 1984 NSW recommendation to introduce no-fault motor accident compensation.

3.3 Data collection

The data for this research was compiled from documentary evidence taken from both primary and secondary sources. This data was seen as both suitable and necessary to address the research question and its collection was informed by three key principles. First, the scope of documents examined was broad. Common has written that 'detailed content

analysis of various types of documentation' is necessary to 'detect' policy transfer.[169] Similarly, Evans and Davies wrote that researchers should 'look for a preponderance of evidence' of transfer.[170] Second, original and transferred injury compensation characteristics were compared where possible. This followed Evans' insistence that '[d]etailed comparison of the subject policy against both domestic and original settings' is 'essential' to support the extent of transfer.[171] Third, deliberate steps were taken to understand the context to transfer from sources such as parliamentary debates, historical accounts and other contextual information. Neuman has written that historical comparative analysis requires researchers to become 'immersed in and absorbing details about a context'.[172] Subsections 3.3.1 – 3.3.5 explain the forms of documentary evidence that this research examined specifically.

3.3.1 Legislation

Legislative provisions were a primary source of documentary evidence that this research examined. Typically, the examined provisions were of domestic origin, being made by State, Territory or federal parliaments. However, where other documentary evidence suggested that domestic content was transferred from international legislation, the foreign legislation was also analysed.

3.3.2 Explanatory materials and parliamentary debates

Explanatory memoranda (or explanatory statements in some jurisdictions and for some types of legislation) and parliamentary debates were another important source of documentary evidence. Explanatory memoranda are documents that governments prepare to accompany legislation through parliament. The documents are intended to explain legislation content while parliamentary debates contain speeches on the draft legislation. An obvious risk of relying upon government speeches in parliament and explanatory memoranda is that they may aggrandise or exaggerate legislation effects.[173] Macdonald recommends that it 'is sound practice to check things from more than one angle' in

[169] Richard Common, *Public Management and Policy Transfer in Southeast Asia* (Aldgate Publishing, 2001) 31.
[170] Evans and Davies, above n 96, 382.
[171] Mark Evans, 'Parting Shots' (2009) 30 *Policy Studies* 397, 399.
[172] Neuman, above n 159, 472.
[173] See discussion of this risk in Common, above n 169, 39.

documentary research.[174] As such, in addition to analysing government speeches, the analysis also collected data from speeches of political opponents and minor party members. Legislation may also have been introduced and debated over several parliaments so it was important to trace the parliamentary progress of legislation and speeches on earlier versions and amendments.

3.3.3 Other government documents

The research examined documentary evidence from government documents besides legislation and explanatory memoranda. This followed Dolowitz sentiment that 'official government statements provide the most direct evidence that [policy] transfer has occurred'.[175] Examples of the other publications examined were annual reports of government agencies that dealt with statutory injury compensation, government media releases, speeches, consultation documents and budget papers. Additionally, the research examined archival State and Territory Cabinet information although access was very restricted and sometimes involved considerable lag times.

3.3.4 Media reports

Newspaper articles were a further source of documentary evidence. Articles provided insights into the public policy agenda and debate surrounding legislation. Also, the media could be influential at facilitating or discouraging policy transfer by shaping public perceptions of a reform proposal through newspaper editorials and reports. Dolowitz has commented that mass media is 'one of the most common' ways through which transfer agents learn about policies or programs in other jurisdictions.[176] The media examined were all national, State, Territory and local newspapers accessible from the National Library of Australia 'Trove' website. Where necessary, the study also accessed microfiche records of newspaper articles that were not available on Trove and articles from electronic databases such as 'Factiva', particularly for more recent content.

3.3.5 Biographical information and other secondary sources

The final sources of documentary evidence that this research examined were autobiographies, biographies, secondary historical texts, journal articles and books.

[174] Keith MacDonald, 'Using Documents' in Nigel Gilbert (ed), *Researching Social Life* (SAGE, 3rd ed, 2008) 285, 299.
[175] Dolowitz, 'Policy Transfer: A New Framework of Policy Analysis', above n 118, 32.
[176] Ibid 29.

Biographical information typically concerned individuals that were involved in the preparation and passage of statutory injury compensation such as the responsible Ministers, former Premiers, Prime Ministers and senior staff from key interest groups. The *Australian Dictionary of Biography* was a frequently accessed resource. The research examined publications by notable interest groups, such as their annual reports or submissions and accounts of bodies' history. The research also examined secondary accounts of Australian history, the history of particular State jurisdictions and governments, a period in time or an organisation. This data provided useful information about any structural conditions that may have influenced policy transfer.

3.4 Analysis

The documentary evidence was analysed via a qualitative approach. The analysis first singled out legislation that modified the form and/ or eligibility conditions for statutory injury compensation in the research periods of each case study. The analysis investigated the contribution that policy transfer made to this legislation, beginning with the explanatory memoranda (where available). The analysis then examined the content of parliamentary debate on the legislation, proceeding on the basis that government speeches provided the 'orthodox' explanation while non-government speeches provided an alternate, often critical perspective. Further insights were gleaned from government media releases, speeches, reports, budget papers and consultation documents. Materials' relevance was often identified from parliamentary debates or explanatory memoranda. The analysis also examined wider, potentially critical, documentary sources such as newspaper articles, industry submissions and academic publications. These broader sources could, in turn, direct attention to other, aforementioned materials.

There were four objectives that guided the documentary analysis particularly. First, the analysis observed tests to identify policy transfer that Smith has summarised. Those tests are:

- the need to show similarities between policy in the importing country/ jurisdiction and policies overseas/ in other jurisdictions;
- the need for analysis to identify the agent(s) who transferred knowledge about policies and made policy makers aware of them; and

- the need for the analysis to prove that knowledge about policy transfer opportunities has been utilised by policy makers during policy development.[177]

Second, the analysis focused upon identifying the 'whys' of transfer, going to the first question of the Dolowitz and Marsh research framework and reflecting sentiment of authors such as Benson and Jordan[178] and Stone.[179] Third, the analysis accepted sentiment of authors such as Common and Benson and Jordan that the 'structured context within which [transfer] takes place' should be examined.[180] Thus, secondary historical accounts, and contextual information such as biographies, were examined especially. Fourth, and particularly in the no-fault motor accident compensation case study as would be expected, the analysis examined explanations for any 'non-transfer' identified. Evans felt that this was an important aspect to demonstrating policy transfer.[181]

3.5 Limitations

There were two key limitations of the research approach. First, the decision to rely upon the case study method imposed a limitation. As section 3.2 acknowledged, a comprehensive appraisal of the contribution that policy transfer made would involve a detailed assessment of the origins for every example of statutory injury compensation but this was not feasible. As such, the research necessarily limited its analysis to four case studies, which made the study tractable. Second, the decision to rely upon documentary analysis involved a potential limitation. Expanding the project to include documentary evidence and other research techniques such as actor interviews could have provided more detailed explanations of the contribution that policy transfer made. However, as section 3.1 noted, the case study research periods meant that accessing individuals with first-hand knowledge was not always feasible. The research deliberately analysed documentary evidence from multiple sources to obtain different perspectives on the contribution that policy transfer made. Personalised insights were also drawn from biographical information. It is felt that the approach to data

[177] Adrian Smith, 'Policy Transfer in the Development of UK Climate Policy' (2004) 32 *Policy & Politics* 79, 81. On the importance of identifying the agent(s) of transfer and the role they played, see Evans and Davies, above n 96, 369.
[178] Benson and Jordan, above n 122, 374.
[179] Stone, 'Transfer and Translation of Policy', above n 36, 489.
[180] Common, above n 169, 89; Benson and Jordan, above n 122, 374.
[181] Evans, 'Parting Shots', above n 171, 399.

collection and examination of different documentary sources addressed any limitation that relying upon documentary analysis presented.

3.6 Conclusion

Of the various research approaches available for this study, the case study method was considered the most reliable and practical to address the research question. This chapter discussed the merits of the case study approach and explained the criteria that were relied upon to select the four case studies examined. The criteria included a requirement that studies examine the most significant examples of statutory injury compensation; a criterion to incorporate a 'negative case' and a criterion to test past assertions about policy transfer and early workers' compensation legislation. The research relied upon documentary analysis with data drawn from sources such as legislation, explanatory memoranda, parliamentary debates, government documents, media articles and secondary texts. Analysis of the documents collected had regard to recommendations from past authors who suggested factors that transfer researchers should examine in particular. The reliance upon the case study approach and documentary analysis was acknowledged to involve limitations, but these were not assessed to be significant.

CHAPTER 4
EMPLOYERS' LIABILITY AND WORKERS' COMPENSATION (1882 – 1926)

4.1 Introduction

This chapter examines the results of the first case study undertaken for the purposes of this research. Its primary focus, consistent with the research question, is revealing the contribution that policy transfer made to colonial employers' liability legislation and early workers' compensation legislation enacted from 1882 to 1926. In particular, the chapter asks why policy transfer occurred, what was the degree of transfer; what the sources of transfer were; what actors were involved and what factors restricted or facilitated transfer. The chapter assesses whether there was evidence for assertions that early Australian workers' compensation legislation 'copied' British legislation[182] and/or was 'based' upon British legislation.[183] Also, the chapter tests the claims about statutory transfer in Australia that Carroll made. As section 1.2 explained, Carroll contends that from around 1850 to 1900, there was 'a continuing, but declining, and more selective rate of statutory transfer' from the UK to Australia.[184] From 1900 until World War II, Carroll contends that transfer from the UK continued but was even further in decline.[185]

The chapter discovers, consistent with the Carroll assertion, that colonial employers' liability legislation and initial workers' compensation legislation characteristics were indeed sourced overwhelmingly from the UK. However, transfer was not necessarily from final British legislation or UK legislation alone. Transfer from the UK diminished following passage of the first workers' compensation statutes and was replaced by interstate transfer. Political ideology was integral to deciding what lessons transferred. The chapter is divided into six sections plus this introduction and the conclusion. The six section headings are titles of four UK statutes, the *Workers' Compensation Act 1916* (Qld) and a section titled 'Workmen's Compensation Conventions'. The sections examine transfer from the statute in the title and the section titled 'Workmen's Compensation Conventions' examines transfer from International Labour Organization (ILO) Conventions.

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[182] See, eg, Mendelsohn, above n 17, 218. See also P S Atiyah, 'Compensating the Accident Victim' (1971) 43(2) *Australian Quarterly* 16, 19.
[183] Purse, above n 18, 9.
[184] Carroll, above n 56, 660-1.
[185] Ibid 662.

4.2 *Employers' Liability Act 1880* (UK)

4.2.1 Legislation overview

The *Employers' Liability Act 1880*, 43 & 44 Vict, c 42 ('*Employers' Liability Act 1880* (UK)') was made in response to legal deficiencies that injured British workers faced attempting to recover compensation in the nineteenth century. A British employee first proceeded against their employer for injuries negligently caused at work in 1837[186] but cases were few and their prospects were limited.[187] Litigation was costly, wages were low and employees risked recrimination if they proceeded against their employer.[188] Employers were also protected from claims by three legal defences. They were: (1) proof that an employee's actions contributed to their injury (defence of contributory negligence); (2) proof that the employee was injured by a known risk or hazard of their employment (defence of voluntary assumption or risk or *volenti non fit injuria*); and (3) the defence of 'common employment'.

The defence of common employment, which the decision in *Hutchinson v York, Newcastle and Berwick Railway Co*[189] affirmed, especially frustrated employee claims. The defence relieved employers from having to pay damages if their employee's injury was caused by another employee (someone in 'common employment' with them). Throughout the 1860s and 1870s, there were attempts to limit or abolish employer defences, including the defence of common employment, but they failed.[190] However, in 1877, a UK parliamentary select committee recommended that employers should be liable for employee injuries if the employer could have personally discharged oversight of the employee or if the employer had deliberately abdicated their personal responsibilities.[191] This foreshadowed the *Employers' Liability Act 1880* (UK) which modified the defence of common employment.

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[186] *Priestley v Fowler* (1837) 3 M & W 1. See discussion at P W J Bartrip and S B Burman, *The Wounded Soldiers of Industry: Industrial Compensation Policy 1833-1897* (Clarendon Press, 1983) 103-4.
[187] See discussion P W Bartrip, *Workmen's Compensation in Twentieth Century Britain* (Gower, 1987) 3.
[188] Bartrip and Burman, above n 186, 25-8.
[189] (1850) 5 Ex 343.
[190] See discussion Bartrip, above n 187, 8.
[191] United Kingdom Parliament, House of Commons, *Report from the Select Committee on Employers' Liability for Injuries to their Servants, 1877*, Report No 285 (25 June 1877) xiii.

4.2.2 Copying

All Colonies transferred *Employers' Liability Act 1880* (UK) characteristics after colonial media described British deliberations[192] and some even expressed support for the statute objects. *The Brisbane Courier* and *The Sydney Morning Herald*, for example, reported that the House of Lords' refusals to pass an Employers' Liability Bill 'offended … the working man'.[193] This support and coverage of British union deliberations[194] piqued local union interest. Indeed, trade unions became a vocal transfer agent for employers' liability legislation characteristics at a time when their political influence increased with the widening of the franchise. Within a few years, the Australian Labor party would form and its representatives entered parliament. Demonstrating unions' attitude, the chairperson of an 1884 meeting of the SA Trades and Labour Council stated that the *Employers' Liability Act 1880* (UK) had 'proved a great success' and there was an 'undoubted need' for its transfer to SA.[195] Thus, in addition to altruistic considerations, political motivations also explained transfer.

Colonies copied almost every aspect of the *Employers' Liability Act 1880* (UK) when they transferred its characteristics.[196] As a result, employees in the same categories of 'manual labour' as the British statute had the same legal remedies against their employer as someone that was not an employee if they were injured in circumstances copied from the British legislation.[197] Governments also copied qualifications upon this right. For example,

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[192] See, eg, 'General Summary', *The Sydney Morning Herald* (Sydney), 19 July 1876, 7; 'Parliamentary', *Supplement, South Australian Register* (Adelaide), 19 July 1876, S 1; 'General Summary', *The Argus* (Melbourne), 19 July 1876, 7; Employers' Liability Bill' *Brisbane Courier,* 20 August 1880, 2; 'Employers' Liability Bill', *The Mercury* (Hobart), 20 August 1880, 2; 'Employers' Liability Bill', *The Sydney Morning Herald* (Sydney), 20 August 1880, 5; 'Bills Before the House of Lords', *The Brisbane Courier* (Brisbane), 6 September 1880, 2; 'The New Employers' Liability Act in Operation', *The Maitland Mercury* (Maitland), 17 February 1881, 6.

[193] 'Threatened Political Crisis', *The Brisbane Courier* (Brisbane), 3 September 1880, 2; 'The Action of the House of Lords', *The Sydney Morning Herald* (Sydney), 3 September 1880, 5.

[194] See, eg, 'The Trades Union Congress in Bristol', *The South Australian Register* (Adelaide), 28 November 1878, 6.

[195] 'The Trades and Labor Council', *The South Australian Advertiser* (Adelaide), 21 July 1884, 7.

[196] *Employers' Liability Act 1882* (NSW); *Employers' Liability Act 1886* (NSW); *Employers' Liability Act 1886* (Qld); *Employers' Liability Act 1884* (SA); *Employers' Liability Act 1895* (Tas); .*Employers' Liability Act* 1886 (Vic); *Employers and Employés Act* 1890 (Vic); *Employers' Liability Act 1894* (WA).

[197] *Workmen's Compensation Act 1897*, 60 & 61 Vict, c 37, s 1. Those circumstances were generally personal injury due to any 'defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer'; 'negligence' of any person entrusted with 'superintendence', in the course of that superintendence; 'negligence of any person in the service of the employer to whose orders or directions the workman at the time of injury was bound to conform, and did conform, where such injury resulted from him having so conformed'; an 'act or omission of any person in the service of the employer, done or made in obedience to the rules or bylaws of the employer, or in obedience to particular instructions given by any

the ‘defect’ in the ways, works, machinery or plant that entitled employees to proceed against their employer had to have been undiscovered and/or not remedied by the employer due to their negligence or the negligence of someone that the employer had entrusted to keep the ways, works, machinery or plant in ‘proper condition’.[198]

Governments’ copying accorded with the Carroll contention that ‘much [colonial] legislation continued to be based on that transferred from England’.[199] Clearly, the fact that colonial legislative bodies were subordinate to the British Parliament, with their laws liable to be overruled by that Parliament as Tasmanian Attorney General Andrew Inglis Clark noted in 1891, provided some explanation for the copying.[200] However, this was not a situation of ‘coercive transfer’ from the Imperial Parliament as that term is understood by Dolowitz and Marsh. As Bennet and Forbes explain, the ‘Colonial Office sympathised with local legislative experiments and actively discouraged servile conformity’.[201] Rather, colonial governments copied British policy due to a mix of voluntary, coercive and indirectly coercive considerations. Hudson and Sharp suggest that colonial governments’ belief in the ‘superiority’ of British institutions and culture was important.[202] Possibly this belief reflected the fact that 34 per cent of the colonial population in 1880 had been born in the UK.[203] Further, Meaney contends that the ‘cultural baggage’ that many British settlers brought with them ‘grew in Australian esteem and affection’ so that individuals born in Australia ‘took inordinate pride in being of British stock’.[204] Economic dependence between the

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person delegated with the authority of the employer in that behalf’; or ‘negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive engine or train upon a rail or tramway’: *Employers' Liability Act 1882* (NSW) s 1; *Employers' Liability Act 1886* (NSW) s 1; *Employers’ Liability Act 1886* (Qld) s 4; *Employers' Liability Act 1884* (SA) s 3; *Employers' Liability Act 1895* (Tas) s 3; *Employers’ Liability Act 1886* (Vic) s 3; *Employers and Employés Act 1890* (Vic) s 38; *Employers' Liability Act 1894* (WA) s 1.

[198] *Employers' Liability Act 1880*, 43 & 44 Vict, c 42, s 2; *Employers' Liability Act 1882* (NSW) s 4(1); *Employers’ Liability Act 1886* (NSW) s 2(I); *Employers’ Liability Act 1886* (Qld) s 5(1); *Employers' Liability Act 1884* (SA) s 2(I); *Employers' Liability Act 1895* (Tas) s 4(I); *.Employers’ Liability Act* 1886 (Vic) s 4(1); *Employers and Employés Act* 1890 (Vic) s 39(1); *Employers' Liability Act 1894* (WA) s 4(1).

[199] Carroll, above n 56, 661.

[200] W J Hudson and M P Sharp, *Australian Independence: Colony to Reluctant Kingdom* (Melbourne University Press, 1988) 14.

[201] Bennett and Forbes, above n 53, 173.

[202] See discussion in Peter Karsten, *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora - The United States, Canada, Australia, and New Zealand, 1600 - 1900* (Cambridge University Press, 2002) 507; Bennett and Forbes, above n 53, 173.

[203] R A Gollan, 'Nationalism, the Labour Movement and the Commonwealth' in Gordon Greenwood (ed), *Australia: A Social and Political History* (Angus & Robertson, 1955) 145, 145.

[204] Neville Meaney, *The Search for Security in the Pacific, 1901 – 14* (Sydney University Press, 1976) 3-4. For an illustration, see the discussion of Tasmanians’ particular brand of ‘Britishness’ in Peter Boyce, 'Britishness' in

Colonies and the UK was also important and there was a belief that copying British legislation limited legal challenges. Writing in respect of Victorian policy for example, Moore explained that 'the guidance of English decisions and English textbooks' afforded greater 'certainty'[205] whereas '[d]ivergence would mean uncertainty … [and] … costly litigation' before the law settled.[206]

4.2.3 Restricted transfer

Conservative parliamentarians from State upper houses could be pivotal to government decisions to copy British legislation as parliamentary responses to a ban upon 'contracting-out' demonstrated. This thesis contends that parliamentarians' actions in this respect were an example of 'coercive transfer' as governments were forced to make, or more commonly not make, amendments against their will. In their articles of 1996 and 2000, Dolowitz and Marsh used 'coercive transfer' in the context of forced transfer by external actors only but this research widens its remit. 'Contracting out' described a practice that emerged following passage of the *Employers Liability Act 1880* (UK). It involved employees providing a written undertaking not to pursue (or 'contract out') of their rights under the statute. In return, their employer typically agreed to contribute to or make a larger contribution to an accident relief fund that had been established to compensate injured employees.[207] Contracting out attracted strident criticism from British trade unions, possibly because employee/ employer co-operation threatened their position and jeopardised employers' liability claims that, according to Bartrip and Burman, 'could be a powerful recruiting device'.[208] When *Griffiths v Earl of Dudley*[209] upheld the legitimacy of contracting out, unions and the British Liberal opposition unsuccessfully sought to legislate a ban. Acting in response to altruistic considerations and union lobbying, colonial governments also sought a ban. However, only the governments in SA, Queensland and WA succeeded in the face of strong conservative opposition.

Alison Alexander (ed), *The Companion to Tasmanian History* (Centre for Tasmanian Historical Studies, 2005) 402.

[205] Sir W Harrison Moore, 'A Century of Victorian Law' (1934) 16 *Journal of Comparative Legislation and International Law* 175, 182.

[206] Ibid 183.

[207] See discussion of accident and relief funds, including those that existed before the *Employers' Liability Act 1880* (UK), in Bartrip and Burman, above n 186, 159-60.

[208] Bartrip and Burman, above n 186, 162-3.

[209] (1882) 9 QBD 357.

Conservative parliamentarians' opposition to contracting out was grounded in anxiety about the implications for employers of departing from British legislation. NSW parliamentary debate provides an example. Inspired by British policy, the Parkes government in NSW had attempted to include three novel provisions in the Employers' Liability Bill 1882 (NSW). They were a contracting out ban; inclusion of domestic servants among eligible employees and permission for employees to recover compensation if they notified their injury within 12 weeks rather than the British six weeks. However, all three aspects were omitted. Typifying a majority of Legislative Council members' responses, Edward (later Sir Edward) Knox declared that if the NSW Bill 'were a transcript of [the *Employers' Liability Act 1880* (UK)], I should have no fault to find with it'.[210] Similarly, John Frazer felt that it was 'advisable to follow the course adopted by the English legislature'.[211] There were like sentiments in Victoria where a resigned Attorney General declared in 1886 that the Gillies government was left with little alternative but to introduce a 'transcript of the English Act' after Legislative Council opposition.[212]

The colonial SA government succeeded in banning contracting out with the co-operation of some high profile parliamentarians that accepted its altruistic benefits. Future Premier Charles Kingston emphasised that contracting out 'had been found to be a defect of some magnitude' in the UK[213] and there was sufficient support from parliamentarians that had promoted social welfare causes to pass the legislation. Legislative Council member Allan Campbell, who voted for a ban, was a medical practitioner that had 'tended to the poor at the Adelaide Homeopathic Medical Charity', devised a 'home working scheme for … one of Adelaide's poorest suburbs' and 'worked unsparingly on improvements to South Australia's health laws' for example.[214] Former Adelaide Mayor William Buik also voted for the ban and

[210] New South Wales, *Parliamentary Debates,* Legislative Council, 27 September 1882, 588 (Edward (later Sir Edward) Knox). For examples of Legislative Council sentiment critical of copying from British legislation see New South Wales, *Parliamentary Debates,* Legislative Council, 4 October 1882, 712 (Leopold De Salis); 809 (Alexander Campbell).
[211] New South Wales, *Parliamentary Debates,* Legislative Council, 4 October 1882, 712 (John Frazer).
[212] Victoria, *Parliamentary Debates,* Legislative Assembly, 24 November 1886, 2480 (Henry Wrixon).
[213] South Australia, *Parliamentary Debates,* House of Assembly, 26 August 1884, 746 (Charles Kingston).
[214] Suzanne Edgar, 'Allan Campbell' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography: Volume 7: 1891 - 1939* (Melbourne University Press, 1966—) 542, 542.

stated that he believed that the Employers' Liability Bill 1884 (SA) 'fairly met the requirements of the working class'.[215]

Parliamentarian intervention was also critical to the contracting out ban in the *Employers' Liability Act 1886* (Qld).[216] The *Employers' Liability Act 1886* (Qld) was described as 'creation' of the Premier Sir Samuel Griffith[217] who acknowledged that it had been 'framed on the basis' of the British legislation but included 'some changes … for the purpose of removing doubts'.[218] Those changes benefited both employers and employees. Griffith explained that a contracting out ban was necessary because if legislation is 'good law it ought to be the law of the land and an employer ought not to be in a position to get his workmen to contract themselves out of it'.[219] Typifying conservative parliamentarians' opposition, William Box and William Forrest branded the ban as 'most un-English' and an imposition upon employers' freedom to contract.[220] However, it passed. In part, this was because some Legislative Council members mistakenly believed that employers were already unable to contract out.[221]

Like SA and Queensland, WA also traced its contracting out ban[222] to parliamentarian personality and conservative parliamentarians' opportunity to observe the implications of a ban in other Colonies. Walter (later Sir Walter) James and George Leake were key transfer agents. James had spent six months as a barrister in London in 1888 and, according to Hunt, this exposure to 'urban squalor … confirmed a commitment to the underdog'.[223] James was 'active in reform groups and co-operated with trade union leaders'.[224] This was significant as WA union leaders had committed to employers' liability legislation at a meeting to establish a WA Trades and Labor Council on 9 December 1892. James insisted that the

[215] South Australia, *Parliamentary Debates,* Legislative Council, 12 November 1884, 1671 (William Buik).
[216] *Employers' Liability Act 1886* (Qld) s 12.
[217] Charles Arrowsmith Bernays, *Queensland Politics During Sixty (1859 - 1919) Years* (Government Printer, 1919) 107.
[218] Queensland, *Parliamentary Debates,* Legislative Assembly, 10 August 1886, 293 (Sir Samuel Griffith).
[219] Ibid.
[220] Queensland, *Parliamentary Debates,* Legislative Council, 6 October 1886, 167 (William Forrest), (William Box).
[221] See, eg, Queensland, *Parliamentary Debates,* Legislative Council, 6 October 1886, 167 (George King); 167 (Augustus (later Sir Augustus) Gregory); 167 (Andrew Thynne); 168 (Patrick Macpherson).
[222] *Employers' Liability Act 1894* (WA) s 14.
[223] Lyall Hunt, 'Sir Walter Hartwell James' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography: Volume 9: 1891 - 1939* (Melbourne University Press, 1966—) 466, 467.
[224] Ibid.

Employers' Liability Bill 1894 (WA) should incorporate 'the most recent decisions of the English courts'[225] and proposed transfer of a contracting out ban from the *Employers' Liability Act Amendment Act 1891* (NZ).[226] The conservative Forrest government and conservative parliamentarians in the Legislative Council blocked many James amendments but accepted a ban. Essentially this was on altruistic grounds although the emergent political influence of unions was relevant. From the 1880s, unions had been 'endorsing, financing and mobilising electoral support' for parliamentary candidates in WA.[227] Premier Forrest explained that permitting parties to contract out would leave a 'loophole' and '[t]hey all knew that in many cases, for various reasons, advantage was taken of workmen' by contracting out.[228]

The passage of time and progressive parliamentarians' opinions facilitated transfer of further disparity from the *Employers' Liability Act 1880* (UK) when some colonial governments extended its protections to seamen. British unions had agitated to have seamen included among the manual workers that the *Employers' Liability Act 1880* (UK) protected and, as with earlier experience, local unions echoed their demands. Seamen's protection was an aspect of the NSW Labor Platform on employers' liability legislation in 1891[229] and also featured in the Progressive Political League of Victoria Platform of the same year.[230] Conservative parliamentarians maintained reservations but progressive parliamentarians in SA facilitated the *Employers' Liability Act 1884* (SA) being extended to seamen[231] and the *Employers' Liability Act 1886* (Qld) was also extended to seamen. However, this was not before a failed attempt in the Employers' Liability 1886 Bill (Qld)[232] and conservative parliamentarians receiving an opportunity to assess inter-colonial implications. A former opponent acknowledged that 'experience … had robbed [the

[225] Western Australia, *Parliamentary Debates,* Legislative Assembly, 2 August 1894, 116 (Walter (later Sir Walter) James).
[226] *Employers' Liability Act Amendment Act 1891* (NZ) s 9.
[227] Andrew Wells, *Constructing Capitalism: An Economic History of Eastern Australia, 1788 - 1901* (Allen & Unwin, 1989) 158.
[228] Western Australia, *Parliamentary Debates,* Legislative Assembly, 15 August 1894, 241 (Sir John (later Baron John) Forrest).
[229] See William Guthrie Spence, *Australia's Awakening: Thirty Years in the Life of an Australian Agitator* (The Worker Trustees, 1909) 383.
[230] Ibid 395.
[231] *Employers' Liability Amendment Act 1889* (SA) s 2.
[232] Queensland, *Parliamentary Debates,* Legislative Assembly, 19 August 1886, 431 (Sir Samuel Griffith).

Employers' Liability Act 1886 (Qld)] of many of its terrors' for example.[233] Unions[234] and media[235] also lobbied for reform.

4.3 *Workmen's Compensation Act 1897* (UK)

4.3.1 Legislation overview

The *Workmen's Compensation Act 1897,* 60 & 61 Vict, c 37 ('*Workmen's Compensation Act 1897* (UK)') was made in the final years before the turn of the century. The statute was the outcome of policy transfer itself after the conservative UK Salisbury government drew inspiration from social insurance reforms that the Bismarck government enacted.[236] The legislation emerged following an ongoing political stalemate about contracting out[237] and dissatisfaction with the complex eligibility criteria, delays and costly legal proceedings to receive protections under the *Employers' Liability Act 1880* (UK).[238] Fraser implies that the statute was also part of a political strategy of the Salisbury government to use 'social policy as a means of undermining and heading off socialism itself'.[239] The *Workmen's Compensation Act 1897* (UK) prescribed amounts of compensation that employers had to pay if an employee suffered 'personal injury by accident arising out of and in the course of' their employment.[240] An injury had to disable an injured employee for at least two weeks to be compensable[241] and not be attributable to serious and wilful misconduct.[242] The definition of 'workman' eligible for compensation was limited to employees in particular manual professions such as those involved in employment on, in or about a railway, factory,

[233] Queensland, *Parliamentary Debates,* Legislative Council, 17 October 1888, 81 (Edward Forrest). See also Queensland, *Parliamentary Debates,* Legislative Council, 17 October 1888, 80 (William Box).
[234] See 'Trades and Labour Council', *The Brisbane Courier* (Brisbane), 29 June 1887, 6; Sir S W Griffith, 'Seamen and the Employers Liability Act', *The Brisbane Courier* (Brisbane), 27 September 1887, 3.
[235] Editorial, *The Brisbane Courier* (Brisbane), 19 July 1888, 4.
[236] For a brief discussion see Lynn Abrams, *Bismarck and the German Empire, 1871 – 1918* (Routledge, 1995) 32-3.
[237] See discussion in Bartrip, above n 187, 8-9.
[238] David G Hanes, *The First British Workmen's Compensation Act 1897* (Yale University Press, 1968) 24.
[239] See Derek Fraser, *The Evolution of the British Welfare State: A History of Social Policy Since the Industrial Revolution* (Palgrave Macmillan, 4th ed, 2009) 167.
[240] *Workmen's Compensation Act 1897*, 60 & 61 Vict, c 37, s 1(1).
[241] Ibid s 2(a).
[242] Ibid s 2(c).

mine, quarry or engineering work.[243] Further, employees could not recover workers' compensation and court-ordered damages for the same injury.[244]

4.3.2 Emulation and inspiration

The *Workmen's Compensation Act 1897* (UK) was a new source of transfer for Colonial and State governments and its content informed local reform. The *Dangerous Buildings Removal Act 1897* (Vic) provided for the removal of a fire-damaged, eight-storey building in central Melbourne and included *Workmen's Compensation Act 1897* (UK) aspects. The British Bill circulated among Victorian parliamentarians and, together with their natural interest in working conditions; this facilitated a Labor proposal to transfer *Workmen's Compensation Act 1897* (UK) provisions. Billy Trenwith explained that there 'was the possibility – it might even be said the probability – of some serious disablement or perhaps death' from the work.[245] The *Dangerous Buildings Removal Act 1897* (Vic) copied British characteristics. Subject to some exceptions, this meant that workmen employed in or about the repair, alteration or pulling down of the building became eligible for weekly compensation for up to three years or, if they had died, their dependents became eligible for three years' wages and reasonable medial or burial expenses were reimbursed if there were no dependents.[246] Parliamentary acceptance of the provision was likely facilitated by the small number of workers affected and the fact that their duties were not expected to last for longer than a few weeks or months.[247]

4.3.3 Coercive transfer

The first government to enact a formal workers' compensation statute was the Kingston government in SA. The Kingston government had introduced a Workmen's Compensation Bill into the Colonial Parliament only months after the *Workmen's Compensation Act 1897* (UK) commenced. However, it and a further 1899 Bill failed. The fact that Premier Kingston attended parliamentary debate upon the British legislation[248] facilitated this early appetite

[243] Ibid s 7.
[244] Ibid s 6.
[245] Victoria, *Parliamentary Debates,* Legislative Assembly, 30 November 1897, 354 (Billy Trenwith).
[246] *Dangerous Buildings Removal Act 1897* (Vic) s 9.
[247] See parliamentarian discussion of Bill contents at Victoria, *Parliamentary Debates,* Legislative Assembly, 30 November 1897, 363 (John Hancock); Legislative Council, 1 December 1897, 179, (James Bill); 381 (William Embling).
[248] 'Workmen's Compensation Bill: Explanation and Criticisms', *The South Australian Register* (Adelaide), 16 November 1898, 9.

to legislate. However, despite acknowledging that his government could 'disarm [parliamentary] opposition by adhering closely' to the British legislation,[249] Kingston was not content to copy the *Workmen's Compensation Act 1897* (UK) verbatim. The Workmen's Compensation Bills of 1898 and 1899 omitted a British rule that limited compensation for construction workers to those employed on buildings of particular height for example after Kingston stated that it was 'unjustifiable'.[250] Transferring British Liberal opposition policy, the Bills also sought to extend the class of eligible workers to shipping workers and the 'injury' definition permitted the inclusion of any injury 'arising out of or consequent upon any employment declared by proclamation to be dangerous or injurious to health, or dangerous to life or limb'.[251]

The Workmen's Compensation Bills were accused of being 'too much a copy' of the British legislation[252] but conservative Legislative Council parliamentarians were dissatisfied. Council membership had changed since the *Employers' Liability Act 1884* (SA) passed and it now resembled the 'bastion of conservatism' that Butlin, Barnard and Pincus ascribed to all State upper houses at the turn of the twentieth century.[253] Council defeated attempts to diverge from the *Workmen's Compensation Act 1897* (UK), essentially due to concerns about the financial implications for employers of novel characteristics.[254] As William Robinson explained, the House of Commons was 'largely composed of businessmen and the House of Lords almost entirely of employers' which meant that SA employers 'could take it as an absolute guarantee that no harm or risk was likely to accrue' if legislation copied the *Workmen's Compensation Act 1897* (UK).[255]

Ultimately, the *Workmen's Compensation Act 1900* (SA) copied multiple *Workmen's Compensation Act 1897* (UK) characteristics and government had to rely upon special circumstances to secure disparity. The election of former Premier Charles Kingston to the Legislative Council gave the government a one-seat majority in the vote to include seamen

[249] South Australia, *Parliamentary Debates,* House of Assembly, 15 November 1898, 851 (Charles Kingston).
[250] Ibid 852.
[251] 'Workmen's Compensation Bill: Explanation and Criticisms', above n 248.
[252] See, eg, Editorial, 'Workmen's Compensation Act', *The Weekly Herald* (Adelaide), 12 November 1898, 5.
[253] N G Butlin, A Barnard and J J Pincus, *Government and Capitalism: Public and Private Choice in Twentieth Century Australia* (George Allen & Unwin, 1982) 151.
[254] See, eg, South Australia, *Parliamentary Debates,* Legislative Council, 8 December 1898, 477 (James Martin).
[255] South Australia, *Parliamentary Debates,* Legislative Council, 13 December 1898, 489 (William Robinson).

in the 'workman' definition for example.[256] To pass a clause that included electric lighting work, waterworks and proclaimed 'dangerous or injurious' employments in the vocations eligible for compensation, the government accepted an unwieldy requirement for there to be an address from both houses of parliament before a proclamation could be made.[257] Also, the government secured a reduction in the minimum period that a worker had to be disabled to recover compensation ('minimum disability period') from two weeks to one.[258] This was after fending off a motion to copy the British two week period by highlighting differences in the nations' climates, support for the reform from friendly societies and concern not to have injured workers 'starve' before receiving compensation.[259] The tortured experience highlighted conservative parliamentarians' coercive approach although there was an exception. The *Workmen's Compensation Act 1900* (SA) compensated 'personal injury arising out of and in the course of employment', which omitted the British requirement for injury to have arisen from 'accident'.[260] This was not mentioned in parliamentary debate apparently due to Council oversight.

4.3.4 Transfer from NZ

The *Workers' Compensation Act 1902* (WA) was the second Australian workmen's compensation statute and it incorporated more discrepancies from the *Workmen's Compensation Act 1897* (UK). Indeed, Walter (later Sir Walter) James, who attracted the label of 'Member for NZ' for his championing of NZ employers' liability legislation characteristics,[261] commented that the Bill was 'based' upon the *Workers' Compensation for Accidents Act 1900* (NZ) rather than the British statute.[262] Minister for Lands Adam Jameson noted that the statute 'more closely' followed the NZ legislation and that NZ legislation was an 'advance' on the British statute.[263]

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[256] *Workmen's Compensation Act 1900* (SA) s 2 (definition of 'workman'). See South Australia, *Parliamentary Debates,* Legislative Council, 20 November 1900, 418.
[257] See South Australia, *Parliamentary Debates,* Legislative Council, 20 November 1900, 419 (John Hannah Gordon). The relevant subsection, incorporating the requirement for parliamentary consent, was *Workmen's Compensation Act 1900* (SA)s 3(II).
[258] *Workmen's Compensation Act 1900* (SA) s 4(b).
[259] South Australia, *Parliamentary Debates,* Legislative Council, 14 December 1899, 342 (Gregor McGregor).
[260] *Workmen's Compensation Act 1900* (SA) s 4.
[261] See Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 1894, 223 (Septimus Burt).
[262] Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 September 1901, 737 (Walter (later Sir Walter) James).
[263] Western Australia, *Parliamentary Debates,* Legislative Assembly, 29 January 1902, 2595 (Adam Jameson).

Transfer from NZ reflected the political influence that Labor parliamentarians exerted in WA at the turn of the century. Two Labor parliamentarians had been elected to each of the federal Senate and the House of Representatives chambers for WA at the inaugural federal election. Six Labor representatives were also elected to the WA Legislative Assembly and Premier Leake relied upon their support to govern throughout 1901 and 1902.[264] Labor parliamentarians and union officials had demonstrated their preparedness to act as transfer agent for NZ legislation. The inaugural Trades and Labour Congress in WA had endorsed the enactment of compulsory conciliation and arbitration and trade union legislation modelled on NZ legislation in 1899.[265] Subsequently, provisions of NZ legislation and the *Industrial Conciliation and Arbitration Act 1900* (WA) and *Trade Unions Act 1902* (WA) overlapped. Attorney General Richard Pennefather enthused that NZ 'seems to have had the hardihood … to tackle subjects connected with industrial science' in a way that 'commends itself to the admiration of any other portion of the British Empire'.[266]

Multiple *Workers' Compensation Act 1902* (WA) provisions copied *Workers' Compensation for Accidents Act 1900* (NZ) characteristics. Most obviously, the statute transferred NZ nomenclature of 'workers' compensation' and also expressly extended to female[267] and government employees[268] like the NZ legislation. Further, the statute copied a NZ rule that amounts owed to workers in particular industries became a charge on employer assets[269] and a rule that permitted government to prescribe provisions for any mandatory accident insurance policy.[270] The government would have liked to transfer more *Workers' Compensation for Accidents Act 1900* (NZ) characteristics. However, like their counterparts in SA, the government faced opposition from conservative Legislative Council parliamentarians, essentially due to concerns about employer implications and interstate

[264] C T Stannage, 'The Composition of the Western Australian Parliament: 1890 - 1911' (1966) 4(4) *University Studies in History* 1, 12-13.
[265] See discussion in I H Vanden Driesen, 'The Evolution of the Trade Union Movement in Western Australia' in C T Stannage (ed), *A New History of Western Australia* (University of Western Australia Press, 1981) 352, 370.
[266] Western Australia, *Parliamentary Debates,* Legislative Assembly, 18 September 1900, 467 (Richard Pennefather).
[267] *Workers' Compensation Act 1902* (WA) s 2(1) (definition of 'worker'); *Workers' Compensation for Accidents Act 1900* (NZ) s 2(1) (definition of 'worker').
[268] *Workers' Compensation Act 1902* (WA) s 3; *Workers' Compensation for Accidents Act 1900* (NZ) s 3.
[269] *Workers' Compensation Act 1902* (WA) s 17; *Workers' Compensation for Accidents Act 1900* (NZ) s 18.
[270] *Workers' Compensation Act 1902* (WA) s 20; *Workers' Compensation for Accidents Act 1900* (NZ) s 21.

competitiveness.[271] The government was unable to transfer a NZ provision that widened the scope of employees protected to include employees injured on 'any industrial, commercial or manufacturing work' for example.[272] Rather, it had to copy the narrower employment contexts to which the *Workers' Compensation Act 1900* (SA) applied.[273] This ensured that WA employers were not disadvantaged compared to their SA counterparts.

4.3.5 Further transfer from NZ

The *Workers' Compensation Act 1905* (Qld) was the third Australian workers' compensation statute and continued transfer dynamics that affected its WA equivalent. The statue was passed after multiple failed attempts at reform from Labor. Indeed, reflecting their determination, Bowden contends that Queensland Labor entered the Morgan-Kidston coalition government to 'win the passage of industrial and political reforms'.[274] There were more NZ characteristics in the *Workers' Compensation Act 1902* (WA) than in the *Workers' Compensation Act 1905* (Qld). Likely, this was because Labor formed part of government and labour interests demanded transfer from the NZ legislation. *The Worker* had commented in June 1901 that 'we want a Workmen's Compensation Act along the lines of that which came into force in NZ last week' for example.[275] This was significant as *The Worker* was a 'powerful factor in Queensland Labor politics'.[276] Conservative parliamentarians had also received more opportunity to assess the financial implications of the NZ legislation. Transferred aspects of the *Workers' Compensation for Accidents Act 1900* (NZ) included the 'workers' compensation' nomenclature like in WA and a wider 'worker' definition that included employees on any ship or vessel of any kind.[277] The government also adopted the broader employment contexts in which injuries could be

[271] See, eg, Western Australia, *Parliamentary Debates*, Legislative Council, 29 January 1902, 2595 (Sir John Winthrop Hackett); Legislative Council, 30 January 1902, 2658 (Richard Septimus Haynes). See also 'Vigilans Et Audax', *The West Australian* (Perth), 5 September 1901, 44.
[272] *Workers' Compensation for Accidents Act 1900* (NZ) s 4. See, eg, Western Australia, *Parliamentary Debates,* Legislative Assembly, 12 September 1901, 900 (Sydney Piggott); 903 (William George); 904 (William Butcher).
[273] *Workers' Compensation Act 1902* (WA) s 4(2). The employment contexts were any employment on, in or about any railway, waterwork, tramway, electric lighting work, factory, mine, quarry, or engineering or building work and any proclaimed employment that was dangerous or injurious to health, or life or limb, provided there was an address from both houses of parliament.
[274] Bradley Bowden, 'No Improvement Without Standardisation: The Origins of Queensland's Industrial Relations System, 1857 – 1916' in Bradley Bowden et al (eds), *Work and Strife in Paradise: The History of Labour Relations in Queensland 1859 to 2009* (Federation Press, 2009) 1, 15.
[275] 'Wanted, A Workmen's Compensation Act', *The Worker* (Brisbane), 15 June 1901 ,3.
[276] Spence, above n 229, 175.
[277] See *Workers' Compensation Act 1905* (Qld) s 2 (definition of 'worker'); *Workers' Compensation for Accidents Act 1900* (NZ) s 2 (definition of 'worker').

sustained and receive compensation from NZ. This included any agricultural work, work for the Queensland government and employment on, in or about any industrial, commercial, manufacturing or building work.[278]

The *Workers' Compensation Act 1905* (Qld) highlighted parliamentarians' preparedness to draw lessons from UK and interstate experience. Responding to a practice observed in the UK for example, the government prohibited employers deducting amounts from employees' pay to fund future compensation.[279] The government also prescribed minimum compensation for injured workers below age 21 as security[280] and allowed government to reduce widows' compensation or pay it to someone else on account of remarriage, 'drunkenness, neglect of children or other sufficient misconduct'.[281] This followed a conservative parliamentarian's request based upon anecdotal experience of widows 'misusing' compensation. Further, the government permitted infirm and older workers to agree alternate compensation, within legislated amounts,[282] lest those workers' 'added vulnerability to injury' discourage employers from recruiting them.[283]

Employee concessions in the *Workers' Compensation Act 1905* (Qld) attracted allegations that it was biased towards labour interests.[284] However, conservative Legislative Council parliamentarians also compelled transfer and non-transfer of NZ characteristics that benefited employers. Conservative parliamentarians prevented government transferring a NZ amendment[285] that reduced the minimum disability period from two weeks to one week for example. This was essentially due to concerns about the cost that a reduction would have for employers. The timeframe that workers had to lodge a compensation claim was

[278] *Workers' Compensation Act 1905* (Qld) s 3.
[279] Ibid s 14.
[280] Ibid sch cl 1 Proviso (c).
[281] Ibid sch cl 8.
[282] Ibid sch cl 1 Proviso (a), (b).
[283] Queensland, *Parliamentary Debates,* Legislative Council, 15 November 1905, 1605 (Andrew Barlow). Following passage of the *Workmen's Compensation Act 1897* (UK), media had reported that some elderly and infirm mine workers were discharged due to concerns that they were more likely to require workers' compensation: see, eg , 'Labour Troubles: The Workmen's Compensation Act', *The West Australian* (Perth), 6 October 1898, 5; 'Lancashire Miners: The Workmen's Compensation Act', *The Sydney Morning Herald* (Sydney), 6 October 1898, 7.
[284] Editorial, 'The Workers' Compensation Bill', *The Brisbane Courier* (Brisbane), 21 September 1905, 4; Editorial, 'The Workers Compensation Bill', *The Brisbane Courier* (Brisbane), 24 October 1905, 4.
[285] *Workers' Compensation for Accidents Act Amendment Act 1902* (NZ) s 4.

also reduced from the British six months from injury date[286] to two months.[287] Further, the period in which weekly payments were redeemable for a lump sum was reduced from six months to three months[288] and compensation for injuries sustained while proceeding to or from employment was expressly denied.[289] One industrialist parliamentarian declared that to allow compensation in this circumstance would be 'monstrous'.[290] Conservative parliamentarians' increased preparedness to dictate innovations would become significant.

4.4 *Workmen's Compensation Act 1906* (UK)

4.4.1 Legislation overview

The *Workmen's Compensation Act 1897* (UK) was repealed by the *Workmen's Compensation Act 1906*, 6 Edw 7, c 58 ('*Workmen's Compensation Act 1906* (UK)'),[291] which became a new transfer source. The *Workmen's Compensation Act* 1906 (UK) was made by the Campbell-Bannerman Liberal government, which had won a landslide election victory on 5 December 1905. What distinguished the *Workmen's Compensation Act 1906* (UK) from its predecessor were considerably improved entitlements for injured workers. A revised workman definition substantially widened the scope of employees eligible for compensation to all individuals employed by way of 'manual labour, clerical work or otherwise' for example.[292] Seamen acquired rights to compensation,[293] individuals that sustained particular prescribed industrial diseases became eligible for compensation[294] and the minimum disability period was reduced from two weeks to one.[295] This reflected the *Workers' Compensation for Accidents Act Amendment Act 1902 (NZ)*.[296]

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[286] *Workmen's Compensation Act 1897,* 60 & 61 Vict, c 37, s 9(1)(b).
[287] *Workers' Compensation Act 1905* (Qld) ss 8(1), 9(1)(a).
[288] Ibid sch cl 12.
[289] Ibid s 4(2)(iii).
[290] Queensland, *Parliamentary Debates*, Legislative Assembly, 26 October 1905, 1362 (James Forsyth).
[291] *Workmen's Compensation Act 1906*, 6 Edw 7, c 58, s 16(2).
[292] Ibid s 13 (definition of 'workman'). There were specific exclusions for non-manual employees earning above a prescribed annual amount (£250 a year); casual employees or those employed otherwise than for the purposes of the employer's trade or business; police; outworkers; or members of the employer's family dwelling in the employer's house.
[293] *Workmen's Compensation Act 1906*, 6 Edw 7, c 58, s 7.
[294] Ibid s 8.
[295] Ibid s 1(2)(a).
[296] *Workers' Compensation for Accidents Act Amendment Act 1902* (NZ) s 4.

4.4.2 Restricted transfer

No government copied multiple *Workmen's Compensation Act 1906* (UK) provisions as was the case following the *Workmen's Compensation Act 1897* (UK). Aspects of the new British statute transferred to federal statutes compensating injured seafarers that the Fisher Labor government made.[297] However, conservative parliamentarians frustrated Labor parliamentarian attempts to transfer *Workmen's Compensation Act 1906* (UK) characteristics at State level. Labor parliamentarians' actions suggested that the *Workmen's Compensation Act 1906* (UK) had become the preferred benchmark for workers' compensation legislation. This was likely facilitated by the fact that the Liberal Campbell-Bannerman government was the main opposition to the Conservative party in 1906 and therefore occupied a similar role to Labor. Evidence suggested that political ideology was important to transfer decisions at the time. Conservative parliamentarians had forced transfer from the *Workmen's Compensation Act 1897* (UK), which the Conservative Salisbury government made for example. However, conservative parliamentarians overwhelmingly frustrated transfer of novel *Workmen's Compensation Act 1906* (UK) characteristics.

The first State to enact a new workers' compensation statute following the *Workmen's Compensation Act 1906* (UK) was the Wade conservative government in NSW. Premier Wade had assumed his position three weeks after the 1907 State election but no action was taken on workers' compensation until months after the electoral defeat of the conservative federal Deakin government in April 1910. Hogan explains that the federal defeat sent 'shock waves through the NSW Liberal Party' and 'threatened a massacre' of its members at the forthcoming State election.[298] To present itself in a 'more populist light', therefore, the government went into 'full campaign mode, with a raft of promises' in the parliamentary session from June to August.[299] The *Workmen's Compensation Act 1910* (NSW) was one of those promises and highlighted conservative governments' concerns about aspects of the new British statute. The statute transferred *Workmen's Compensation Act 1906* (UK) characteristics that were in the *Workmen's Compensation Act 1897* (UK). For an injury to be

[297] See, eg, *Seamen's Compensation Act 1909* (Cth) s 5(2)(a); *Seamen's Compensation Act 1911* (Cth) s 5(2)(a).
[298] Michael Hogan, 'The 1910 Election' in Michael Hogan and David Clune (eds), *The People's Choice: Electoral Politics in 20th Century New South Wales 1901 to 1927 Volume One* (Parliament of New South Wales and University of Sydney, 2001) 91, 101.
[299] Ibid.

compensable, for example, it had to arise 'by accident out of and in the course of' employment.[300] However, the statute did not transfer novel *Workmen's Compensation Act 1906* (UK) characteristics such as compensation for categories of industrial disease. Also, the minimum disability period was two weeks whereas the UK had accepted one week.[301]

The *Workmen's Compensation Act 1910* (NSW) was an early example of conservative State governments combining interstate characteristics rather than transferring British precedent. The Wade government copied *Workers' Compensation Act 1905* (Qld) provisions that affected widows' compensation eligibility for example[302] and transferred the provisions concerning the amount of compensation for injured workers under age 21 or that were infirm.[303] Further, rather than the inclusive, wide British 'workman' definition, the government emulated SA legislation so that NSW employees had to be engaged 'by way of manual labour' in prescribed employment contexts to qualify for compensation.[304] These contexts included the unwieldy SA clause that permitted other 'dangerous' employments to be proclaimed subject to a resolution from both houses of the NSW parliament.[305] The explanation for this clause was essentially concerns about ensuring interstate competitiveness.

The *Workers' Compensation Act 1910* (Tas) followed the *Workmen's Compensation Act 1910* (NSW) and continued the bias towards employer interests of its predecessor. The conservative Lewis government members had purportedly united 'against the Labor threat'[306] and the *Workers' Compensation Act 1910* (Tas) imposed the tightest restrictions upon compensation eligibility of any workers' compensation statute in Australia. This was despite the initial Bill being introduced by Labor.[307] Indeed, highlighting their philosophy

[300] *Workmen's Compensation Act 1910* (NSW) s 5.
[301] Ibid s 6(a).
[302] Ibid sch 2 cl 7.
[303] Ibid sch 2 cl 1(2) Proviso.
[304] Ibid s 2(1) (definition of 'workman').
[305] Ibid ss 4, 5(b).
[306] Scott Bennett, 'Sir Neil Elliott Lewis' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography: Volume 10: 1891 - 1939* (Melbourne University Press, 1966—) 94, 94.
[307] 'Parliament: House of Assembly', *The Mercury* (Hobart), 15 July 1910, 6 (Charles Howroyd).

towards worker interests, government parliamentarians, including Premier Sir Elliott Lewis, attempted to compel workers to contribute towards workers' compensation.[308]

The Labor involvement, and Legislative Council co-operation, explained some aspects of the *Workers' Compensation Act 1910* (Tas) that benefited employers. In addition to copying the 'workers' compensation' nomenclature from NZ, the Workers' Compensation Bill 1910 (Tas) reduced the minimum disability period to one week for example. The Legislative Council retained this concession on altruistic grounds after the Lewis government attempted to insert a two week threshold.[309] Labor also transferred provisions of the *Workers' Compensation Act 1905* (Qld) that prescribed minimum compensation for low income workers under age 21 and permitted older and infirm workers to agree alternate compensation.[310] Further, Labor transferred a NZ table[311] that prescribed the amounts of compensation for particular listed injuries ('table of maims').[312] See Table 4.1 for an extract.

Table 4.1 Extract, Second Schedule, *Workers' Compensation Act 1910* (Tas)

Nature of Injury	Ratio to the Compensation for Total Incapacity (%)
Loss of both eyes	100
Loss of both hands	100
Loss of both feet	100
Loss of a hand and a foot	100
Total and incurable loss of mental powers, involving inability to work	100
Total and incurable paralysis of the limbs or of mental power	100
Total loss of the right arm or of the greater part of the arm	80
Total loss of the left arm or of the greater part of the arm …….	75

[Source: *Workers' Compensation Act 1910* (Tas)]

The responsible NZ Minister that introduced the table in that country rationalised its inclusion on the grounds of ensuring consistency and predictability of payments for workers

[308] 'House of Assembly: Friday, November 11: Workers' Compensation Bill', *The Mercury* (Hobart), 12 November 1910, 8.
[309] 'Parliament: Legislative Council: Thursday, November 24: Workmen's Compensation Bill', *The Mercury* (Hobart), 25 November 1910, 7.
[310] *Workers' Compensation Act 1910* (Tas) sch 1 cl 1 provisos (b), (c) and (d).
[311] *Workers' Compensation Act 1908* (NZ) sch 2.
[312] *Workers' Compensation Act 1910* (Tas) sch 2.

and employers.[313] Similar justifications were advanced for the table's inclusion in the *Workers' Compensation Act 1910* (Tas).

Aspects of the *Workers' Compensation Act 1910* (Tas) that benefited employees were the exception as, in the main, the Lewis government revised the Workers' Compensation Bill 1910 (Tas) to benefit employers. Like the NSW Wade government, the Lewis government did not want Tasmanian employers burdened by compensation responsibilities that did not exist interstate. Thus, the government removed a clause compensating industrial diseases that Labor had copied from the *Workmen's Compensation Act 1906* (UK). Parliamentarians queried the applicability of some of the listed diseases to Tasmania.[314] The government emulated SA and NSW legislation to permit additional 'dangerous' industries to be added to the employment contexts in which injuries were compensable, provided a resolution was passed by both houses of Parliament.[315] Reflecting Queensland legislation,[316] the government also copied the explicit prohibition on compensation for injuries sustained while proceeding to or from employment.[317]

The Lewis government narrowed compensation characteristics that had originated in the *Workmen's Compensation Act 1897* (UK), which highlighted their determination to protect employer interests. To reflect a form purportedly 'taken from the original English Act' for example,[318] the government defined 'worker' as any person employed in 'manual labour' at any railway, ,factory, quarry, mine or engineering work provided the individual did not earn above a threshold and was not in 'casual employment'.[319] This combined restrictive elements of the workman definitions in both the *Workmen's Compensation Act 1897* (UK) and *Workmen's Compensation Act 1906* (UK). Also, due to an amendment that conservative parliamentarian Norman Ewing initiated,[320] the government widened the British rule that

[313] New Zealand, *Parliamentary Debates*, House of Representatives, 6 October 1908, 940 (John A Millar).
[314] 'Parliament: Legislative Council: Wednesday, November 23', *The Mercury* (Hobart), 24 November 1910, 7; 'Parliament: Legislative Council: Thursday, November 24: Workmen's Compensation Bill', *The Mercury* (Hobart), 25 November 1910, 7.
[315] *Workers' Compensation Act 1910* (Tas) s 2 (definition of 'worker').
[316] *Workers' Compensation Act 1905* (Qld) s 4(2)((iii).
[317] *Workers Compensation Act 1910* (Tas) s 3(4)(III).
[318] 'House of Assembly: Friday, November 11: Workers' Compensation Bill', *The Mercury* (Hobart), 12 November 1910, 8.
[319] *Workers' Compensation Act 1910* (Tas) s 2 (definition of 'worker').
[320] 'Parliament: House of Assembly: Thursday, September 16: Workers' Compensation Bill', *The Mercury* (Hobart), 17 September 1909, 6.

precluded compensation for injuries sustained from 'serious and wilful misconduct'. The revised preclusion included injuries directly attributable to 'insobriety', 'serious and wilful negligence' or 'breach of any rule printed and published by the employer for the safety and protection' of employees.[321] Attorney-General William Propsting explained that the *Workers' Compensation Act 1010* (Tas) was 'in the main the English Act' but, importantly, 'did not go so far; the maximum compensation was lower and the class of workers affected were more limited'.[322]

The *Workers' Compensation Act 1910* (Tas) demonstrated conservative parliamentarians' preparedness to frustrate Labor attempts to transfer *Workmen's Compensation Act 1906* (UK) characteristics and the *Workmen's Compensation Act 1911* (SA) was another example. From 1907, successive SA Labor governments had attempted to transfer *Workmen's Compensation Act 1906* (UK) characteristics but faced opposition from a conservative dominated Legislative Council. Attorney General Bill Denny stressed that the Workmen's Compensation Bill 1911 (SA) was 'virtually a copy of the Imperial Act of 1906',[323] which would have secured Council acceptance in 1900. However, Council members' attitudes had changed. Australasian National League leader Beaumont Moulden declared that the *Workmen's Compensation Act 1906* (UK) had 'evidently worked unsatisfactorily' due to attempts to amend it and litigation about its contents.[324] Further, John (later Sir John) Duncan noted that '[i]n the old country, men in certain callings were much less migratory in their habits than were workmen in Australia'.[325]

Legislative Council members insisted that the Verran government transfer compensation characteristics that emulated the *Workmen's Compensation Act 1897* (UK) and interstate legislation. Responding to Council demands for example, the 'workman' definition was narrowed from the British approach to individuals engaged in 'manual work' with classes such as workers whose average weekly earnings exceeded a threshold, out-workers and

[321] *Workers' Compensation Act 1910* (Tas) s 3(4)(II).
[322] See 'Parliament: Legislative Council: Tuesday, November 22: Workers' Compensation Bill', *The Mercury* (Hobart), 23 November 1910, 6.
[323] South Australia, *Parliamentary Debates,* House of Assembly, 11 July 1911, 73 (Bill Denny).
[324] South Australia, *Parliamentary Debates,* Legislative Council, 12 September 1911, 201 (Beaumont Moulden).
[325] South Australia, *Parliamentary Debates,* Legislative Council, 2 December 1911, 315 (John (later Sir John) Duncan).

domestic servants excluded.[326] There was a notable exception to rejecting new British legislation however. This is because Council members did not insist upon their opposition to copying the list of compensable industrial diseases in the *Workmen's Compensation Act* 1906 (UK). Council members had initially voiced concern that SA employers would be liable to compensate diseases acquired interstate if that provision were included.[327] However, Chief Secretary Frederick Wallis stressed the presence of legislative protections which meant that liability would not accrue if disease was acquired elsewhere.[328] Also, seeking appeasement, the Chief Secretary noted that the government had relented on its desire to transfer other aspects of the *Workmen's Compensation Act 1906* (UK) so 'surely the Council could also consider the matter in the same spirit'.[329] Government entreaties were successful.[330]

4.4.3 Increased transfer

Labor parliamentarians continued their attempts to transfer *Workmen's Compensation Act 1906* (UK) characteristics and gradually had more success. This reflected the passage of time and conservative parliamentarians' ability to assess implications of the British statute. As the *Commonwealth Workers' Compensation Act 1912* (Cth) demonstrated, Labor parliamentarians were also increasingly prepared to innovate and improve workers' compensation characteristics to benefit employees. The *Commonwealth Workers' Compensation Act 1912* (Cth) established workers' compensation for federal employees and generally followed 'the lines … of the Seamen's Compensation Act'.[331] This meant that it transferred characteristics of the *Workers' Compensation Act 1906* (UK). However, when the government would have proceeded with the UK one week minimum disability period, it faced strident internal demands for no minimum. Queensland Labor had attempted no minimum disability period in 1909 and eventually accepted a three day period.[332] Reflecting Queensland Labor sentiment, Queensland Senator James Stewart railed that 'the arbitrary term of one week is one of the most stupid and conservative propositions I ever heard

[326] *Workmen's Compensation Act 1911* (SA) s 4 (definition of 'workman').
[327] See, eg, South Australia, *Parliamentary Debates,* Legislative Council, 4 October 1911, 315 (John (later Sir John) Duncan).
[328] South Australia, *Parliamentary Debates,* Legislative Council, 5 December 1911, 318 (Frederick Wallis).
[329] South Australia, *Parliamentary Debates,* Legislative Council, 14 November 1911, 491 (Frederick Wallis).
[330] See *Workmen's Compensation Act 1911* (SA) s 12.
[331] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1912, 4757 (Patrick Glynn).
[332] *Workers' Compensation Act Amendment Act 1909* (Qld) s 2.

of'.[333] Duly, the *Commonwealth Workers' Compensation Act 1912* (Cth) had no minimum disability period.

Labor continued transfer of *Workmen's Compensation Act 1906* (UK) characteristics in the *Workers' Compensation Act 1912* (WA). Unlike its equivalents in NSW, Tasmania and SA, the *Workers' Compensation Act 1912* (WA) did not restrict the 'workman' definition to individuals involved in 'manual labour'.[334] Instead, the Scaddan government compensated employees in 'manual labour, clerical work or otherwise' so long as they did not fall within particular excepted groups such as police and outworkers.[335] The WA statute also compensated seamen, consistent with the *Workmen's Compensation Act 1906* (UK);[336] reduced the minimum disability period from two weeks to one;[337] and introduced notification timeframes that were consistent with those in the UK.[338]

Three critical factors explained why the Scaddan government transferred *Workmen's Compensation Act 1906* (UK) characteristics and Labor parliamentarians in other States failed. First, the passage of time had allowed conservative parliamentarians to assess characteristics' implications in other jurisdictions which allayed concerns. Legislative Council member William Patrick Snr noted that seamen were captured by the legislation in other States as justification for their inclusion in WA for example.[339] Second, the absence of acrimonious relations between the Scaddan government and the WA Legislative Council such as those in SA obviously assisted policy transfer. Third, the fact that 'Imperial authorities had circulated details of the *Workmen's Compensation Act 1906* (UK) and asked that reforms be 'brought into line' with it likely had some impact.[340] The Council did not accept all aspects of the *Workmen's Compensation Act 1906* (UK) however. In particular, Council members defeated a clause that copied the British list of compensable industrial

[333] Commonwealth, *Parliamentary Debates,* Senate, 5 December 1912, 6432 (James Stewart).
[334] See *Workers' Compensation Act 1912* (WA) s 2(1) (definition of 'workman').
[335] See *Workmen's Compensation Act 1906*, 6 Edw 7, c 58, s 13 (definition of 'workman'); *Workers' Compensation Act 1912* (WA) s 2(1) (definition of 'workman').
[336] See *Workmen's Compensation Act 1906*, 6 Edw 7, c 58, s 7; *Workers' Compensation Act 1912* (WA) s 12.
[337] *Workers' Compensation Act 1912* (WA) s 6(2)(a).
[338] Ibid s 7.
[339] Western Australia, *Parliamentary Debates,* Legislative Council, 5 December 1912, 4259 (William Patrick Snr). See also Western Australia, *Parliamentary Debates,* Legislative Council, 5 December 1912, 4257 (Hal (later Sir Harry) Colebatch).
[340] See mention at Western Australia, *Parliamentary Debates,* Legislative Assembly, 10 October 1912, 2337 (Thomas Walker).

diseases despite its presence in SA. Members expressed concern that employers may be liable for diseases caused by earlier, perhaps unidentifiable, employers.[341]

The *Workers' Compensation Act 1912* (WA) transferred compensation characteristics that benefited employees from sources besides the *Workmen's Compensation Act 1906* (UK). In its wider 'member of a family' definition for example, the Scaddan government transferred aspects of the 'relative' definition from the *Workers' Compensation Act 1908* (NZ).[342] The government also restricted solicitors' ability to deduct any costs from a compensation award, which was based upon a NZ provision,[343] and retained aspects of the *Workers' Compensation Act 1902* (WA) that were initially copied from NZ such as the fact that amounts owed to injured employees were a charge on particular employer assets.[344] Further, the government introduced a table of maims.[345] Passage of these aspects, and the *Workers' Compensation Act 1912* (WA) in general, highlighted conservative parliamentarians' growing acceptance of compensation characteristics that benefited employees.

The inaugural workers' compensation statutes for Victoria reiterated conservative parliamentarians' increased acceptance of improved workers' compensation entitlements. Six attempts to legislate workers' compensation had been made in Victoria since 1905[346] and the Workers' Compensation Bill 1914 (Vic) characteristics contents had been debated to such an extent that there was little new from prior Bills. The *Workers' Compensation Act 1914* (Vic) and *Workers' Compensation Act 1915* (Vic) transferred multiple *Workmen's Compensation Act 1906* (UK) characteristics. Likely, as with the *Workers' Compensation Act 1912* (WA), this transfer was facilitated by the passage of time. Conservative parliamentarian John Murray, for example, declared that '[o]n the whole [in respect of workers compensation], the experience of the Motherland has been of a satisfactory

[341] See, eg, Western Australia, *Parliamentary Debates,* Legislative Council, 4 December 1912, 4165 (Archibald Sanderson); 4165 (Douglas Gawler); 4167 (James Connolly).
[342] *Workers' Compensation Act 1912* (WA) s 4 (definition of 'member of a family').
[343] *Workers' Compensation Act 1912* (WA) sch 1 cl 24; *Workers' Compensation Act 1908* (NZ) s 37.
[344] See, eg, *Workers' Compensation Act 1912* (WA) s 18. See government acknowledgement of transfer from NZ at Western Australia, *Parliamentary Debates*, Legislative Council, 13 November 1912, 3260 (Jabez Dodd).
[345] *Workers' Compensation Act 1912* (WA) sch 2.
[346] Victoria, *Parliamentary Debates,* Legislative Assembly, 13 July 1905, 329 (David Smith).

kind'.[347] Also influential would have been the fact that all other States had legislated, providing a further guide on implications.

The Victorian statutes also transferred multiple NZ characteristics, in part reflecting Labor contributions to earlier Bills. The Peacock government transferred the ability for judges to award compensation as either a lump sum or weekly payment for example,[348] incorporated a table of maims and permitted courts to increase compensation if an employer had caused an 'unreasonable delay' in settlement.[349] Further reflecting NZ legislation,[350] the government also established a State Accident Insurance Office to compete with the private sector and offer workers' compensation insurance.[351] This reflected concern that private insurers may not offer insurance in respect of some employees perceived as more vulnerable to injury and highlighted parliamentarians' altruistic concern to improve employees' support.[352] Significantly, the Peacock government also introduced the first legal requirement for employers to take out approved workers' compensation insurance or face a penalty.[353] A key proponent explained that the only way of 'not imposing undue hardship on employers' from unanticipated personal injuries claims was by making insurance obligatory.[354]

4.5 *Workers' Compensation Act 1916* (Qld)

4.5.1 Legislation overview

Victorian innovation in the *Workers' Compensation Act 1914* (Vic) and *Workers' Compensation Act 1915* (Vic) preceded significant novelty in Queensland legislation. The *Workers' Compensation Act 1916* (Qld) was a landmark statute in the evolution of workers' compensation in Australia. The statute pioneered a radical revision of the test that government relied upon to determine workers' compensation eligibility and transferred system characteristics from a notable new source. The statute was drafted by Premier T J Ryan, Assistant Minister for Justice John Fihelly and the Under Secretary for Justice and

[347] Victoria, *Parliamentary Debates,* Legislative Assembly, 27 November 1912, 3148 (John Murray).
[348] *Workers' Compensation Act 1908* (NZ) s 5; *Workers' Compensation Act 1915* (Vic) s 7.
[349] *Workers' Compensation Act 1914* (Vic) s 6(1); *Workers' Compensation Act 1915* (Vic) s 6(1). See Victoria, *Parliamentary Debates,* Legislative Assembly, 15 October 1911, 1508 (William Plain).
[350] See *Government Accident Insurance Act 1899* (NZ) s 3.
[351] *Workers' Compensation Act 1915* (Vic) s 32(1).
[352] Victoria, *Parliamentary Debates,* Legislative Assembly, 27 November 1912, 3151 (John Murray).
[353] *Workers' Compensation Act 1915* (Vic) s 37.
[354] Victoria, *Parliamentary Debates,* Legislative Assembly, 27 August 1913, 991 (John (later Sir John) Mackey).

Crown Solicitor Thomas McCawley.[355] McCawley's involvement was integral as he prepared a 'very comprehensive' memorandum pointing out the advantages of compulsory insurance and outlining state insurance systems in Nevada and Washington.[356] These insights would become significant as the *Workers' Compensation Act 1916* (Qld) transferred US legislation. According to Murphy, McCawley would take a 'leading role' in drafting the Workers' Compensation Bill 1916 (Qld).[357] For his part, Assistant Minister for Justice Fihelly had been a regular contributor to *The Worker* from 1906; had part responsibility for Labor party campaign literature and, according to Crouchley, was 'well-read' and an 'innovator'.[358]

The *Workers' Compensation Act 1916* (Qld) transferred UK workers' compensation characteristics that favoured injured workers. Government emulated the broad 'workman' definition in the *Workmen's Compensation Act 1906* (UK) for example;[359] compensated industrial diseases that overlapped with those in the UK;[360] and transferred a table of maims.[361] In addition, the government implemented beneficial interstate compensation characteristics. From Victoria for example, government transferred the provision that mandated employers hold approved workers' compensation insurance.[362] Further, from Victoria and NZ, and also reflecting a commitment to state-owned enterprises that Queensland Labor had made from 1898,[363] the government established a State Accident Insurance Office.[364] This Office functioned as a monopoly which Premier Ryan had

[355] Betty Crouchley, 'John Arthur Fihelly' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography: Volume 8: 1891 - 1939* (Melbourne University Press, 1966—) 495, 495.
[356] D J Murphy, *T J Ryan: A Political Biography* (University of Queensland Press, first published 1975, 1990 ed) 123.
[357] Ibid 122.
[358] Crouchley, above n 355.
[359] *Workers' Compensation Act 1916* (Qld) s 3(1) (definition of 'worker').
[360] *Workers' Compensation Act 1916* (Qld) s 14A, as inserted by *Workers' Compensation Act Amendment Act 1916* (Qld) s 3.
[361] *Workers' Compensation Act 1916* (Qld) sch cl 9.
[362] Ibid s 8.
[363] See D J Murphy, 'The Establishment of State Enterprises in Queensland, 1915 - 1918' (1968) 14 *Labour History* 13, 13.
[364] *Workers' Compensation Act 1916* (Qld) s 4,

advocated from 1905.[365] According to Cowan, the monopoly decision was 'unashamedly directed towards ending the huge profits gained by insurance companies'.[366]

The decision to establish the State Accident Insurance Office complemented transfer of US compensation characteristics, which were another example of transfer motivated by government desire to improve compensation. As preceding paragraphs explain, NZ legislation had been a preferred source of workers' compensation characteristics for Labor from the turn of the century before the *Workmen's Compensation Act 1906* (UK) gained primacy. However, it seemed that when the Ryan government enacted the *Workers' Compensation Act 1916* (Qld), US legislation was a new benchmark. No doubt this was facilitated by, or perhaps explained, the aforementioned McCawley memorandum on US workers' compensation. Thomis and Wales also note that in the 'late winter months of 1915', the Queensland Department of Justice 'conducted extensive worldwide research … to find out how different countries handled the issue of workers' compensation'.[367]

Compensation characteristics transferred from the US were significant. Reflecting West Virginian legislation,[368] the government narrowed the UK rule that precluded compensation for injury sustained from serious and wilful misconduct so that it became a rule that precluded compensation for injury caused by 'intentionally self-inflicted injury'.[369] The government also permitted compensation for personal injury sustained away from employment if the employee had been acting in the course of their employment or under employer instructions or they were injured on a journey to or from such employment.[370] This transferred Washington State policy.[371] These US characteristics complemented a

[365] Murphy, 'The Establishment of State Enterprises in Queensland', above n 363, 14. Despite Council opposition, the monopoly proposal passed as Council members mistakenly thought that it had been defeated. See discussion in Murphy, *T J Ryan: A Political Biography*, above n 356, 126-7, 146-7.
[366] Paula Cowan, 'From Exploitation to Innovation: The Development of Workers' Compensation Legislation in Queensland' (1997) 73 *Labour History* 93, 101. For government explanations of why it made the State Accident Insurance Office a monopoly, which included controlling premiums' level and protecting policy holders from financially unsound companies, see Queensland Government, *Socialism at Work* (Government Printer, 1918). 83, 87.
[367] Malcolm I Thomis and Murdoch Wales, *From SGIO to Suncorp* (Suncorp Insurance and Finance, 1986) 7.
[368] W Va Code § 15P.684 (Hogg 1913).
[369] *Workers' Compensation Act 1916* (Qld) s 9(3).
[370] *Workers' Compensation Act 1916* (Qld) s 9(1).
[371] *Workmen's Compensation Act*, ch 74, § 5, 1911 Wash Sess Laws 345, 357.

revised nexus to employment that permitted compensation for injury by accident 'at the place of' employment instead of the British formulation of injury 'out of' employment.[372]

4.5.2 Restricted transfer

The *Workers' Compensation Act 1916* (Qld) was a new transfer source for Australian governments but the *Workmen's Compensation Act 1916* (NSW) demonstrated that conservative parliamentarians could still compel transfer. The NSW Holman Labor government had announced its aspiration to introduce a social-insurance based workers' compensation scheme in 1913.[373] However, this plan lapsed when the government confronted sustained opposition to its legislative program from the conservative-dominated Legislative Council. Between 1910 and 1916, the Council blocked 25.1 per cent of the 412 Bills that the Holman and preceding McGowan Labor governments introduced. This compared to 8.1 per cent of the 210 Bills that non-Labor governments had introduced between 1904 and 1910.[374] The level of obstruction was 'unparalleled' according to Hagan and Turner[375] and this likely facilitated the re-aligned Holman Nationalist government to copy nearly all aspects of the *Workmen's Compensation Act 1906* (UK) in the *Workmen's Compensation Act 1916* (NSW). A rare exception was the inclusion of additional diseases in the list of compensable industrial diseases.[376]

4.5.3 Increased transfer

The *Workmen's Compensation Act 1916* (NSW) proved an anomaly among transfer approaches. This is because other governments increasingly transferred *Workers' Compensation Act 1916* (Qld) characteristics as WA and SA legislation demonstrated. Reflecting the *Workers Compensation Act 1916* (Qld) for example, the Collier Labor government in WA obligated employers to hold complying workers' compensation insurance[377] and compensated mining and industrial diseases in the *Workers' Compensation*

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[372] Ibid.
[373] 'Policy Speech: Premier at Town Hall', *The Sydney Morning Herald* (Sydney), 15 October 1913, 13
[374] Jim Hagan and Ken Turner, *A History of the Labor Party in New South Wales 1891-1991* (Longman Cheshire, 1991) 105.
[375] Ibid.
[376] *Workmen's Compensation Act 1916* (NSW) sch 3.
[377] *Workers' Compensation Act 1912* (WA) s 8A, as inserted by *Workers' Compensation Act Amendment Act 1924* (WA) s 11(1).

Act Amendment Act 1924 (WA).[378] Also, going further than the one day minimum disability period in Queensland, the government abolished a minimum period altogether.[379] Apparently, this had been WA Labor policy since 1920.[380] The government would have liked to transfer more *Workers' Compensation Act 1916* (Qld) characteristics but it met parliamentary opposition. The WA Legislative Council rejected the widened nexus between employment and injury to recover compensation in the *Workers' Compensation Act 1916* (Qld) for example. Also, the Council abolished what the future Premier Sir James Mitchell branded the 'ridiculous'[381] clause that would have allowed compensation for injuries sustained journeying to and from work. The consistent explanation for this opposition was concern about the implications that these provisions would have for employers.

The SA Gunn Labor government continued the approach of transferring *Workers Compensation Act 1916* (Qld) characteristics in the *Workers' Compensation Act Further Amendment Act 1924* (SA). Government introduced a widened 'worker' definition to include servants and clerical workers[382] and obliged employers to insure against potential liabilities for workplace injury, albeit with some exceptions.[383] This reflected the *Workers Compensation Act 1916* (Qld). However, like WA, the Gunn government faced parliamentary opposition to attempts to transfer other *Workers Compensation Act 1916* (Qld) characteristics. The government was unable to copy the widened nexus between employment and injury to recover compensation for example.[384] Council members expressed concern about the effects that this reform would have on insurance premiums.[385] Also, perhaps because insufficient time had elapsed since the *Workers' Compensation Act*

[378] *Workers' Compensation Act 1912* (WA) ss 6A, sch 3, as inserted by *Workers' Compensation Act Amendment Act 1924* (WA) ss 5, 8.
[379] *Workers' Compensation Act 1912* (WA) s 6(2)(a), as inserted by *Workers' Compensation Act Amendment Act 1924* (WA) s 4(2).
[380] See Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 September 1920, 706 (John Lutey).
[381] Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 December 1924, 2550 (Sir James Mitchell).
[382] *Workmen's Compensation Act 1911* (SA) s 4 (definition of 'workman'), as inserted by *Workers' Compensation Act Further Amendment Act 1924* (SA) s 3(b).
[383] *Workmen's Compensation Act Further Amendment Act 1924* (SA) s 13. The exceptions were the Crown, South Australian Railways Commissioner; employers with 'adequate financial resources' to meet all probable claims and employers that had entered an approved alternate compensation scheme under section 8 of the *Workmen's Compensation Act 1911* (SA).
[384] South Australia, *Parliamentary Debates*, House of Assembly, 21 October 1924, 1154-5 (Bill Denny).
[385] South Australia, *Parliamentary Debates,* Legislative Council, 2 December 1924, 1986 (Sir David Gordon).

1916 (Qld) passed, the government persisted with characteristics of the amended *Workers' Compensation Act 1905* (Qld) such as a three day minimum disability period.[386] The *Workers' Compensation Act Further Amendment Act 1924* (SA), like its WA equivalent, highlighted the primacy that interstate transfer had assumed in place of national transfer from the UK and NZ.

4.6 *Workmen's Compensation Act 1923* (UK) and *Workmen's Compensation Act 1925* (UK)

4.6.1 Legislation overview

The *Workmen's Compensation Act 1923*, 13 & 14 Geo, c 42 ('*Workmen's Compensation Act 1923* (UK)') and subsequent consolidation, the *Workmen's Compensation Act 1925*, 15 & 16 Geo 5, c 84 ('*Workmen's Compensation Act 1925* (UK)'), repealed the *Workmen's Compensation Act 1906* (UK). They were a new source of transfer for Australian governments but all declined. Only NSW had emulated the *Workmen's Compensation (Silicosis) Act 1918,* 4 & 9 Geo, c 14[387] and in other States, governments overwhelmingly sourced compensation characteristics from interstate. Parliamentary statements suggested that this was due to increased familiarity with workers' compensation and the ability to assess compensation characteristics' implications in more familiar conditions.

4.6.2 Innovation

The *Workers' Compensation Act 1926* (NSW) highlighted the interstate transfer that had come to characterise compensation statutes. The legislation was another landmark statute in the evolution of workers' compensation legislation that NSW Premier Lang passed after increasing NSW Legislative Council membership with 25 of his own appointees.[388] Some characteristics were transferred from the *Workmen's Compensation Act 1925* (UK). The government copied a provision that obligated employers to post notices of the timeframes that injured workers had to claim compensation for example.[389] Also, the legislation

[386] *Workmen's Compensation Act Further Amendment Act 1924* (SA) s 4.
[387] *Workmen's Compensation (Broken Bill) Act 1920* (NSW); *Workmen's Compensation (Amendment) Act 1920* (NSW).
[388] For a discussion of NSW parliamentarians' historic ability to appoint Legislative Council members, see Barbara Page, 'The Legislative Council of New South Wales: Past, Present and Future' (Background Paper 1990/1, New South Wales Parliamentary Library, 1990) 1.
[389] *Workers' Compensation Act 1926* (NSW) s 43.

deemed particular individuals to be employees for workers compensation purposes[390] and included a rule that allowed workers unable to secure employment 'wholly or mainly' due to their injury to recover compensation.[391] However, compared to the substantial overlap between British legislation and the preceding *Workmen's Compensation Act 1916* (NSW), transfer was minimal.

The interstate workers' compensation characteristics that the Lang government transferred had been present in some jurisdictions for years but were not adopted in NSW while the conservative Holman government held office. The characteristics included a table of maims[392] and a Queensland provision that precluded compensation for intentional self-inflicted injury or death.[393] This was inserted at the insistence of the conservative opposition.[394] Government replaced the former nexus between injury and employment so that compensation was permitted if an employee was injured 'in the course of employment'.[395] This emulated the Queensland nexus that omitted the 'accident' requirement. Injury or death was also compensable if sustained in the course of a journey to or from employment consistent with Queensland legislation, provided the harm did not occur during a 'substantial interruption' or 'deviation'.[396] Further, like Victoria and Queensland, the government mandated workers compensation insurance[397] and established a Government Insurance Office to compete with private workers' compensation insurance providers.[398] The Lang government rationalised that a government insurer was necessary 'because private insurers were reluctant to cover compensation risks for

[390] Ibid ss 6(11)-(12).
[391] Ibid s 12.
[392] Ibid s 16.
[393] Ibid s 7(3)(c).
[394] New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 February 1926, 188 (Francis Stewart Boyce).
[395] *Workers' Compensation Act 1926* (NSW) s 7(1)(a).
[396] Ibid s 7(1).
[397] Ibid s 18(1).
[398] *Government Insurance (Enabling and Validating) Act 1927* (NSW).

reasonable premiums'.[399] Cosgrove has also noted that in some cases, insurers wanted to charge rates that produced a 150 per cent increase in premiums.[400]

The Lang government explained that the *Workers' Compensation Act 1926* (NSW) brought NSW 'into line' with what already existed in other States and countries'[401] but this understated significant innovations. The innovations revealed that the Lang government had drawn lessons from the operation of earlier interstate legislation, particularly from Queensland, and they typically benefited employees. Responding to concerns that certain employers may be unable to obtain workers' compensation insurance due to their risk profile for example, the government denied insurers the right to refuse workers' compensation insurance.[402] To provide some assurance about the form of compensation, employers were obligated to pay a capped amount for medical costs as an aspect of minimum insurance responsibilities.[403] Further, from NZ, the government copied a provision that abolished the traditional legal defence of common employment entirely.[404] A significant and landmark further innovation was an independent Workers' Compensation Commission with exclusive jurisdiction to 'examine into, hear and determine all matters and questions arising under the *Workers' Compensation Act 1926* (NSW)'.[405] This reflected ongoing concerns about the suitability of the courts to assess compensation and adverse implications for employees of the legal system.

4.7 Workmen's Compensation Conventions

The primacy of interstate transfer and transfer among national governments should not suggest that there were no opportunities for international transfer. In 1919, the International Labour Organisation (ILO) formed and there was the option for federal governments to ratify or adopt ILO Conventions and Recommendations that would then become binding. ILO Conventions on workers' compensation that emerged in the research

[399] Peter J Tyler, *Humble and Obedient Servants: The Administration of New South Wales: Volume 2 1901 - 1960* (UNSW Press, 2006) 105.
[400] Kevin Cosgrove, 'The 1927 Election' in Michael Hogan and David Clune (eds), *The People's Choice: Electoral Politics in New South Wales 1901 to 1927 Volume One* (Parliament of New South Wales and University of Sydney, 2001) 325, 330.
[401] New South Wales, *Parliamentary Debates,* Legislative Council, 12 January 1926, 3905 (Albert Willis).
[402] *Workers' Compensation Act 1926* (NSW) s 18(1).
[403] Ibid s 10.
[404] *Workers' Compensation Act 1908* (NZ) s 62; *Workers' Compensation Act 1922* (NZ) s 67; *Workers' Compensation Act 1926* (NSW) s 65.
[405] *Workers' Compensation Act 1926* (NSW) s 36(1).

period were the *Workmen's Compensation (Agriculture) Convention* 1921; *Workmen's Compensation (Accidents) Convention 1925*; *Workmen's Compensation (Occupational Diseases) Convention 1925*[406] and the *Equality of Treatment (Accident Compensation) Convention 1925*. In broad terms, these Conventions provided that workers' compensation should extend to workmen in particular industries; compensate occupational disease or ensure equal treatment for workmen's compensation among member nations.

The federal government did not ratify these Conventions until well after World War II,[407] which contrasted to the approach that other nations took[408] and to situations where the federal government had sole policy responsibility for an ILO Convention subject.[409] The delay was largely because ratification depended upon State governments' approval given the shared policy responsibilities and States' position was described as 'wholly unco-operative'.[410] Then federal Attorney General Herbert Evatt provided insight into State government approaches when he disclosed that a sub-committee at the 1936 Premier's Conference had agreed that 17 unratified ILO Conventions fully or near fully covered existing Australian law. However, by June 1939, five State governments had endorsed ratification of 12 Conventions only and one government had provided no reply at all.[411]

Two external considerations contributed to State governments' attitudes toward ILO Convention especially. First, Evatt has suggested that States were disengaged because they were not involved in negotiations about the relevant Conventions.[412] Second, the initial ILO Constitution (Part XIII of the *Treaty of Versailles*) apparently provided a disincentive. Article 405 of the *Treaty* provided that an ILO Convention might take effect as a recommendation

[406] This Convention was revised in the *Workmen's Compensation (Occupational Diseases) Convention (Revised) 1934* which added additional compensable diseases including phosphorous poisoning, arsenic poisoning and silicosis.
[407] The *Workmen's Compensation (Occupational Diseases) Convention 1925* was ratified on 22 April 1959 and the *Workmen's Compensation (Occupational Diseases) (Revised) Convention 1934* was ratified on 29 April 1959; the *Workmen's Compensation (Agriculture) Convention 1921* was ratified on 7 June 1960 and the *Equality of Treatment (Accident Compensation) Convention 1925* was ratified on 12 June 1959.
[408] The United Kingdom, for example, ratified the *Workmen's Compensation (Occupational Diseases) Convention 1925* on 6 October 1926; the *Workmen's Compensation (Agriculture) Convention 1921* on 6 August 1923 and the *Workmen's Compensation (Occupational Diseases) Convention (Revised) 1934* on 29 April 1936.
[409] The *Placing of Seamen Convention 1920 (No* 9), which concerned a matter of federal responsibility, came into force on 23 November 1921 and was ratified on 3 August 1925 for example.
[410] Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed ed, 2010) 67-8.
[411] H V Evatt, *Post-War Reconstruction: A Case for Greater Commonwealth Powers* (Commonwealth Government Printer, 1942) 38.
[412] See K H Bailey, 'Australia and the International Labour Conventions' (1946) 54 *International Labour Relations* 285, 289.

rather than a binding obligation in the case of federal States such as Australia where capacity to implement Conventions was limited.[413] Opeskin writes that while this clause applied 'most federal States, including Australia, regarded the ILO Conventions as recommendatory, with the result that few of them ratified the Conventions'.[414] The Article was revised from 9 October 1946 to increase obligations upon federal governments to advise and receive support from constituent governments about ILO Conventions.[415] The Commonwealth and State Ministers for Labour signed a Resolution on ILO matters in 1947 that included a requirement for Australian governments' compliance with unratified Conventions to be assessed.[416] This formalised deliberations about ratification of ILO Conventions.

Convention content could also discourage ratification as the experience of the *Workmen's Compensation (Accidents) Convention 1925* demonstrated. In 1969, the federal government disclosed that despite 'substantial compliance' with most aspects of this Convention, ratification did not occur. This was because the reference to providing 'constant help' to an injured worker in Article 7 had been interpreted to require constant attendance and '[i]n no jurisdiction, Commonwealth or State, is this Article, as so interpreted, fully implemented'.[417] Further, in Victoria and WA, governments precluded *all* workers with income above $6,000 per annum and $10 per week respectively from receiving workers' compensation. By contrast, Article 2(2)(d) only permitted governments to exclude *non-manual* workers whose remuneration exceeded a threshold.

4.8 Conclusion

This chapter has explained the results of the first case study examined for this research. Its focus was the contribution that policy transfer made to colonial employers' liability legislation and workers' compensation legislation enacted in Australia from 1882 to 1926. The chapter asked what the sources of policy transfer were; what was the degree of policy transfer; what actors were involved; why did actors pursue policy transfer and what factors

[413] *Treaty of Versailles,* signed and entered into force 28 June 1919, art 405.
[414] Brian R Opeskin, 'International Law and Federal States' in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 1, 14.
[415] *Instrument for the Amendment of the Constitution of the International Labour Organization*, signed and entered into force 9 October 1946, annex.
[416] See Department of Industrial Relations, *Status of ILO Conventions in Australia, 1994* (1994) 22.
[417] National Labour Advisory Council, *Review of Australian Law and Practice Relating to Conventions Adopted by the International Labour Conference* (Government Publisher, 1969) 29.

restricted and/or facilitated transfer. A secondary focus was testing assertions that early workers compensation legislation 'copied' or were 'based' upon British legislation and assessing whether there was support for the segmentation of statutory transfer in Australia that Carroll identified (see section 1.2). Table 4.2 summarises the findings.

Table 4.2 Summary of Policy Transfer Contribution[418]

Carroll	PHASE 2	PHASE 3		
	1882 - 1899	1900 - 1905	1906 - 1915	1916 - 1926
Source	1. UK 2. NZ 3. Interstate	1. UK 2. NZ 3. Interstate	1. Interstate 2. NZ 3. UK	1. Interstate 2. UK 3. US
Actor(s)	1. Individuals 2. Unions	1. Conservatives 2. Labor	1. Conservatives 2. Labor	1. Labor 2. Conservatives
Degree	1. Copying	1. Copying 2. Combinations	1. Combinations 2. Copying	1. Combinations 2. Non-transfer
Explanation	1. Coercion 2. Voluntarily	1. Coercion 2. Voluntarily	1. Lesson-d 2. Coercion	1. Lesson-d 2. Coercion
Restrict/ Facilitate	1. Altruism 2. Labor demand 3. Colonialism 4. Lead-following 5. Financial	1. Altruism 2. Labor demand 3. Colonialism 4. Lead-following 5. Financial	1. Political ideology 2. Lead-following 3. Altruism 4. Labor demand 5. Financial	1. Political ideology 2. Altruism 3. Labor demand 4. Lead-following 5. Financial

[Source: Original]

As the Table outlines and the chapter explained, the initial sources for employers' liability and workers' compensation characteristics in Australia was UK and NZ legislation. However, interstate transfer became dominant from 1906 and in 1916, there was transfer from US legislation. Despite ILO Conventions on workers' compensation, the study contained no example of international transfer. The federal-State division of workers' compensation responsibilities was a major factor that restricted transfer from this source. Parliamentarians were the primary actors that dictated transfer in this study, followed by unions. Parliamentarians' actions could reflect personal preference. WA parliamentarian Walter (later Sir Walter) James facilitated transfer of NZ characteristics based upon personal preference for example. Political ideology was also significant. Conservative

[418] Table Items are listed in the order of significance and are not exhaustive. 'Individuals' refers to high profile parliamentarians; 'Conservatives' and 'Labor' refer to parliamentarians of that ideology; 'Lead-following' refers to State governments enacting reform that was precipitated by interstate legislation; 'Lesson-d' refers to lesson-drawing (bounded rationality) from the Dolowitz and Marsh continuum; 'Colonialism' refers to deference to British tradition; 'Financial' refers to concerns about costs for employers.

parliamentarians demanded transfer from the *Workmen's Compensation Act 1897* (UK) and insisted upon transfer from conservative interstate legislation. Labor parliamentarians pursued transfer from the *Workers' Compensation for Accidents Act 1900* (UK), *Workmen's Compensation Act 1906* (UK) and *Workers' Compensation Act 1916* (Qld).

The prevalence of copying as the preferred transfer degree around and before federation reflected parliamentarians' anxiety about financial implications for employers of workers' compensation and deference to British tradition. Copying continued after federation but its incidence declined and combinations, emulation and innovation (non-transfer) increased. Parliamentarians wanted to moderate costs for employers, implement interstate policy or, altruistically, increase compensation. These were the three leading explanations for policy transfer together with the initial deference to British tradition. The study was characterised by (typically) Labor parliamentarians making transfer decisions based upon their desire to increase compensation generosity and non-Labor parliamentarians anxious to minimise employer costs. This political division between Labor and conservative parliamentarians meant that coercion was an aspect of government transfer decisions. Indeed, there were multiple examples of the contested policy transfer degree that Dussauge-Laguna described.[419]

The study provided evidence for the segmentation of statutory transfer in Australia that Carroll presented. As Carroll asserted, there was considerable evidence of policy transfer from the UK during the second phase of his analysis (1850 to 1901). However, transfer of British policy was not only from enacted legislation but also British opposition policy and included transfer from NZ. Following federation, during the third phase that Carroll identified, transfer of UK policy continued but there was increasing transfer from other jurisdictions. The *Workers' Compensation Act 1902* (WA), for example, was 'more closely' based upon the *Workers' Compensation for Accidents Act 1901* (NZ) and the *Workers' Compensation Act 1916* (Qld) transferred US legislation. Supporting Carroll, interstate transfer became the dominant source of policy transfer in the third phase. Given the significant contribution that transfer from NZ, interstate jurisdictions and the US made, it is simplistic to assert that early workers' compensation legislation 'copied' or even was 'based' upon British statute as some authors have done.

[419] See Dussauge-Laguna, 'Policy Transfer as a "Contested" Process', above n 130.

CHAPTER 5
CRIMINAL INJURIES COMPENSATION (1967 – 2014)

5.1 Introduction

This chapter examines the results of the second case study undertaken for the purposes of this research. Its focus is the contribution that policy transfer made to statutory criminal injuries compensation enacted in Australia from 1967 to 30 June 2014. Like Chapter 4, the chapter asks what the sources of transfer were, the degree of policy transfer, the identity of actors involved, explanations for policy transfer and factors that facilitated and/or restricted transfer. The chapter also tests the assertions that Carroll made about the characteristics of statutory transfer during the purported fourth phase of the evolution of statutory transfer in Australia (1946 to 2012).[420] Carroll had asserted that, during this phase, policy transfer from the UK continued to decline in favour of local innovation, transfer from international organisations, 'managed' transfer and continued interstate transfer.

The chapter discovers that international ideas and legislation were the initial source for statutory criminal injuries compensation characteristics in Australia like the workers' compensation case study. However, the degree of transfer was not copying and interstate transfer was more prevalent. Parliamentarians were the key transfer agents while crime victims' groups, financial advisers/ actuaries and legal bodies were also important. Interstate competitiveness influenced transfer but the evidence of political ideology making a contribution to transfer decisions as had been the case in the workers' compensation case study was limited. The chapter sections examine the genesis for statutory criminal injuries compensation in Australia; the inaugural legislative example; transfer of its characteristics and subsequent further interstate and international transfer. There are seven sections plus this introduction and the conclusion.

5.2 British scheme and *Criminal Injuries Compensation Act 1963* (NZ)

The genesis of statutory criminal injuries compensation in Australia was an idea that first emerged in the UK in the late 1950s. Crime victims are entitled to seek compensation from their offender(s) for any injury or damage that they suffer as the consequence of their crime. However, offenders frequently lack assets to pay and for some offences, the offender is never identified or convicted. Consequently, victims may often receive no or limited

[420] Carroll, above n 56, 663.

compensation as the British social reformer and former magistrate Margery Fry documented. From 1957, Fry campaigned for reform, highlighting the harsh circumstances that confronted some crime victims[421] and her work precipitated questions in the UK Parliament,[422] media reports,[423] and a pre-election commitment to reform from the Conservative UK government.[424] From 1 August 1964, British crime victims could recover compensation from an administrative scheme and the conservative Holyoake government in NZ enacted the *Criminal Injuries Compensation Act 1963* (NZ). This statute commenced on 1 January 1964 and its approach emulated workers' compensation, which is what Fry recommended. This meant that an independent tribunal awarded compensation, compensation was recoverable for any expenses or pecuniary losses incurred as a result of the offence plus an amount for pain and suffering[425] and applicants could recover an amount for solicitor expenses (if applicable).[426] The total compensation award was also capped and amounts recoverable in respect of the injury from other sources such as workers compensation were deductible.

The UK and NZ deliberations attracted Australian media attention[427] and there were questions in State parliaments. In Queensland for example, on 5 September 1963, Labor parliamentarian Harry Dean asked if the 'attention' of the Nicklin government had been drawn to the Criminal Injuries Compensation Bill 1963 (NZ) and if the Minister for Justice intended 'to seek further information … with a view to proposing similar legislation in Queensland'.[428] Premier Nicklin responded that the Bill would be 'studied and examined'.[429] Subsequently, Minister for Justice Peter (later Sir Peter) Delamothe provided a similar

[421] Margery Fry, 'Justice for Victims', *The Observer* (London), 7 July 1957,8; Margery Fry, 'Justice for Victims' (1959) 8 *Journal of Public Law* 191, 193. See discussion of promotion activities in Enid Huws Jones, *Margery Fry: The Essential Amateur* (Oxford University Press, 1966) 234-5, 242.
[422] See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 27 February 1958, vol 583, col 70W (William Owen); House of Commons, 27 March 1958, vol 585, col 575 (Arthur Moody); House of Commons, 13 May 1958, vol 588, col 16W (Dingle Foot); House of Commons, 15 May 1958, vol 588, col 601 (Hector Hughes); House of Commons, 10 July 1958, vol 591, col 40W (Hector Hughes).
[423] See, eg, Legal Correspondent, 'Compensation for the Victim: Can the Criminal be Made to Pay?', *The Glasgow Herald* (Glasgow), 21 May 1959, 6.
[424] Conservative Party, 'General Election Manifesto 1959' in Iain Dale (ed), *Conservative Party General Election Manifestos 1900 - 1997* (Routledge, 2000) 127, 136.
[425] *Criminal Injuries Compensation Act 1963* (NZ) s 18.
[426] Ibid s 29.
[427] See, eg, 'N.Z. Crime Victims to Get Compensation ', *The Age* (Melbourne), 13 September 1963, 7; 'New Law to Aid Victims of Violence', *The Canberra Times* (Canberra), 3 August 1964, 11; Editorial, 'N.Z Sets the Pace', *The Sun* (Sydney), 25 August 1964, 30.
[428] Queensland, *Parliamentary Debates,* Legislative Assembly, 5 September 1963, 200 (Harold Dean).
[429] Ibid 201 (Frank (later Sir Francis) Nicklin).

response to a further question on 14 November 1963.[430] However, there was no reform. Explaining his government's inaction, Premier Nicklin stated that 'because Australia is a federation of States … the only government which could properly introduce legislation of this nature … would be the Commonwealth government'.[431] This attitude meant that the first steps towards statutory criminal injuries compensation were taken when the WA Brand government enacted the *Police Assistance Compensation Act 1964* (WA).

Statutory compensation for crime victims was first raised with the conservative Brand government on 4 December 1963. Citing a newspaper article on British deliberations and also an article that outlined criticisms of government approaches to injury compensation from Victorian Supreme Court Justice Sir John Barry,[432] former Labor Minister William Hegley implored the government to examine these materials, 'secure a copy of the NZ legislation, and examine the whole question with a view to introducing legislation'.[433] This entreaty had particular resonance in light of a high profile shooting that also involved the fatal shooting of a police officer. The victim's widow and their two young children had been left without 'adequate compensation' from the impecunious offender[434] and this precipitated reform. The *Police Compensation Act 1964* (WA) was not statutory criminal injuries compensation of the type that NZ and the UK provided. However, the statute, which remains in operation, permits individuals injured assisting or attempting to assist police make an arrest or preserve the peace an amount equivalent to workers' compensation plus an amount for property damages.[435]

WA parliamentarians did not acknowledge the British or UK developments when debating the Police Assistance Compensation Bill 1964 (WA) and in other States, deliberations had apparently stalled. The Menzies federal government sought to facilitate 'uniform' statutory criminal injuries compensation legislation at an August 1964 meeting of the Standing Committee of Attorneys General.[436] However, the Committee members ultimately resolved

[430] Queensland, *Parliamentary Debates,* Legislative Assembly, 14 November 1963, 1442 (Peter (later Sir Peter) Delamothe).
[431] Queensland, *Parliamentary Debates,* Legislative Assembly, 3 March 1964, 2141 (Frank (Sir Francis) Nicklin).
[432] Sir John Barry, 'Compensation Without Litigation' (1964) 37 *Australian Law Journal* 339, 347.
[433] Western Australia, *Parliamentary Debates,* Legislative Assembly, 4 December 1963, 3666-68 (William Hegley).
[434] Ibid 3666.
[435] See *Police Assistance Compensation Act 1964* (WA) s 5.
[436] 'Payments Plan for Victims of Crime', *The Canberra Times* (Canberra), 26 August 1964, 3.

that it was 'a question for each State to decide'.[437] State Labor oppositions demanded reform[438] and successive conservative federal administrations were questioned about legislation for the ACT and NT, which they administered.[439] The ACT Advisory Council advocated statutory criminal injuries compensation[440] and in March 1967, the federal Attorney General advised that the matter was being 'considered'.[441] However, it remained 'under consideration' in October 1968 after the NSW Askin conservative government had enacted the *Criminal Injuries Compensation Act 1967* (NSW).[442]

5.2.1 Inspiration

The *Criminal Injuries Compensation Act 1967* (NSW) was the first statutory criminal injuries compensation statute in Australia and was made after both Labor and the Coalition committed to reform before the 1965 NSW State election.[443] Labor Minister for Justice Jack Mannix had approved 'the drafting of appropriate legislation' in 1964[444] but Labor took no action. Publicly, this was because of concerns that statutory criminal injuries compensation would be assessed for social security means test purposes and crime victims could be worse off,[445] which was a concern that other Labor State governments raised.[446] The veracity of these claims was questioned in some jurisdictions however. SA Opposition parliamentarian Robin Millhouse disclosed a letter from the responsible federal Minister that indicated SA

[437] Commonwealth, *Parliamentary Debates,* House of Representatives, 10 October 1968, 1902 (Nigel (later Sir Nigel) Bowen).
[438] Eg, South Australia, *Parliamentary Debates,* House of Assembly, 24 September 1964, 1051 (Don Dunstan).
[439] Eg, Commonwealth, *Parliamentary Debates,* Senate, 25 August 1964, 190 (Samuel Cohen); Senate, 18 September 1968, 743 (Ellis Lawrie); Commonwealth, *Parliamentary Debates,* House of Representatives, 12 October 1965, 1658 (Gough Whitlam); House of Representatives, 9 December 1965, 3896 (Bert James); House of Representatives, 15 March 1967, 659 (Andrew Peacock); House of Representatives, 24 August 1967, 397 ((Adrian Gibson).
[440] See, eg, 'Compensate Crime Victims', *The Canberra Times* (Canberra), 3 February 1965, 3; 'Compensation Plan Waits on Council', *The Canberra Times* (Canberra), 4 February 1965, 11; Editorial, 'Compensation for Victims of Crime', *The Canberra Times* (Canberra), 13 April 1965, 2; R P Greenish, 'Compensation for Crime Victims', *The Canberra Times* (Canberra), 14 April 1965, 2; 'A.C.T Advisory Council: Violent Crime Compensation Sought', *The Canberra Times* (Canberra), 5 May 1965, 17.
[441] Commonwealth, *Parliamentary Debates,* House of Representatives, 15 March 1967, 659 (Nigel (later Sir Nigel) Bowen).
[442] Commonwealth, *Parliamentary Debates,* House of Representatives, 10 October 1968, 1902 (Nigel (later Sir Nigel) Bowen).
[443] Robert Askin, 'Policy Speech' (Speech delivered at the 1965 NSW State Election Liberal Party Campaign Launch, Sydney, 13 April 1965) 36; J B Renshaw, 'Labor's Policy' (Speech delivered at the 1965 NSW State election ALP Re-election Campaign Launch, Paddington, 8 April 1965) 11.
[444] New South Wales, *Parliamentary Debates,* Legislative Assembly, 3 September 1964, 374 (Jack Mannix).
[445] Ibid.
[446] See, eg, South Australia, *Parliamentary Debates,* House of Assembly, 31 August 1966, 1466-7 (Don Dunstan); Commonwealth, *Parliamentary Debates,* House of Representatives, 24 August 1967, 397 (Adrian Gibson).

had not sought to have statutory criminal injuries compensation exempted for means test purposes.[447] This was despite assertions that government had 'repeatedly raised the matter' with their federal equivalent.[448] A sceptical *The Canberra Times* correspondent suggested that the SA delay reflected government 'financial difficulties' as much as federal inaction.[449]

The *Criminal Injuries Compensation Act 1967* (NSW) did not copy British or NZ policy like the inaugural examples of workers' compensation legislation. Rather, Minister for Social Welfare Arthur Bridges explained that the statute was an 'endeavour' 'to adapt some of the better provisions of both systems to NSW conditions'.[450] This translated as an approach that built upon *Crimes Act 1900* (NSW) provisions that permitted courts to order offenders to compensate victims up to $2,000 for serious offences and $300 for minor offences.[451] The *Criminal Injuries Compensation Act 1967* (NSW) meant that crime victims could claim the amount(s) that courts ordered up to these thresholds from government, provided that the sum exceeded $100.[452] If there was no conviction or an acquittal, courts could issue a certificate that set out the amount that they would have ordered if a conviction was made and this amount was recoverable from the government.[453] Again, it had to exceed $100. To prevent 'double recovery', applicants had to advise the Treasurer of any amounts that they had or would have received if they 'exhausted all relevant rights of action and other legal remedies available' to him/ her in respect of the injury.[454]

The Askin government publicly rationalised its decision to leverage off *Crimes Act 1900* (NSW) provisions rather than copy foreign legislation principally upon altruistic grounds. Attorney General Ken (later Sir Kenneth) McCaw insisted that 'the courts established over the years' and 'the principles that have been written into legislation for a very long time' were the 'best means' of compensation.[455] He also asked rhetorically 'What

[447] South Australia, *Parliamentary Debates,* House of Assembly, 12 October 1966, 2240 (Robin Millhouse).
[448] South Australia, *Parliamentary Debates,* House of Assembly, 31 August 1966, 1466 (Don Dunstan).
[449] South Australian Correspondent, 'Setback for State Move to Compensate Victims of Crime', *The Canberra Times* (Canberra), 21 October 1966, 2.
[450] New South Wales, *Parliamentary Debates,* Legislative Council, 14 March 1967, 2005 (Arthur Dalgety Bridges).
[451] *Crimes Act 1900* (NSW) ss 437, 554(3).
[452] *Criminal Injuries Compensation Act 1967* (NSW) s 3(b).
[453] Ibid s 4(1).
[454] Ibid s 5(1)(b).
[455] New South Wales, *Parliamentary Debates,* Legislative Assembly, 8 March 1967, 3910 (Ken (later Sir Kenneth) McCaw).

better protection can there be against exploitation than that an order for compensation should be left in the hands of the court that hears the criminal matter?'.[456] McCaw reasoned that government would not have to prescribe a list of crimes qualifying victims for compensation like NZ.[457] This suggested that administrative considerations were relevant. In addition, although Attorney General McCaw did not acknowledge their influence expressly, financial considerations were also likely pivotal. Premier Askin had cautioned that Cabinet 'wanted to avoid a scheme involving high costs of administration'[458] and McCaw had stressed that NSW Treasury was 'not wealthy at present'.[459] If the government aligned statutory criminal injuries compensation to workers' compensation or civil damages characteristics like NZ or the UK, the government risked high costs.

5.2.2 Emulation and copying

The *Criminal Injuries Compensation Act 1967* (NSW) characteristics, being a court-based approach and limited compensation, were emulated and at times copied interstate. Transfer was facilitated by the fact that NSW had legislated, which precipitated political opposition and interest group demands for reform. Also, there was increasingly sympathetic media coverage of crime victims' circumstances and strong popular support for statutory criminal injuries compensation. In 1968 for example, a national survey of 2,700 individuals found that nine out of ten respondents supported statutory criminal injuries compensation.[460] Altruistic concerns for crime victims' circumstances emerged as a major justification for reform that parliamentarians in all jurisdictions advanced. The Queensland Minister for Justice stated that the object of the *Criminal Code Amendment Act 1968* (Qld) was 'to assist in fulfilling the need … to alleviate the hardship which crimes of violence are inflicting upon innocent people' for example.[461] Future WA Premier Charles (later Sir Charles) Court noted that 'in a significant number of cases', the perpetrator 'goes unidentified, dies, or is for some other reason beyond the reach of the law'.[462] Similarly, NT

[456] Ibid.
[457] Ibid 3912.
[458] John O'Hara, 'Go-Ahead on Plan to Compensate Victims of Crime', *The Sydney Morning Herald* (Sydney), 2 December 1966, 1.
[459] New South Wales, *Parliamentary Debates,* Legislative Assembly, 1 September 1966, 732 (Ken (later Sir Kenneth) McCaw).
[460] 'Pay Crime Victims: Poll Vote', *The Herald* (Melbourne), 4 December 1968, 2.
[461] Queensland, *Parliamentary Debates,* Legislative Assembly, 25 September 1968, 567 (Peter Delamothe).
[462] Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 September 1970, 804 (Charles (later Sir Charles) Court).

parliamentarian Ron Withnall declared that 'on many occasions, offenders will have inadequate income'.[463]

The fact that governments copied or emulated *Criminal Injuries Compensation Act 1967* (NSW) characteristics was not disguised. The Court government admitted that the 'contents' of the WA Bill were 'very similar' to the laws of NSW and SA.[464] The Queensland Attorney General noted that 'a similar scheme [to the NSW system] …, could be adopted' and this became the Queensland approach.[465] In the NT, Ron Withnall explained that '[i]n considering what law should be introduced into the NT, I had regard to the law in NSW'.[466] Copying meant that the 'injury' definitions across jurisdictions overlapped;[467] eligible victims had to have suffered 'injury'[468] or been 'aggrieved' by the crime;[469] and compensation had to exceed a minimum award threshold, which was generally $100 like NSW.[470] Further, all governments required any behaviour of the victim that directly or indirectly contributed to their injury, including particular relationships with the offender, to be taken into account when assessing compensation.[471]

The offences that qualified victims for statutory criminal injuries compensation typically included any 'felony', 'misdemeanour' or 'crime'[472] although in Queensland, government introduced the narrower requirement for an 'indictable offence relating to a person's

[463] Northern Territory, *Parliamentary Debates*, Legislative Council, 15 November 1972, 1053 (Ron Withnall).
[464] Western Australia, *Parliamentary Debates,* Legislative Assembly, 16 September 1970, 804 (Richard Court).
[465] Queensland, *Parliamentary Debates,* Legislative Assembly, 25 September 1968, 569 (Peter Delamothe).
[466] Northern Territory, *Parliamentary Debates,* Legislative Council, 15 November 1972, 1054 (Ron Withnall).
[467] *Criminal Injuries Compensation Ordinance 1983* (ACT) s 2 (definition of 'injury'); *Criminal Injuries Compensation Act 1967* (NSW) s 2 (definition of 'injury'); *Criminal Injuries (Compensation) Ordinance 1975* (NT) s 2 (definition of 'injury'); *The Criminal Code* (Qld) s 663A (definition of 'injury'), as inserted by *The Criminal Code Amendment Act 1968* (Qld) s 4; *Criminal Injuries Compensation Act 1969* (SA) s 3 (definition of 'injury'); *Criminal Injuries Compensation Act 1976* (Tas) s 2(2); *Criminal Injuries Compensation Act 1972* (Vic) s 2(1) (definition of 'injury'); *Criminal Injuries Compensation Act 1970* (WA) s 3 (definition of 'injury').
[468] *Criminal Injuries Compensation Act 1969* (SA) s 4(1); *Criminal Injuries Compensation Act 1970* (WA) s 4(1).
[469] *Criminal Injuries Compensation Act 1967* (NSW) ss 3, 4; *Criminal Injuries (Compensation) Ordinance 1975* (NT) s 3; *The Criminal Code* (Qld) s 663B, as inserted by *The Criminal Code Amendment Act 1968* (Qld) s 4; *Criminal Injuries Compensation Act 1969* (SA) s 6(1); *Criminal Injuries Compensation Act 1970* (WA) s 6(1).
[470] *Criminal Injuries Compensation Ordinance 1983* (ACT) s 9(2); *Criminal Injuries Compensation Act 1967* (NSW) s 3(b); *Criminal Injuries (Compensation) Ordinance 1975* (NT) s 5; *The Criminal Code* (Qld) ss 663C(1), 663D(4), as inserted by *The Criminal Code Amendment Act 1968* (Qld) s 4; *Criminal Injuries Compensation Act 1969* (SA) ss 5, 6(1), 7(5); *Criminal Injuries Compensation Act 1970* (WA) ss 5, 6(2).
[471] See *Criminal Injuries Compensation Ordinance 1983* (ACT) s 15(1); *Criminal Injuries Compensation Act 1967* (NSW) s 8; *Criminal Injuries (Compensation) Ordinance 1975* (NT) s 4; *The Criminal Code Amendment Act 1968* (Qld) s 663B(2); *Criminal Injuries Compensation Act 1969* (SA) s 4(2); *Criminal Injuries Compensation Act 1976* (Tas) s 5(3); *Criminal Injuries Compensation Act 1970* (WA) s 4(2).
[472] See, eg, *Crimes Act 1900* (NSW) s 437; *Criminal Injuries Compensation Act 1969* (SA) s 4(1); *Criminal Injuries Compensation Act 1970* (WA) s 4(1).

person'.[473] This may have been because Harry Dean, the Labor parliamentarian that lobbied for reform, had declared in 1965 that compensation 'should be limited to homicide, assaults and sexual crimes involving violence'.[474] Another Labor parliamentarian declared that 'in order to safeguard the taxpayers' money, we should try to organise and administer our law so that the number of claimants will be as limited as possible'.[475] This highlighted the overlap in major party attitudes towards statutory criminal injuries compensation compared to the workers' compensation case study.

There were three principal explanations for those circumstances where governments diverged from the *Criminal Injuries Compensation Act 1967* (NSW) approach. First, governments enacted their inaugural statutes over three decades which meant that later legislation incorporated subsequent changes that other State governments had made. Second, for various philosophical and financial reasons, there were different attitudes among governments on the appropriate design of statutory criminal injuries compensation. As mentioned, the Queensland government felt that compensation should assist a subset of crime victims. Governments also differed on the question whether offenders had to have been convicted before they paid compensation. In some jurisdictions, victims were compensable if the relevant charges had been dismissed or an offender was acquitted[476] or the offender was under some legal disability.[477] SA permitted individuals 'claiming to be aggrieved' from an alleged offence to seek compensation[478] and Queensland permitted compensation if an offence had been reported 'without delay, and after due inquiry and search the offender cannot be found'.[479] The third explanation for disparity was concerns about cost, which impacted the maximum compensation that victims could recover particularly. To 1980, the inaugural maximum awards were $2,000 in NSW,[480]

[473] *The Criminal Code* (Qld) s 663B(1), as inserted by *The Criminal Code Amendment Act 1968* (Qld) s 4.
[474] Queensland, *Parliamentary Debates,* Legislative Assembly, 19 August 1965, 51 (Harry Dean).
[475] Queensland, *Parliamentary Debates,* Legislative Assembly, 5 December 1968, 2106 (Colin Bennett).
[476] See, eg, *Criminal Injuries Compensation Act 1967* (NSW)s 4(1); *Criminal Injuries Compensation Act 1969* (SA) s 6(1); *Criminal Injuries Compensation Act 1970* (WA) s 6(1).
[477] *Criminal Injuries Compensation Ordinance 1983* (ACT) s 4; *The Criminal Code* (Qld) s 663D(1)(b), as inserted by *The Criminal Code Amendment Act 1968* (Qld) s 4; *Criminal Injuries Compensation Act 1976* (Tas) s 4(1)(a); *Criminal Injuries Compensation Act 1972* (Vic) s 3(4).
[478] *Criminal Injuries Compensation Act 1969* (SA) s 7.
[479] *The Criminal Code* (Qld) s 663D(1)(c)(i), as inserted by *The Criminal Code Amendment Act 1968* (Qld) s 4.
[480] *Crimes Act 1900* (NSW) s 437.

Queensland[481] and WA;[482] $1,000 in SA;[483] $3,000 in Victoria;[484] $4,000 in the NT[485] and $10,000 in Tasmania.[486] These thresholds drew parliamentary criticism for being too low,[487] but no political opposition felt strongly enough to move amendments.

5.2.3 Transfer from NZ

Victoria was an exception among governments emulating the court-based compensation approach in the *Criminal Injuries Compensation Act 1967* (NSW). The Victorian Bolte conservative government had been sluggish towards compensation. In 1968, the government copied almost verbatim the contents of the *Police Assistance Compensation Act 1964* (WA).[488] However, despite opposition criticism that the legislation did not extend to other crime victims,[489] there was no change. Future Premier Dick (later Sir Rupert) Hamer noted dismissively that it is 'often the fate' of new measures to be 'criticised for not going further'.[490] Yet, Hamer did acknowledge that compensation for other crime victims would be 'considered'[491] and in December 1971, the then Attorney General George Reid tasked an inter-departmental committee to examine the issue. This committee comprised representatives of the Law Department, the Victorian Treasury and the Chief Secretary's Department[492] and it recommended that government transfer the tribunal-based approach to statutory criminal injuries compensation from the *Criminal Injuries Compensation Act 1963* (NZ).

Reflecting upon the explanation for the interdepartmental committee recommendation, a NSW taskforce concluded that the committee felt that 'already overburdened courts were

[481] *The Criminal Code* (Qld) ss 663B(1), 663D(1), as inserted by *The Criminal Code Amendment Act 1968* (Qld) s 4.
[482] *Criminal Injuries Compensation Act 1970* (WA) s 4(1).
[483] *Criminal Injuries Compensation Act 1969* (SA) s 4(1).
[484] *Criminal Injuries Compensation Act 1972* (Vic) s 16(1)
[485] *Criminal Injuries (Compensation) Ordinance 1975* (NT) s 3.
[486] *Criminal Injuries Compensation Act 1976* (Tas) s 6(1).
[487] See, eg, New South Wales, *Parliamentary Debates,* Legislative Council, 14 March 1967, 4013 (Cedric Cahill); Queensland, *Parliamentary Debates*, Legislative Assembly, 16 October 1968, 685 (Pat Hanlon); Victoria, *Parliamentary Debates*, Legislative Assembly, 30 November 1972, 2797 (Robert Trethewey); Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 October 1970, 1307 (Ron Bertram).
[488] See *Police Assistance Compensation Act 1968* (Vic).
[489] See, eg, Victoria, *Parliamentary Debates,* Legislative Council, 20 November 1968, 1840-1 (John Galbally); Legislative Council, 29 October 1968, 1330 (Leo Fennessy); Legislative Council, 20 November 1968, 1842 (Michael Clarke).
[490] Victoria, *Parliamentary Debates,* Legislative Council, 20 November 1968, 1843 (Dick (later Sir Rupert) Hamer).
[491] Ibid 1844.
[492] Victoria, *Parliamentary Debates,* Legislative Council, 8 December 1972, 3311 (Michael Clarke).

too slow in awarding compensation and that the determination of compensation was inappropriate to the criminal court's role'.[493] The Hamer government accepted the committee recommendation and there was considerable overlap between the *Criminal Injuries Compensation Act 1963* (NZ) and *Criminal Injuries Compensation Act 1972* (Vic). Like NZ, the Hamer government established a 'Crimes Compensation Tribunal' to decide compensation applications and it had to be satisfied of like conditions to the NZ Tribunal.[494] The Tribunal could order compensation whether or not a person had been convicted or prosecuted[495] and the individuals compensable were almost the same as those in NZ. Compensation was also recoverable for like losses. They were expenses actually and reasonably incurred as a result of the victim injury or death; pecuniary loss due to total and permanent incapacity for work; pecuniary loss for dependents as a result of victim death; other pecuniary losses and expenses that it was reasonable to incur; and pain and suffering.[496] Solicitors' rights to recover costs were limited.[497]

The overlap between *Criminal Injuries Compensation Act 1972* (Vic) and *Criminal Injuries Compensation Act 1963* (NZ) characteristics was significant but, like interstate counterparts, the Victorian government capped maximum compensation. The cap was $3,000.[498] This represented approximately 56 per cent of annualised average male weekly earnings in Victoria for 1972-73. A provision also specified that workers' compensation, an amount awarded pursuant to a third party motor vehicle insurance claim and any award under the *Police Assistance Compensation Act 1968* (Vic) were to be deducted from the final award or taken into account in its assessment.[499] Further, the amount of victim loss had to exceed a minimum award threshold to be compensable and victims could be compelled to undergo a medical examination or produce medical records and other documents concerning their medical history as a condition of recovering compensation.[500] This design highlighted that

[493] New South Wales Taskforce on Services for Victims of Crime, *Criminal Injuries Compensation in New South Wales: Report and Recommendations* (1986) 36.
[494] See *Criminal Injuries Compensation Act 1963* (NZ) s 17(5); *Criminal Injuries Compensation Act 1972* (Vic) s 14(2).
[495] *Criminal Injuries Compensation Act 1963* (NZ) s 17(6); *Criminal Injuries Compensation Act 1972* (Vic) s14(4).
[496] *Criminal Injuries Compensation Act 1963* (NZ) s 18(1); *Criminal Injuries Compensation Act 1972* (Vic) s 15(1).
[497] *Criminal Injuries Compensation Act 1972* (Vic) s 26; *Criminal Injuries Compensation Act 1963* (NZ) s 29.
[498] *Criminal Injuries Compensation Act 1972* (Vic) s 16(1).
[499] Ibid s 17.
[500] *Criminal Injuries Compensation Act 1972* (Vic) ss 14(2)(d), (e).

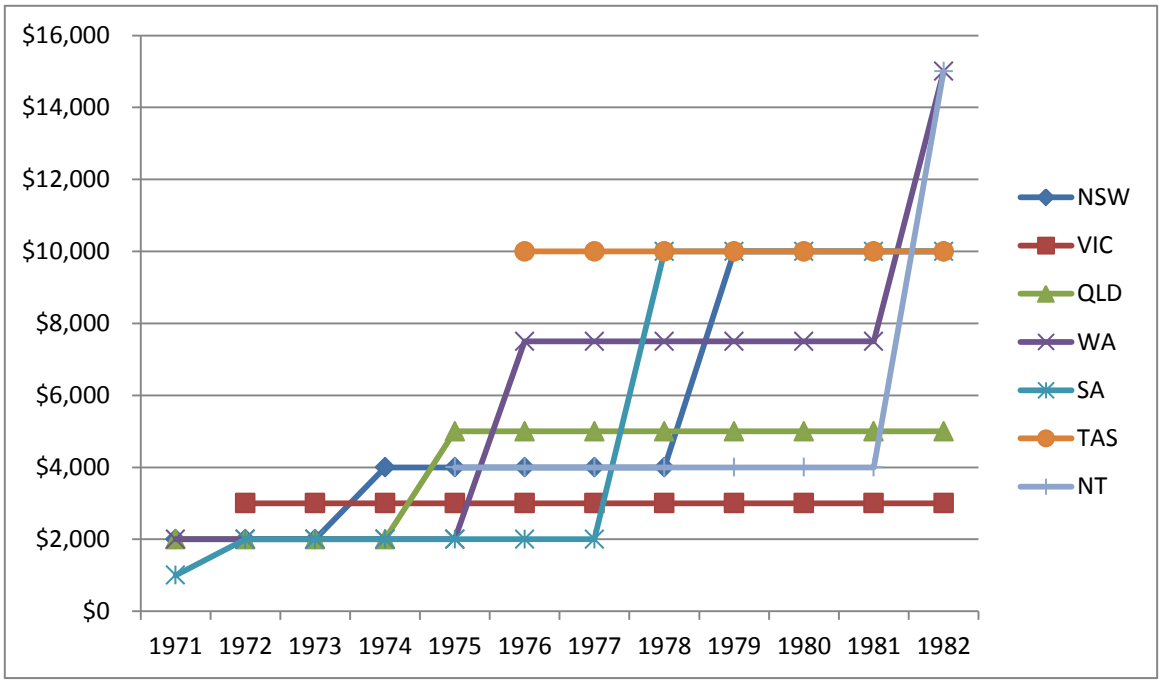
while the Hamer government may not have transferred interstate governments' court-based approach to compensation, it nonetheless shared their concerns about total cost.

5.3 'Phase of Victim Consciousness'

Australian governments gradually increased the generosity of statutory criminal injury compensation throughout the 1970s. Reforms meant that, where it was not made explicit initially, lost earnings[501] and family and dependents of people deceased from crime were confirmed as compensable.[502] Further, amendments also permitted compensation where no offence was recorded in more circumstances[503] and the maximum caps on recoverable compensation increased as Figure 5.1 (next page) outlines:[504]

[501] See, eg, *Criminal Injuries Compensation Act 1967* (NSW) s 2 (definition of 'compensation for injury'), as inserted by *Criminal Injuries (Compensation) Amendment Act 1984* (NSW) sch 1 cl 1(a).
[502] See *Crimes Act 1900* (NSW) s 437(4) (definition of 'aggrieved person), as inserted by *Crimes (Compensation) Amendment Act 1979* (NSW) sch 1 cl (1)(e); *Criminal Injuries Compensation Act 1982* (NT) s 5(2); *Criminal Injuries Compensation Act 1978* (SA) s 7(7)(b); *Criminal Injuries Compensation Act 1970* (WA) s 3 (definition of 'loss'), as inserted by *Criminal Injuries (Compensation) Act Amendment Act 1976* (WA)s 2(b).
[503]See, eg, *Criminal Injuries Compensation Act Amendment Act 1972* (SA) s 3; *Criminal Injuries Compensation Act 1970* (WA) s 4(2B), as inserted by *Criminal Injuries (Compensation) Act Amendment Act 1976* (WA) s 3(d).
[504] Increases were made by *Criminal Injuries Compensation Act Amendment Act 1974* (SA) s 2(b); *Crimes and Other Acts (Amendment) Act 1974* (NSW) s 9(c)(i); *The Criminal Code and the Justices Act Amendment Act 1975* (Qld) ss 30-3; *Criminal Injuries (Compensation) Act Amendment Act 1976* (WA) s 3(a); *Criminal Injuries Compensation Act 1976* (Tas) s 6(1); *Criminal Injuries Compensation Act 1978* (SA) s 7(8); *Crimes (Compensation) Amendment Act 1979* (NSW) sch 1 cl (1)(a); *Crimes Compensation Act 1982* (NT) s 13(1); *Criminal Injuries Compensation Act 1982* (WA) s 21(1); and *Criminal Injuries Compensation Act 1985* (WA) s 20(1).

Figure 5.1 Maximum caps (1971 – 1982) [Source: Original]



The incremental revision of compensation characteristics preceded a period that Freckelton labels the 'phase of victim-consciousness'.[505] The NSW Law Reform Commission contends that this phase, which emerged from the early 1980s, was 'fuelled by the attention given to domestic violence and sexual assault' in popular literature and 'the emphasis given to the notion of retribution inherent in 'just deserts''.[506] An 'increasingly organised and activist [crime] victims' movement' was also relevant according to Freckelton.[507] Highlighting the support that victims' groups attracted, a group of individuals that included parents of murdered young women whose remains were found near Truro, SA formed the SA Victims of Crime Service (VOCS) in 1979.[508] Within 12 months, the VOCS had 1,800 members, had secured government funding, acquired premises in the centre of Adelaide, developed a newsletter and obtained the services of a team of volunteers.[509] Freckelton asserts that crime 'victims became politicised and [their] plight … became a vote winner' during the

[505] Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (LBC, 2001) 37.
[506] New South Wales Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) 412.
[507] Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy*, above n 505, 36.
[508] Jo Robinson, *It Can Happen to You: The Story of Victim Support Service* (Wakefield Press, 2004) 9.
[509] See Ray Whitrod, *Before I Sleep: Memoirs of a Modern Police Commissioner* (University of Queensland Press, 2001) 196. See, for examples of the public support that crime victims attracted: 'One in Nine is Crime Victim', *The Canberra Times* (Canberra), 23 June 1979, 7; 'World-Wide Movement: Crime Victims 'Are Helping Themselves'', *The Canberra Times* (Canberra), 16 September 1979, 3.

phase of victim consciousness,[510] which facilitated transfer of two transfer 'objects' to improve victims' wellbeing specifically. First, governments significantly increased statutory compensation. Second, governments transferred the strategy of independent inquiries to examine crime victims' support.

5.3.1 Increased compensation

Governments pursued transfer of their first 'object' of increased compensation via two strategies. The first was to align statutory criminal injuries compensation with compensation characteristics of other schemes. The Bjelke-Petersen government aligned maximum statutory criminal injuries compensation to the maximum award under the *Workers' Compensation Act* 1916 (Qld) for example[511] and permitted up to $20,000 to be awarded as compensation for mental and nervous shock from crime.[512] Attorney General Neville Harper gloated that the 800 per cent maximum compensation increase meant that Queensland had the 'most generous' scheme in Australia.[513] In Victoria, an expert committee recommendation to align statutory criminal injuries compensation and workers compensation characteristics[514] was integral to Cain government reform. Attorney General James Kennan admitted that the government had decided to 'substantially implement' committee recommendations.[515] Thus, the government capped weekly statutory criminal injuries compensation at the maximum weekly workers' compensation payment[516] and widened the dependents definition to 'equate' with the definition in the *Workers' Compensation Act 1958* (Vic).[517] Premier Cain noted that maximum compensation for pecuniary losses would be 'revised periodically to take account of inflation and changes in levels of award for pecuniary loss under workers' compensation legislation'.[518]

The *Criminal Injuries Compensation Ordinance 1983* (ACT) embodied the second strategy that government took to increase compensation, which was significant increases unrelated

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[510] Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy,* above n 505, 316.
[511] *The Criminal Code* (Qld) s 663A (definition of 'prescribed amount'), as amended by *The Criminal Code Amendment Act 1984* (Qld) s 3.
[512] *The Criminal Code* (Qld) s 663AA, as inserted by *The Criminal Code Amendment Act 1984* (Qld) s 4.
[513] See Queensland, *Parliamentary Debates,* Legislative Assembly, 31 January 1984, 1222 (Neville Harper); Legislative Assembly, 9 February 1984, 1556 (Neville Harper).
[514] Working Party to Review the Criminal Injuries Compensation Act 1972 (Vic), *Report* (1983) 17-18.
[515] Victoria, *Parliamentary Debates,* Legislative Council, 25 October 1983, 692 (James Kennan).
[516] *Criminal Injuries Compensation Regulations 1984* (Vic) reg 18.
[517] Victoria, *Parliamentary Debates,* Legislative Council, 25 October 1983, 692 (James Kennan).
[518] Victoria, *Parliamentary Debates,* Legislative Council, 8 November 1983, 1615 (John Cain).

to other compensation schemes. The ordinance was the first criminal injuries compensation statute for the ACT and it introduced an unprecedented $20,000 maximum compensation threshold.[519] This almost equalled the annualised average weekly earnings of a full-time ACT worker in June 1983.[520] In addition, building upon compensable expenses interstate, the Ordinance compensated any expense incurred in submitting a compensation application (other than legal fees)[521] and 'prescribed property damages'.[522] Further, compensable injuries extended to any contractions, aggravation, acceleration or recurrence of an injury or disease and damage to items such as spectacles, hearing aids and artificial limbs.[523] The explanation for the dramatic compensation increases was altruistic concerns for victim circumstances. Following the 11 March 1983 federal election, the Hawke Labor government had also doubled a $10,000 threshold that its conservative predecessor proposed after that threshold was criticised for being 'too low'.[524]

The *Criminal Injuries Compensation Ordinance 1983* (ACT) was a new transfer source for other governments and the $20,000 threshold transferred to other jurisdictions.[525] This was despite concerns about compensation cost.[526] Indeed, continuing a theme of the previous decade, maximum compensation thresholds continued to climb. The NSW government introduced a $50,000 threshold in response to a review recommendation in 1985 for example[527] and there were demands for an even higher threshold from the federal leader of the Australian Democrats. Janine Haines provided notice of a motion that the maximum cap 'should be at least $100,000',[528] essentially because of 'inequity' between crime victims and those that suffered similar injury through car or work related accident'.[529] This motion did

[519] *Criminal Injuries Compensation Ordinance 1983* (ACT) s 7.
[520] Australian Bureau of Statistics, *Average Weekly Earnings, States and Australia, June Quarter 1983* (1983) 3.
[521] *Criminal Injuries Compensation Ordinance 1983* (ACT) s 5(4).
[522] Ibid s 5(3).
[523] Ibid s 2 (definition of 'injury').
[524] Crispin Hull, 'Compensation Plan for ACT Crime Victims', *The Canberra Times* (Canberra), 14 November 1982, 1.
[525] Eg, *Crimes Act 1900* (NSW) s 437(2) (definition of 'prescribed amount'), as inserted by *Crimes (Compensation) Amendment Act 1984* (NSW) sch 1 cl 1; *Criminal Injuries Compensation Act Amendment Act 1987* (SA) 4(b).
[526] See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 May 1984, 878 (Paul Landa); Tasmania, *Parliamentary Debates,* House of Assembly, 14 November 1984, 3423 (Geoff Pearsall); Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 October 1982, 4053 (Cyril Rushton).
[527] New South Wales Task Force on Services for Victims of Crime, *Criminal Injuries Compensation in New South Wales: Report and Recommendations* (1986) 53 (rec 7).
[528] Commonwealth, *Parliamentary Debates,* Senate, 16 September 1985, 540 (Janine Haines).
[529] Commonwealth, *Parliamentary Debates,* Senate, 14 October 1985, 1164-5 (Janine Haines).

not proceed but other governments matched the $50,000 threshold. Victorian Attorney General Andrew McCutcheon declared that the Cain government had 'fully' accepted its responsibility to assist crime victims with its $50,000 threshold.[530] Similarly, the minority Kaine Liberal government Attorney General in the ACT declared that a $50,000 threshold afforded crime victims' 'just' compensation.[531] These statements highlight the continued bipartisan attitude towards statutory criminal injuries compensation that existed among parliamentarians.

5.3.2 Independent inquiries

Independent inquiries were the second 'object' that governments transferred to improve crime victims' wellbeing and in 1980, the conservative SA Tonkin government commissioned the first example. The genesis of this inquiry, as with the significant compensation increases, was parliamentarians' concern for crime victims' wellbeing and crime victim demands for improved support. The then executive director of the VOCS, Ray Whitrod, claimed that the VOCS had 'helped initiate' the SA inquiry for example.[532] The SA committee recommendations demonstrate the empathy that existed for crime victims. They included improved public education about crime effects and crime prevention;[533] revised media protocols for crime reporting;[534] better victims support services, including more funding;[535] improved emergency personnel training;[536] amended court procedures;[537] and higher compensation.[538] Like recommendations were also made by the inquiries that other States and Territories commissioned following the SA inquiry. For example, there were recommendations to increase funding for victims' services;[539] establish more and/ or new

[530] Victoria, *Parliamentary Debates,* Legislative Council, 24 March 1988, 906 (Andrew McCutcheon).
[531] Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 14 March 1991 (Bernard Collaery).
[532] Whitrod, above n 509, 196.
[533] South Australia Committee of Inquiry, *Report of the Committee of Inquiry on Victims of Crime* (1981) 131-2 (recs 3, 6); 137 (rec 14); 139 (rec 15); 143 (rec 19).
[534] Ibid 135-6 (recs 9 - 12).
[535] Ibid 140 (rec 17); 142 (rec 18); 145 (recs 23, 24); 149 (recs 31, 33); 151 (rec 34); 152 (rec 35).
[536] Ibid 140 (rec 16); 146 (rec 26); 148 (rec 29).
[537] Ibid ix – xii (recs 37 – 54).
[538] Ibid 165 (recs 55, 56).
[539] Eg, New South Wales Taskforce on Services for Victims of Crime, *Report and Recommendations* (1987) 2-3 (recs 8, 10); Legal and Constitutional Committee, Parliament of Victoria, *Report Upon Support Services for Victims of Crime* (1987) xxii (rec 24).

victims' services;[540] provide better education and public awareness of victims' needs;[541] improve personnel training;[542] compensate more expenses[543] and re-design and relocate court buildings.[544]

The NSW Victims Compensation Tribunal, which government established in the *Victims Compensation Act 1987* (NSW),[545] demonstrated the transfer of interstate compensation characteristics that inquiry recommendations could facilitate. As subsection 5.2.3 explained, Victoria had pioneered the notion of an independent tribunal to assess statutory criminal injuries compensation and throughout the 1970s and early 1980s, there were demands for other governments to follow their lead.[546] In 1982, the conservative O'Connor government in WA somewhat acquiesced when it established an independent 'Assessor' to decide compensation.[547] This followed a WA Law Reform Commission recommendation.[548] Deputy Premier Rushton explained that the court system could intimidate victims; involve 'cost and inconvenience'; and comprise 'legal complexities' that necessitated lawyers' involvement.[549] The NSW Taskforce on Services for Victims of Crime echoed these sentiments when it recommended a tribunal for NSW.[550] In addition, there were NSW Police Association criticisms of the adequacy of the court system;[551] parliamentarian concerns[552] and positive

[540] Eg, Department of Justice (Tas), *Report of the Inter-Departmental Committee on Victims of Crime* (1989) 25; Legal and Constitutional Committee, Parliament of Victoria, above n 539, 81 (rec 45).
[541] Eg, New South Wales Taskforce on Services for Victims of Crime, *Report and Recommendations,* above n 539, 96 (rec 32), 139 (recs 52, 53); Legal and Constitutional Committee, Parliament of Victoria, above n 539, 111. (rec 60).
[542] Eg, Legal and Constitutional Committee, Parliament of Victoria, above n 539, xxiii (rec 26, 28, 29); New South Wales Taskforce on Services for Victims of Crime, *Report and Recommendations,* above n 539, 6-7 (recs 18(3), 22), 141-2 (recs 54, 56). See also South Australia Committee of Inquiry, above n 533, vii – viii (rec 22, 29).
[543] Eg, New South Wales Taskforce on Services for Victims of Crime, *Criminal Injuries Compensation in New South Wales*, above n 527, 58 (rec 12); Department of Justice (Tas), above n 540, 4; Legal and Constitutional Committee, Parliament of Victoria, above n 539, 18 (rec 5), 20-23 (recs 7-10).
[544] Eg, Legal and Constitutional Committee, Parliament of Victoria, above n 539, xxix (recs 52, 57).
[545] *Victims' Compensation Act 1987*(NSW) s 4(1).
[546] See, eg, South Australia Committee of Inquiry, above n 533, 168-9.
[547] *Criminal Injuries Compensation Act 1982* (WA) s 5(1); *Criminal Injuries Compensation Act 1985* (WA) s 5(1).
[548] Law Reform Commission of Western Australia, *Report on Criminal Injuries Compensation*, Report No 46 (1975) 3-5.
[549] Western Australia, *Parliamentary Debates,* Legislative Assembly, 20 October 1982, 4052 (Cyril Rushton).
[550] New South Wales Taskforce on Services for Victims of Crime, *Criminal Injuries Compensation in New South Wales*, above n 527, 9.
[551] See Ibid 41.
[552] Eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 November 1987, 16270 (Terry Sheahan); Legislative Assembly, 23 November 1987, 17016 (John Dowd).

lessons from the experience of a tribunal in Victoria.[553] Together, these factors facilitated transfer of a tribunal to NSW to decide compensation.

5.4 UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*

5.4.1 Declaration overview

The altruistic concerns that facilitated improved crime victims' support during the phase of victim consciousness were shared internationally and facilitated a new transfer source for Australian governments. The Council of Europe opened for signature a convention on victims' compensation in 1983.[554] Subsequently, in 1985, the UN adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* ('*Declaration'*) to assist governments 'secure justice and assistance for victims of crime'.[555] The *Declaration* and especially its annexure, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ('UN Declaration'), became a major source of transfer for Australian governments. The fact that Australia played an 'important role' in the *Declaration* development according to then SA Attorney General Chris Sumner was important in this regard.[556] Sumner wrote in 1987 that Australia should, through both federal and State Parliaments, ensure that the UN Declaration 'is implemented in our legal and social systems' for example, and he placed SA at the forefront of that process.[557] Table 5.1 (next page) extracts UN Declaration Principles that State and Territory governments copied and emulated. Subsections 5.5.1 – 5.5.3 examine their transfer.

[553] New South Wales Taskforce on Services for Victims of Crime, *Criminal Injuries Compensation in New South* Wales, above n 527, 36, 41.
[554] *European Convention on the Compensation of Victims of Violent Crimes*, opened for signature 24 November 1983, 1525 UNTS 37 (entered into force 1 February 1988).
[555] *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40th sess, 96th plen mtg, Agenda Item 98, UN Doc A/RES/40/34 (29 November 1985) ('*UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*') Preamble para 3.
[556] South Australia, *Parliamentary Debates,* Legislative Council, 29 October 1985, 1565 (Chris Sumner).
[557] C J Sumner, 'Victim Participation in the Criminal Justice System' (1987) 20 *Australian and New Zealand Journal of Criminology* 195, 200.

Table 5.1 UN Declaration Principles[558]

Item	Declaration
[4] -[6], [14], [15]	[***Victims' Treatment***] **[**4] 'Victims should be treated with compassion and respect for their dignity' … **[5] '…** Victims should be informed of their rights in seeking redress…' **[6]** 'The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information. (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system. (c) Providing proper assistance throughout the legal process. (d) Taking measures to minimize inconvenience to victims…' **[14]** 'Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community based and indigenous means' **[15]** 'Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them'
[16]	[***Personnel Training***]'Police, justice, health, social services and other personnel concerned should receive training to sensitize them to the needs of victims and guidelines to ensure proper and prompt aid'
[12]	[***Compensation Eligibility***] 'Where compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to: (a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes (b) the family, in particular dependents of persons who have died or become physically incapacitated as a result of such victimisation'
[13]	[***Alternate Compensation Funds***] 'The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged'

[Source: Adapted from UN Declaration (1985)]

5.4.2 Victims' Treatment and Personnel Training

The sentiments of the UN Declaration Principles in the Table 5.1 cells labelled 'Victims' Treatment' and 'Personnel training' transferred to multiple Australian jurisdictions. Transfer was facilitated by altruistic concerns for victims' wellbeing and political pressure to be seen to be doing more for crime victims. Guidelines on victims' treatment and 'rights' were the

[558] *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, above n 555, annex ('Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power').

most obvious example of governments transferring these UN Declaration Principles.[559] In some jurisdictions, guidelines' language even copied UN Declaration Principle. The WA 'Guidelines as to How Victims Should be Treated', for example, instructed that victims should be treated with 'compassion and with respect for the victim's dignity'; '[i]nconvenience … should be minimized' and 'privacy … should be protected'.[560] In other jurisdictions, governments emulated UN Declaration Principle such as when they established statutory bodies to advocate on victims' behalf like the ACT Victims of Crime Co-ordinator. Its functions include promoting legislated principles for the treatment of offenders;[561] providing services to crime victims and awareness-raising about victims' needs.[562]

Transfer of the UN Declaration Principle that crime victims' 'views and concerns' should be 'presented and considered at appropriate stages of the proceedings' was more contentious. This was due to legal concerns that the Principle and associated notion of victim impact statements (VISs) could impact the fairness of criminal trials and sentencing decisions.[563] Transfer of the Principle ultimately proceeded[564] but its acceptance relied upon the presence of three factors. First, the passage of time allowed parliamentarians to observe that foreign governments[565] and SA from 1988 had permitted VISs with no obvious adverse implications for trial fairness. Second, in some States, there had been inquiry recommendations that governments should permit VISs. The 1989 inquiry into crime

[559] See, eg, *Victims of Crime Act 1994* (ACT) s 4; *Victims Rights Act 1996* (NSW) s 6; Northern Territory Office of the Director of Public Prosecutions, *Guidelines* [Appendix E] <http://www.dpp.nt.gov.au/legal-resources/documents/dppguidelines.pdf>; *Criminal Offence Victims Act 1995* (Qld) pt 2; South Australia, *Parliamentary Debates,* House of Assembly, 29 October 1985, 1564 (Chris Sumner); *Victims of Crime Act 2001* (SA) pt 2 div 2; Department of Justice (Tas), *Charter of Rights for Victims of Crime* <http://www.justice.tas.gov.au/victims/charter_of_rights_for_victims_of_crime>; *Victims' Charter Act 2006* (Vic) pt 2; *Victims of Crime Act 1994* (WA) sch 1. See also Standing Council on Law and Justice, *National Framework of Rights and Services for Victims of Crime 2013 - 2016* (2013) .

[560] *Victims of Crime Act 1994* (WA) sch 1.

[561] *Victims of Crime Act 1994* (ACT) s 4.

[562] Ibid s 7.

[563] See discussion in Legal and Constitutional Committee, Parliament of Victoria, above n 539, 101; Victorian Sentencing Committee, *Sentencing* (Attorney-General's Department (Vic), 1988) vol 2, 543; Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) xxiii, 104-5.

[564] See *Acts Revision (Victims of Crime) Act 1994* (ACT) pt 3; *Victims Rights Act 1996* (NSW) sch 2; *Sentencing Act 1995* (NT) s 104; *Penalties and Sentences Act 1992* (Qld) s 9(2)(c), *Juvenile Justice Act 1992* (Qld) s 109(1)(g), *Criminal Offence Victims Act 1995* (Qld) s 15; *Criminal Law (Sentencing) Act 1988* (SA) s 7; *Sentencing Amendment Act 2002* (Tas) s 7; *Sentencing (Victim Impact Statement) Act 1994* (Vic); *Victims of Crime Act 1994* (WA) ss 4-5.

[565] Eg, *Victims of Offences Act 1987* (NZ) s 8.

victims' support in Tasmania felt that VISs would be a 'very useful tool in ensuring that the sentencing court is properly informed about the effects of the crime upon the victim' for example.[566] Third, there was some evidence that VISs had therapeutic benefits. Kelly wrote that victims 'wanted more than pity and politeness; they wanted to participate'[567] and Erez explained that research had found that filing a VIS resulted in an 'increased satisfaction with the outcome' for victims.[568]

5.4.3 Compensation Eligibility

Revising compensation eligibility to target groups mentioned in the UN Declaration Principle titled 'Compensation Eligibility' that Table 5.1 extracts was another characteristic that transferred among Australian jurisdictions. Publicly, this transfer was facilitated by altruistic concerns for the crime victims that benefited. However, governments were also increasingly anxious about cost. Like its response to other UN Declaration aspects, the SA Bannon government again spearheaded the transfer process. Attorney General Sumner explained that singling out the family of a deceased crime victim for compensation was necessary because 'the death of a close relative as a result of a crime is in itself a traumatic experience'.[569] Thus, from 1985, SA established a separate basis for compensation to assist 'family victims', which provided compensation for 'grief' of a spouse or putative spouse and parents of a child under age 18 if the spouse or child had been killed by homicide.[570] Subsequently, the *Victims Compensation Act 1987* (NSW) also singled out family of a deceased crime victim for compensation specifically in a four-class categorisation of victims that became a source of transfer in its own right. The four classes were 'primary victim', 'secondary victim', 'close relative' of a deceased victim and 'law enforcement victim'.[571]

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[566] Department of Justice (Tas), above n 540, 35.
[567] Deborah P Kelly, 'Victims' (1987) 34 *Wayne Law Review* 69, 72.
[568] Edna Erez, 'Victim Impact Statements' (Trends & Issues in Crime and Criminal Justice No 33, Australian Institute of Criminology, 1991) 6. See also Edna Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment *and* Enhancement of Justice' [1999] *Criminal Law Review* 545 and Dean G Kilpatrick and Randy K Otto, 'Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning' (1987) 34 *Wayne Law Review* 7, 27.
[569] South Australia, *Parliamentary Debates,* House of Assembly, 29 October 1985, 1562(Chris Sumner).
[570] *Criminal Injuries Compensation Act 1978* (SA) s 7(2a), as inserted by *Statutes Amendment (Victims of Crime) Act 1986* (SA) s 6(b).
[571] For definitions, see *Victims Compensation Act 1987* (NSW) ss 3(1), 10(1).

5.4.4 Alternate Compensation Funds

The 'Alternate Compensation Funds' Principle was the final UN Declaration Principle that governments transferred. Australian governments had considered additional methods of financing statutory criminal injuries compensation expenditure besides consolidated revenue before the UN Declaration. In 1981 for example, the conservative Thompson government in Victoria asked the working party whose recommendations informed the *Criminal Injuries Compensation Act 1983* (Vic) to consider the option of a 'surcharge' upon fines to partially fund compensation. Queensland Attorney General Neville Harper also noted that the Bjelke-Petersen government had opted against introducing a levy to partially fund compensation in 1984. Harper commented that although there were 'very sound reasons' for a levy, the government was a 'low-tax government' and a levy was inconsistent with this approach.[572]

The SA Bannon Labor government was the first to emulate the UN Declaration Principle and introduce a levy upon offenders to partially fund statutory criminal injuries compensation ('offenders' levy').[573] The levy applied to all offences, including parking fines, which reflected a particular philosophy of Attorney-General Sumner. Sumner explained:

> Imposts on cigarettes do not fall on the whole community and are justified on the grounds of the increased cost of health care for smokers even though not all individual smokers will need the additional care. Liquor fees are imposed only on a certain group in the community. Likewise, in this case a levy has been imposed on a certain group in the community (i.e. offenders). There is a choice not to smoke, consume liquor or commit offences.[574]

The offenders' levy notion transferred to other jurisdictions, essentially to provide additional funding for compensation expenditure.[575] Table 5.2 (next page) outlines the scope of offenders and amounts of levy that they had to pay in each jurisdiction as at 1 July 2014. Victoria has not introduced a levy and in WA, although there was

[572] Queensland, *Parliamentary Debates,* Legislative Assembly, 31 January 1984, 1223 (Neville Harper).
[573] *Criminal Injuries Compensation Act 1978* (SA) pt IV, as inserted by *Criminal Injuries Compensation Act Amendment Act 1987* (SA) s 6.
[574] Sumner, above n 557, 214.
[575] *Criminal Injuries Compensation Act 1983* (ACT) s 34D, as inserted by *Criminal Injuries Compensation (Amendment) Act 1996* (ACT) s 6; *Victims' Compensation Act 1987* (NSW) s 65C, as inserted by *Victims Compensation (Amendment) Act 1989* (NSW) sch 1(3); *Crimes Compensation Act 1982* (NT) s 25B(2), as inserted by *Crimes Compensation Amendment Act 1989* (NT) s 23.

acknowledgement of deliberations and legislation being developed in 2011,[576] no reform occurred in the research period.

Table 5.2 Offender levy amounts, 1 July 2014

Jurisdiction	**ACT**[577]	**NSW**[578]	**NT**[579]
Levy	adult: $30: Supreme/ Magistrates court sentence	adult/ child: $166: indictable offence $74: other	adult: $200: indictable offence $150: other $40: infringement notice enforcement order child: $50 body corporate: $1,000
Jurisdiction	**QLD**[580]	**SA**[581]	**TAS**[582]
Levy	adult: $321.40: Supreme/ District Court sentence $107.10: Magistrate Court sentence	adult/ child: $260: indictable $160: summary (other) $60: summary offence (if fine paid on time) The levies double for specific serious offences.[583]	adult: $50: Supreme Court sentence ('simple offence': $20) $20: court of petty sessions

[Source: Original]

No jurisdiction has opted to transfer the breadth of offender that must pay the offenders levy in SA.[584] Concerns about hardship are one explanation for government decisions to levy

[576] Department of Attorney General (WA), *Annual Report 2010 – 11* (2011) 26; Department of Attorney General (WA), *Annual Report 2011-12* (2012) 17. See also Amanda Banks, 'Call for Criminal to Pay Victim Levy', *The West Australian* (Perth), 1 October 2010, 12; Amanda Banks, 'Crime Payouts Jump to $33m', *The West Australian* (Perth), 3 October 2011, 6.

[577] *Victims of Crime Act 1994* (ACT) s 24. Courts may exonerate an offender from paying the levy if it is 'likely to cause undue hardship': *Victims of Crime Act 1994* (ACT) s 26(2).

[578] *Victims Rights and Support (Victims Support Levy) Notice 2013* (NSW) reg 2. A court may exempt a child from paying the levy: *Victims Rights and Support Act 2013* (NSW) s 106(3).

[579] *Victims of Crime Assistance Act 2006* (NT) ss 61(3), (6). Levies were substantially increased by the Mills Country Liberal government. From 1 July 2013, amounts went from $60 to $200; $40 to $150; $20 to $40; $20 to $50 and $200 to $1,000: *Victims of Crime Assistance Amendment Act 2013* (NT) s 4.

[580] *Penalties and Sentences Regulation 2005* (Qld) reg 8A. The Queensland offenders' levy does not compensate crime victims specifically but 'helps pay generally for the cost of law enforcement and administration': *Penalties and Sentences Act 1992* (Qld) s 179A.

[581] *Victims of Crime (Fund and Levy) Regulations 2003* (SA) sch 1 cl 1. A child cannot be liable to pay levies that collectively exceed $180 for serious offences that are prescribed and $100 for other offences: *Victims of Crime (Fund and Levy) Regulations 2003* (SA) sch 1 cl 3.

[582] *Victims of Crime Compensation Act 1994* (Tas) s 5(3). If total compensation levies for an offender exceed $500 ('combined limit'), court may reduce the levy in circumstances of financial hardship: *Victims of Crime Compensation Act 1994* (Tas) s 6.

[583] *Victims of Crime (Fund and Levy) Regulations 2003* (SA) sch 1, cl 2. Examples are homicide, robbery, aggravated robbery, serious criminal trespass and the offence of assaulting and hindering police.

[584] For examples of the offences that governments opted to relieve from having to pay the levy, see *Victims of Crime Regulation 2000* (ACT) sch 2; *Victims of Crime Assistance Regulations 2007* (NT) reg 26. The offences

only some offenders (and not introduce a levy at all) and there have also been philosophical concerns about the appropriateness of levying some minor offenders. The NSW Taskforce on Services for Victims of Crime suggested that 'problems of logic and justice are involved in requiring persons ordered to pay fines, such as parking and traffic offenders to assist in funding a criminal injuries compensation scheme'.[585] Administrative considerations have also been a disincentive. Attorney General Simon Corbell in the ACT Stanhope Labor government imposed a flat offenders levy in that jurisdiction because the 'additional administrative work that would be required to introduce a graduated scheme … would far exceed any substantial funding that would be derived from adopting such a model'.[586] Governments have also allowed recovered crime proceeds and profits to contribute towards the cost of compensation.[587]

5.5 The 'Schedule' and 'Assistance' approaches

Transfer of policies such as an offender levy and restrictions on the categories of victim eligible for compensation highlighted growing concerns about total compensation expenditure. Throughout the 1980s, compensation claims had increased sizeably. Freckelton nominated a 'new phenomenon' of lawyers soliciting for claims; improved advertising of scheme benefits; less stigma associated with being a crime victim and judicial decisions that extended compensation eligibility as possible explanations.[588] Towards the end of the decade, parliamentarians increasingly voiced concern about cost[589] and what Freckelton labels a 'backlash' against the size of compensation expenditure emerged.[590] This backlash

include parking offences, offences under workers' compensation legislation and offences under local government by-laws.

[585] New South Wales Taskforce on Services for Victims of Crime, *Criminal Injuries Compensation in New South Wales*, above n 527, 47. For a discussion of wider concerns about offenders' levies, see Heather Douglas and April Chrzanowski, 'A Consideration of the Legitimacy and Equity of Queensland's Offender Levy' (2013) 24 *Current Issues in Criminal Justice* 317.

[586] Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 15 November 2007, 3418 (Simon Corbell).

[587] See, eg, *Confiscation of Criminal Assets Act 2003* (ACT) s 134(2)(d); *Victims' Compensation Act 1987* (NSW) s 65G(a), as inserted by *Victims Compensation (Amendment) Act 1989* (NSW) sch 1(3); *Crimes (Confiscation of Profits) Act 1986* (SA) s 10; *Criminal Injuries Compensation Act 1976* (Tas) s 11(2)(d), as inserted by *Criminal Injuries Compensation Amendment Act 1993* (Tas) s 7; *Crimes (Confiscation of Profits) Act 1986* (Vic) pt 2A, as inserted by *Crimes (Confiscation of Profits) (Amendment) Act 1991* (Vic) s 16; *Criminal Property Confiscation Act 2000* (WA) s 132(2)(c).

[588] Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy*, above n 505, 37-8.

[589] Eg, South Australia, *Parliamentary Debates*, House of Assembly, 19 March 1987, 3570 (Greg Crafter); Tasmania, *Parliamentary Debates*, House of Assembly, 17 October 1989, 1704 (Peter Patmore); Victoria, *Parliamentary Debates*, Legislative Assembly, 24 March 1988, 904 (Andrew McCutcheon).

[590] Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy*, above n 505, 50.

facilitated what this thesis labels the 'Schedule' and 'Assistance' approaches to statutory criminal injuries compensation.

5.5.1 Schedule approach

The signature characteristic of the Schedule approach, which the *Criminal Offence Victims' Act 1995* (Qld) pioneered, was a table equivalent to the 'table of maims' in workers' compensation legislation that Chapter 4 mentioned. The table listed injuries and prescribed a range of percentages of a maximum amount, being $75,000,[591] which courts could award for each listed injury.[592] Table 5.3 contains an extract.

Table 5.3 Extract, Schedule 1, *Criminal Offence Victims' Act 1995* (Qld)

	Injury	% of Scheme Maximum ($75,000)
1	Bruising, laceration etc. (minor/moderate)	1% - 3%
2	Bruising, laceration etc. (severe)	3% - 5%
3	Fractured nose (no displacement)	5% - 8%
4	Fractured nose (displacement/ surgery)	8% - 20%
5	Loss of damage of teeth	1% - 12%
6	Facial fracture (minor)	8% - 14%
7	Facial fracture (moderate)	14% - 20%
8	Facial fracture (severe)	20% - 30%
9	Fractured skull/ head injury (no brain damage)	5% - 15%
10	Fractured skull (brain damages – minor/ moderate)	10% - 25%
11	Fractured skull (brain damage) – severe) ……	25% - 100%

[Source: *Criminal Offence Victims' Act 1995* (Qld)]

Courts were expressly precluded from relying upon general legal principles to assess damages when deciding damages with this table.[593] Indeed, an explanatory provision reiterated that compensation was not intended to reflect the amount recoverable in a civil claim.[594] If an injury was not listed, courts were to rely upon the percentages for any like listed injury[595] and the government could prescribe in regulation amounts and related injury.[596]

[591] *Criminal Offence Victims Regulation 1995* (Qld) reg 2.
[592] *Criminal Offence Victims Act 1995* (Qld) sch 1.
[593] Ibid s 25(8)(a).
[594] Ibid s 22(3).
[595] Ibid s 25(6).
[596] Ibid s 20.

Amendments that the Conservative Major government made to the UK Criminal Injuries Compensation Scheme inspired the signature characteristic of the Schedule approach. In 1965-66, there had been 2,452 applications to the UK Compensation Scheme and the Board made 1,164 awards totalling £4 million. However, in 1992-93, the Board received almost 66,000 applications and made nearly 37,000 awards that totalled £152.5 million.[597] This growth led the Major government to introduce what was known as the 'tariff scheme', which prescribed amounts for listed injuries.[598] Government rationalised that the tariff scheme should allow victims to 'receive their compensation more quickly and in a more straightforward manner'[599] and those sentiments were echoed in Queensland. The Goss Labor government explained that the Schedule approach would 'simplify' the application process and reduce 'inconsistencies in awards'.[600] Anticipated financial savings were another advantage.

5.5.2 Assistance approach

The signature characteristics of the Assistance approach, which the conservative Kennett government made in the *Victims of Crime Assistance Act 1996* (Vic), were increased counselling entitlements; 'victims assistance' as the label in place of 'criminal injuries compensation' (which had happened already in the NT)[601] and abolition of statutory compensation for pain and suffering. The abolition of statutory compensation for pain and suffering was the most contentious aspect of the Assistance approach.[602] However, it had been countenanced for some years. In December 1981 for example, the Thompson Coalition government had tasked the expert working party that reviewed the *Criminal Injuries Compensation Act 1972* (Vic) to advise whether the statute should continue to make awards in respect of 'pain and suffering' or simply on the basis of medical and like expenses.[603] The

[597] Home Office (UK) and Scottish Office Home and Health Department, *Compensating Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme*, Cm 2434 (1993) 2.
[598] Ibid annex A.
[599] Ibid 7.
[600] Explanatory Note, Criminal Offence Victims Bill 1995 (Qld) 707.
[601] *Crimes Compensation Amendment Act 1989* (NT) ss 5, 13.
[602] See criticisms at Victoria, *Parliamentary Debates,* Legislative Assembly, 21 November 1996, 1455 (John Thwaites); Editorial, 'Hearing Victims' Voices', *The Age* (Melbourne), 9 November 1996, 28; Michael Magazanik, 'Crime Victims Fight Move to Halt Compo', *The Sunday Age* (Melbourne), 10 November 1996, 22; Chris Corns, 'Rewriting Victims' Rights in Victoria' (1997) 71(2) *Law Institute Journal* 37, 37; Ian Freckelton, 'Criminal Injuries Compensation: A Cost of Public Health' (1999) 7 *Journal of Law and Medicine* 193, 202-3; Editorial, 'Compensation for Criminal Injuries: The Beginning of the End?' (1997) 4 *Journal of Law and Medicine* 207, 210.
[603] Working Party to Review the Criminal Injuries Compensation Act 1972 (Vic), above n 514, 1.

committee recommended no change. Further, in 1993, the Arnold Labor government in SA restricted victims' rights to statutory compensation for pain and suffering. This was via a formula[604] adapted from motor accident compensation legislation.[605]

The Kennett government rationalised abolition of statutory compensation for pain and suffering in part by downplaying the value of monetary compensation to crime victims. Attorney General Jan Wade insisted that the provision of free counselling sessions would allow victims to 'immediately address the psychological effects of the crime' upon them rather than wait for monetary compensation.[606] Based upon undisclosed research, Wade also claimed that monetary support did 'not alter later symptoms of psychological suffering'[607] which had support interstate. The 1981 SA inquiry concluded that crime victims' suffering could 'often be more effectively reduced by an extension of human sympathy and social support than by the impersonal means of monetary compensation' for example.[608] Similarly, the NT Attorney-General explained in 1989 that financial compensation was only a 'very minor part in the provision of assistance to victims'.[609] However, other stakeholders disputed these perspectives. Adelaide Sexual Assault Referral Centre staff declared in 1990 for example that monetary compensation provided real therapeutic benefit for crime victims.[610]

Anticipated financial savings from abolition of statutory compensation for pain and suffering were another important explanation for this reform. From 1981-82 to 1986-87, total statutory criminal injuries compensation expenditure in Victoria had grown from around $2.5 million[611] to above $7.7 million[612] and then around $43 million in 1994-95.[613] Attorney General Wade noted that, in light of the increased expenditure, continuing to compensate

[604] *Criminal Injuries Compensation Act 1978* (SA) s 8(a)(i), (ii), as substituted by *Criminal Injuries Compensation (Miscellaneous) Amendment Act 1993* (SA) s 5(b).
[605] *Wrongs Act 1936* (SA) s 35A(1)(b), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.
[606] Jan Wade, 'Using Technology to Provide Best Effective Access to Justice' (1996) 99 *Victorian Bar News* 12, 12.
[607] Ibid. See also Victoria, *Parliamentary Debates,* Legislative Assembly, 31 October 1996, 1023-4 (Jan Wade).
[608] South Australia Committee of Inquiry, above n 533, 163.
[609] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 25 May 1989, 6526 (Daryl Manzie).
[610] T Black and T Nelson-Barratt, 'Compensation - People Getting Money for Being Raped' in Deidre Greig and Ian Freckelton (eds), *The Patient, The Law and The Professional: Proceedings of the 11th Annual Congress of the Australian & New Zealand Association of Psychiatry, Psychology and Law* (Monash University Printing Services, 1990) 240-1.
[611] Crimes Compensation Tribunal, *9th Annual Report* (1982) 1.
[612] Crimes Compensation Tribunal, *15th Annual Report* (1987) 15.
[613] Crimes Compensation Tribunal, *23rd Annual Report* (1995) 25.

pain and suffering would likely result in an unaffordable scheme.[614] The Assistance approach meant that crime victims could recover an amount of 'financial assistance' for any financial loss that they sustained as the result of a crime[615] up to $60,000.[616] However, if they wanted an amount for non-financial loss such as pain and suffering, with the exception of family of a deceased crime victim who could recover an amount for 'distress',[617] they had to pursue legal proceedings against the offender(s).[618] As section 5.2 explained, offenders' frequent impecuniosity had motivated statutory injury compensation initially so the outlook for crime victims seeking pain and suffering compensation was limited.

5.6 Transfer of Schedule and Assistance approach characteristics

5.6.1 *Victims' Compensation Act 1996* (NSW): Schedule approach

Characteristics of the Assistance and Schedule approaches transferred to other jurisdictions in large part because of shared concerns about statutory criminal injuries compensation expenditure. NSW Attorney-General Jeff Shaw explained that the Carr Labor government had a 'clear responsibility' to ensure that expenditure did not 'cause an unaffordable drain on public funds'.[619] As such, government enacted the *Victims' Compensation Act 1996* (NSW) which, according to Shaw, had a primary goal of addressing the 'escalating cost' of compensation.[620] Shaw also wanted to ensure that compensation was directed toward victims with the 'most serious injuries'.[621] Thus, the government required applicants to actually witness the act of violence against the victim and sustain injury to recover compensation.[622] This was in place of the former rule that compensated victims who sustained injury after 'otherwise becoming aware of an injury'. In addition, the government denied inmates' rights to compensation for injuries sustained in prison except in

[614] Victoria, *Parliamentary Debates,* Legislative Assembly, 31 October 1996, 1023 (Jan Wade).
[615] *Victims of Crime Assistance Act 1996* (Vic) ss 8(2), (3); 10(2), (3).
[616] Ibid s 8(1).
[617] Ibid s 13(2)(c).
[618] Ibid s 74.
[619] New South Wales, *Parliamentary Debates,* Legislative Council, 15 May 1996, 974 (Jeff Shaw).
[620] Ibid.
[621] Ibid.
[622] *Victims Compensation Act 1996* (NSW) s 8(1). There was a concession for parents or guardians of a child victim that suffered injury from 'subsequently becoming aware' of a violent act against their child provided they had not committed the violent act themselves: *Victims Compensation Act 1996* (NSW) s 8(2). See government explanation for concession at New South Wales, *Parliamentary Debates,* Legislative Council, 15 May 1996, 976-7 (Jeff Shaw).

'exceptional circumstances'.[623] This continued an interstate practice[624] and followed adverse media reports of claims from particular inmates.[625]

A table prescribing amounts of compensation for listed injuries[626] was the *Victims' Compensation Act 1996* (NSW) aspect that government transferred from the Schedule approach. The table determined the amount of compensation that crime victims could recover in place of courts' former reliance upon general legal principles. Attorney General Shaw reasoned that the community had 'a right to expect' that compensation would 'be consistent and equitable'.[627] Also, there was the added benefit of greater certainty about the amount of compensation. Reforming a characteristic in the initial *Criminal Injuries Compensation Act 1967* (NSW), the Carr government also significantly increased the minimum award threshold that compensation had to exceed to be paid from $200 to $2,400.[628] Highlighting the financial motivation for this reform, Shaw explained that the threshold increase was necessary 'to remove small claims which occupy disproportionate administrative time and cost'.[629]

5.6.2 *Victims Compensation (Amendment) Acts* (NSW): Assistance approach

The Carr government had not finished compensation restrictions in the *Victims Compensation Act 1996* (NSW) for in 1998 and 2000 it made further amendments.[630] This followed two reports on the long term financial viability of the scheme.[631] The government transferred the notion of a 'deductible' from workers' compensation so that $750 had to be deducted from any compensation award assessed at less than $20,001 with an exception for

[623] *Victims Compensation Act 1996* (NSW) s 24(5). An example of 'exceptional circumstances' was if the inmate was 'seriously and permanently injured'.
[624] In 1982, for example, the conservative O'Connor government in WA had, among other preclusions, denied compensation to victims where it was likely to benefit the offender(s): *Criminal Injuries Compensation Act 1982* (WA) s 25; *Criminal Injuries Compensation Act 1985* (WA) s 23. For another preclusion example before the *Victims Compensation Act 1996* (NSW), see *Crimes Compensation Act 1982* (NT) s 12, as inserted by *Crimes Compensation Amendment Act 1989* (NT) s 13.
[625] See, eg, Michael Sharp, 'Ebony's Killer Claims Victims' Cash', *The Sydney Morning Herald* (Sydney), 16 September 1995, 3.
[626] *Victims Compensation Act 1996* (NSW) sch 1.
[627] New South Wales, *Parliamentary Debates,* Legislative Council, 15 May 1996, 975 (Jeff Shaw).
[628] *Victims Compensation Act 1996* (NSW) s 20(1).
[629] New South Wales, *Parliamentary Debates,* Legislative Council, 15 May 1996, 975 (Jeff Shaw).
[630] Eg, *Victims Compensation Amendment Act 1998* (NSW); *Victims' Compensation Amendment Act 2000* (NSW).
[631] Joint Select Committee on Victims Compensation, Parliament of New South Wales, *The Long Term Financial Viability of the Victims Compensation Fund: Second Interim Report* (1997) ; Joint Select Committee on Victims Compensation, Parliament of New South Wales, *Ongoing Issues Concerning the New South Wales Victim Compensation Scheme* (2000) .

awards to family victims.[632] Emulating Assistance approach characteristics, the government also restricted statutory compensation for psychological or psychiatric injury essentially because their cost was deemed excessive.[633] One of the restrictions meant that only victims of armed robbery, abduction or kidnapping could recover compensation for 'moderately disabling' chronic psychological or psychiatric disorder.[634] Attorney General Shaw explained that '[w]hilst the victims of such serious crimes may not necessarily incur physical injuries, they often suffer significant and long-lasting psychological damage'.[635] Further emulating Assistance approach characteristics, the government also permitted 'family victims' to recover up to 20 hours of approved counselling and such further periods '*as may be requested'.*[636] Treasurer Michael Egan stressed that counselling was 'very important' to crime victims and a 'primary goal' of the amending legislation was to shift the scheme 'focus' from 'compensation to rehabilitation'.[637] This echoed sentiments that Victorian Attorney General Jan Wade expressed in the context of the Assistance approach. Indeed, the Carr government replaced 'compensation' in the *Victims Compensation Act 1996* (NSW) title with the phrase 'support and rehabilitation'.[638]

5.6.3 *Victims of Crime (Financial Assistance) Amendment Act 1999* (ACT): Assistance approach

Like its NSW counterpart, the minority ACT Carnell Liberal government also transferred Assistance approach characteristics in the *Victims of Crime (Financial Assistance) (Amendment) Act 1999* (ACT). The ACT was recovering from a recession that Chief Minister Kate Carnell accredited to 'massive' 'spending and employment cutbacks' of the federal Howard Coalition government in 1998.[639] This made the government especially anxious about the size of statutory criminal injuries compensation expenditure which the Deputy Chief Minister and Attorney General Gary Humphries described as the 'second most

[632] *Victims Compensation Act 1996* (NSW) s 19A(1), as inserted by *Victims Compensation Amendment Act 1998* (NSW) sch 1 cl 2.
[633] *Victims Compensation Amendment (Compensable Injuries) Regulation 2000* (NSW) sch 1 cl 2-4. See explanation at New South Wales, *Parliamentary Debates,* Legislative Council, 22 October 1998, 8855 (Ron Dyer).
[634] *Victims' Support and Rehabilitation Act 1996* (NSW) sch 1 cl 5(3), as inserted by *Victims' Compensation Amendment Act 2000* (NSW) sch 1 cl 22.
[635] New South Wales, *Parliamentary Debates,* Legislative Council, 22 June 2000, 7416 (Jeff Shaw).
[636] *Victims' Support and Rehabilitation Act 1996* (NSW) s 21(4), as substituted by *Victims' Compensation Amendment Act 2000* (NSW) sch 1 cl 7. (emphasis added)
[637] New South Wales, *Parliamentary Debates,* Legislative Council, 22 June 2000, 7403 (Michael Egan).
[638] *Victims' Compensation Amendment Act 2000* (NSW) sch 1 cl 1 -2.
[639] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 1998, 826 (Kate Carnell).

expensive scheme per capita in Australia'.[640] Humphries noted that in 1997-98, $5 million was paid 'to around only 350 victims'[641] and he tasked inquiries to examine statutory criminal injuries compensation. These inquiries' findings were integral to explaining why the Carnell government emulated the Assistance approach as they downplayed the value of monetary compensation,[642] praised counselling as an alternative[643] and criticised the former ACT scheme for being 'overly focused on individualised financial packages'.[644] Indeed, an Attorney-General's Department discussion paper stated that the Victorian approach towards counselling had 'much to commend it'.[645]

The Carnell government adopted the 'financial assistance' nomenclature to describe victims' compensation like the Assistance approach[646] and Attorney General Humphries explained that this assistance would reimburse expenses associated with the injury, costs of making an application and lost earnings.[647] However, while the *Victims of Crime (Financial Assistance) (Amendment) Act 1999* (ACT) removed the specific mention of compensation for pain and suffering that the *Criminal Injuries Compensation Ordinance 1983* (ACT) had,[648] Humphries acknowledged that 'in significant cases [of criminal injury,] rehabilitation is not achievable'.[649] As such, via a notable variation from the Assistance approach, the government retained a right to 'special assistance' of up to $30,000 for victims that had obtained 'such assistance from the victims' assistance service as is reasonably available' and that had 'an extremely serious injury' such as 'permanent impairment, loss or disfigurement, or that had lost a foetus.[650] A minor party amendment meant that police, ambulance officers, firefighters and sexual assault victims could recover 'special assistance

[640] Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 25 November 1999, 3724 (Gary Humphries).
[641] Ibid 3036.
[642] Attorney-General's Department (ACT), *Discussion Paper: Reform of the Australian Capital Territory Criminal Injuries Compensation Scheme* (1997) 23.
[643] Ibid 1 (rec 4).
[644] Australian Capital Territory Victim Support Working Party, *Victim Support in the ACT: Options for a Comprehensive Response: Report of the Victim Support Working Party* (Victims of Crime Co-ordinator, 1998) 27.
[645] Attorney-General's Department (ACT), above n 642, 23.
[646] *Victims of Crime (Financial Assistance) (Amendment) Act 1999* (ACT) s 4.
[647] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 1998, 3037 (Gary Humphries).
[648] See *Criminal Injuries Compensation Ordinance 1983* (ACT) s 6(1)(c).
[649] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 1998, 3037 (Gary Humphries).
[650] *Criminal Injuries Compensation Act 1983* (ACT) ss 10(1)(d); (2); 11, as inserted by *Victims of Crime (Financial Assistance) (Amendment) Act 1999* (ACT) s 5.

by way of reasonable compensation for pain and suffering' of up to $50,000.[651] This special assistance concession highlighted the political sensitivities associated with completely abolishing statutory compensation for crime victims' pain and suffering.

5.7 Transfer of Schedule and Assistance characteristics interrupted

The *Victims of Crime (Financial Assistance) Amendment Act 1999* (ACT) proved to be the final statute that transferred Assistance and Schedule approach characteristics to 2000. This is because, in the subsequent five years, government reforms of statutory criminal injuries compensation were characterised by non-transfer from these two approaches as subsections 5.7.1 – 5.7.4 explain.

5.7.1 *Victims of Crime Assistance (Amendment) Act 2000* (Vic)

The *Victims of Crime Assistance (Amendment) Act 2000* (Vic) was the first example of non-transfer of Assistance and Schedule approach characteristics. Before the 20 October 1999 Victorian State election, the Bracks Labor opposition had committed to restore statutory criminal injuries compensation for pain and suffering. This followed significant stakeholder opposition to the Kennett government policy and Labor acceptance that there was value delivering monetary compensation for crime victims' pain and suffering. Labor formed a minority government after the State election and moved to implement its commitment. Attorney General Rob Hulls explained that denying statutory compensation for pain and suffering precluded victims having their 'suffering validated by the State'.[652] Also, in direct contrast to Kennett government sentiment, Hulls reasoned that 'a sum of money –however small – provides [victims] with recognition and acknowledgement that they have suffered' as crime victims and that government was willing to offer them a 'tangible expression of [government's] sympathy for the harm that they have suffered.[653]

The Bracks government did not fully restore statutory criminal injuries compensation for pain and suffering however despite its endorsement of monetary compensation. Rather, the government opted for an approach that emulated the right to 'special assistance' that the

[651] *Criminal Injuries Compensation Act 1983* (ACT) ss 10(1)((e)-(f), as inserted by *Victims of Crime (Financial Assistance) (Amendment) Act 1999* (ACT) s 5. This amendment was moved by Dave Rugendyke, who was a former police officer and member of the Osborne Independents: see Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 December 1999, 4263 (Dave Rugendyke).
[652] Victoria, *Parliamentary Debates,* Legislative Assembly, 26 May 2000, 1912 (Rob Hulls).
[653] Ibid 1913.

conservative ACT Carnell government legislated. This meant that victims could recover 'special financial assistance' if they had suffered 'significant adverse effects' from a violent act.[654] 'Significant adverse effects' included 'grief, distress, trauma or injury'.[655] The minimum and maximum amounts of this special financial assistance were prescribed in legislation and increased with act severity. Acts of violence were grouped into four categories[656] and in 'exceptional circumstances', the government also entitled children injured witnessing violence against a family member and parents or guardians injured becoming aware of violence against their child to recover 'additional assistance' for any expenses that they incurred attempting to recover from that witnessing or learning.[657] Attorney General Hulls suggested compensation 'for reasonable interstate travel costs to attend a funeral' as an example of this additional assistance.[658] Contrary to NSW Labor sentiment that favoured a minimum award threshold, Attorney General Hulls explained that 'victims ought not be excluded from obtaining recognition from the state simply because their entitlement to compensation is small'.[659]

5.7.2 *Victims of Crime Act 2001* (SA)

The *Victims of Crime Act 2001* (SA) was the second example of non-transfer of Schedule and Assistance approach characteristics from 2000. In contrast to other jurisdictions, the SA Olsen conservative government was not burdened by the high cost of statutory criminal injuries compensation. Annual expenditure had decreased by 28 per cent since a 'peak' in 1994-95 and 'been relatively constant for the three years to 1998-99'.[660] Further, the proportion of compensation financed by offenders, which included proceeds of the broadly applicable offenders levy in SA, had risen from 3.1 per cent in 1994-95 to 7.7 per cent in 1997-98 before a slight decline.[661] These conditions meant that when Attorney General

[654] *Victims of Crime Assistance Act 1996* (Vic) s 8A, as inserted by *Victims of Crime Assistance (Amendment) Act 2000* (Vic) s 7.
[655] *Victims of Crime Assistance Act 1996* (Vic) s 3(1) (definition of 'significant adverse effect'), as inserted by *Victims of Crime Assistance (Amendment) Act 2000* (Vic) s 5(b).
[656] *Victims of Crime Assistance Act 1996* (Vic) s 8A(5), as inserted by *Victims of Crime Assistance (Amendment) Act 2000* (Vic) s 7.
[657] *Victims of Crime Assistance Act 1996* (Vic) s 10A, as inserted by *Victims of Crime Assistance (Amendment) Act 2000* (Vic) s 8.
[658] Victoria, *Parliamentary Debates,* Legislative Assembly, 26 May 2000, 1915 (Rob Hulls).
[659] Ibid 1914.
[660] Victims of Crime Review, *Report Three: Criminal Injuries Compensation* (Attorney General's Department (SA), 2000) 23.
[661] Ibid 26.

Trevor Griffin tasked a unit within the SA Attorney General's Department to develop recommendations that would improve crime victims' support,[662] there was less urgency to identify ways to reduce expenditure. Indeed, the review concluded that 'most of the factors that stimulated change and underpinned much of the debate and reform interstate were not as prevalent in SA'[663] and its findings contradicted other government sentiments. The review 'acknowledged the importance to crime victims of both monetary compensation and assistance' for example[664] and it recommended against the abolition of 'monetary compensation for non-financial losses'.[665] The review also concluded that a counselling regime 'was not a viable option' to ensure 'financial sustainability' based upon experience in Victoria, NSW and the ACT.[666]

The review recommendations, and its recommendations concerning monetary compensation particularly, informed *Victims of Crime Act 2001* (SA) characteristics.[667] Attorney General Griffin declared that the 'object' of the statute was to 'bring the operation of the [SA scheme] closer to what was originally intended; that is, *monetary* payments to those persons who suffer physical or mental injuries as a result of violent or sexual offences'.[668] Contrary to interstate legislation, the Olsen government abolished the minimum award threshold that total compensation had to exceed to be paid and lowered the minimum threshold that applied to deciding damages for non-economic loss such as pain and suffering specifically.[669] The government also increased the amount recoverable for funeral expenses,[670] consistent with a review recommendation,[671] and permitted crime victims without mental or physical injury to recover discretionary compensation.[672] A

[662] In total, the SA Attorney-General's Department prepared three reports: Victims of Crime Review, *Report One* (Attorney General's Department (SA), 1999) ; Victims of Crime Review, *Report Two: Survey of Victims of Crime* (Attorney General's Department (SA), 2000) Victims of Crime Review, *Report Three*, above n 660.
[663] Victims of Crime Review, *Report Three*, above n 660, v.
[664] Ibid 75.
[665] Ibid 83 (rec 7).
[666] Ibid 91 (rec 11).
[667] See South Australia, *Parliamentary Debates,* Legislative Council, 16 May 2001, 1479 (Trevor Griffin).
[668] Ibid 1480 (emphasis added).
[669] *Victims of Crime Act 2001* (SA) s 20(3)((a)(ii).
[670] Ibid s 20(1)(d).
[671] Victims of Crime Review, *Report Three*, above n 660, 87 (rec 9).
[672] *Victims of Crime Act 2001* (SA) s 27(4)(e).

relevant circumstance was the victim of a 'home invasion' that wanted to install improved security devices.[673]

The Olsen government rejected compensation characteristics that existed interstate. For example, the government rejected a review recommendation to emulate NSW and compensate primary, secondary and related victims separately.[674] Griffin explained that the government was 'persuaded' by submissions that argued against differentiating compensation among victims.[675] The government also decided against prescribing amounts of compensation like the Schedule approach. Rather, judges could order 'such amount as the court thinks fit'.[676] Further, although the government accepted the interstate requirement for an 'act of violence' before victims qualified for compensation, the government took what the Minister labelled a 'slightly broader approach'.[677] This permitted individuals that were victims of threats of violence against them or their family, or that had a 'reasonable apprehension of imminent harm' to them or their family, to recover compensation.[678] Not all interstate sentiments or characteristics were rejected however. The government introduced a specific right for the spouse of a murdered victim and the parents of a murdered child to recover compensation for grief for example.[679] Further, the government barred prisoners recovering compensation for psychological injury from offences in prison 'unless the prisoner was assaulted or suffered serious injury'.[680] This reflected NSW legislation.

The *Victims of Crime Act 2001* (SA) was a new transfer source for other governments but none transferred its characteristics. Rather, as NT and ACT legislation demonstrated, continued concerns about cost facilitated transfer of legislative themes enacted before the *Victims of Crime Act 2001* (SA). In the NT, the Martin Labor government doubled the 'offenders' levy' amount;[681] precluded compensation for injuries sustained in the

[673] South Australia, *Parliamentary Debates,* Legislative Council, 16 May 2001, 1480 (Trevor Griffin).
[674] Victims of Crime Review, *Report Three*, above n 660, 51 (rec 1).
[675] South Australia, *Parliamentary Debates,* Legislative Council, 16 May 2001, 1480 (Trevor Griffin).
[676] *Victims of Crime Act 2001* (SA) s 20(1)(a).
[677] South Australia, *Parliamentary Debates,* Legislative Council, 16 May 2001, 1480 (Trevor Griffin).
[678] *Victims of Crime Act 2001* (SA) s 17(1).
[679] Ibid s 17(2).
[680] Ibid s 17(5)(e).
[681] *Crimes (Victims Assistance) Amendment Act 2002* (NT) sch.

'commission of a crime'[682] and limited the fees recoverable by lawyers from criminal injuries compensation claims.[683] Attorney General Peter Toyne explained that lawyers' fees represented 41 per cent of total scheme costs in 2001-02, which was up from 21 per cent in 1998-99.[684] Toyne also signalled that thought was being given to a 'completely new' compensation system focused upon 'rehabilitation and counselling'.[685] In the ACT, the Stanhope Labor government, which had assumed office in November 2001, rejected an independent recommendation to widen eligibility for pain and suffering compensation on the basis that this would be 'unaffordable'.[686] Echoing Kennett government sentiment, but contrary to SA findings and results of further research,[687] the Stanhope government insisted that 'research' suggested that monetary compensation did not aid victims' recovery.[688] The government provided no details.

5.7.3 *Criminal Injuries Compensation Act 2003* (WA)

The third example of non-transfer from Schedule and Assistance approach characteristics after 2000 was the *Criminal Injuries Compensation Act 2003* (WA) that the Gallop Labor government enacted. Like interstate approaches, the *Criminal Injuries Compensation Act 2003* (WA) narrowed the victims eligible for mental or nervous shock compensation to reflect interstate classes.[689] The legislation also denied compensation for individuals injured during the commission of a crime[690] and restricted compensation for victims injured by contributory conduct.[691] However, that was where synergies ended. This is because what essentially distinguished the *Criminal Injuries Compensation Act 2003* (WA) from interstate

[682] *Crimes (Victims Assistance) Act* (NT) s 12(f), as inserted by *Crimes (Victims Assistance) Amendment Act 2002* (NT) s 6(d).
[683] *Crimes (Victims Assistance) Regulations* (NT) reg 5-6, as inserted by *Crimes (Victims Assistance) Amendment Act 2002* (NT) s 15(1).
[684] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 22 August 2002, 2309 (Peter Toyne).
[685] Ibid 2310. For an earlier discussion of rehabilitation see Crime Victims Advisory Committee, *Report from the Crime Victims Advisory Committee to the NT Attorney-General on Crime Victim Assistance* (1997) 36.
[686] Australian Capital Territory Government, *Government Response to the Report by Dr Anthony Dare on Assistance for Victims of Crime in the ACT: A Review of the Operation of the Victims of Crime (Financial Assistance) Act 1983 and the Victims Services Scheme* (Department of Justice and Community Safety, 2003) 10.
[687] See, eg, Michael Dawson and Jodie Zada, 'Victims of Crime: The Therapeutic Benefit of Receiving Compensation' (Paper presented at the Australian and New Zealand Association of Psychiatry, Psychology and Law Nineteenth Annual Congress, All Seasons Premier Menzies Hotel,, Sydney, 16 - 19 September 1999) 7 <http://archive.victimsa.org/files/articles-and-presentations/anzappl-conference---compensation.pdf.>.
[688] Australian Capital Territory Government, *Government Response to the Report by Dr Anthony Dare*, above n 686, 9.
[689] *Criminal Injuries Compensation Act 2003* (WA) s 35(2).
[690] Ibid s 39.
[691] Ibid s 41(b)(i).

approaches was the fact that the Gallop government persisted with a comparatively unchanged approach from the *Criminal Injuries Compensation Act 1985* (WA). The scope of compensable harms remained personal injury and 'loss' (defined as financial expenses and loss of earnings)[692] plus there was compensation for future medical expenses.[693] The provisions allowing individuals to recover compensation in circumstances of an 'alleged offence' were unchanged.[694] Further, in contrast to the moderated compensation increases in other States, the Gallop government increased the maximum compensation threshold by 50 per cent to $75,000.[695] Attorney-General Jim McGinty explained that this was essentially because it had not been amended for 12 years.[696]

The absence of any real demand for alternate reform explained the Gallop government persistence with *Criminal Injuries Compensation Act 1985* (WA) characteristics. Parliamentarians made no mention of the compensation revisions interstate during parliamentary debate and no obvious campaign for transfer emerged from external stakeholders. Attorney General McGinty acknowledged that the Criminal Injuries Compensation Bill 2003 (WA) 'incorporated' a number of recommendations of a 1997 working party review of the *Criminal Injuries Compensation Act 1985* (WA).[697] However, as Greens parliamentarian Giz Watson noted, the Bill implemented only half of the 34 review recommendations[698] and many of those were for government to persist with the existing approach. Working party recommendations for government to transfer Schedule and Assistance approach characteristics such as a tariff of injuries[699] and $1,000 minimum award threshold[700] were ignored. Like the SA legislation, this was apparently due to different perspectives on what were optimal compensation characteristics and, again, the absence of any real demand for these recommendations.

[692] Ibid s 6(2).
[693] Ibid s 6(2)(b).
[694] Ibid ss 13 -17.
[695] Ibid s 31(1).
[696] Western Australia, *Parliamentary Debates,* Legislative Assembly, 24 September 2003, 11682 (Jim McGinty).
[697] Ibid.
[698] Western Australia, *Parliamentary Debates,* Legislative Council, 2 December 2003, 13867 (Giz Watson).
[699] Working Party, *Report of the Review of the Criminal Injuries Compensation Act 1985 (WA)* (Policy and Legislation Division, Ministry of Justice (WA), 1997) 44 (rec 17).
[700] Ibid 52 (rec 24((i)).

5.7.4 *Criminal Injuries Compensation Amendment Act 2005* (Tas)

The *Criminal Injuries Compensation Amendment Act 2005* (Tas) was the fourth and final example of non-transfer of Schedule and Assistance approach characteristics from 2000. Statutory criminal injuries compensation claims were increasing at 'an unsustainable rate' in Tasmania in 2005.[701] *The Mercury* reported that payments had increased from $3.6 million in 2002-03 to $5.7 million two years later.[702] Attorney General Judy Jackson commented that non-monetary support for crime victims was 'more important, or should be more important, than the money that [victims] get' and that criminal injuries compensation was about 'assisting people'.[703] This emulated Assistance approach sentiment and apparently because it provided a 'more realistic impression' of its purpose,[704] the Lennon Labor government re-titled the Tasmanian compensation statute the *Victims of Crime Assistance Act 1976* (Tas).[705] Both actions suggested that government was emulating the Assistance approach. However, in contrast to a signature characteristic of the Assistance approach, government retained specific rights to statutory compensation for pain and suffering[706] and also did not introduce any counselling entitlements.

Not dissimilar to the *Criminal Injuries Compensation Act 2003* (WA), the Lennon government retained the framework of its former statutory criminal injuries compensation approach with some interstate modifications. These modifications included the requirement for there to have been a violent act to recover compensation.[707] Also, the classes of eligible victim became individuals against whom an offence was committed;[708] witnesses of an offence, or parents or guardians of a child victim[709] and other immediate family of a victim.[710] Attorney General Jackson acknowledged that these classes were consistent with the approach in

[701] Tasmania, *Parliamentary Debates,* House of Assembly, 18 May 2005, 35-6 (Judy Jackson).
[702] Gavin Lower, 'State Compo Leaps $2m in Two Years: Payouts on Crime Soar ', *The Mercury* (Hobart), 29 August 2005, 3.
[703] Tasmania, *Parliamentary Debates,* House of Assembly, 18 May 2005, 50 (Judy Jackson).
[704] Ibid 35.
[705] *Criminal Injuries Compensation Amendment Act 2005* (Tas) s 4.
[706] *Criminal Injuries Compensation Act 1976* (Tas) ss 4(2)(d), 4(3)(e), 4(4)(e), as substituted by *Criminal Injuries Compensation Amendment Act 2005* (Tas) s 6.
[707] *Criminal Injuries Compensation Amendment Act 2005* (Tas) s 5(a) – (d).
[708] *Criminal Injuries Compensation Act 1976* (Tas) s 2(1) (definition of 'primary victim'), as inserted by *Criminal Injuries Compensation Amendment Act 2005* (Tas) s 5(e).
[709] *Criminal Injuries Compensation Act 1976* (Tas) s 2(1) (definition of 'secondary victim'), as inserted by *Criminal Injuries Compensation Amendment Act 2005* (Tas) s 5(f).
[710] *Criminal Injuries Compensation Act 1976* (Tas) s 2(1) (definition of 'related victim'), as inserted by *Criminal Injuries Compensation Amendment Act 2005* (Tas) s 5(e).

Queensland, NSW and Victoria.[711] Reflecting a recommendation of its 1989 inquiry,[712] and again consistent with other jurisdictions, the government increased the maximum compensation threshold from $20,000 to $50,000[713] and abolished compensation for property damages.[714]

The Lennon government would have liked to emulate more interstate legislation but, like the ACT government, it met political opposition that could also have discouraged it attempting to transfer more contentious Schedule and Assistance approach characteristics. The government attempted to preclude compensation where the victim would also be entitled to workers' compensation for the same injury like WA for example.[715] However this reform was defeated as, reflecting police and prison guard criticisms, the Liberal opposition leader branded the proposal 'outrageous'.[716] Parliamentary opposition, particularly from Greens parliamentarians, also defeated an attempt to transfer the NSW provision that denied compensation to prison inmates injured in prison. The opposition was based on philosophical concerns for inmates' wellbeing.

5.8 The Assistance approach re-emerges

The *Criminal Injuries Compensation Amendment Act 2005* (Tas) was the final statute that spurned Schedule and Assistance approach characteristics from 2000 as subsequent legislation reprised their characteristics.

5.8.1 *Victims of Crime Assistance Act 2006* (NT)

The *Victims of Crime Assistance Act 2006* (NT) was the first statute to reprise Assistance and Schedule approach characteristics. Like the *Victims of Crime Assistance Act 1996* (Vic), its genesis was what NT Attorney General Peter Toyne labelled the 'enormous annual cost' of statutory criminal injuries compensation.[717] Toyne noted that the statute contents were

[711] Tasmania, *Parliamentary Debates,* House of Assembly, 18 May 2005, 36 (Judy Jackson).
[712] Department of Justice (Tas), above n 540, 4.
[713] *Criminal Injuries Compensation Regulations 2000* (Tas) reg 4, as substituted by *Criminal Injuries Compensation Amendment Regulations 2005* (Tas) reg 6.
[714] *Criminal Injuries Compensation Act 1976* (Tas) s 6(1)(c), as substituted by *Criminal Injuries Compensation Amendment Act 2005* (Tas) s 8.
[715] See, eg, *Criminal Injuries Compensation Act 1985* (WA) ss 24A, 24B, as inserted by *Criminal Injuries Compensation Amendment Act 1996* (WA) s 8.
[716] Tasmania, *Parliamentary Debates,* House of Assembly, 18 May 2005, 38 (Michael Hodgman).
[717] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 29 March 2006, 1981 (Peter Toyne).

'largely based' upon 1997 recommendations of the Crime Victims Advisory Committee,[718] who had overwhelmingly advocated the implementation of Assistance approach characteristics. For example, the recommendations included a direction for government to 'shift away from assistance/ compensation to rehabilitation'; to provide 'quality and timely counselling services'; to increase maximum assistance and to provide 'urgent interim financial assistance'.[719]

The *Victims of Crime Assistance Act 2006* (NT) emulated key Schedule and Assistance approach characteristics. Reflecting the Schedule approach, the government introduced a table to decide compensation that prescribes amounts for listed injuries for example.[720] Reflecting the Assistance approach, the government also abolished statutory compensation for pain and suffering; established a Victims Counselling Scheme;[721] entitled victims to free counselling;[722] and introduced up to $5,000 in 'immediate payments of financial assistance'.[723] Attorney General Toyne explained that research had 'shown that immediate assistance, support and counselling is one of the most effective ways to help victims of crime overcome and rehabilitate', which echoed Assistance approach sentiment.[724] However, he provided no elaboration. Toyne insisted that monetary compensation 'alone is not a particularly good way to get closure for victims and to assist them in the rehabilitation'.[725] Rather, Toyne insisted that 'very strong counselling, and ongoing counselling services, is a more critical factor in those cases for rehabilitation than the actual size of the compensation payment'.[726]

Transfer of Assistance and Schedule approach characteristics complemented further examples of interstate transfer in the *Victims of Crime Assistance Act 2006* (NT). The statute includes categories of victim and required harm that emulate interstate legislation for example[727] plus a statutory body that advises the Minister about victims' interests and

[718] Ibid.
[719] Crime Victims Advisory Committee, above n 685, 38 (recs 2, 3, 7, 8).
[720] *Victims of Crime Assistance Act 2006* (NT) ss 38(1), 39(1), 40(1).
[721] Ibid s 20.
[722] Ibid ss 10(1), 12(1), 14(1), 16.
[723] Ibid ss 26, 27.
[724] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 29 March 2006, 1982 (Peter Toyne).
[725] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 3 May 2006, 2257 (Peter Toyne).
[726] Ibid 2258.
[727] See, eg, *Victims of Crime Assistance Act 2006* (NT) ss 9, 11, 13.

rights.[728] The government has also established a Victims Financial Assistance Scheme[729] whereby applications are made to a Crime Victims Services Unit (CVSU) within government in place of the courts.[730] Rationalising this reform, Attorney General Toyne lamented that 'over half of the money paid out [to crime victims] was going to the process'.[731] He also noted that government had received 'overwhelming advice that people were traumatised by the court-based process' and that the litigation process was 'adding another layer of victimisation on the victim'.[732] This suggested financial and altruistic motivations for this reform although financial motivations were a more overt explanation for other characteristics of the revised scheme. The statute incorporates a comparatively high minimum award threshold of $7,500 for example.[733] Further, succeeding where the Tasmanian government failed, an amount cannot be recovered for an injury if the individual may also recover workers' compensation.[734] The *Victims of Crime Assistance Act 2009* (NT) highlights the primacy that emulation had assumed as the dominant transfer degree.

5.8.2 Victims of Crime Assistance Amendment Bill 2007 (Tas)

Attempts to transfer Assistance approach characteristics continued when the Tasmanian Lennon Labor government introduced the Victims of Crime Assistance Amendment Bill 2007 (Tas). Despite *Criminal Injuries Compensation Amendment Act 2005* (Tas) restrictions, the government had not reduced statutory criminal injuries compensation expenditure to the extent desired. As such, the Victims of Crime Assistance Amendment Bill 2007 (Tas) proposed to limit compensation to medical expenses 'reasonably incurred', with pain and suffering compensation recoverable by a limited class of sexual offence victims and then only up to $2,000.[735] Dramatically, Treasurer Michael Aird announced that statutory criminal injuries compensation in Tasmania would 'cease operation' but for $2 million over four years for a 'Victims Assistance Scheme to help victims of person-to-person violence'.[736] This emulated Assistance approach characteristics but the Bill failed amid strong legal[737] and

[728] *Victims of Crime Rights and Services Act 2006* (NT) s 10.
[729] *Victims of Crime Assistance Act 2006* (NT) s 23.
[730] The CVSU is established under *Victims of Crime Rights and Services Act 2006* (NT) s 5(1).
[731] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 3 May 2006, 2256 (Peter Toyne).
[732] Ibid 2257.
[733] *Victims of Crime Assistance Act 2006* (NT) ss 38(3), 39(3).
[734] Ibid s 18.
[735] Victims of Crime Assistance Amendment Bill 2007 (Tas) cl 6.
[736] Tasmania, *Parliamentary Debates*, House of Assembly, 7 June 2007, 47 (Michael Aird).
[737] Nick Clark, 'Lawyers Slam New Compo Law', *The Mercury* (Hobart), 31 July 2007, 10.

political criticism about its adverse implications for crime victims.[738] One parliamentarian noted that the Tasmanian Police Association was anxious that police could lose compensation under the Bill for injuries sustained during employment as well.[739] This echoed concerns that the Association had expressed about the 2005 proposal to preclude 'double recovery' of statutory criminal injuries compensation and workers' compensation. Parliamentarians' opposition persisted despite a government offer to increase the amount recoverable for pain and suffering from $2,000 to $10,000.[740]

5.8.3 *Victims of Crime Assistance Act 2009* (Qld)

The failed attempt at transfer in Tasmania did not discourage Assistance approach characteristics in a new Queensland criminal injuries compensation statute. The Bligh Labor government tasked an independent review of statutory criminal injuries compensation in November 2007[741] and many of its recommendations inspired *Victims of Crime Assistance Act 2009* (Qld) characteristics.[742] In particular, drawing inspiration from legislation interstate,[743] the review recommended an administrative scheme known as 'Victim Assist' in place of the Schedule approach that Queensland pioneered. This scheme permits victims to claim 'assistance' that involves government paying for or reimbursing compensable expenses up to $75,000 for individuals and $100,000 for a class of victims.[744] Compensable expenses include reasonable counselling expenses, travel expenses, medical expenses, loss of earnings, 'report expenses'[745] and an amount for funeral expenses.[746] In addition, a provision permits up to $10,000 for 'distress' to 'related victims'.[747]

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[738] See, eg, Tasmania, *Parliamentary Debates*, Legislative Council, 13 June 2007, 67 (Greg Hall); 71 (Carolynn Jamieson); 88 (Ruth Forrest). See also Michael Stedman, 'Victim Compo On Line: MLCs Set to Veto Scrapping of Scheme', *The Sunday Tasmanian* (Hobart), 8 July 2007, 7; Philippa Duncan, 'State Drops Plans to Axe Victims of Crime Compo', *The Mercury* (Hobart), 21 December 2007, 13.
[739] Tasmania, *Parliamentary Debates*, House of Assembly, 4 July 2007, 93 (Jeremy Rockliff).
[740] See Sue Neales, 'MLCs' Ire Over New Compo Law', *The Mercury* (Hobart), 4 October 2007, 13.
[741] See Anna Bligh and Kerry Shine, 'Victims of Crime Urged to Have Their Say' (Media Release, 26 November 2007) 1 < http://statements.qld.gov.au/Statement/2007/11/26/victims-of-crime-urged-to-have-their-say>.
[742] Characteristics of the *Victims of Crime Assistance Act 2009* (Qld) also transferred to the *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012* (Cth). See, eg, *Social Security Act 1991* (Cth) ss 1061PAA(2)-(4), as inserted by *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012* (Cth) s 11.
[743] Department of Justice and Attorney General (Qld), *Victims of Crime Review Report* (2008) 33.
[744] Explanatory Note, Victims of Crime Assistance Bill 2009 (Qld) 2.
[745] *Victims of Crime Assistance Act 2009* (Qld) ss 39, 42, 45, 46, 49.
[746] Ibid s 50.
[747] Ibid s 49(1)(f). 'Related victims' are defined as any 'close family member' or dependent of a person that has died, provided that they have not committed the act of violence: at ss 26(5), (7).

Attorney General Cameron Dick emphasised that the new scheme provided a 'tailored, needs based response' to victims' demands, which suggested its characteristics had an altruistic motivation.[748] However, like stakeholder responses to Assistance approach characteristics interstate, there were accusations that the legislation was a 'cost-cutting exercise'[749] and other characteristics restricted compensation more overtly. The *Victims of Crime Assistance Act 2009* (Qld) narrows the categories of victims that may recover compensation to those that the *Victims Compensation Act 1987* (NSW) pioneered for example,[750] and denies compensation for particular 'undeserving' groups. Examples are individuals that, without 'reasonable excuse', fail to report an offence to police or responsible authorities or fail to 'give reasonable assistance in the arrest or prosecution of an alleged offender.[751] Similarly, individuals are ineligible for assistance if they are injured during the commission of an act of violence or in conspiring to commit an act of violence.[752]

5.8.4 *Victims Rights and Support Act 2013* (NSW)

The *Victims' Rights and Support Act 2013* (NSW) was the final criminal injuries compensation statute that governments made in the research period and it continued the transfer of Assistance approach characteristics evident in earlier statutes. Successive NSW governments had attempted to moderate statutory criminal injuries compensation expenditure as sections 5.6.3 and 5.6.4 explained.[753] However, the attempts were unsuccessful and processing delays increased. The NSW Victims Compensation Tribunal chairperson reported a 13 per cent increase in compensation applications in 2009-10[754] after a 17 per cent increase in 2008-09[755] and a 25 per cent increase in 2007-08.[756] This led to a claims backlog of 18,030 in 2009-10 compared to 6,246 in 2005-06[757] and the average period from lodgement to claim determination had increased from 25 months to 31 months

[748] Queensland, *Parliamentary Debates,* Legislative Assembly, 18 August 2009, 1627 (Cameron Dick).
[749] See, eg, Toby Nielson, '*Victims of Crime Assistance Act 2009*: New Deal for the Victims of Crime' (2009) 29(10) *Proctor* 17, 18.
[750] *Victims of Crime Assistance Act 2009* (Qld) s 26.
[751] Ibid ss 21(3), 81; 82.
[752] Ibid ss 21(2), 79, 80.
[753] For examples of legislation designed to increase alternate compensation sources, see *Courts and Crimes Legislation Further Amendment Act 2010* (NSW); *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010* (NSW).
[754] Chairperson, Victims Compensation Tribunal (NSW), *Chairperson's Report 2009-10* (Victims Services, Department of Attorney General and Justice (NSW), 2010) 11.
[755] Ibid.
[756] Ibid.
[757] Ibid 10.

at 30 June 2012.[758] The O'Farrell Coalition government announced an independent review on 11 August 2012 and then Attorney General Greg Smith predicted that, without reform, the total number of compensation claims in 2014-15 could be as high as 33,666 based upon growth in claimant rates.[759] Media described 'ridiculous and nightmarish waits for statutory criminal injuries compensation.[760]

The O'Farrell government responded to scheme delays by emulating Assistance approach characteristics. This accorded with recommendations of an independent review that government commissioned as then Planning Minister Brad Hazzard acknowledged.[761] Reflecting Queensland and NT legislation for example, the *Victims Rights and Support Act 2013* (NSW) abolished the Victims Compensation Tribunal and transferred its functions to a Victims Support Division within government from June 2013.[762] The then Attorney General explained that there were 'four pillars' of victims' support, which include counselling, 'immediate assistance' and 'financial assistance' that emulate Assistance approach characteristics.[763] The fourth 'pillar' is a 'recognition payment' of between $1,500 and $15,000,[764] which emulates the 'special financial assistance' that the Victorian Bracks government established. Hazzard explained that stakeholders had unanimously advised government that 'a lump sum payment in recognition of trauma is an important part of the rehabilitation process'.[765] This contradicted other statements that downplayed monetary compensation for crime victims. The *Victims Rights and Support Act 2013* (NSW) continued the dependence upon interstate transfer that has characterised evolution of statutory criminal injuries compensation.

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[758] Ibid 19.
[759] New South Wales, *Parliamentary Debates,* Legislative Assembly, 11 August 2011, 4290 (Greg Smith).
[760] See, eg, Jonathan Swan, ''Ridiculous' Wait for Crime Victims', *The Sydney Morning Herald* (Sydney), 12 November 2012, 55; Jonathan Swan, 'Victims Stuck in Nightmare Limbo', *The Sydney Morning Herald* (Sydney), 22 November 2012, 11.
[761] New South Wales, *Parliamentary Debates,* Legislative Assembly, 7 May 2013, 20069 (Brad Hazzard).
[762] See Chairperson, Victims Compensation Tribunal (NSW), *Chairperson's Report 2012-13* (Victims Services, Department of Attorney General and Justice (NSW), 2013) 7.
[763] Greg Smith, 'New Scheme to Support Victims of Crime' (Media Release, 7 May 2013) 1 <http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Media_Centre_agmediareleases2013>.
[764] See *Victims Rights and Support Regulation 2013* (NSW) reg 12.
[765] New South Wales, *Parliamentary Debates,* Legislative Assembly, 7 May 2013, 32 (Brad Hazzard).

5.9 Conclusion

This chapter has explained the results of the second case study examined for this research. Its focus was the contribution that policy transfer made to statutory criminal injuries compensation enacted in Australia from 1967 to 30 June 2014. The chapter asked what the sources of policy transfer were; what was the degree of transfer; what actors were involved; why did actors pursue transfer; and what factors restricted and/or facilitated transfer. The chapter also assessed whether there was support for the characteristics of the fourth phase of statutory transfer in Australia that Carroll identified (see section 1.2). Table 5.4 summarises the findings:

Table 5.4 Summary of Policy Transfer Contribution[766]

Carroll	**PHASE 4**				
	1967 - 1982	**1983 - 1994**	**1995 - 1999**	**2000 - 2005**	**2006 – 2014**
Source	1. UK, NZ 2. Interstate	1. Interstate 2. International	1. Interstate 2. UK	1. Interstate	1. Interstate
Actor(s)	1. Inquiries 2. Individual 3. Labor	1. Inquiries 2. Victims 3. Individual	1. Actuaries 2. Inquiries 3. Politicians 4. Media	1. Inquiries 2. Lawyers	1. Actuaries 2. Inquiries 3. Politicians 4. Lawyers
Degree	1. Inspiration 2. Copying 3. Combinations	1. Emulation	1. Emulation	1. Non-transfer 2. Emulation	1. Emulation
Explanation	1. Lesson-d 2. Voluntarily	1. Lesson-d 2. Voluntarily	1. Lesson-d 2. Voluntarily	1. Lesson-d 2. Voluntarily	1. Lesson-d 2. Voluntarily
Restrict/ Facilitate	1. Altruism 2. Lead-following 3. Competition 4. Labor	1. Altruism 2. Competition 3. Lead-following	1. Financial 2. Altruism 3. Ld-following	1. Altruism 2. Financial 3. Ld- following	1. Financial 2. Altruism 3. Ld-following

[Source; Original]

The sources in this study reflected the workers' compensation case study in that the genesis of statutory criminal injuries compensation was foreign policy before interstate transfer became dominant. This research also included international transfer (from the UN Declaration), which was not an aspect of the workers' compensation case study. The key

[766] Table items are listed in order of significance and are not exhaustive. 'Individuals' refers to high profile parliamentarians that facilitated or obstructed policy transfer such as Chris Sumner; 'International' refers to the UN Declaration; 'Lesson-d' refers to lesson-drawing; 'Competition' refers to States' desire to provide and appear more generous at providing statutory criminal injuries compensation.

actors were parliamentarians, expert inquiries, victims' groups, lawyers and actuaries and in all cases, actors could both facilitate and restrict policy transfer. Notably, governments' reliance upon expert inquiries to recommend compensation characteristics was a persistent theme and led to some notable examples of non-transfer such as the *Victims of Crime Act 2001* (SA). The Hamer government also followed inquiry recommendations when it transferred *Criminal Injuries Compensation Act 1963* (NZ) characteristics rather than NSW legislation. Individuals that impacted transfer particularly were then NSW Attorney General Ken (later Sir Kenneth) McCaw who was integral to the Askin government decision to introduce statutory criminal injuries compensation. SA Attorney General Chris Sumner also facilitated international transfer from the UN Declaration.

The degree of transfer at schemes' inception did not reflect the degree of transfer in other case studies such as the copying in the workers' compensation case study. Rather, the NSW government drew inspiration from foreign developments to enact its own reform and other governments then emulated its approach. The exception was Victoria which copied NZ legislation in response to an expert inquiry recommendation as mentioned. Governments enacted statutory criminal injuries compensation in response to a mix of altruistic and political considerations that emerged from growing public and political interest in crime victims' circumstances. Governments' desire to moderate compensation expenditure became significant following the 'backlash' against statutory criminal injuries compensation from the mid-1990s. Transfer typically lay at 'lesson drawing (bounded rationality)' or 'voluntarily' on the Dolowitz and Marsh policy transfer continuum. However, in recent decades, parliamentarians forced transfer or non-transfer of compensation characteristics. An example was the parliamentary blocks on attempts to preclude 'double recovery' of statutory criminal injuries compensation and workers' compensation.

Transfer was facilitated by altruistic desires to increase statutory criminal injuries compensation and political desires to appease stakeholders both at schemes' inception and during the 'phase of victim consciousness'. This included the desire to appear as generous as other governments. Following the backlash in compensation expenditure however, governments' motivations were more mixed. Financial positions became a major determinant of transfer decisions. In SA, the Bannon government decision to introduce a broad offenders' levy established a surplus in the State victims' compensation fund that

facilitated a more generous approach to compensation in the *Victims of Crime Act 2001* (SA). By contrast, other governments narrowed monetary compensation eligibility and scope. This period also revealed wide disparities in government attitudes towards the losses that statutory criminal injuries compensation should compensate and the eligible victims. This included within political parties, which contrasted to the workers' compensation case study. The Victorian Bracks Labor government rejected some compensation characteristics that the NSW Carr Labor government accepted for example. Also, Labor governments in the NT and Queensland emulated Assistance approach characteristics that the conservative Victorian Kennett government initially pioneered.

CHAPTER 6
FAULT-BASED MOTOR ACCIDENT COMPENSATION (1935 – 2014)

6.1 Introduction

This chapter examines the results of the third case study undertaken for the purposes of this research. Its focus is the contribution that policy transfer made to the evolution of legislation designed to moderate damages for personal injury or death from motor accident in Australia. The period of analysis is from 1935, which is the year that the first example of such legislation was enacted, until 30 June 2014. As the chapter explains, there are two mechanisms to moderate damages for personal injury or death from motor accident that governments have relied upon especially. Governments may ban or restrict jurors from hearing any legal claim seeking these damages (labelled 'motor accident claims' in this chapter). This is essentially because juries are perceived as likely to inflate damages. Alternatively, or in addition, governments may restrict damages with statutory thresholds and bans on damages for particular losses ('statutory damages restrictions'). This study examined the contribution that policy transfer made to the evolution of both mechanisms, focusing upon the source(s) of transfer; actors that were involved; degree of transfer; explanation for transfer and factors that facilitated or restricted policy transfer particularly. The chapter was also interested in further testing the assertions about statutory transfer in Australia that Carroll made.

As would be expected, the focus upon legislation moderating damages meant that financial considerations were a consistent factor that facilitated transfer in this study. Financial advisers, actuaries and expert inquiries were important actors and, building upon the statutory criminal injuries compensation case study findings, lawyers' involvement was significant. Transfer degree varied from direct copying to inspiration and the explanations for transfer included, as mentioned, a desire to moderate pressure upon damages. There was also evidence of disparate philosophical opinions on the appropriateness of legislative intervention and judges' role. The chapter divides its analysis into two broad sections plus this introduction and a conclusion. Section 6.2 examines transfer of legislative bans or restrictions upon jurors' ability to hear motor accident claims. Section 6.3 examines transfer of statutory damages restrictions.

6.2 Trial by Jury Restrictions

6.2.1 British legislation

The idea of restricting or abolishing jurors' ability to decide motor accident claims originated in the UK. England had first restricted trial by jury in 1854[767] and from 1 September 1931, the Macdonald National Party government provided that trial by jury in most civil actions such as motor accident claims could occur only if the presiding judge approved.[768] This followed judicial criticism of jurors allegedly inflating personal injury damages once they learned that the defendant had insurance.[769] Parliamentarians also expressed concern about the 'burden' that jury service imposed upon members of the public[770] and one suggested that 'it takes possibly two or three times as long to try' a matter with a jury as opposed to trial by a judge alone.[771] This was significant as motor accident claims were the majority of jury actions.[772]

6.2.2 Abolition in Tasmania, SA, WA, Queensland, NT and ACT

The English restriction upon trial by jury was copied in Australia in the same way that national transfer from the UK informed inaugural employers' liability and workers' compensation legislation. NZ, the UK and States of the US had required motorists to insure or hold sufficient resources to meet any liability that they may face for personal injury or death from use of their motor vehicle from 1928[773] and this notion transferred to Australia. The Ogilvie Labor government in Tasmania enacted the first Australian example of 'mandatory third party insurance legislation' in 1935 and, in addition to obliging motorists to hold third party insurance, this legislation contained the first Australian provision that banned trial by jury in motor accident claims.[774] A committee comprising the Royal Autocar

[767] See discussion at Sir Patrick Devlin, *Trial By Jury* (Stevens & Sons, 1956) 130. Subsequent restrictions were included in *Juries Act 1918*, 8 & 9 Geo 5, c 23, ss 1, 8; *Administration of Justice Act 1920*, 10 & 11 Geo 5, c 81, s 2.

[768] *Administration of Justice (Miscellaneous Provisions) Act 1933*, 23 & 24 Geo 5, c 36s 6(1). There were exceptions if the action involved libel, slander, malicious prosecution, false imprisonment, seduction, breach of a marriage promise or fraud provided the judge did not feel that proceeding with a jury in one of those cases would involve 'prolonged examination of documents or accounts or any scientific or local investigation which could not conveniently be made with a jury.

[769] See, eg, *Gowar v Hales* [1928] 1 KB 191, 197 (Scrutton LJ).

[770] United Kingdom, *Parliamentary Debates,* House of Lords, 25 May 1933, vol 87, col 1043 (Viscount Sankey).

[771] United Kingdom, *Parliamentary Debates,* House of Lords, 25 May 1933, vol 87, col 1050 (Viscount Sankey).

[772] Ibid.

[773] See, eg, *Motor Vehicles Insurance (Third Party Risks) Act 1928* (NZ) s 3(1); *Road Traffic Act 1930*, 20 & 21 Geo 5, c 43, s 35(1).

[774] *Traffic Act 1925* (Tas) s 73, as inserted by *Traffic Act 1935* (Tas) s 2.

Club, Commercial Motor Users' Association, Council of Chamber of Commerce, Dairymen's Association and Farmer's Stock owners was integral to the decision to transfer a ban. The committee concluded that it was 'advisable that all claims under the [Traffic] Act should be heard by a Judge without a Jury'.[775] This was essentially based upon the same concerns that jurors would inflate damages as in the UK.

The Tasmanian ban precipitated equivalent provisions in the mandatory third party insurance legislation of SA, Queensland, WA, the ACT and the NT.[776] However, the Tasmanian provision was not necessarily the source for these other provisions. Rather, the *Road Traffic Amendment Act 1936* (SA), which implemented recommendations of an expert committee, was influential.[777] The expert committee had not mentioned a juror ban in its final report but its recommendations could not 'fully be set out'.[778] The committee had 'very carefully considered' third party insurance legislation in the UK and draft Bills in Victoria and Tasmania which all incorporated a ban.[779] Indeed, committee member and Chief Commissioner of Police Brigadier-General Ray (later Sir Raymond) Leane commissioned a 'comparative table … setting out in parallel columns the sections of the English Road Traffic Act …, the Tasmanian Bill, the Victorian Bill and the NZ Act'.[780] This would have disclosed draft clauses that abolished trial by jury in Tasmania and Victoria although, as subsection 6.2.4 explains further, the Victorian clause did not proceed.

WA parliamentary debates reveal that two critical factors facilitated transfer of the jurors' ban in that State and likely others. First, governments wanted to moderate the cost of mandatory third party insurance amid concerns that jurors inflated damages. Country party parliamentarian Ignatius Boyle claimed, for example, that 'juries are prone to be sympathetic, whereas a judge deals with the position as he finds it'.[781] Second, reflecting a

[775] 'Compulsory Insurance: Considered by Motorists: Support Accorded', *The Mercury* (Hobart), 23 November 1932, 3.
[776] *Motor Traffic Ordinance 1936* (ACT) s 41AK, as inserted by *Motor Traffic Ordinance 1947* (ACT) s 7; *Motor Vehicles Ordinance 1949* (NT) s 78; *Motor Vehicles Insurance Act 1936* (Qld) s 12; *Road Traffic Act 1934* (SA) s 70I, as inserted by *Road Traffic Amendment Act 1936* (SA) s 31; *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 16.
[777] See, eg, Western Australia, *Parliamentary Debates,* Legislative Assembly, 6 December 1938, 2738 (Harry Millington).
[778] Honorary Committee, *Report of the Honorary Committee Appointed by the Government to Report Upon the Road Traffic Act, 1934, and to Make Recommendations Relating to Traffic Laws* (Government Printer, 1936) 29.
[779] Ibid 12.
[780] Ibid.
[781] Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 December 1938, 3875 (Ignatius Boyle).

dynamic that was evident in other case studies, government was desirous of WA legislation being consistent with examples interstate. Deputy Premier Harry Millington stressed overlap between the *Motor Vehicle (Third Party Insurance) Act 1943* (WA) and the *Road Traffic Amendment Act 1936* (SA) for example.[782] Parliamentarians also drew positive lessons from the legislative experience interstate. Country party member Boyle reflected that because the SA legislation 'had evidently given satisfaction [in SA, I] assume that … it will give satisfaction here'.[783] Yet, not all governments accepted the merits of a juror ban.

6.2.3 Abolition in NSW

NSW and Victoria did not join other governments and ban trial by jury in motor accident claims in their inaugural mandatory third party insurance legislation. In NSW, this was essentially because of strong philosophical opposition to a ban from members of the McKell Labor government who felt that trial by jury was a fundamental legal entitlement.[784] Placing no restriction upon jurors' presence presented no difficulties initially. This is because the federal government rationed petrol and limited chassis imports during World War II[785] so that vehicle registrations were fairly constant and even decreased in some years.[786] Further, some States compelled third party insurance premium reductions[787] and/or third party insurers voluntarily reduced premiums.[788] Once World War II ended however, motor vehicle registrations and accident levels rose dramatically. In NSW, three fatalities occurred on the State's roads every two days in 1950 and the Commissioner of Road Transport predicted that, based on the trend, one in every four persons alive in NSW could expect to be killed or injured in a road accident.[789] The national growth in vehicle registrations and road deaths, including NSW, from 1945–1960 is in Table 6.1 (next page).

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[782] Western Australia, *Parliamentary Debates,* Legislative Assembly, 6 December 1938, 2742 (Harry Millington).
[783] Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 December 1938, 3874 (Ignatius Boyle).
[784] See, eg, New South Wales, *Parliamentary Debates,* Legislative Assembly, 29 April 1942, 3111 (Abram Landa).
[785] See discussion in Rosemary Broomham, *On The Road: The NRMA's First Seventy-Five Years* (Allen & Unwin, 1996) 77.
[786] See Bureau of Infrastructure, Transport and Regional Economics (Cth), *Road Deaths in Australia 1925 - 2008* (2010) 4 <http://www.bitre.gov.au/publicati2,824.2ons/2010/is_038.aspx>.
[787] See, eg, 'Reductions in Compulsory Third Party Insurance', *The Mercury* (Hobart), 14 June 1944, 6; Victoria, *Victoria Government Gazette*, No 29, 21 January 1942, 207.
[788] See 'Motor Insurance: Lower Premiums After Next Month: Petrol Restrictions Responsible', *The Adelaide Chronicle* (Adelaide), 19 June 1994, 30.
[789] Broomham, above n 785, 103.

Table 6.1 Road Deaths and Registrations[790]

Year	Road Deaths	Registered vehicles (thousands)	Population (thousands)	Deaths per 100,000 population
1945	1,011	854.0	7,391.7	13.7
1946	1,270	928.4	7,465.2	17.0
1947	1,346	1,012.8	7,579.4	17.8
1948	1,348	1,107.3	7,708.8	17.5
1949	1,424	1,224.8	7,908.1	18.0
1950	1,643	1,397.1	8,178.7	20.1
1951	1,926	1,580.4	8,421.8	20.9
1952	2,054	1,770.2	8,636.5	23.8
1953	1,856	1,839.9	8,815.4	21.1
1954	1,976	1,947.3	8,986.5	22.0
1955	2,042	2,129.7	9,199.7	22.2
1956	2,119	2,246.3	9,425.6	22.5
1957	2,113	2,366.1	9,640.1	21.9
1958	2,146	2,506.2	9,842.3	21.8
1959	2,264	2,649.1	10,056.5	22.5
1960	2,468	2,824.2	10,275.0	24.0

[Source: Extracted from *Road Deaths in Australia – 1925 – 2008*]

The rise in motor vehicle accidents translated as significantly increased compensation demands upon nascent third party insurers that forced many to leave the industry.[791] Governments had capped the maximum premium that insurers could levy when they first mandated third party insurance.[792] As such, insurers were constrained in their ability to increase premiums and the ratio of amounts paid in compensation to premium revenue ('loss ratio') rose markedly. Third party insurance was branded 'unprofitable' from 1947.[793] Indeed, in WA, a 'crisis' in the availability of third party insurance caused by private insurers departing the industry led to the establishment of the monopoly third party insurance provider, the Motor Vehicle Insurance Trust (MVIT), in 1949.[794]

[790] Bureau of Infrastructure, above n 786, 38-9.
[791] See, eg, 'Insurance Companies Dislike Third Party Risks', *The Canberra Times* (Canberra), 12 January 1951, 4; 'Company Ends Third Party Insurance', *The Advertiser* (Adelaide), 18 April 1953, 3.
[792] *Motor Traffic Ordinance 1936* (ACT) s 41AR(1), as inserted by *Motor Traffic Ordinance 1947* (ACT) s 7; *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) s 33; *Motor Vehicles Ordinance 1949* (NT) s 85(1); *Motor Vehicles Insurance Act 1936* (Qld) s 9(1)(f); *Road Traffic Act 1934* (SA) s 70M, as inserted by *Road Traffic Act Amendment Act 1936* (SA) s 31; *Traffic Act 1925* (Tas) s 74(7), as inserted by *Traffic Act 1935* (Tas) s 2; *Motor Car (Third Party Insurance) Act 1939* (Vic) ss 32(12), 34(1)(a); *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 36.
[793] See 'Motor Car Insurance Losses', *The Sydney Morning Herald* (Sydney), 13 May 1947, 6.
[794] *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 3A, as inserted by *Motor Vehicle (Third Party Insurance) Act Amendment Act 1948* (WA) s 4.

Governments' first response to the growth in third party insurance claims was to increase maximum premiums, at times directly in response to insurer entreaties.[795] These increases were never sufficient for insurers to recoup the amounts that they spent on claims due to political sensitivities. As such, more insurers left the industry. Insurer profitability was also not assisted by the fact that governments widened the circumstances in which plaintiffs could recover damages. This followed British legislation that revised traditional legal principles. With significance for motor accident claims that involved a negligent driver and injured passenger spouse for example, governments abolished the traditional legal principle that precluded spouses suing one another.[796]

The fact that insurance premiums were insufficient to fund the growth in third party claims led to NSW demands for abolition of trial by jury in motor accident claims. *The Sydney Morning Herald* had criticised the size of juror awards from as early as 1950[797] and, in the course of judgements in 1952 and 1954, judges also criticised 'unreasonable and excessive [juror] awards'.[798] The secretary of the National Roads and Motorists' Association (NRMA) demanded reform in 1959[799] and in 1961, there were more judicial criticisms.[800] NSW Labor maintained that trial by jury was fundamental to the legitimacy of the State legal system. However, the conservative opposition supported a ban.[801] This shift was facilitated by continued significant increases in third party insurance premium and the inevitability of their continuation due to escalating accident levels. In 1964 for example, there was a record road toll in NSW of 1,010 deaths and 26,631 injuries followed in 1965 by 1,151 deaths and 29,157 injuries.[802]

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[795] See, eg, 'Increased Motor Premiums To Be Sought', *The Sydney Morning Herald* (Sydney), 28 June 1946, 6.
[796] Eg, *Married Persons (Property and Torts) Act 1901* (NSW) s 16B, as inserted by *Law Reform (Married Persons) Act 1964* (NSW) s 2; *Motor Vehicles Act 1959* (SA) s 118; *Marriage (Liability in Tort) Act 1968* (Vic) s 2.
[797] See, eg, Editorial, 'Juries and Third Party Claims', *The Sydney Morning Herald* (Sydney), 20 November 1950, 2; Staff Correspondent, 'What is Wrong with Our Jury System?', *The Sunday Herald* (Sydney), 4 January 1953, 2;'"Swayed" Juries Blamed for 'Third Party' Rises ', *The Argus* (Melbourne), 21 April 1953, 7.
[798] *Commissioner for Road Transport and Tramways v Cullinan* (1952) 52 SR (NSW) 199, 156 (Street CJ); *Hately v Allport* (1954) 54 SR (NSW) 17, 21 (Street CJ, Owen and Herron JJ).
[799] See 'Steep Increases in Third-Party Insurance Approved', *The Sydney Morning Herald* (Sydney), 4 November 1959, 1.
[800] See Justice Gordon Wallace, 'Speedier Justice (and Trial by Ambush)' (1961) 35 *Australian Law Journal* 124, 131. See also Judge Clegg, 'Discussion' (1961) 35 *Australian Law Journal* 151, 151.
[801] See 'Change Urged in System of Damages', *The Sydney Morning Herald* (Sydney), 4 October 1952, 5; 'Liberals Frame New Policy on Third Party Cases', *The Sydney Morning Herald* (Sydney), 12 January 1960, 9.
[802] Broomham, above n 785, 126.

The Askin conservative opposition reiterated its policy to abolish trial by jury in motor accident claims before the 13 May 1965 State election that it subsequently won.[803] Newly appointed Attorney General Ken (later Sir Kenneth) McCaw insisted that he wanted to bring NSW 'into line' with what the Minister said was the 'rule rather than the exception in Australia, the rule in England and what is virtually the rule in Canada'.[804] McCaw expressed concern about the cost and delays of jury actions[805] and also noted that '11,000 jurors were taken from their occupations every year to hear road accident cases'.[806] The government dismissed suggestions to increase Supreme Court judge numbers, which had already increased from 11 in 1943 to 27 in 1965.[807] However, this opposition was futile. Labor held a majority in the Legislative Council and this majority blocked the proposed abolition. Opposition leader and former Premier Jack Renshaw insisted that trial by jury was a 'legal corner-stone in the foundations of our democratic fabric'[808] and a colleague disputed suggestions that jury trials resulted in greater expense and delays.[809]

Labor was not completely opposed to some restriction being placed upon trial by jury in motor accident claims however. Reg Dowling suggested that government should implement the system that operated in the NSW District Court whereby a jury was present in a case if one party applied for it[810] and this was the option that government accepted. From 1 January 1966, trial before a judge became the default option in motor accident claims unless a party requested otherwise within 21 days after the action was set down for trial.[811] However, the Askin government was dissatisfied. On 24 February 1968, the government was re-elected and Attorney-General McCaw insisted that it had a 'complete and most emphatic mandate' to implement its proposed abolition.[812] Rationalising reform, McCaw stressed that

[803] Askin, above n 443, 16.
[804] New South Wales, *Parliamentary Debates,* Legislative Assembly, 25 August 1965, 117 (Ken (later Sir Kenneth) McCaw).
[805] New South Wales, *Parliamentary Debates,* Legislative Assembly, 1 December 1965, 2661 (Ken (later Sir Kenneth) McCaw). See also 'Law Costs 'Beyond Most People"', *The Sydney Morning Herald* (Sydney), 23 July 1965, 7; '"Living Off Road Cases" - Review of Jury System', *The Sun* (Sydney), 2 June 1965, 4.
[806] See 'Strict Limits to No-Jury Scheme', *The Daily Telegraph* (Sydney), 3 June 1965, 7.
[807] New South Wales, *Parliamentary Debates,* Legislative Assembly, 1 December 1965, 2661 (Ken (later Sir Kenneth) McCaw).
[808] New South Wales, *Parliamentary Debates,* Legislative Assembly, 25 August 1965, 94 (Jack Renshaw).
[809] New South Wales, *Parliamentary Debates,* Legislative Council, 7 December 1965, 2872 (Robert Downing).
[810] Ibid 2864.
[811] *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) sub-s 5(1).
[812] New South Wales, *Parliamentary Debates,* Legislative Assembly, 27 March 1968, 65 (Ken (Sir Kenneth) McCaw).

trial by jury in motor accident claims had been abolished in SA and Tasmania where Labor governments were in office.[813] There was also support from insurers and the NSW Law Society[814] although the Bar Council was opposed.[815] Further, '[e]minent legal authorities and members of both the Australian and English Superior Courts strongly supported' the plan.[816] The *Administration of Justice Act 1968* (NSW) abolished trial by jury in motor accident claims. However, there was an exception if both parties wanted a jury or in an 'industrial accident' case.[817] This latter concession reflected a particular Labor anxiety that jurors should still be able to hear workers' compensation claims.

6.2.4 Retention in Victoria

Victoria was the only jurisdiction that had no restriction upon trial by jury in motor accident claims once NSW legislated despite some past attempts. The conservative Argyle government had attempted to remove juries from motor accident claims in the Motor Car (Third Party Insurance) Bill 1934 (Vic) for example but it failed. Like their NSW counterparts, Victorian Labor insisted that trial by jury was fundamental to the Australian legal system[818] and this perspective remained while the Dunstan Country Party government relied upon their support or Labor was in office. Yet, motor vehicle ownership, claim numbers, total claims and average claim amount continued to rise in Victoria as Table 6.2 (next page) outlines.

[813] Ibid 99.
[814] See Ibid.
[815] See Bar Council of New South Wales, *Your Right to a Jury Trial* (1965) . *The Daily Telegraph* branded Bar Council opposition 'self-interest': Editorial, 'Accidents', *The Daily Telegraph* (Sydney), 3 June 1965, 2.
[816] 'Law Reforms: Speed-Up Plan on Damages', *The Daily Telegraph* (Sydney), 2 June 1965, 1.
[817] *Administration of Justice Act 1968* (NSW) s 4(b).
[818] For examples of Labor parliamentarians' sentiment see Victoria, *Parliamentary Debates,* Legislative Assembly, 31 July 1934, 782 (Thomas Tunnecliffe); 793 (William Slater).

Table 6.2 Motor Accident Claims Information, 1950 – 1959[819]

Year	Vehicles	Claims	Total Claims (Inc. Outstanding)	Average Claim (£)
1950	390,646	6,050	1,185,872	196.0
1951	444,523	6,343	1,563,588	122.9
1952	540,297	7,565	2,270,276	300.1
1953	568,233	7,802	2,290,382	379.4
1954	564,985	9,198	3,381,006	367.8
1955	617,154	9,694	3,340,966	344.6
1956	690,926	9,313	4,233,078	454.5
1957	713,743	9,747	4,319,434	443.2
1958	756,707	9,121	5,098,499	559.0
1959	778,303	9,393	5,089,669	541.9

[Source: Coppel (1959)]

The rise in claims spearheaded insurer demands for trial by jury to be abolished in Victorian motor accident claims.[820] Some Victorian judges criticised the size of damages that jurors awarded[821] and the *Australian Law Journal* lamented jurors' 'eccentric generosity' in accident claims.[822] Professor Alex Castles of the University of Melbourne suggested that the test whether there was negligence was being 'increasingly superseded by the equivalent of strict liability … as jurors consistently found against insurers'.[823]

The Bolte Liberal government was elected in Victoria on 7 June 1955 and in 1959, it tasked a Royal Commission to examine aspects of third party insurance. The terms of reference for this inquiry included whether the parties to a motor accident claim should be able to opt for a judge or jury to determine liability or damages separately, which was an opportunity to recommend juror restrictions.[824] Commissioner E G Coppel declined to address whether juries should be precluded from motor accident claims, declaring that the matter was 'purely one of political policy'.[825] However, the Commissioner evidently accepted that jurors' awareness that the defendant held insurance could bias their decision. This is

[819] Extracted from E G Coppel, *Report of the Royal Commission on Motor Car Third-Party Compulsory Insurance* (Government Printer, 1959) 8.
[820] See 'Damages Awarded by Juries Criticised', *The Advertiser* (Adelaide), 14 May 1953, 4.
[821] See, eg, *Kranz v Riley Dodds Australia Ltd* [1954] VLR 296; *Parry and Pedlar v Fisher* [1956] VLR 58.
[822] Current Topics, 'Juries and Damages for Accidents' (1954) 28 *Australian Law Journal* 2, 2. See also Current Topics, 'Guessing of Damages by Juries' (1954) 28 *Australian Law Journal* 365.
[823] Alex C Castles, 'Juries and Compulsory Automobile Insurance Legislation' (1958) 31 *Australian Law Journal* 638, 642.
[824] Coppel, above n 819, 4.
[825] Ibid 22.

because the Commissioner recommended that jurors should be precluded from any motor accident claim involving a nominal defendant as the nominal defendant's presence 'necessarily involves disclosure of the fact [that the plaintiff] is suing an insurance company'.[826]

The Bolte government did not act on the Commissioner recommendation, suggesting instead that it was one that required 'very careful consideration'.[827] However, concerns about jurors' presence persisted as the number of Supreme Court actions before a jury increased (see Table 6.3).

Table 6.3 Rise in Supreme Court Jury Trials, 1950, 1955, 1960 – 1966[828]

Year	Trial by Judge	Trial by Jury	Total Trials
1950	51	70	121
1955	47	212	249
1960	73	283	356
1961	107	347	454
1962	387	1,247	1,634
1963	394	1,572	1,966
1964	496	1,045	1,541
1965	509	985	1,494
1966	493	940	1,433

[Source: Dean (1968)]

On 23 June 1967, Attorney General George (later Sir George) Reid issued a media release that endorsed abolition of trial by jury in motor accident claims. This resembled the first steps in a process towards reform that most other Australian governments had taken. Indeed, Reid noted that England and every State in Australia besides Victoria and NSW (at that time) had restricted trial by jury in civil litigation.[829] He also reasoned that 'congestion' in civil trials could be 'substantially reduced' if motor accident claims were heard by a judge without a jury.[830] Further, Reid noted that the delays associated with jury trials exposed

[826] Ibid 23.
[827] Victoria, *Parliamentary Debates,* Legislative Assembly, 11 May 1960, 2875 (Murray (later Sir Murray) Porter).
[828] Extracted from Arthur Dean, *A Multitude of Counsellors: A History of the Bar of Victoria* (F W Cheshire, 1968) 237.
[829] Victorian Bar Council, *Congestion in the Civil Lists of the Supreme Court of Victoria: Statement of Victorian Bar Council Relating to Matters Raised by the Honourable the Attorney-General in Press Release of 23rd June, 1967* (1967) 6.
[830] Ibid.

motor accident victims and their families to 'great personal hardship', had a 'serious effect on the finances of hospitals' and would likely lead to the 'break down' of the Supreme Court without reform.[831]

The Reid media release met strident opposition from the Victorian legal profession that would ultimately defeat its proposal. As subsection 5.2.3 mentioned, NSW legal bodies had split on the question whether juries should be present in motor accident claims. By contrast, in Victoria, the Bar Council and Law Institute were united and the Council issued a media release and small booklet that argued against abolition. There were four criticisms that this booklet nominated particularly. First, the Council disputed suggestions that trial by jury contributed to congestion in civil trial lists, suggesting that congestion was the 'end result of the increasing number of motor vehicle accidents'.[832] Second, the Council stressed that jurors' involvement provided an insight into the current standards and values of the community, which was important to damages' assessment. Third, contesting the sentiment that abolition would align Victoria with other jurisdictions, the Council noted that 49 of 50 American States, NZ, Scotland, Ireland, Northern Ireland and a majority of Canadian provinces permitted trial by jury in motor accident claims.[833] Vaguely, the Council noted that based upon 'legal literature' and media reports, the English juror restrictions were apparently causing difficulties and a 'return to the jury system appears not the least unlikely solution'.[834] Fourth, the Council asserted that following abolition of trial by jury in motor accident claims in Tasmania, Queensland, WA and SA, there had purportedly been 'a steady flow of appeals to the High Court'.[835]

The Bar Council recommended the appointment of more judges to the Victorian Supreme Court as its primary mechanism to address court congestion,[836] which Attorney General Reid accepted. This acceptance was despite the fact that the Supreme Court had advised that

[831] Ibid 5. In 1967, reports emerged that thousands of dollars for treatment expenses following motor accident were owed to major metropolitan Melbourne hospitals and there were lengthy delays in payment: See 'Govt. Proposals on Court Cases Opposed', *The Age* (Melbourne), 24 June 1967, 3.
[832] Victorian Bar Council, *Congestion in the Civil Lists*, above n 829, 9.
[833] Ibid 25.
[834] Ibid 27.
[835] Ibid 26.
[836] Ibid 6.

more judges was not the solution to congestion in its 1967 annual report.[837] Reid conceded that he had sought the views of the Bar Council and Law Institute, which highlighted their contribution to his decision.[838] Reid had also relied upon advice from Victorian Solicitor–General Tony Murray, who was a former Vice-President of the Bar Council. [839] Reid likely also faced internal opposition to any attempt to restrict trial by jury. Vernon Wilcox, who succeeded Reid as Attorney General, purportedly expressed support for jurors' continued ability to hear motor accident claims for example.[840] The Hamer government did not revisit jurors' rights to hear motor accident claims before it introduced no-fault motor accident compensation from 1973, which incorporated a separate tribunal to decide compensation. As such, there was no longer the need to transfer jurors' abolition. Defeat of the Reid suggestion to restrict trial by jury demonstrated legal bodies' capacity to restrict policy transfer which is a theme that the following section explores further.

6.3 Statutory Damages Restrictions

The abolition or restriction of trial by jury in motor accident claims was the first mechanism that governments relied upon to moderate damages. However, damages' size continued to rise, processing delays persisted and there was a 'backlog' of cases in multiple jurisdictions. This meant that governments faced ongoing third party insurer losses, concentration of third party insurance business in government insurers and continued pressure to increase premiums. This facilitated statutory damages restrictions, which had been implemented and debated internationally.[841]

6.3.1 Northern Territory

The NT was the first Australian jurisdiction to enact statutory damages restrictions, which were an aspect of its 1979 legislation providing no-fault motor accident compensation.[842]

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[837] Victoria, *Parliamentary Debates,* Legislative Assembly, 19 October 1967, 1081 (George (later Sir George) Reid). See Supreme Court of Victoria, *Annual Report 1966* (1967) 4.
[838] Victoria, *Parliamentary Debates,* Legislative Assembly, 19 October 1967, 1080 (George (later Sir George) Reid).
[839] Ibid.
[840] See reference in Bar Council of New South Wales, above n 815, 47.
[841] See, eg, academic proposals to restrict or moderate pain and suffering damages in William Zelermyer, 'Damages for Pain and Suffering' (1954) 6 *Syracuse Law Review* 27, 41-2; Marcus L Plant, 'Damages for Pain and Suffering' (1958) 19 *Ohio State Law Journal* 200, 210-11; Clarence Morris, 'Liability for Pain and Suffering' (1959) 59 *Columbia Law Review* 476, 476; Cornelius J Peck, 'Compensation for Pain: A Reappraisal in Light of New Medical Evidence' (1974) 72 *Michigan Law Review* 1355, 1396.
[842] *Motor Accidents (Compensation) Act 1979* (NT) ss 5, 39.

The genesis for the restrictions, as the preceding paragraph foreshadowed, was concern about the operation of third party insurance in the NT. The NT had twice as many reported accidents and three times the number of road deaths per 10,000 registered vehicles of any Australian jurisdiction in the late 1970s. Because of this high accident rate and associated claims, NT third party insurance premiums were the highest in Australia and rising. Chief Minister Paul Everingham sought actuarial advice on reforms necessary to moderate premiums. In what was among the first recommendations to government of its type, recently retired federal actuary Sid Caffin concluded that third party insurance premiums could only be moderated if the scheme offered some 'fixed maximum schedule of benefits'.[843] Everingham tasked Caffin to develop his options and analyse the associated premium implications.[844] The end result was the initial Motor Accidents Compensation Bill 1979 (NT) which contained the radical proposal to abolish damages for personal injury or death from motor accident for Territory residents altogether. This accorded with a Caffin recommendation[845] and was dictated entirely by what Caffin felt would moderate pressure upon government to increase premiums. However, the proposal did not proceed.

Everingham was not wedded to Motor Accidents Compensation Bill 1979 (NT) characteristics when he introduced it. Indeed, he tasked an expert committee to assess public 'reaction' to the Bill[846] and was considering whether, in addition to the initial statutory benefits, victims should receive an amount for pain, suffering, loss of amenities or capacity to enjoy life.[847] His inspiration was a provision of the *Accident Compensation Act 1972* (NZ) that compensated loss of amenities or capacity for enjoying life, and pain and mental suffering.[848] The expert committee recommended against abolishing damages for Territory residents for three key reasons. First, the committee stressed that 'nowhere in the world (including NZ) had fault liability on the roads been done away with completely'.[849] Second, the committee disputed past predictions of the premium necessary to fund future

[843] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 8 March 1979, 1111 (Paul Everingham).
[844] Ibid.
[845] Ibid 1113.
[846] Ibid 1114. The expert committee was chaired by future NT Chief Magistrate Hugh Bradley and included Sid Caffin, the retired Commonwealth actuary, whose recommendation had inspired the initial Motor Accident Compensation Bill 1979 (NT).
[847] Ibid.
[848] *Accident Compensation Act 1972* (NZ) s 120.
[849] Third Party Insurance Committee, *Northern Territory Inquiry into Motor Accident Compensation* (Northern Territory Government, 1979) 13.

liabilities. For example, the committee asserted that '[i]t now appears that early indications that substantial premium increases were … required to maintain the present common law system were wrong' and that actuarial advice to the committee 'clearly establishes the adequacy of the current premium'.[850] Third, the committee praised the flexibility of the law of negligence. The committee commented that statutory no-fault compensation or 'table benefits' 'are incapable of contemplating the complete range of injuries sustained by motor accident victims'.[851]

The expert committee was adamant that a combination of no-fault motor accident compensation and damages provided the 'greatest social justice'.[852] However, this did not mean that its members rejected statutory damages restrictions altogether. The committee acknowledged some of the concerns about legal system operation and damages awards that had been raised. For example, the committee noted public concern about the 'spiralling costs' of third party insurance[853] and noted that 'numerous people had expressed the view that many of the awards being granted by the courts were unreasonably large'.[854] The committee recommended the introduction of a maximum cap upon total damages for personal injury or death from motor accident of $300,000,[855] which reflected actuarial predictions of what would deliver the optimal savings in premium.[856] The recommendation followed academic writings on a 'damages cap'[857] and acknowledgement in WA parliamentary debate.[858] A 1978 Victorian Board of Inquiry had also considered statutory

[850] Ibid 67.
[851] Ibid.
[852] Ibid 59. This included a single damages award of $500,000 in 1974 that was estimated to have increased the third party insurance premium on a private motor vehicle from $24.30 to $45.40.
[853] Ibid.
[854] Ibid.
[855] Ibid 69.
[856] Ibid.
[857] See TK J Palmer and T M Webber, 'Excessive Awards of Damages for Personal Injuries – the Need for an Upper Limit?' (1978) 52 *Australian Law Journal* 107 and note the response in H Luntz, Excessive Awards of Damages for Personal Injuries – The Need for an Upper Limit?' (1978) 52 *Australian Law Journal* 514. For a discussion of US damages restrictions from the 1970s see Randall R Boybjerg, Frank A Sloan and James F Blumstein, 'Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"' (1989) 83 *Northwestern University Law Review* 908.
[858] Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 November 1963, 1451 (Crawford Nalder).

damages restrictions but rejected the notion, declaring that restrictions would be 'not only unjust but useless' at reducing system expenditure.[859]

The Everingham government did not adopt the expert recommendation to cap total damages. Instead, it introduced a short-lived statutory right to damages for particular losses. Everingham explained that '[t]he justification for damages … should be on non-pecuniary general grounds only'.[860] Thus, the *Motor Accidents (Compensation) Act 1979* (NT) permitted up to $100,000 in compensation for pain and suffering, and loss of amenities for Territory residents.[861] However, these entitlements were repealed in 1984.[862] Then Treasurer Marshall Perron explained that the right to damages had proven 'increasingly costly' and had been included only because of 'vocal opposition' to damages' abolition from a 'small community segment'.[863] Perron predicted that if damages entitlements remained, the premium on private motor vehicles would have to rise from $104 to $151.[864] This highlighted the priority that governments afforded to moderating third party insurance premiums. The NT experience also signalled actuaries' involvement as a key actor in policy transfer.

6.3.2 Queensland and New South Wales

The *Motor Accidents (Compensation) Act 1979* (NT) precipitated multiple statutory damages restrictions interstate. Like their predecessors, these restrictions were facilitated by concerns about third party insurance premiums' level and third party insurer losses, and their content was typically determined by actuarial predictions. Third party insurance premiums had increased by more than 100 per cent in every jurisdiction besides Tasmania and Queensland in the eight years to 1982,[865] coinciding with significant increases in damages awards. In 1981, three of the seven High Court judges in *Pennant Hills Restaurants*

[859] Sir John Minogue, *Report of the Board of Inquiry into Motor Vehicle Accident Compensation in Victoria* (Government Printer, 1978) 4 (rec 1(e).
[860] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 17 May 1979, 1295 (Paul Everingham).
[861] *Motor Accidents (Compensation) Act 1979* (NT) ss 5(2), 39.
[862] Ibid s 5, as inserted by *Motor Accidents (Compensation) Amendment Act (No 2) 1984* (NT) s 5. This repeal did not affect non-Territory residents' rights to recover damages if injured by the negligent use of a Territory-registered motor vehicle in the NT. Those individuals could recover damages until a 2007 amendment: *Motor Accidents (Compensation) Amendment Act 2007* (NT) s 5.
[863] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 7 March 1984, 283 (Marshall Perron).
[864] Ibid 284.
[865] New South Wales Law Reform Commission, *Accident Compensation*, Issues Paper No 2 (1982) 56.

Pty Ltd v Barcell Insurances Pty Ltd[866] ruled that judges should not discount an award for future economic loss as they would ordinarily to recognise the fact that these amounts could be invested and deliver a return. If this position was accepted, it risked significantly increasing damages' size and the Queensland Minister for Justice and Attorney General Sam Doumany voiced concern. Doumany feared that no discount could become judges' formal position or, alternatively, courts could discount awards by a rate that bore no relationship to the return that individuals actually recovered.[867] To avert this possibility, the Bjelke-Petersen government prescribed a five per cent discount rate that courts had to apply when discounting damages for future economic loss.[868] This applied to damages assessments in all personal injury claims.

The Queensland government was not alone in its concerns about damages awards in motor accident claims. In NSW, the deputy general manager of the Government Insurance Office (GIO) disclosed that damages for personal injury or death from motor accident had increased from a maximum of $176,000 in 1973 to $409,000 in 1978.[869] Purportedly, this was due to awards including amounts for loss of earnings and predicted loss of earnings that were increasing due to inflation,[870] and the increases persisted in the 1980s. Between 1980 and 1981, awards and settlements above $100,000 grew from 160 to 272 while settlements and awards over $500,000 and $1 million rose from 10 to 16 and one to eight respectively.[871] The increases attracted media,[872] insurer[873] and judicial criticism. Justice Roden of the NSW Supreme Court branded the legal system for compensating motor accident victims as 'little short of farcical'[874] and Professor Ronald Sackville of the University of NSW argued that 'some significant change to compensation arrangements in NSW is

[866] (1981) 145 CLR 625.
[867] Queensland, *Parliamentary Debates,* Legislative Assembly, 8 September 1981, 1925 (Sam Doumany).
[868] *Common Law Practice Act 1867* (Qld) s 5, as inserted by *Common Law Practice and Limitation of Actions Acts Amendment Act 1981* (Qld) s 14(2).
[869] Norm Lipson, 'The Staggering Cost of Car Crash Compensation', *The Daily Telegraph* (Sydney), 11 March 1978, 6.
[870] Ibid.
[871] New South Wales Law Reform Commission, *Accident Compensation*, above n 865, 54.
[872] See, eg, 'Accident Victim Awarded Over $1m', *The Sydney Morning Herald* (Sydney), 15 August 1980, 2; John Slee and Tom Downes, '$2.7m Award Rekindles Law Debate', *The Sydney Morning Herald* (Sydney), 30 September 1981, 1; Editorial, 'Record Awards', *The Sydney Morning Herald* (Sydney), 5 October 1981, 6.
[873] See discussion at Richard Ackland, 'Insurers, Lawyers Focus on Big Damages Payouts', *The National Times* (Sydney), 20-26 September 1981, 54.
[874] 'Judge Slates Damages System', *The Sydney Morning Herald* (Sydney), 15 May 1981, 3.

inevitable'.[875] These criticisms, and demands from the GIO particularly, facilitated the Wran government decision to introduce statutory damages restrictions.

The GIO involvement in the Wran government statutory damages restrictions was critical. The GIO chief legal officer explained in 1978 that the insurer was not anxious about its ability to meet claims 'as yet' but there was concern about reinsurance, which was 'becoming more difficult' and higher damages awards only exacerbated the 'problem'.[876] The GIO lobbied government to address the size of damages, reporting annually on the increased amounts that it paid in claims and the fact that the revenue to meet these claims was less than claims' amount.[877] The GIO singled out the effects of specific judicial decisions as providing cause for reform, focusing particularly upon *Todorovic v Waller*[878] ('Todorovic') and *Griffiths v Kerkemeyer*[879] ('Griffiths'). In Todorovic, the High Court ruled that future economic loss damages should be discounted by three per cent.[880] This implied that investment earnings on any lump sum damages amount would be three per cent which fell below the likely return. In Griffiths, the High Court allowed plaintiffs to recover an amount equivalent to the value of any gratuitous nursing and domestic services that were provided or to be provided to the plaintiff.[881]

The Wran government had pledged to reduce NSW third party insurance premiums by six per cent before the 24 March 1984 State election.[882] However, effects of the Todorovic and Griffiths decisions, and wider trend of damages increases, made achieving this commitment without reform impossible. The government acknowledged that there were predictions that the average third party insurance premium would increase from $158 to $443 without reform when it introduced the Motor Vehicles (Third Party Insurance) Amendment Bill 1984 (NSW).[883] Responding to Griffiths, the Bill capped the weekly amount recoverable for gratuitous services in motor accident claims at no more than average weekly

[875] Ronald Sackville, 'The Post-Woodhouse Follies' (1982) 5(5) *AII Journal* 40, 42.
[876] Quoted in John Slee, 'No-Fault Insurance Scheme Studied', *The Sydney Morning Herald* (Sydney), 5 October 1981, 3.
[877] See, eg, Government Insurance Office of New South Wales, *Report for the Year Ended 30 June 1981* (1981) 6; Government Insurance Office of New South Wales, *Report for the Year Ended 30 June 1982* (1982) 6.
[878] (1981) 150 CLR 402.
[879] (1977) 139 CLR 161.
[880] (1981) 150 CLR 402, 424 (Gibbs CJ and Wilson J); 451 (Mason J); 460 (Aickin J); 480 (Brennan J).
[881] (1977) 139 CLR 161, 168-9 (Gibbs CJ); 180 (Stephen J); 193 (Mason J).
[882] See New South Wales, *Parliamentary Debates,* Legislative Assembly, 10 May 1984, 586 (Terry Sheahan).
[883] New South Wales, *Parliamentary Debates,* Legislative Assembly, 29 February 1984, 4819 (Ken Booth).

total earnings of all NSW employees as calculated by the Australian Statistician.[884] Responding to Todorovic, the Bill prescribed a discount rate on future economic loss damages of five per cent.[885] This accorded with a GIO recommendation[886] and matched the discount rate that the Bjelke Petersen government had legislated in 1981.

The Wran government also took the opportunity of the *Motor Vehicles (Third Party Insurance) Amendment Act 1984* (NSW) to modify other aspects of the law of negligence. Correcting what Attorney General Sheahan branded an 'anomaly' for example,[887] the government abolished courts' ability to award interest on damages for non-pecuniary losses such as pain and suffering in respect of a period from the date of the victim injury or death to final award (that is, 'pre-judgement').[888] Also, in separate legislation, the government abolished the 'archaic'[889] damages for loss of consortium.[890] These were an amount that had historically been awarded to husbands to compensate them for loss of their wife's 'domestic services' if she was injured. The government rationalised these modifications on modernisation grounds but they also contributed towards the broader goal of moderating damages and the associated pressure upon third party insurance premiums. Table 6.4 tabulates the statutory damages restrictions that the governments in NSW and Queensland had made to 1984 (the NT is omitted as it had predominantly abolished damages entitlements by 1984).

Table 6.4 Statutory Damages Restrictions: 1984

Damages	**Restriction**						
	QLD	NSW	SA	WA	Tas	Vic	ACT
Gratuitous services damages (GS) – weekly cap		✓					
Discount rate – prescribed [rate bracketed]	✓[5]	✓[5]					
Loss of consortium damages – ban		✓					
Non-economic loss – pre-judgement interest ban		✓					

[Source: Original]

[884] *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) s 35C, as inserted by *Motor Vehicles (Third Party Insurance) Amendment Act 1984* (NSW) sch 3 cl 2.
[885] *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) s 35B, as inserted by *Motor Vehicles (Third Party Insurance) Amendment Act 1984* (NSW) sch 3 cl 2.
[886] New South Wales Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for New South Wales*, Report No 43 (1984) vol 1, 104.
[887] New South Wales, *Parliamentary Debates,* Legislative Assembly, 10 May 1984, 588 (Terry Sheahan).
[888] *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) s 35D, as inserted by *Motor Vehicles (Third Party Insurance) Amendment Act 1984* (NSW) sch 3 cl 2.
[889] New South Wales, *Parliamentary Debates,* Legislative Assembly, 29 February 1984, 4872 (Frank Walker).
[890] *Law Reform (Marital Consortium) Act 1984* (NSW) s 3(1).

6.3.3 South Australia

The NSW statutory damages restrictions were made a year before the SA Bannon Labor government also implemented restrictions. The *Wrongs Act Amendment Act 1936* (SA) transferred characteristics of NSW legislation and, like the NT and NSW reforms, was facilitated by concerns about the level of third party insurance premiums and third party insurer losses. The State Government Insurance Commission (SGIC) had become the sole third party insurer in SA from 1 July 1975 and in the following years, private motor vehicle third party insurance premiums rose almost annually. Increases were generally by 10 per cent or less. However, in 1981, premiums rose by 23 per cent[891] and then an independent committee recommended a 12.5 per cent increase in 1983.[892] The SA Auditor-General reported that third party insurance premium income had been 'insufficient' to meet increased claim costs over the three years to 1985[893] and in 1986, the SGIC recorded its highest loss on third party insurance business since 1975.[894] In large part, this was due to escalating claims paid from SGIC that had risen from $94.5 million in 1982-83 to $102.2 million in 1983-84, $117.4 million in 1984-85 and $146.4 million in 1985-86.[895]

Transferring an interstate strategy, the Bannon government commissioned an urgent review of third party insurance in 1985 in response to the SGIC financial position. This review was by an SGIC representative and the retired Supreme Court judge, Keith Sangster. As the NSW experience illustrated, a State insurer could be pivotal to statutory damages restrictions' design and in SA, the committee recommendations were an essential SGIC 'wish list' of reforms. The committee had sourced characteristics from the *Motor Vehicles (Third Party Insurance) Amendment Act 1984* (NSW) and implored government to modify the effects of multiple decisions. For example, the 'exploited' damages for gratuitous services that Griffiths established should be abolished[896] as well as the 'unwarranted' damages for the

[891] Motor Vehicle Third Party Insurance Premium Committee (SA), *Report* (1981) 2.
[892] Motor Vehicle Third Party Insurance Premium Committee (SA), *Report* (1983) 1.
[893] Auditor-General of South Australia, *Report for the Year Ended 30 June 1985* (1985) 488.
[894] State Government Insurance Commission (SA), *Commemorating 20 Years of SGIC* (1992) Innovation.
[895] Auditor-General of South Australia, *Report on the State Government Insurance Commission 1985-86* (1986) 3.
[896] See R A W Daniell and A K Sangster, *Compulsory Third Party Insurance Enquiry* (State Government Insurance Commission, 1985) 12-3.

costs of managing or investing a lump sum.[897] The committee also recommended that the 'ill-founded' damages for loss of consortium should be abolished.[898]

The committee rationalised these recommendations on the basis that they addressed legal anomalies rather than being driven by costs' reduction. However, financial savings were a more overt object for other recommendations. The committee recommended a maximum cap upon damages for non-economic loss ('NEL') for example. NEL represented 44.1 per cent of the total compensation that the SGIC paid in 1984-5 and their size was predicted to rise from $51.8 million to $68.2 million the following year.[899] The committee also recommended a six per cent discount rate on damages for future economic loss, which exceeded the five per cent rate in NSW and Queensland.[900] The excess was due to higher anticipated investment returns.

The committee recommendations were a detailed prescription of statutory damages restrictions for the Bannon government and multiple recommendations were adopted. The government introduced a formula that courts had to apply when deciding NEL,[901] precluded interest accruing on their sum and required applicants to have been significantly impaired for at least seven days to qualify ('impairment threshold').[902] Plaintiffs could not recover compensation for lost earning capacity in respect of the first week of that incapacity (an 'incapacity threshold')[903] and damages for the cost(s) of investing or managing a damages award were abolished.[904] The government also mandated a 15 per cent reduction of any damage award ('damages reduction') if the plaintiff was injured while not wearing a seat-belt.[905] Further, plaintiffs were assumed to have been negligent and damages had to be reduced by an unspecified amount if they were voluntarily the passenger in a vehicle and knew the driver was impaired.[906]

[897] Ibid 13. The right to damages for any costs associated with managing or investing a lump sum were upheld in *Campbell v Nangle* (1985) 40 SASR 161; *Beasley v Marshall (No 1)* (1985) 40 SASR 544.
[898] Daniell and Sangster, above n 896, 13.
[899] Ibid 11.
[900] Ibid 6.
[901] *Wrongs Act 1936* (SA) s 35A(1)(b), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.
[902] Ibid s 35A(1)(a), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.
[903] Ibid s 35A(1)(d), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.
[904] Ibid s 35A(1)(f), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.
[905] Ibid s 35A(1)(i), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.
[906] Ibid s 35A(1)(j), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.

The Bannon government damages restrictions were extensive but it did not implement every committee recommendation. For some, the anticipated 'loss' to motor accident victims (and associated political sensitivity) exceeded the anticipated savings gains in a 'balancing act' that the Attorney General described.[907] Most significantly, the government did not implement the recommended abolition of damages for gratuitous services. Instead, it transferred the NSW approach of prescribing the weekly rate that providers could recover for these services.[908] 'Gratuitous services' also had to be provided by the injured person's parent, spouse or child and no amount was recoverable for expenses that were voluntarily incurred or would be voluntary incurred other than 'reasonable out-of-pocket expenses'.[909] Attorney General Chris Sumner rationalised that if damages for gratuitous services were abolished completely, plaintiffs could lodge more costly claims for 'professional nursing or institutional care'.[910] The Bannon government also prescribed a five per cent discount rate on damages for future economic loss which accorded with NSW and Queensland legislation but not the expert committee six per cent discount rate.[911] Likely because the Dunstan Labor government had widened eligibility for damages for loss of consortium just over a decade previously,[912] the Bannon Government also ignored the recommendation to abolish that head of damages.

The Bannon government statutory damages restrictions and further premium increases improved the SGIC financial position. In 1988, the SGIC reported a trading profit on its compulsory third party insurance business of $16 million[913] and that was followed by a trading profit of $41 million to 30 June 1989.[914] The SA Auditor-General explained that the decreased costs facing the SGIC 'resulted from a reduction in the average cost of claims' due to the damages restrictions as well as steps that the SGIC took to identify 'fraudulent or

[907] South Australia, *Parliamentary Debates,* Legislative Council, 27 November 1986, 2409 (Chris Sumner).
[908] *Wrongs Act 1936* (SA) s 35A(1)(h), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.
[909] Ibid s 35A(1)(g), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.
[910] South Australia, *Parliamentary Debates,* Legislative Council, 27 November 1986, 2411 (Chris Sumner).
[911] *Wrongs Act 1936* (SA) s 35A(6) ('the prescribed discount rate'), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3. See discussion at South Australia, *Parliamentary Debates,* Legislative Council, 27 November 1986, 2410 (Chris Sumner).
[912] In 1972, the Dunstan Labor government extended the right to damages for loss of consortium to wives who could recover in respect of services that their husband formerly provided: *Wrongs Act 1934* (SA) s 33, as inserted by *Statutes Amendment (Law of Property and Wrongs) Act 1972* (SA) s 13.
[913] Auditor-General of South Australia, *Report for the Year Ended 30 June 1988* (1988) 443.
[914] Ibid 406.

exaggerated claims'.[915] The *Wrongs Act Amendment Act 1986* (SA) provided evidence of the effectiveness of statutory damages restrictions as a mechanism to improve third party insurer profitability and alleviate pressure to increase premiums. The statute also reiterated the important role of State third party insurers and expert inquiries as transfer agents. Table 6.5 incorporates the SA statutory damages restrictions in Table 6.4 to outline the state of restrictions from 1985.

Table 6.5 Statutory Damages Restrictions: 1985

Damages	**Restriction**						
	QLD	NSW	SA	WA	Tas	Vic	ACT
Gratuitous services damages (GS) – weekly cap		✓	✓				
GS – provider conditions			✓				
GS – voluntary services not compensable			✓				
Discount rate – prescribed[rate bracketed]	✓[5]	✓[5]	✓[5]				
Loss of consortium damages – ban		✓					
Investment managers' fees damages – ban			✓				
NEL – cap			✓				
NEL – formula calculation			✓				
NEL – impairment threshold			✓				
NEL – interest ban			✓				
NEL – pre-judgement interest ban		✓					
Lost earning capacity – incapacity threshold			✓				
Damages reduction – voluntary passenger			✓				
Prescribed damages reduction – no seat belt			✓				

[Source: Original]

6.3.4 Western Australia and Tasmania

The SA damages restrictions were a new benchmark that other governments could transfer but the first government to legislate following their passage declined. The WA Burke Labor government did not face the financial losses in the MVIT and pressure to increase third party insurance premiums that existed in NSW and SA. Premier Brian Burke stated that increases in WA third party insurance premiums had 'been held to around the inflation rate or below'[916] and the MVIT made a profit for the 1985 financial year.[917] Opposition

[915] Ibid 415.
[916] Western Australia, *Parliamentary Debates,* Legislative Assembly, 10 October 1985, 2098 (Brian Burke).
[917] Western Australia, *Parliamentary Debates,* Legislative Assembly, 5 November 1985, 3681 (Brian Burke).

parliamentarian and future Premier Richard Court declared that the MVIT was a 'well-run, tight ship',[918] 'highly regarded' and 'performing well'.[919]

The MVIT financial position meant that a crucial factor that facilitated statutory damages restrictions in the NT, NSW and SA was not present in WA. However, likely because of concerns that those circumstances could emerge in WA, the Burke government introduced restrictions. These restrictions were comparatively minor compared to other States' and were not targeted solely at motor accident claims. The government abolished damages for 'loss of consortium' for example,[920] which Premier Burke branded an 'offensive anachronism'.[921] The government also abolished plaintiffs' rights to pre-judgement interest on damages for pain and suffering, loss of enjoyment and amenities of life.[922] More significantly, the government prescribed a six per cent discount rate on damages for future economic loss,[923] which was higher than Queensland, NSW and SA. Burke explained that the higher rate was chosen as market interest rates had increased to 'very high levels'[924] and there was scope for variation by regulation.

The positive financial experience of the third party insurance system in WA did not extend to Tasmania. As subsection 7.2.3 will explain in more detail, the Bethune Labor government in Tasmania had introduced no-fault motor accident compensation in the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas). This meant that, irrespective of fault, most Tasmanian motor accident victims could recover statutory compensation for medical expenses and forgone earnings that they sustained from accident. In addition, victims able to prove third party fault as the proximate cause of their injury could recover damages. The government owned Motor Accidents Insurance Board (MAIB) was the sole third party insurer under the new scheme and paid all compensation, whether in the form of statutory benefits or damages. In the first years of the scheme, the MAIB traded profitably. However, from the late 1970s and into the early 1980s, the MAIB incurred rising losses that were

[918] Western Australia, *Parliamentary Debates,* Legislative Assembly, 3 July 1986, 1313 (Richard Court).
[919] Ibid 1314.
[920] *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 3, as inserted by *Acts Amendment (Actions for Damages) Act 1986* (WA) s 4.
[921] Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 June 1986, 299 (Brian Burke).
[922] *Supreme Court Act 1935* (WA) s 32(2)((aa), as inserted by *Acts Amendment (Actions for Damages) Act 1986* (WA) s 6.
[923] *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 5, as inserted by *Acts Amendment (Actions for Damages) Act 1986* (WA) s 5.
[924] Western Australia, *Parliamentary Debates,* Legislative Assembly, 17 June 1986, 299 (Brian Burke).

attributed to increased claims, higher damages awards and inadequate premiums that were independently set. The MAIB accumulated deficit to 30 June 1983 was $29.4 million,[925] which increased to $30 million at 30 June 1984,[926] $35.5 million at 30 June 1935[927] and $36.9 million at 30 June 1986.[928]

The MAIB reiterated its support for motor accident victims' damages entitlements in its annual report for the year ended 30 June 1986.[929] However, the Board stressed that damages restrictions had to be imposed 'in order to contain rising premium costs'.[930] This reflected sentiment of earlier annual reports and, very likely, MAIB demands informed the statutory damages restrictions in the *Common Law (Miscellaneous Actions) Act 1986* (Tas) that the conservative Gray Tasmanian government made. Deputy Premier and Acting Attorney General Geoff Pearsall reiterated that personal injury damages were 'a fundamental right that must be retained' but emphasised that something had to be 'done to reduce the ever-increasing amount of … damages if the motor vehicle accidents insurance scheme [was] to survive in its current form'.[931]

Highlighting the severity of MAIB losses, characteristics of the statutory restrictions that the Gray government made were the most severe of any jurisdiction. Stating that it was 'necessary' taking into account inflation, taxation, wage increases and interest rates,[932] the government enacted a seven per cent discount rate on damages for future economic loss for example.[933] This was the highest of any jurisdiction. Further, in addition to abolishing the 'quaint and anachronistic' loss of consortium damages,[934] the government took the radical step of abolishing damages for gratuitous services.[935] Echoing expert SA committee justifications,[936] government leader in the State Legislative Council Tony Fletcher explained that government had a 'fundamental objection' to these damages because they did not

[925] Motor Accidents Insurance Board, *Report for the Year Ended 30 June 1983* (1983) 9.
[926] Motor Accidents Insurance Board, *Report for the Year Ended 30 June 1984* (1984) 10.
[927] Motor Accidents Insurance Board, *Report for the Year Ended 30 June 1985* (1985) 14.
[928] Motor Accidents Insurance Board, *Report for the Year Ended 30 June 1986* (1986) 16.
[929] Ibid 13.
[930] Ibid
[931] Tasmania, *Parliamentary Debates,* House of Assembly, 26 November 1986, 4510 (Geoff Pearsall).
[932] Tasmania, *Parliamentary Debates,* Legislative Council, 2 December 1986, 3152 (Tony Fletcher).
[933] *Common Law (Miscellaneous Actions) Act 1986* (Tas) s 4.
[934] Ibid s 3.
[935] Ibid s 5.
[936] See Daniell and Sangster, above n 896, 12-3.

compensate for any loss actually incurred.[937] The Tasmanian Law Society, who opposed the restrictions, estimated that the abolition could reduce damages payouts by as much as a third.[938] However, the government was unmoved, highlighting the primacy that it accorded to reducing scheme expenditure above other altruistic considerations.

6.3.5 Victoria

The Tasmanian and West Australian governments restricted damages in the same year that the Victorian Cain Labor government attempted the radical option of abolishing damages for personal injury or death from motor accident altogether. As subsection 7.2.2 will explain, like its counterpart in Tasmania, the Victorian Hamer government had also introduced no-fault motor accident compensation. This permitted motor accident victims to recover statutory compensation for eligible medical benefits and loss of earnings irrespective of fault. In addition, victims that proved fault as the cause of their injury were entitled to damages. The government owned Motor Accidents Board (MAB) administered this scheme and, from 1976, the State Insurance Office became the sole Victorian third party insurer amid increasing claims to the MAB and insufficient associated premium increases. Outstanding MAB liabilities at 30 June 1982 from anticipated claims were estimated to be $64.4 million[939] and this increased to $97.6 million at 30 June 1983,[940] $122.6 million at 30 June 1984[941] and $135.1 million at 30 June 1985.[942] *The Age* editorialised that the Victorian third party insurance scheme was in a 'desperate financial mess' in November 1985[943] and by 30 June 1986, the estimated outstanding liability of the MAB was $161.2 million.[944]

The Cain government proposal to abolish damages for personal injury or death from motor accident was an aspect of 'an entirely new motor accident compensation scheme' that included the new Transport Accident Commission and improved statutory 'no-fault'

[937] Tasmania, *Parliamentary Debates,* Legislative Council, 2 December 1986, 3151 (Tony Fletcher).
[938] See 'Personal Injury Payouts will be Reduced under New Law - Claim', *The Mercury* (Hobart), 2 December 1986, 3.
[939] Motor Accidents Board, *Ninth Annual Report* (1982) 9.
[940] Motor Accidents Board, *Tenth Annual Report* (1983) 13.
[941] Motor Accidents Board, *Eleventh Annual Report* (1984) 11.
[942] Motor Accidents Board, *Twelfth Annual Report* (1985) app 1 cl 11.
[943] Editorial, 'Third Party A Financial Mess', *The Age* (Melbourne), 4 November 1985, 13.
[944] Motor Accidents Board, *Thirteenth Annual Report* (1986) 19.

benefits.[945] However, the proposal failed amid strident criticism from the Victorian legal bodies.[946] As subsection 6.2.4 explained, the Victorian Bar Council and Law Institute had been pivotal to a Bolte government decision to retain trial by jury in motor accident claims and they were again outspoken on this occasion. The bodies surveyed public opinion, notified their clients and advertised against the government proposal. Also, the Law Institute published a paper that would become pivotal.

The Law Institute paper outlined an approach that denied damages eligibility for most motor accident victims but retained damages for victims with particular serious injuries (what the Law Institute labelled a 'threshold').[947] The Law Institute publication was circulated among parliamentarians and its proposal drew praise from the Liberal opposition.[948] This was significant as the conservative opposition held a majority in the Victorian Legislative Council and had indicated their strong opposition to the government abolition proposition. The Law Institute threshold initiative emerged as a potential way forward and, acknowledging the proposal in parliament, Treasurer Rob Jolly declared that the government was prepared to consider 'reasonable' proposals on the 'common law issue'.[949] Subsequently, the major parties agreed a set of principles based upon the Law Institute proposal and their implementation in the final legislation was made a condition of the opposition supporting the Transport Accidents Bill 1986 (Vic).[950]

The *Transport Accident Act 1986* (Vic) damages restrictions applied predominantly to claims from accidents that occurred after 1 January 1987 and transferred few interstate characteristics. This is because the restrictions copied recommendations from the Law Institute proposal that drew upon various sources, including workers' compensation. The 'threshold' that individuals had to satisfy to recover damages became a requirement that

[945] Victorian government, *Transport Accident Compensation Reform* (Victorian government, 1986) 25.
[946] See, eg, Law Institute of Victoria, 'Public Opinion Says "No" to No-fault' (1986) 60 *Law Institute Journal* 634; Frank Paton, 'Paying for Just Compensation' (1985) 59 *Law Institute Journal* 1147, 1147; Law Institute of Victoria, 'Government Faults - Where the Transport Accident Bill Takes Turns for the No-Fault Worse' (1986) 60 *Law Institute Journal* 768; Law Institute of Victoria, 'Case Studies - What the Transport Accident Bill Could Do To Motor Accident Victims' (1986) 60 *Law Institute Journal* 774.
[947] Law Institute of Victoria, *A Motor Vehicle Accident Compensation Scheme for Victoria* (1985) 2-3.
[948] Victoria, *Parliamentary Debates,* Legislative Assembly, 10 September 1986, 138 (Alan Stockdale). For examples of Liberal parliamentarians expressing support for damages entitlements, see: Victoria, *Parliamentary Debates,* Legislative Assembly, 10 September 1986, 159 (Simon Ramsay); Legislative Assembly, 11 September 1986, 245 (Ronald Wells).
[949] Victoria, *Parliamentary Debates,* Legislative Assembly, 21 October 1986, 1307 (Rob Jolly).
[950] Victoria, *Parliamentary Debates*, Legislative Assembly, 3 December 1986, 2680 (Alan Stockdale).

applicants have suffered a 'serious injury'.[951] Damages were limited to 'pain and suffering damages' up to $200,000[952] and 'pecuniary loss damages' up to $450,000,[953] although neither head of damages was recoverable if their amount was assessed at less than $20,000.[954] There was a six per cent discount rate on damages for future economic loss, irrespective of whether the accident occurred before or after 1 January 1987[955] and damages for gratuitous services were removed.[956] This was because the *Transport Accident Act 1986* (Vic) provided rights to recover the costs of reasonable rehabilitation and housekeeping service expenses.[957] Damages for gratuitous services provided in respect of injury from an accident that occurred before 1 January 1987 were subject to a maximum cap.[958] Further, damages for losses such as forgone wages, lost earning capacity and loss of consortium fell within the amount recoverable as 'pecuniary loss damages'.[959] Table 6.6 (next page) incorporates the *Transport Accident Act 1986* (Vic) damages restrictions into Table 6.5.

[951] *Transport Accident Act 1986* (Vic) s 93(2). 'Serious injury' is defined in subsection 93(17) to mean a 'serious long-term impairment or loss of a bodily function; permanent serious disfigurement; severe long-term mental or severe long-term behavioural or disturbance or disorder; or loss of a foetus'.
[952] *Transport Accident Act 1986* (Vic) s 93(7)(b).
[953] Ibid s 93(7)(a).
[954] Ibid s 93(7). The *Transport Accident Act 1986* (Vic) defines 'pecuniary loss damages' as 'damages for loss of earnings, loss of earning capacity, loss of value of services or any other pecuniary loss or damage' and 'pain and suffering damages' as 'damages for pain and suffering, loss of amenities of life or loss of enjoyment of life': at s 93(17). The 'pecuniary loss damages' definition scope is uncertain. For example, it is not clear if Victoria has followed other governments' lead and abolished damages for loss of consortium although one decision has suggested that is the case: see *Doughty v Martino Developments Pty Ltd* [2010] VSCA 121 (2 June 2010) (per Nettle JA).
[955] Ibid ss 93(13); 173(1); 175(1).
[956] Ibid ss 93(10(b), (c).
[957] Ibid s 60.
[958] Ibid s 174(1).
[959] See Ibid s 93(10)(b).

Table 6.6 Statutory Damages Restrictions: 1987

Damages	Restriction						
	QLD	NSW	SA	WA	Tas	Vic	ACT
Total damages – serious injury threshold						✓	
Gratuitous services damages (GS) – ban					✓		
GS – weekly cap		✓	✓				
GS – provider condition			✓				
GS – voluntary services excluded			✓				
Discount rate – prescribed[rate bracketed]	✓[5]	✓[5]	✓[5]	✓[6]	✓[7]	✓[6]	
Loss of consortium – ban		✓		✓	✓		
Investment managers' fees - ban			✓				
Exemplary/ punitive damages – ban						✓	
NEL damages – cap			✓			✓	
NEL damages - minimum award threshold						✓	
NEL damages – formula calculation			✓				
NEL damages – impairment threshold			✓				
NEL damages – interest ban			✓				
NEL damages – pre-judgement interest ban		✓		✓			
Pecuniary loss – cap						✓	
Pecuniary loss – minimum award threshold						✓	
Lost earning capacity – incapacity threshold			✓				
Damages reduction – voluntary passenger			✓				
Prescribed damages reduction - no seat belt			✓				

[Source: Original]

6.3.6 New South Wales

The *Transport Accident Act 1986* (Vic) damages restrictions were made a year before a NSW statute that transferred more restrictions. The 1984 Wran government restrictions (see subsection 6.3.2) had failed to moderate compensation expenditure as much as desired and in 1986 the government's successor, the Unsworth Labor government, established the controversial Transcover scheme ('Transcover'). Transcover abolished damages for personal injury or death from transport accidents that occurred on or after 1 July 1987.[960] In their place, the government introduced statutory benefits that required applicants to prove, 'in accordance with the civil law', that a third party was liable in whole or in part for their harm.[961] Premier Unsworth explained that premiums would have to exceed $1,000 per annum by 1992-93 to keep the third party insurance fund viable if Transcover was not

[960] *Transport Accidents Compensation Act 1987* (NSW) s 40(1).
[961] Ibid ss 31, 32.

established.[962] Similarly, Treasurer Ken Booth explained that if there was no reform, 'premiums would need to increase by more than 23 per cent each year, well into the future'.[963] However, Transcover attracted strong criticism, particularly from legal bodies, and the newly elected Greiner government abolished it less than a year after the scheme commenced and restored damages. The Greiner government rationalised damages' restoral on altruistic grounds, praising the legal profession and courts' responsibilities for deciding compensation.[964] However, cynics labelled the decision lawyers' appeasement after the legal profession campaigned strongly for the Greiner government election.[965]

The Greiner government did not fully restore victims' damages entitlements in the *Motor Accidents Act 1988* (NSW). Rather, continuing a theme of other States' reforms, the government imposed statutory damages restrictions whose design was dictated by actuarial advice of what was necessary to moderate third party insurance premiums. Indeed, Attorney General Dowd acknowledged that a 'leading firm of actuaries' had costed a 'number of possible options for reform'.[966] The government restored Wran government restrictions such as the five per cent discount rate on damages for future economic loss[967] and a maximum cap on weekly damages for gratuitous services.[968] Also, government emulated and extended *Wrongs Act Amendment Act 1986* (SA) restrictions. If an injured person was not wearing a seat-belt, driving while intoxicated or voluntarily the passenger in a vehicle driven by a drunk or drugged person, for example, contributory negligence was presumed and damages had to be reduced.[969] NEL were also restricted. This was via a formula that, like SA legislation, incorporated a maximum cap, minimum amount and scale that ascended with harm that courts had to rely upon to calculate these damages.[970]

The Greiner government did not only pursue emulation and copying in its statutory damages restrictions however. This is because it also drew upon past and interstate restrictions to inspire some notable innovations. Transferring an idea from workers'

[962] New South Wales, *Parliamentary Debates,* Legislative Assembly, 23 April 1986, 2462 (Barrie Unsworth).
[963] New South Wales, *Parliamentary Debates,* Legislative Assembly, 14 May 1987, 12228 (Ken Booth).
[964] See New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 November 1988, 3828 (John Dowd).
[965] Editorial, 'Greiner Repays the Lawyers', *The Sydney Morning Herald* (Sydney), 24 November 1988, 18; Philip Clark, 'Compensation Change Music to Lawyers' Ears', *The Sydney Morning Herald* (Sydney), 14 April 1988, 11.
[966] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 November 1988, 3828 (John Dowd).
[967] *Motor Accidents Act 1988* (NSW) s 71.
[968] Ibid ss 72(5), (6).
[969] Ibid ss 74, 76.
[970] See Ibid s 79.

compensation legislation for example, the government provided for $15,000 or an amount thereof to be deducted from any NEL assessed up to $55,000 (a 'deductible').[971] Further, in place of the former ban on pre-judgement interest on NEL, the government introduced a ban on pre-judgement interest on all damages. The exception was if the defendant had failed to take reasonable steps to settle a valid claim, including making a reasonable offer settlement.[972] The government also banned courts awarding exemplary or punitive damages against a defendant in motor accident claims via a 1989 amendment.[973] Table 6.7 (next page) incorporates the statutory damages restrictions that the *Motor Accidents Act 1988* (NSW) and *Motor Accidents (Amendment) Act 1989* (NSW) made in Table 6.6.

[971] Ibid s 79(5).
[972] Ibid s 73.
[973] Ibid s 81A, as inserted by *Motor Accidents (Amendment) Act 1989* (NSW) sch 1 cl 41. This reflected a historic ban on exemplary or punitive damages being recovered by deceased estates: see, eg, *Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT) s 5(a); *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(a)(i); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(2)(a).

Table 6.7 Statutory Damages Restrictions: 1989

Damages	Restriction						
	QLD	NSW	SA	WA	Tas	Vic	ACT
Total damages - serious injury threshold						✓	
Gratuitous services damages (GS) – ban					✓		
GS – weekly cap		✓	✓				
GS – provider conditions			✓				
GS – duration conditions		✓					
GS – voluntary services excluded		✓	✓				
Discount rate – prescribed[rate bracketed]	✓[5]	✓[5]	✓[5]	✓[6]	✓[7]	✓[6]	
Loss of consortium – ban		✓		✓	✓		
Investment managers' fees – ban			✓				
Exemplary/ punitive damages – ban		✓				✓	
NEL – cap		✓	✓			✓	
NEL – minimum award threshold		✓				✓	
NEL – formula calculation		✓	✓				
NEL – impairment threshold		✓	✓				
NEL – deductible		✓					
NEL – interest ban			✓				
NEL – pre-judgement interest ban				✓			
Pre-judgement interest - limited		✓					
Pecuniary loss – maximum cap						✓	
Pecuniary loss – minimum award threshold						✓	
Lost earning capacity – incapacity threshold			✓				
Damages reduction – no seatbelt/ helmet		✓					
Damages reduction – drunk, drugged		✓					
Damages reduction – voluntary passenger		✓	✓				
Prescribed damages reduction– no seat belt			✓				

[Source: Original]

6.3.7 Western Australia and the Australian Capital Territory

The *Motor Accidents Act 1988* (NSW) inspired statutory damages restrictions in WA that copied NSW characteristics. Likely, this copying was facilitated by the shared political ideology of the Greiner and Court conservative governments. Further, when the Court government legislated, it could observe the third party insurance premium reductions that the *Motor Accidents Act 1988* (NSW) had produced. This was important as the Court government voiced concern about 'unrealistic compensation expectations for minor injuries'.[974] The *Motor Vehicle (Third Party Insurance) Amendment Act 1994* (WA) transferred a formulaic approach to calculating NEL (labelled 'damages for non-pecuniary

[974] Western Australia, *Parliamentary Debates,* Legislative Assembly, 1 December 1993, 8588 (Richard Court).

loss' in WA) like NSW.[975] This reflected the disproportionate contribution that these damages made to total expenditure. The government also subjected the maximum level of damages for gratuitous services to a weekly cap,[976] required their amount to exceed $5,000 (indexed) to be awarded[977] and precluded damages for services that would have been provided even if the victim was uninjured.[978] Such was the Court government desire to transfer Greiner government policy that it instructed WA courts to follow NSW courts' interpretations of NSW provisions that it had copied.[979]

The NSW, SA and WA reforms suggested that statutory damages restrictions were an accepted government mechanism to reduce pressure upon third party insurance premiums. However, successive ACT governments held a different perspective. Federal governments had not introduced restrictions when they administered the ACT and following self-government in 1989, governments' indifference continued. Responding to a Community Law Reform Committee recommendation in 1991,[980] the Follett Labor government abolished the 'repugnant'[981] damages for loss of consortium which accorded with other governments' legislation.[982] However, again accepting a Committee recommendation,[983] the government also allowed plaintiffs to recover an amount for any loss sustained as a result of incapacity to perform domestic services.[984] This contrasted with the trend of restrictions interstate and, taking a thinly veiled swipe at interstate reforms, Attorney General Terry Connolly emphasised that the *Law Reform (Miscellaneous Amendments) Act (No 2) 1991* (ACT) did not impose an 'arbitrary formula for the calculation of compensation'.[985] Yet,

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[975] *Motor Vehicle (Third Party Insurance) Act 1943* (WA) ss 3C(3) - (5), as inserted by *Motor Vehicle (Third Party Insurance) Amendment Act 1994* (WA) s 5. The formula incorporated a minimum threshold that damages had to exceed to be paid of $10,000 (indexed) and a maximum cap of $200,000 (indexed). Also, $10,000 had to be deducted from an award between $10,001 and $30,000 initially.
[976] Ibid s 3D(3), as inserted by *Motor Vehicle (Third Party Insurance) Amendment Act 1994* (WA) s 5.
[977] Ibid ss 3D(6), (7), as inserted by *Motor Vehicle (Third Party Insurance) Amendment Act 1994* (WA) s 5.
[978] Ibid ss 3D(2), as inserted by *Motor Vehicle (Third Party Insurance) Amendment Act 1994* (WA) s 5.
[979] Western Australia, *Parliamentary Debates,* Legislative Assembly, 1 December 1993, 8589 (Richard Court).
[980] See Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Second Report*, Report No 32 (1986) 6.
[981] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 1991, 3884 (Terry Connolly).
[982] *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) s 32, as inserted by *Law Reform (Miscellaneous Provisions) Amendment Act (No 2) 1991* (ACT) s 5. Now *Civil Law (Wrongs) Act 2002* (ACT) s 144.
[983] See Law Reform Commission, above n 980, 10.
[984] *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) s 33, as inserted by *Law Reform (Miscellaneous Provisions) Amendment Act (No 2) 1991* (ACT) s 5. Now *Civil Law (Wrongs) Act 2002* (ACT) s 39.
[985] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 1991, 3885 (Terry Connolly).

concerns about premiums' level continued and in 1994 the Follett government tasked a steering committee to examine third party insurance. This committee recommended multiple restrictions that overlapped with interstate legislation but the government made no reform. This was despite the committee anticipating that there would be third party insurance premium reductions if government accepted its recommendations.[986]

Some explanations for why the Follett government rejected statutory damages restrictions emerge from stakeholder responses to the steering committee recommendation. Writing in *The Canberra Times,* Crispin Hull felt that there were some 'nasty suggestions' in the committee report[987] and the 'capped, part-administrative' schemes present in other States 'invariably are worse for the catastrophically injured'.[988] One solicitor suggested that a $21,000 damages award would be reduced to an amount between $1,000 and $3,000,[989] which had therapeutic implications but also impacted legal remuneration. Further, the ACT Community Law Reform Committee chair felt that a 'substantial unfairness' would result from making victims bear the cost of harm inflicted upon them by others.[990] This was significant as the Committee chair was ACT Supreme Court judge Terence Higgins.

ACT third party insurance premiums were below NSW premiums which was a further major disincentive to reform. Why would the ACT government transfer statutory damages restrictions when they had apparently been ineffective interstate?. The ACT Law Society President emphasised the disparity in premium levels and suggested that instead of damages restrictions, the government should increase premiums which the minority Carnell Liberal government accepted from 1 July 1996.[991] The Carnell government had replaced the Follett government at the 18 February 1995 ACT election and on 21 February 1996, Minister for Urban Services Tony De Domenico advised that the government had rejected transferring the 'more severe' damages restrictions in NSW.[992] Likely, continued ACT legal opposition facilitated this approach and non-transfer remained the subsequent Humphries

[986] Australian Capital Territory Compulsory Third Party Insurance Review Steering Committee, *Motor Vehicle Compulsory Third Party Insurance in the A.C.T: A Review of Options for a Revised Scheme* (Government Printer, 1994) 18.
[987] Crispin Hull, 'Injured Matter Less than Driving Voters', *The Canberra Times* (Canberra), 22 June 1994, 13.
[988] Crispin Hull, 'Third Party: Something Will Have to Give', *The Canberra Times* (Canberra), 28 June 1994, 8.
[989] Jacqueline Fuller, 'Accident Compensation to be Cut', *The Canberra Times* (Canberra), 6 July 1994, 7.
[990] Ibid.
[991] Roderick Campbell, '3rd Party Increase Supported', *The Canberra Times* (Canberra), 19 June 1995, 3.
[992] Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 21 February 1996, 110 (Tony De Domenico).

minority conservative government approach. Table 6.8 outlines statutory damages restrictions that were in place from 1994 after the WA Court government enacted the *Motor Vehicle (Third Party Insurance) Amendment Act 1994* (WA).

Table 6.8 Statutory Damages Restrictions: 1994

Damages	**Restriction**						
	QLD	NSW	SA	WA	Tas	Vic	ACT
Total damages - serious injury threshold						✓	
Gratuitous services damages (GS) – ban					✓		
GS – weekly cap		✓	✓	✓			
GS – provider condition			✓				
GS – duration conditions		✓					
GS – voluntary services excluded		✓	✓	✓			
Discount rate – prescribed[rate bracketed]	✓[5]	✓[5]	✓[5]	✓[6]	✓[7]	✓[6]	
Loss of consortium – ban		✓		✓	✓		✓
Investment managers' fees - ban			✓				
Exemplary/ punitive damages - ban		✓				✓	
NEL – cap		✓	✓	✓		✓	
NEL – minimum award threshold		✓		✓		✓	
NEL – formula calculation		✓	✓	✓			
NEL – impairment threshold		✓	✓				
NEL – deductible		✓		✓			
NEL – interest ban			✓				
NEL – pre-judgement interest ban				✓			
Pre-judgement interest – limited		✓					
Pecuniary loss – maximum cap						✓	
Pecuniary loss – minimum award threshold						✓	
Lost earning capacity - incapacity threshold			✓				
Damages reduction – no seatbelt/ helmet		✓					
Damages reduction – drunk, drugged		✓					
Damages reduction – voluntary passenger		✓	✓				
Prescribed damages reduction - no seat belt			✓				

[Source: Original]

6.3.8 New South Wales

NSW governments may have hoped that the *Motor Accidents Act 1988* (NSW) would obviate the need for further damages restrictions but the statute was unsuccessful in the longer term. The Greiner government deregulated the level of third party insurance premiums and offered financial incentives for private insurers to enter the market. Initially, this extra competition and financial incentives significantly reduced premiums' level.[993] However, as the years passed, premiums increased and in May 1995, only months after the 25 March 1995 State election that the Carr Labor government won, Attorney General Jeff Shaw indicated that premium levels would return to 'those which applied at the time of deregulation'.[994] Shaw nominated growth in claims as the reason for the increases[995] amid estimates that almost 70 per cent of motor accident injuries in NSW manifested as claims in 1994-95.[996] This proportion was much higher than historical levels and led to more statutory damages restrictions that were informed by recommendations of a working party that the Motor Accidents Authority (MAA) chaired.[997] Highlighting their importance to the process, the MAA had provided Attorney General Shaw with 'full details' of submissions from the Law Society, NSW Bar Association and the Insurance Council of Australia.[998]

The *Motor Accidents Amendment Act 1995* (NSW) extended *Motor Accidents Act 1988* (NSW) statutory damages restrictions. Shaw implied that past restrictions had not been interpreted correctly. As such, he insisted that it was 'critical to unambiguously impart the underlying aims and objectives of the [*Motor Accidents Act 1988* (NSW)]'[999] and the government inserted 'objects' provisions. They included an object to limit '[NEL] in the case of relatively minor injuries' and the preservation of benefits for 'persons with more severe injuries involving on-going disability'.[1000] The government required there to be at least a 25 per cent likelihood that the plaintiff would sustain future economic loss or the

[993] See Graham Williams, 'Most Drivers to Save on Third Party', *The Sydney Morning Herald* (Sydney), 20 March 1991, 5.; Matthew Moore, 'Rego Could Fall by $146: Greiner', *The Sydney Morning Herald* (Sydney), 21 March 1991, 11; Nick Greiner, 'Keeping New South Wales a Triple-A State' in Chris James, Chris Jones and Andrew Norton (eds), *A Defence of Economic Rationalism* (Allen & Unwin, 1993) 51, 57.
[994] New South Wales, *Parliamentary Debates,* Legislative Council, 25 May 1995, 201 (Jeff Shaw).
[995] Ibid.
[996] Motor Accidents Authority, *Annual Report 1995-96* (1996) 30.
[997] Ibid 31.
[998] Ibid.
[999] New South Wales, *Parliamentary Debates,* Legislative Council, 16 November 1995, 3322 (Jeff Shaw).
[1000] *Motor Accidents Act 1988* (NSW) s 2A(1)(c)(i), as inserted by *Motor Accidents Amendment Act 1995* (NSW) sch 1 cl 1.

diminution of future earning capacity before damages for these losses were recoverable.[1001] Also, the government heightened restrictions on NEL, essentially because NEL for minor injuries represented 15 per cent of the total compensation paid in NSW in 1995.[1002]

The NEL restrictions extended the formulaic approach to assessing these damages that the Greiner government inserted, likely at actuaries' instruction. With effect for accidents from midnight 26 September 1995, injured persons' ability to lead a normal life had to have been significantly impaired *for a continuous period of not less than 12 months* before they could recover these damages.[1003] This was up from the *Motor Accidents Act 1988* (NSW) impairment threshold that required the applicant's ability to lead a normal life to have been significantly impaired only.[1004] Further, the maximum NEL amount recoverable was $235,000 (indexed)[1005] and a table outlined proportions of this maximum that were recoverable depending upon injury severity.[1006] One per cent of $235,000 was recoverable for an injury assessed as 15 per cent of the most serious case for example, which reflected *Wrongs Act Amendment Act 1986* (SA) restrictions. Further emulating the SA statute, the Carr government also inserted a new 'injury' definition that required an injury to have occurred from vehicle driving, collision, running out of control or defect.[1007] Attorney General Shaw explained that '[o]ver the years, the courts have interpreted the [third party insurance] policy as providing for a wide range of injuries often unrelated to motor accidents.[1008]

6.3.9 South Australia

The *Motor Accidents Amendment Act 1995* (NSW) restrictions were a new transfer source for other governments and the Olsen Liberal government in SA made an attempt. The Olsen government had been advised to increase third party insurance premiums by 12.9 per cent before it developed its legislation and Treasurer Rob Lucas agreed to 8 per cent on condition

[1001] Ibid s 70A, as inserted by *Motor Accidents Amendment Act 1995* (NSW) sch 1 cl 29.
[1002] New South Wales, *Parliamentary Debates,* Legislative Council, 16 November 1995, 3321 (Jeff Shaw).
[1003] *Motor Accidents Act 1988* (NSW) s 79A(3), as inserted by *Motor Accidents Amendment Act 1995* (NSW) sch 1 cl 36 (emphasis added).
[1004] Ibid s 79(1).
[1005] Ibid s 79A(6), as inserted by *Motor Accidents Amendment Act 1995* (NSW)sch 1 cl 36.
[1006] Ibid s 79A(5), as inserted by *Motor Accidents Amendment Act 1995* (NSW) sch 1 cl 36.
[1007] *Motor Accidents Amendment Act 1995* (NSW) sch 1 cl 4. For the original SA provision, see *Wrongs Act 1936* (SA) s 35A(5), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.
[1008] New South Wales, *Parliamentary Debates,* Legislative Council, 16 November 1995, 3322 (Jeff Shaw).

that parliament accepted restrictions to make up the shortfall.[1009] Lucas explained that the Motor Accident Commission, which had replaced the SGIC, estimated that government restrictions would save between $13.3 million and $18.3 million annually.[1010] However, the government ambitions were thwarted. Following a conference of representatives from both parliamentary chambers, both government and the Labor opposition accepted that Labor and minor parties in the Legislative Council had defeated two-thirds of the projected Bill savings.[1011] As a result, the government announced a further 3.1 per cent increase in private motor vehicle third party insurance premiums compared to June 1998 levels (and commensurate increases on other vehicles).[1012]

The Labor opposition and minor parties opposed Statutes Amendment (Motor Accidents) Bill 1998 (SA) aspects despite considerable overlap between its contents and those in the *Motor Accidents Amendment Act 1995* (NSW) that the Carr Labor government made. This highlighted the limited role that political ideology had facilitating policy transfer in this case study. Like NSW, the Olsen government proposed to increase the significant impairment threshold that plaintiffs had to satisfy to qualify for NEL. The government also proposed to increase the probability that any future economic loss had to satisfy to be compensated and cap the maximum damages recoverable for loss of consortium, which had been abolished altogether in NSW, WA, Tasmania and the ACT. However, Labor parliamentarians branded the proposals 'mean',[1013] which was likely facilitated by strong opposition to the Bill from key stakeholders. Labor parliamentarian Kris Hanna acknowledged 'very shrewd, wise and passionate submissions from a range of knowledgeable and concerned people'.[1014] Some examples were the Royal Automobile Association of SA, the Australian Medical Association and, most significantly, legal bodies.

The government was able to negotiate the inclusion of some new restrictions in the *Statutes Amendment (Motor Accidents) Act 1998* (SA). In place of the former rules that required courts to reduce damages by what was 'just and equitable if the injured claimant was

[1009] South Australia, *Parliamentary Debates*, Legislative Council, 4 June 1998, 859 (Rob Lucas).
[1010] Ibid.
[1011] See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 27 August 1998, 1952 (Malcolm Buckby); 1955 (Kevin Foley).
[1012] South Australia, *Parliamentary Debates*, House of Assembly, 27 August 1998, 1952 (Malcolm Buckby).
[1013] See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 27 August 1998,1953 (Kevin Foley).
[1014] South Australia, *Parliamentary Debates*, House of Assembly, 18 August 1998, 1779 (Kris Hanna).

driving while intoxicated/ drug affected, or the voluntary passenger with such a driver, the government prescribed percentage reductions.[1015] It also increased the prescribed damages reduction for individuals injured when riding with no seat belt from 15 per cent to 25 per cent[1016] and extended it to individuals injured when riding with no helmet.[1017] Lucas characterised the prescribed reductions as a 'more streamlined approach' and noted advantages from a deterrence perspective and as a means to reduce legal argument.[1018] The government also capped total damages for future economic loss,[1019] initially at $2 million.[1020] Lucas noted the implications of one first instance decision, which equated to $30 for each vehicle registered in SA before being reduced on appeal, as justification for the cap.[1021] The government succeeded in emulating one NSW characteristic when it relieved insurers from having to pay any aggravated or exemplary damages.[1022] Plaintiffs could still recover these damages from a negligent defendant directly however. Table 6.9 (next page) includes the *Motor Accidents Amendment Act 1995* (NSW) and SA statutory damages restrictions in Table 6.8.

[1015] *Wrongs Act 1936* (SA) ss 35A(1)(jb), (jc); (3A) , as inserted by *Statutes Amendment (Motor Accidents) Act 1998* (SA) s 13(b).
[1016] Ibid s 35A(1)(j), as substituted by *Statutes Amendment (Motor Accidents) Act 1998* (SA) s 13(b).
[1017] Ibid s 35A(1)(ja), as inserted by *Statutes Amendment (Motor Accidents) Act 1998* (SA) s 13(b).
[1018] South Australia, *Parliamentary Debates*, Legislative Council, 4 June 1998, 862 (Rob Lucas).
[1019] *Wrongs Act 1936* (SA) s 35A(1)(da), as inserted by *Statutes Amendment (Motor Accidents) Act 1998* (SA) s 13(a).
[1020] Ibid s 35A(1)(6)) (definition of 'the prescribed maximum'), as inserted by *Statutes Amendment (Motor Accidents) Act 1998* (SA) s 13(g).
[1021] South Australia, *Parliamentary Debates*, Legislative Council, 4 June 1998, 861 (Rob Lucas).
[1022] *Motor Vehicles Act 1959* (SA) s 113A, as inserted by *Statutes Amendment (Motor Accidents) Act 1998* (SA) s 6. The Queensland Beattie government enacted a similar provision: see *Motor Accident Insurance Act 1994* (Qld) s 55.

Table 6.9 Statutory Damages Restrictions: 1998

Damages	Restriction						
	QLD	NSW	SA	WA	Tas	Vic	ACT
Total damages - serious injury threshold						✓	
Gratuitous services damages (GS) – ban					✓		
GS – weekly cap		✓	✓	✓			
GS – provider condition			✓				
GS – duration requirement		✓					
GS – voluntary services excluded		✓	✓	✓			
Discount rate – prescribed [rate bracketed]	✓[5]	✓[5]	✓[5]	✓[6]	✓[7]	✓[6]	
Loss of consortium – ban		✓		✓	✓		✓
Investment managers' fees - ban			✓				
Exemplary/ punitive damages – ban		✓				✓	
NEL – cap		✓	✓	✓		✓	
NEL – minimum award threshold		✓		✓		✓	
NEL – formula calculation		✓	✓	✓			
NEL – impairment threshold		✓	✓				
NEL – deductible		✓		✓			
NEL – interest ban			✓				
NEL – pre-judgement interest ban				✓			
Pre-judgement interest – limited		✓					
Pecuniary loss – maximum cap						✓	
Pecuniary loss – minimum award threshold						✓	
Loss of earning capacity damages – cap			✓				
Lost earning capacity – incapacity threshold		✓	✓				
Damages reduction – no seatbelt/ helmet		✓					
Damages reduction – drunk, drugged		✓					
Damages reduction – voluntary passenger		✓					
Prescribed damages reduction - no seat belt			✓				
Prescribed reduction – no helmet			✓				
Prescribed reduction – voluntary passenger			✓				
Prescribed reduction – drunk, drugged			✓				

[Source: Original]

6.3.10 New South Wales

The Carr government may have hoped that it would not have to impose further damages restrictions when it made the *Motor Accidents Amendment Act 1995* (NSW). However, within a few years it added to their scope because, despite the restrictions, damages continued to rise. The Carr government made the *Motor Accidents Compensation Act 1999* (NSW) after recommendations from an expert committee that Canadian lawyer

Shelley L Miller chaired and many of the restrictions reflected committee sentiment.[1023] The statute retained a ban upon compensation for loss of domestic services;[1024] limitations on damages for gratuitous services[1025] and psychological injury;[1026] a discount rate of five per cent on damages for future economic loss;[1027] exemplary and punitive damages ban;[1028] and prescribed circumstances of contributory negligence that reduced damages.[1029] However, the government revised the requirement that victims demonstrate a 25 per cent likelihood of future economic losses or diminished earning capacity with a requirement to satisfy the court of the plaintiff's 'most likely future circumstances'.[1030]

NEL continued to make a disproportionate contribution to total compensation. As such, the government placed additional restrictions upon their size, which Miller disclosed were sourced from actuarial advice.[1031] The government revised the impairment threshold to qualify for NEL so that in place of the requirement to prove significant impairment for a continuous period of 12 months, claimants had to have permanent impairment of less than 10 per cent.[1032] The government placed a $260,000 maximum cap (indexed) on NEL[1033] and banned interest accruing on them[1034] and damages for gratuitous services.[1035] The government also revised the ban on interest being awarded unless 'reasonable steps' had been taken towards settlement[1036] and prescribed the rate of interest that should accrue at three-quarters the rate that would ordinarily accrue.[1037] Damages for loss of earnings or the deprivation or impairment of earning capacity were not recoverable for the first five days of that loss[1038] and there was a weekly cap on damages for lost earnings or deprivation of

[1023] See an explanation of the reform deliberations in Shelley L Miller, 'Transaction Cost and Governance Engineering in Motor Accident Insurance Scheme Design: A New South Wales Experiment' (2000) 12 *Insurance Law Journal* 1.
[1024] *Motor Accidents Compensation Act 1999* (NSW) s 142.
[1025] Ibid s 128.
[1026] Ibid s 141.
[1027] Ibid s 127.
[1028] Ibid s 144.
[1029] Ibid s 138.
[1030] Ibid s 126(1).
[1031] See, eg, Miller, above n 1023, 14.
[1032] *Motor Accidents Compensation Act 1999* (NSW) s 131.
[1033] Ibid s 134.
[1034] Ibid s 137(3)
[1035] Ibid s 137(2).
[1036] Ibid s 137(4).
[1037] Ibid s 137(6).
[1038] Ibid s 124. This reflected *Wrongs Act 1936* (SA) s 35A((1)(d), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.

earning capacity.[1039] Following a series of NSW decisions that accepted their availability,[1040] the government also abolished damages for the loss of a person's services in respect of a motor accident ('loss of servitium').[1041]

The *Motor Accidents Compensation Act 1999* (NSW) highlighted governments' continued preparedness to restrict damages as a mechanism to reduce pressure upon third party insurance premiums and the restrictions appeared successful. The average annual third party insurance premium (or 'green slip' charge) for a motor vehicle garaged in Sydney metro reduced from $441 before the *Motor Accidents Compensation Act 1999* (NSW) to $345 in the 12 months to 30 June 2002.[1042] A NSW parliamentary committee reported that premiums, as a proportion of average weekly earnings, had fallen in 2005[1043] and in 2006 the MAA advised that premiums were the 'most affordable in the scheme's history'.[1044] The circumstances facilitated NSW legislation that increased compensation generosity such as a Lifetime Care and Support scheme to assist individuals with 'catastrophic injuries'[1045] and no-fault motor accident compensation for child[1046] and 'blameless' motor accidents victims.[1047] Responding to Productivity Commission recommendations in the *Disability Care and Support* report, the ACT Gallagher Labor government and SA Weatherill Labor government also drew inspiration from the NSW Lifetime Care and Support Scheme to provide lifetime care and support for motor accident victims that sustained 'catastrophic injuries' (see discussion of statutory damages restrictions in the SA legislation in subsection

[1039] *Motor Accidents Compensation Act 1999* (NSW) s 125(2).
[1040] In *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392, the High Court ruled that the traditional *action per quod servitium amisit*, which entitled individuals to compensation for any loss they sustained due to the deprival of another's services, had survived in Australia. Subsequently, the rule was applied and confirmed in *Sydney City Council v Bosnich* [1968] 3 NSWR 725; *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571 and *GIO Australia Ltd v Robson* [1997] 42 NSWLR 439.
[1041] *Motor Accidents Compensation Act 1999* (NSW) s 142. The Victorian Brumby Labor government also abolished damages for loss of a person's services in transport accident claims after the Supreme Court decision in *Martino Developments Pty Ltd v Doughty* [2008] VSC 517 (27 November 2008) ruled that they had not been abolished by the *Transport Accident Act 1986* (Vic): *Transport Accident Act 1986* (Vic) s 93A, as inserted by *Transport Accident and Accident Compensation Legislation Amendment Act 2010* (Vic) s 11.
[1042] Bob Carr, A New Agenda for Government' (2002) 14 *Sydney Papers* 98, 104.
[1043] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Review of the Exercise of the Functions of the Motor Accidents Authority and the Motor Accidents Council: Seventh Report* (2006) 16.
[1044] Motor Accidents Authority, *Annual Report 2005-2006* (2006) 5.
[1045] See *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW).
[1046] *Motor Accidents Compensation Act 1999* (NSW) pt 1.2 div 2, as inserted by *Motor Accidents Compensation Amendment Act 2006* (NSW) sch 1 cl 7.
[1047] Ibid pt 1.2 div 1, as inserted by *Motor Accidents Compensation Amendment Act 2006* (NSW) sch 1 cl 7.

6.3.12).[1048] Table 6.10 outlines damages restrictions that governments made to and including 1999.

Table 6.10 Statutory Damages Restrictions: 1999

Damages	**Restriction**						
	QLD	NSW	SA	WA	Tas	Vic	ACT
Total damages - serious injury threshold						✓	
Gratuitous services damages (GS) – ban					✓		
GS – weekly cap		✓	✓	✓			
GS – provider condition			✓				
GS – duration requirement		✓					
GS – voluntary services excluded		✓	✓	✓			
GS – interest ban		✓					
Discount rate – prescribed [rate bracketed]	✓[5]	✓[5]	✓[5]	✓[6]	✓[7]	✓[6]	
Loss of consortium – ban		✓		✓	✓		✓
Loss of servitium – ban							
Investment managers' fees - ban			✓				
Exemplary/ punitive damages – ban		✓				✓	
NEL – cap		✓	✓	✓		✓	
NEL – minimum award threshold		✓		✓		✓	
NEL – formula calculation		✓	✓	✓			
NEL – impairment threshold		✓	✓				
NEL – deductible		✓		✓			
NEL – interest ban		✓	✓				
NEL – pre-judgement interest ban				✓			
Pre-judgement interest – limited		✓					
Pecuniary loss – maximum cap						✓	
Pecuniary loss – minimum award threshold						✓	
Lost earning capacity damages – cap			✓				
Lost earnings/ earning capacity – weekly cap		✓					
Lost earning capacity – incapacity threshold		✓	✓				
Damages reduction – no seatbelt/ helmet		✓					
Damages reduction – drunk, drugged		✓					
Damages reduction – voluntary passenger		✓					
Prescribed damages reduction - no seat belt			✓				
Prescribed reduction – no helmet			✓				
Prescribed reduction – voluntary passenger			✓				
Prescribed reduction – drunk, drugged			✓				

[Source: Original]

[1048] See *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA); *Lifetime Care and Support (Catastrophic Injuries) Act 2014* (ACT).

6.3.11 Queensland

The *Motor Accidents Compensation Act 1999* (NSW) preceded Queensland legislation that revised what had been historical reluctance to restrict damages. Statutory damages restrictions had been canvassed as an option for Queensland by the State Insurance Commissioner as early as 1968 but the Commissioner concluded that:

> it was not easy to frame limitations that [were] equitable. Inevitably, there would be some modification of the common law rights that are fundamental to our system of justice; also any resultant savings would be at the expense of those who can least afford to make a sacrifice – namely, the unfortunate victims of road accidents.[1049]

The Queensland reluctance was facilitated by the fact that, in contrast to its interstate counterparts, the State Government Insurance Office (SGIO) was trading profitably. In 1976 for example, the SGIO reported an underwriting surplus of more than $13 million[1050] and stated that 'it would appear for the time being [that the SGIO] would not require any significant increase in the existing [premium] rates'.[1051] However, circumstances altered and as subsection 6.3.3 noted, the Bjelke-Petersen government prescribed a five per cent discount rate on damages for future economic loss in 1981.[1052]

The Bjelke-Petersen government countenanced the possibility of further statutory damages restrictions in addition to the prescribed discount rate in 1983. The government had increased third party insurance premiums by 60 per cent from 11 July 1983 after the SGIO underwriting deficit went from $22 million in 1982 to $35 million in 1983.[1053] However, as could be expected, this increase drew an angry response from motorists and to alleviate public concerns, the government tasked a special committee to examine and make recommendations concerning third party insurance on 8 August 1983. The committee recommended that government should introduce statutory damages restrictions and revise premium calculation, funding and court processes. The recommended restrictions included abolition of damages for gratuitous services and abolition of pre-judgement interest on

[1049] Insurance Commissioner (Qld), *Annual Report for the Year Ended 30 June 1968* (1968) 3.
[1050] State Government Insurance Office (Qld), *Annual Report for the Year Ended 30 June 1976* (1976) 6.
[1051] State Government Insurance Office (Qld), *Report on Net Surplus Profits Financial Year 1975-76* (1976) 2.
[1052] *Common Law Practice Act 1867* (Qld) s 5, as inserted by *Common Law Practice and Limitation of Actions Acts Amendment Act 1981* (Qld) s 14(2).
[1053] Thomis and Wales, above n 367, 222.

damages for future or prospective loss that had been made interstate.[1054] However, the Bjelke-Petersen government took no action. Deputy Premier Bill Gunn intimated that this was because the 'Bar Association screamed blue murder'.[1055] Yet, governments were not freed from the political sensitivities associated with increased premiums and in 1999, the Beattie Labor government tasked an independent committee to examine third party insurance. Treasurer David Hamill later recounted that there were 'unsustainable' trends in premium increases at the time that had begun following a 'significant premium rise' in 1996.[1056]

The independent committee final report intimated some of the reasons why Queensland governments may have been reluctant to restrict damages. First, the committee suggested that restrictions reflected mismanagement as 'unlimited access to common law rights' was symptomatic of a scheme that performed 'well'.[1057] Second, the committee seemed sceptical of restrictions' effectiveness at moderating premium increases. The committee noted that some interstate restrictions, most likely those in NSW, 'had not been proven to result in lower insurance premiums'.[1058] Also, the committee acknowledged that it had received submissions questioning the effectiveness of damages restrictions, most likely from legal bodies.[1059] Third, the committee implied that factors other than the size of damages could explain the pressure upon government to increase premiums. The committee concluded that lawyer advertising had exerted 'a significant impact on the incidence of [motor accident] claims particularly at the lower end of the spectrum in the past five years'.[1060] The committee recommended a ban upon tow-truck drivers and others at the scene of accidents 'touting' for lawyers,[1061] coupled with a 'strong statutory authority' for the Queensland Law Society to monitor standards in lawyer advertising.

Despite its criticisms and scepticism about their effectiveness, the independent committee did not reject statutory damages restrictions entirely. The committee noted that it wanted

[1054] See Committee of Inquiry, *Report of Committee of Inquiry – Motor Vehicle Compulsory Third Party (Personal Injury) Insurance* (1984) 36 [rec 14], 39 (rec 17).
[1055] Queensland, *Parliamentary Debates,* Legislative Assembly, 4 September 1985, 741 (Bill Gunn).
[1056] Queensland, *Parliamentary Debates*, Legislative Assembly, 16 May 2000, 1037 (David Hamill).
[1057] Queensland Review Committee, *Review of the Queensland Compulsory Third Party Insurance Scheme Report* (Queensland Government, 1999) 7.
[1058] Ibid 53.
[1059] Ibid 4.
[1060] Ibid 11.
[1061] Ibid 50 (rec 3.1).

to moderate more 'costly' heads of damages and also reduce the contribution that 'lower end claims' made to total compensation,[1062] which echoed interstate sentiment. However, the committee did not transfer interstate restrictions in part due to negative lesson drawing from other States. In particular, the committee provided no recommendation to restrict NEL ('general damages') despite acknowledging that their size had contributed to higher third party insurance premiums.[1063] The committee explained that interstate NEL restrictions had encouraged courts to 'inflate' damages for other losses and/ or encourage plaintiffs to 'maximise symptoms in order to progress up the [prescribed scales]'.[1064] The committee felt that general damages restrictions should only be countenanced 'if the affordability of the scheme comes under pressure and [they] are identified as a significant contributing factor'.[1065] However, the committee recommended other restrictions, noting that there was 'considerable support for limiting or eliminating' damages for loss of personal comfort to the injured person, loss of employer profit from employee injury (loss of servitium) and claims for future care provided free to the injured person'.[1066]

Committee recommendations informed *Motor Accident Insurance Amendment Act 2000* (Qld) characteristics. The government capped the rate of damages for loss of servitium and loss of earnings and earning capacity[1067] at three times average weekly earnings per week for example,[1068] consistent with a recommendation.[1069] The committee expressed concern that awards for these losses were escalating.[1070] Further, applicants seeking damages for loss of servitium or loss of consortium could only recover those damages if the injured person had died or been awarded NEL ('general damages') above $30,000 (before any discount for contributory negligence).[1071] The committee explained that damages for

[1062] Ibid 57.
[1063] Ibid 53.
[1064] Ibid 56.
[1065] Ibid 57 (rec 3.14).
[1066] Ibid 58.
[1067] *Motor Accident Insurance Act 1994* (Qld) s 55A, as inserted by *Motor Accident Insurance Amendment Act 2000* (Qld) s 32.
[1068] Ibid s 55C(3), as inserted by *Motor Accident Insurance Amendment Act 2000* (Qld) s 32.
[1069] Queensland Review Committee, above n 1057, 57 (3.15); 59 (rec 3.18)
[1070] Ibid 57.
[1071] *Motor Accident Insurance Act 1994* (Qld) s 55C, as inserted by *Motor Accident Insurance Amendment Act 2000* (Qld) s 32. This restriction upon damages for loss of consortium or essential 'impairment threshold' qualified a 1989 reform that had permitted wives to recover damages for loss of consortium in respect of loss or impairment of their husband's services: see *Law Reform (Husband and Wife) Act 1968* (Qld) s 3, as substituted by *Law Reform (Husband and Wide) Act Amendment Act 1989* (Qld) s 3.

loss of servitium and consortium should be limited to 'top-end claims where there might be quite substantive justification'.[1072] Government reforms also meant that damages for gratuitous services could only be recovered if the services met particular conditions. These included that the services were 'necessary', the need for them arose 'out of the personal injury suffered in the motor accident'[1073] and services of the same kind were not being provided to the plaintiff before the date of accident,[1074] which emulated interstate restrictions. The committee also recommended that plaintiffs should have to prove that the service provider suffered loss of income if their award for this loss was less than $30,000.[1075] This was essentially due to concerns about minor claims' cost.

The *Motor Accident Insurance Amendment Act 2000* (Qld) revealed three phenomena that informed government decisions concerning statutory damages restrictions particularly. First, the restrictions highlighted the disparities in governments' perception of the appropriateness of restrictions and their reflection upon government. There were some suggestions that restrictions correlated to mismanagement for example. Second, there was evidence of governments drawing negative lessons from statutory damages restrictions' experience interstate. Third, the Queensland legislation reiterated financial considerations' pivotal role in deciding transfer decisions. As the preceding paragraph mentioned, the Beattie government did not copy interstate restrictions or necessarily follow committee recommendations. This was essentially because of actuarial advice of what was considered necessary to reduce pressure on premiums as Treasurer Hamill acknowledged.[1076] Table 6.11 (next page) outlines the statutory damages restrictions that governments made to 2000, including those that the *Motor Accident Insurance Amendment Act 2000* (Qld) made.

[1072] Queensland Review Committee, above n 1057, 58.
[1073] *Motor Accident Insurance Act 1994* (Qld) s 55D, as inserted by *Motor Accident Insurance Amendment Act 2000* (Qld) s 32.
[1074] Ibid s 55D(3), as inserted by *Motor Accident Insurance Amendment Act 2000* (Qld) s 32.
[1075] Queensland Review Committee, above n 1057, 59 (3.19).
[1076] Queensland, *Parliamentary Debates*, Legislative Assembly, 16 May 2000, 1040 (David Hamill).

Table 6.11 Statutory Damages Restrictions: 2000

Damages	Restriction						
	QLD	NSW	SA	WA	Tas	Vic	ACT
Total damages - serious injury threshold						✓	
Gratuitous services damages (GS) - ban					✓	✓	
GS – weekly cap		✓	✓	✓			
GS – provider condition			✓				
GS – duration requirement		✓					
GS – voluntary services excluded	✓	✓	✓	✓			
Discount rate – prescribed [rate bracketed]	✓[5]	✓[5]	✓[5]	✓[6]	✓[7]	✓[6]	
Loss of consortium - ban		✓		✓	✓		✓
Loss of consortium – impairment threshold	✓						
Loss of services ('servitium') – ban		✓					
Loss of services ('servitium') – weekly cap	✓						
Loss of servitium – impairment threshold	✓						
Investment managers' fees – ban			✓				
Exemplary/ punitive damages – ban		✓				✓	
NEL – cap		✓	✓	✓		✓	
NEL – minimum award threshold			✓	✓		✓	
NEL – formula calculation		✓	✓	✓			
NEL – impairment threshold		✓	✓				
NEL – deductible		✓		✓			
NEL – interest ban			✓				
NEL – pre-judgement interest ban				✓			
Pre-judgement interest - limited		✓					
Pecuniary loss – maximum cap						✓	
Pecuniary loss – minimum award threshold						✓	
Lost earning capacity – incapacity threshold		✓	✓				
Lost earning capacity – maximum cap			✓				
Lost earnings/ earning capacity – weekly cap	✓	✓					
Damages reduction – no seatbelt/ helmet		✓					
Damages reduction – drunk, drugged		✓					
Damages reduction – voluntary passenger		✓					
Prescribed reduction - no seat belt/ helmet			✓				
Prescribed reduction – voluntary passenger			✓				
Prescribed reduction – drunk, drugged			✓				

[Source: Original]

6.3.12 'Civil liability' reforms

The recommendations of a 2002 federal review of the law of negligence were an opportunity for some consistency to emerge in State and Territory statutory damages restrictions. The review was the outcome of a process that began with a purported 'crisis' in

the availability of public liability insurance at the turn of the century. This crisis had precipitated a Ministerial Meeting on Public Liability that involved federal, State and Territory ministers and the meeting appointed an expert four-person panel that NSW Supreme Court judge David Ipp chaired ('the Ipp Panel'). Relevantly to the objects of this study, the Panel was tasked to '[i]nquire into the application, effectiveness and operation of common law principles applied in negligence' and to '[d]evelop and evaluate principled options to limit liability and quantum of awards for damages'.[1077] The terms of reference stated that the 'award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another'.[1078]

The Ipp Panel recommended multiple statutory damages restrictions, stressing that a consistent approach among governments was important to assist insurers set premiums and to moderate premiums.[1079] However, consistency did not eventuate and the resulting laws are criticised for being 'appallingly drafted';[1080] 'arbitrary and dogmatic'[1081] and a challenge to 'the student, the practitioner and the court' alike.[1082] Some exceptions are the fact that multiple governments copied the recommendation[1083] to cap the damages that plaintiffs could recover for loss of future employer superannuation contributions.[1084] Further, most governments[1085] prescribed principles that the committee recommended courts should

[1077] Review Panel, *Review of the Law of Negligence: Final Report* (Commonwealth of Australia, 2002) ix.
[1078] Ibid.
[1079] Ibid 184.
[1080] James Goudkamp, 'Statutes and Tort Defences' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013) 31, 53.
[1081] *Cattanach v Melchior* (2003) 215 CLR 1, 53 (Kirby J).
[1082] Chief Justice Robert French, 'Foreword' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) v, vi. For an illustration of the disparity, see table of government responses to the Ipp Panel recommendations in Des Butler, 'A Comparison of the Adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms' (2005) 13 *Torts Law Journal* 203.
[1083] Review Panel, above n 1077, 218.
[1084] See *Civil Liability Act 2002* (NSW) s 15A, as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 2; *Civil Liability Act 2003* (Qld) s 56; *Civil Liability Act 2002* (Tas) s 25(1), as inserted by *Civil Liability Amendment Act 2003* (Tas) s 9.
[1085] Victoria and the NT were exceptions as only limited personal injuries damages entitlements remained in those jurisdictions in 2002: see discussion in respect of the NT in *Hobbs v Motor Accident Commission of South Australia* [2008] NTSC 49 (3 December 2008) [15].

apply when deciding negligence[1086] and two elements of a recommended test to determine whether that negligence caused harm.[1087]

These examples were the exception however for, overwhelmingly, governments' reforms differed as the restrictions upon damages for mental or nervous shock ('pure mental harm') demonstrated. Consistent with a Panel recommendation,[1088] governments required plaintiffs to prove that a reasonable person in the position of the defendant would have foreseen that a person of 'normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken' to recover compensation for this harm.[1089] Governments also required plaintiffs to prove that they had a 'recognised psychiatric illness',[1090] which also accorded with an Ipp Panel recommendation.[1091] However, whereas the Ipp Panel discouraged governments nominating categories of victim that were compensable for mental harm,[1092] this was an aspect of government legislation. Governments required plaintiffs to be family of the accident victim for example, which was

[1086] *Civil Law (Wrongs) Act 2002* (ACT) s 31, as inserted by *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT) s 12; *Civil Liability Act 2002* (NSW) s 5B, as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 1; *Civil Liability Act 2003* (Qld) s 9; *Wrongs Act 1936* (SA) s 32, as inserted by *Law Reform (Ipp Recommendations) Act 2004* (SA) s 27; *Civil Liability Act 2002* (Tas) s 11, as inserted by *Civil Liability Amendment Act 2003* (Tas) s 9; *Civil Liability Act 2002* (WA) s 5B, as inserted by *Civil Liability Amendment Act 2003* (WA) s 8.

[1087] *Civil Law (Wrongs) Act 2002* (ACT) s 31H(1), as inserted by *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT) s 12; *Civil Liability Act 2002* (NSW) s 5D(1), as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 1; *Civil Liability Act 2003* (Qld) s 11(1); *Wrongs Act 1936* (SA) s 34, as inserted by *Law Reform (Ipp Recommendations) act 2004* (SA) s 27; *Wrongs Act 1936* (SA) s 34(1), as inserted by *Law Reform (Ipp Recommendations) Act 2004* (SA) s 27; *Civil Liability Act 2002* (Tas) s 13(1), as inserted by *Civil Liability Amendment Act 2003* (Tas) s 9; *Civil Liability Act 2002* (WA) s 5C(1), as inserted by *Civil Liability Amendment Act 2003* (WA) s 8. Victoria and the NT did not implement these recommendations In respect of motor accident claims as only limited damages entitlements for motor accident injuries remained in those jurisdictions in 2002.

[1088] Review Panel, above n 1077, 144 (rec 34(b)).

[1089] *Civil Law (Wrongs) Act 2002* (ACT) s 30A(1), as inserted by *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT) s 10; *Civil Liability Act 2002* (NSW) s 32(1), as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 5; *Wrongs Act 1936* (SA) s 33(1), as inserted by *Law Reform (Ipp Recommendations) Act 2004* (SA) s 27; *Civil Liability Act 2002* (Tas) s 34(1), as inserted by *Civil Liability Amendment Act 2003* (Tas) s 9; *Civil Liability Act 2002* (WA) ss 5S(1), as inserted by *Civil Liability Amendment Act 2003* (WA) s 8.

[1090] *Civil Law (Wrongs) Act 2002* (ACT) s 30B, as inserted by *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT) s 10; *Civil Liability Act 2002* (NSW) ss 31, 33, as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 5; *Wrongs Act 1936* (SA) s 53(2) –(3), as inserted by *Law Reform (Ipp Recommendations) Act 2004* (SA) s 32; *Civil Liability Act 2002* (Tas) s 33, 35, as inserted by *Civil Liability Amendment Act 2003* (Tas) s 9; *Civil Liability Act 2002* (WA) ss 5S(1), 5T, as inserted by *Civil Liability Amendment Act 2003* (WA) s 8.

[1091] Review Panel, above n 1077, 144 (rec 34(a)), 148 (rec 37(a)(i)).

[1092] Ibid 141.

typically a parent, child, spouse or sibling[1093] although SA omitted siblings. Also, the ACT compensated parents, a 'domestic partner' and other family members only if their relative 'was killed, injured or put in danger within [their] sight or hearing'.[1094] In addition, some jurisdictions permitted individuals that were present at the accident scene to recover compensation for pure mental harm.[1095] Both circumstances emulated conditions to recover these damages in the *Wrongs Act Amendment Act 1986* (SA).[1096]

Financial considerations were one explanation for governments' decision to diverge from Ipp Panel recommendations/ one another, together with the disparate attitudes towards restrictions' appropriateness that the Queensland committee noted. Statements from Tasmanian Attorney General Judy Jackson demonstrate the disparity in opinion. Contrary to sentiment in other States, and particularly NSW, Jackson praised the Tasmanian courts for acting 'responsibly' in their damages assessments[1097] and rejected the Ipp Panel recommendation to cap the amount of damages recoverable for loss of earning capacity.[1098] Essentially, this was because the government was confident that Tasmanian courts would not award excessive damages for this loss. Further, although the Bacon government imposed a minimum award threshold that NEL ('general damages') had to exceed to be paid,[1099] Jackson stressed that the threshold was the lowest of all jurisdictions and intended only to knock out 'nuisance claims', again because of Tasmania's 'traditionally lower damages' awards.[1100] In Queensland and SA, fellow Labor governments introduced detailed 'injury scale values' that courts had to rely upon when assessing NEL.[1101] The Queensland

[1093] *Civil Liability Act 2002* (NSW) s 30(2)(b), as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 5; *Wrongs Act 1936* (SA) s 24C(b), as inserted by *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA) s 3; *Civil Liability Act 2002* (Tas) s 32(2)(b), as inserted by *Civil Liability Amendment Act 2003* (Tas) s 9.
[1094] *Civil Law (Wrongs) Act 2002* (ACT) s 36(1). This copied an historic formulation that had emulated NSW legislation: see, eg, *Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT) s 24(1); *Law Reform (Miscellaneous Provisions) Act 1944* (ACT) s 4(1).
[1095] See, eg, *Civil Liability Act 2002* (NSW) s 30(2)(a), as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 5; *Wrongs Act 1936* (SA) s 24C(a), as inserted by *Wrongs (Liabilities and Damages for Personal Injury) Amendment Act 2002* (SA) s 3. This included its 'immediate aftermath' in Tasmania: *Civil Liability Act 2002* (Tas) s 32(2)(a), as inserted by *Civil Liability Amendment Act 2003* (Tas) s 9.
[1096] *Wrongs Act 1936* (SA) s 35A(1)(c)(i), as inserted by *Wrongs Act Amendment Act 1986* (SA) s 3.
[1097] Tasmania, *Parliamentary Debates*, House of Assembly, 24 June 2003, 53 (Judy Jackson).
[1098] Review Panel, above n 1077, 195 (rec 48).
[1099] *Civil Liability Act 2002* (Tas) s 27(1), as inserted by *Civil Liability Amendment Act 2003* (Tas) s 9.
[1100] Tasmania, *Parliamentary Debates*, House of Assembly, 24 June 2003, 54 (Judy Jackson).
[1101] *Civil Liability Act 2003* (Qld) ss 61, 62; *Wrongs Act 1936* (SA) s 24B(2), as inserted by *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA) s 3.

Beattie government acknowledged that its model was 'similar' to the SA approach[1102] even though the Ipp Panel had received advice that the Victorian and NSW restrictions upon NEL were 'particularly effective'.[1103]

The Bacon Labor government had such confidence in its courts' responsibilities that it unwound damages restrictions that the Gray Liberal government made in 1986. The government reduced the discount rate on damages for future economic loss from seven to five per cent,[1104] which was two percentage points above the Ipp Panel recommendation but consistent with other States. Jackson explained that the seven per cent discount rate had particularly harmed young, seriously injured Tasmanians.[1105] The government also removed the ban on damages for gratuitous services for most plaintiffs.[1106] Importantly, however, this did not extend to motor accident victims.[1107] Jackson explained that catastrophically injured motor accident victims received all the care that they needed from the statutory no-fault motor accident compensation system in Tasmania (see subsection 7.2.3 for more discussion of this system).[1108]

Provisions denying damages to particular individuals or requiring the amount of damages to be reduced due to contributory negligence were another restriction that governments made following the Ipp Panel review. However, the Ipp Panel had not recommended any groups to preclude. Governments' preclusions were facilitated by their desire to moderate compensation expenditure and reflected different perceptions of who should recover compensation. In part, the preclusions demonstrated interstate transfer. Thus, multiple governments barred damages for plaintiffs that had sustained injury while engaged in serious criminal activity that 'contributed materially' to their injury,[1109] with scope for waiver if the circumstances were 'exceptional' or 'harsh' in some jurisdictions.[1110] Also,

[1102] Queensland, *Parliamentary Debates*, Legislative Assembly, 11 March 2003, 368 (Rod Welford).
[1103] Review Panel, above n 1077, 191.
[1104] *Civil Liability Act 2002* (Tas) s 28A, as inserted by *Civil Liability Amendment Act 2005* (Tas) s 7.
[1105] Tasmania, *Parliamentary Debates*, House of Assembly, 23 November 2005, 88-9 (Judy Jackson).
[1106] *Civil Liability Act 2002* (Tas) s 28B, as inserted by *Civil Liability Amendment Act 2005* (Tas) s 7.
[1107] Ibid s 28C, as inserted by *Civil Liability Amendment Act 2005* (Tas) s 7.
[1108] Tasmania, *Parliamentary Debates*, House of Assembly, 23 November 2005, 89 (Judy Jackson).
[1109] *Civil Law (Wrongs) Act 2002* (ACT) s 34(1); *Civil Liability Act 2002* (NSW) s 54(1), as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 5; *Civil Liability Act 2003* (Qld) s 45(1); *Wrongs Act 1936* (SA) s 24I(1), as inserted by *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA) s 3; *Civil Liability Act 2002* (Tas) s 6.
[1110] See, eg, *Civil Law (Wrongs) Act 2002* (ACT) s 34(2); *Civil Liability Act 2002* (NSW) s 54(2), as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 5; s 34(2); *Civil Liability Act 2003* (Qld)

contributory negligence was presumed in more circumstances and there were expanded provisions that mandated damages' reduction.[1111]

In the ACT, successive governments had been reluctant to restrict damages. However, legislation reduced damages if the plaintiff consented to being a passenger in a vehicle driven by a driver that they knew, or ought to have known, was intoxicated.[1112] Damages also had to be reduced if the plaintiff failed to meet road safety obligations such as wearing a helmet or seat-belt.[1113] Other governments specified that damages had to be reduced by 25 per cent if the plaintiff was an intoxicated driver.[1114] In Queensland and SA, via provisions that were almost identical, damages had to be reduced by 50 per cent if the plaintiff was driving while intoxicated[1115] or they were passengers in a vehicle driven by someone that they knew or ought to have known was intoxicated.[1116]

The disparity in damages restrictions reinforced the impact that local considerations and individual policy preferences could have upon transfer decisions. As mentioned, State and Territory governments had been instructed to copy the Ipp Panel recommendations but few accepted. Instead, governments expressed support for judges' responsibility deciding damages; expressed preferences for what groups deserved compensation or widened existing damages restrictions. Table 6.12 (next page) incorporates statutory damages restrictions that governments made following the *Review of the Law of Negligence* in Table 6.11.

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s 45(2); *Wrongs Act 1936* (SA) s 24I(2), as inserted by *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA) s 3.

[1111] *Civil Law (Wrongs) Act 2002* (ACT) s 35; *Civil Liability Act 2002* (NSW) s 50, as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 5; *Civil Liability Act 2003* (Qld) s 47; *Wrongs Act 1936* (SA) s 24J(1), as inserted by *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA) s 3; *Civil Liability Act 2002* (Tas) s 5; *Civil Liability Act 2002* (WA) s 5L, as inserted by *Civil Liability Amendment Act 2003* (WA) s 8.

[1112] *Civil Law (Wrongs) Act 2002* (ACT) s 36.

[1113] Ibid s 37.

[1114] *Civil Liability Act 2002* (NSW) s 50(4), as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 5; *Civil Liability Act 2003* (Qld) s 47(4); *Wrongs Act 1936* (SA) s 24J(3), as inserted by *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA) s 3.

[1115] *Civil Liability Act 2003* (Qld) s 47(5); *Wrongs Act 1936* (SA) s 24J(4), as inserted by *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA) s 3.

[1116] *Civil Liability Act 2003* (Qld) s 49; *Wrongs Act 1936* (SA) s 24K(4), as inserted by *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA) s 3.

Table 6.12 Statutory Damages Restrictions: 2005

Damages	Restriction						
	QLD	NSW	SA	WA	Tas	Vic	ACT
Total damages - serious injury threshold						✓	
Gratuitous services damages (GS) – ban					✓	✓	
GS – weekly cap		✓	✓	✓			
GS – provider condition			✓				
GS – duration requirement	✓	✓					
GS – voluntary services excluded	✓	✓	✓	✓			
GS – interest ban	✓						
Discount rate – prescribed [rate bracketed]	✓[5]	✓[5]	✓[5]	✓[6]	✓[5]	✓[6]	
Loss of consortium – ban		✓		✓	✓		✓
Loss of consortium – impairment threshold	✓						
Loss of services ('servitium') – ban		✓					
Loss of servitium – weekly cap	✓						
Loss of servitium – impairment threshold	✓						
Investment managers' fees – ban			✓			✓	
Exemplary/ punitive damages – ban		✓				✓	
NEL – cap	✓	✓	✓	✓		✓	
NEL – minimum award threshold			✓	✓	✓		
NEL – formula calculation	✓	✓	✓	✓	✓		
NEL – impairment threshold		✓	✓				
NEL – interest ban	✓	✓	✓				
NEL – pre-judgement interest ban				✓			
Pecuniary loss – maximum cap						✓	
Pecuniary loss – minimum award threshold						✓	
Lost earning capacity – incapacity threshold			✓				
Lost earning capacity – maximum cap			✓				
Lost earnings/ earning capacity – weekly cap	✓	✓			✓		
Forgone superannuation - cap	✓	✓			✓		
Damages reduction – no seatbelt/ helmet							✓
Damages reduction – drunk, drugged				✓			✓
Damages reduction – voluntary passenger							✓
Prescribed reduction – drunk, drugged	✓	✓	✓		✓		
Prescribed reduction – voluntary passenger	✓	✓	✓				
Prescribed reduction – no seat belt/ helmet		✓	✓				
Liability precluded – injury during offence	✓	✓	✓		✓		✓

[Source: Original]

6.3.13 Australian Capital Territory

Governments continued to restrict damages despite the revisions they had made in response to Ipp Panel recommendations. In 2006, the Carpenter Labor government in WA introduced a cap upon the maximum amount of economic loss damages recoverable for example.[1117] This was as a 'proactive risk management initiative' to protect the third party insurance fund from the consequences of injury to a high net worth individual.[1118] Subsequently, the ACT Stanhope Labor government attempted restrictions after successive earlier governments declined despite high third party insurance premiums (see subsection 6.3.7). The Stanhope government was keen to attract more third party insurers to the ACT and had transferred interstate third party insurance system characteristics in the *Road Transport (Third Party Insurance) Act 2008* (ACT). The explanatory memorandum for this legislation stated that it would 'remove barriers to competition' and give insurers 'clear guidelines for providing compulsory third party (CTP) insurance in the ACT'.[1119]

However, rather than attract more insurers and alleviate pressure to increase premiums, the average premium on private motor vehicles in the ACT had risen by $141 from 2008 to March 2012[1120] and no new insurers entered the market. Attorney-General Simon Corbell suggested in 2011 that the *Road Transport (Third Party Insurance) Act 2008* (ACT) was the first of multiple 'tiers' of reform[1121] and on 3 October 2010 the government released the Road Transfer (Third-Party Insurance) Amendment Bill 2010 (ACT) for public comment. This proposed to transfer longstanding interstate damages restrictions such as a five discount rate on damages for future economic loss and then Treasurer Katy Gallagher stressed that the proposed amendments were 'consistent with the nature of schemes in NSW and Queensland'.[1122] However, the Bill failed.

[1117] *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 3F(4), as inserted by *Motor Vehicle (Third Party Insurance) Act 2006* (WA) s 4.
[1118] Western Australia, *Parliamentary Debates*, Legislative Council, 9 May 2006, 2312 (Kate Doust).
[1119] Explanatory Statement, Road Transport (Third Party Insurance) Bill 2007 (ACT) 2.
[1120] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 20 March 2012, 879 (Andrew Barr).
[1121] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 17 February 2011, 252 (Simon Corbell).
[1122] Katy Gallagher, 'Government Consults on CTP and Workers' Compensation Scheme Changes' (Media Release, 5 October 2010) 1 <http://info.cmcd.act.gov.au/archived-media-releases/media4146.html?v=10009&m=52&s=22 >.

The Road Transfer (Third-Party Insurance) Amendment Bill 2010 (ACT) stalled in the ACT Legislative Assembly amid opposition from ACT legal bodies and opposition parliamentarians. Attorney-General Simon Corbell stressed the anticipated reductions in third party insurance premium if the Bill passed[1123] and noted deficiencies in the third party insurance system such as the fact that 52 per cent of compensation scheme costs were spent on lawyers' fees and damages were assessed in a lump sum rather than as periodic payments.[1124] However, despite facilitating reform interstate, the arguments failed to persuade the Legislative Assembly. Then Treasurer Katy Gallagher reflected that the ACT legal bodies waged an 'extremely expensive PR campaign' against the Bill in 2012.[1125] Publicly, this opposition was grounded in the bodies' altruistic belief that damages entitlements were 'essential' to individuals' rights and their scepticism whether ACT third party insurance premiums were too high.[1126] However, self-interested concerns about the potential loss of clients and income were an alternate explanation.

Liberal and Greens ACT Legislative Assembly members rationalised their opposition to the proposed statutory damages restrictions on altruistic grounds. Liberal party leader Brendan Smyth summed up his party's sentiment when he commented that restrictions 'create complexity', are 'arbitrary' and cause injustice.[1127] Smyth labelled the proposed five per cent discount rate on future economic loss damages, which had been well accepted interstate, as a 'very significant reduction in the quantum of damages'.[1128] Similarly, the then ACT Greens leader Meredith Hunter stressed that '[t]he potential premium reductions need to be balanced with what could be very serious consequences for the rest of injured people's lives'.[1129] The Greens and Liberals referred the Road Transport (Third Party Insurance) Amendment Bill 2011 (ACT), whose year had changed with the passage of time, to the

[1123] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 17 February 2011, 254 (Simon Corbell).
[1124] Ibid 251.
[1125] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 March 2011, 1173 (Katy Gallagher).
[1126] See Law Society of the ACT and ACT Bar Association, *Brief Summary of the Issues Likely to be Covered in the Submission on the Proposed Changes to the Compulsory Third Party Scheme in the A.C.T* ACT Law Society <http://www.actlawsociety.asn.au/documents/item/184>.
[1127] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 24 August 2012, 3655 (Brendan Smyth).
[1128] Ibid 3654.
[1129] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 March 2011, 1173 (Meredith Hunter).

Legislative Assembly Public Accounts Committee and the Committee recommended against passage.[1130] Siding with legal bodies' concerns rather than insurers',[1131] the Committee insisted that 'limiting access to court-ordered damages should not be done lightly'.[1132]

Deputy Chief Minister and Treasurer Andrew Barr persisted with the Road Transport (Third Party Insurance) Amendment Bill 2011 (ACT) but without Legislative Assembly support, it failed. Minister Barr stressed that it was necessary to 'bring the ACT more into line with other States and Territories',[1133] essentially as a means to reduce costs and attract insurers. However, the Greens successfully repealed the proposed damages restrictions, retaining a capacity for the 'CTP regulator' to issue non-binding 'guidelines' for courts when assessing NEL.[1134] Barr branded the repeal as 'gutting' of the reforms[1135] and warned that third party insurance premiums would 'continue to rise until [the Assembly addressed] the fundamental issues of thresholds and discount rates'.[1136] Nonetheless, government continued negotiations with private insurers and from 1 July 2013, three additional insurers entered the third party insurance market in the ACT.[1137] Adverse reports about the level of ACT third party insurance premiums continued until 30 June 2014 however. In February 2014 for example, *The Canberra Times* declared that despite the entry of new participants, 'CTP insurance [in the ACT was] still unduly expensive'.[1138] These continued concerns about

[1130] Standing Committee on Public Accounts, Legislative Assembly of the Australian Capital Territory, *Inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011* (2012) vi (recs 9-10).
[1131] The Insurance Council of Australia had praised the consistency between the proposed damages restrictions and restrictions interstate: Insurance Council of Australia, Submission No 3 to ACT Legislative Assembly Standing Committee on Public Accounts, *Inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011,* 29 August 2011, 2.
[1132] Ibid 91.
[1133] Andrew Barr, 'It's Time for the Opposition and Greens to Back Reform to Lower CTP Premiums' (Media Release, 16 July 2012) 1 <http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases/barr/2012/its_time_for_the_opposition_and_greens_to_back_reform_to_lower_ctp_premiums>.
[1134] Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 24 August 2012, 3654 (Meredith Hunter). See *Road Transport (Third Party Insurance) Act 2008* (ACT) pt 4.9A, as inserted by *Road Transport (Third Party Insurance) Amendment Act 2012* (ACT) cl 32.
[1135] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 24 August 2012, 3656 (Andrew Barr).
[1136] Ibid 3659.
[1137] Katy Gallagher and Andrew Barr, 'Canberra Motorists to Have Choice for CTP Insurance' (Media Release, 19 June 2013) 1 <http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases/gallagher/2013/canberra-motorists-to-have-choice-for-ctp-insurance2>.
[1138] Editorial, 'CTP insurance still unduly expensive', *The Canberra Times* (Canberra), 25 February 2014, 2.

premiums' level could precipitate further attempts to transfer statutory damages restrictions.

6.3.14 South Australia

The SA Weatherill government was the last to enact statutory damages restrictions in this study which were an aspect of its *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) that also established a Lifetime Support Scheme for catastrophically injured motor accident victims. Like interstate legislation, government anxieties about the size of mandatory third party insurance premiums facilitated the restrictions in this legislation. Minister for Health and Ageing Jack Snelling described SA third party insurance premiums as 'unacceptably high' and noted that they had grown at a rate of more than 5 per cent per annum since 2000' for example.[1139] The Weatherill government emulated interstate statutory damages restrictions. The government required courts to disregard any event whose likelihood was less than 20 per cent when assessing future earning capacity for example, which emulated NSW legislation.[1140] Reflecting law in NSW, Tasmania and Queensland,[1141] government also capped the amount recoverable for any forgone superannuation contributions on lost earnings.[1142] Further, the government relied upon Queensland legislation as a 'starting point'[1143] when it legislated a new approach to deciding NEL that relied upon courts assigning injuries a 'scale value' and amount.[1144]

The *Motor Vehicle Accidents (Lifetime Support Scheme) Act 2013* (SA) did not solely emulate interstate legislation however as the statute also introduced some noticeable innovations. The government required courts to discount any economic loss damages by 20 per cent for example.[1145] This was in addition to the 5 per cent discount on damages for future economic loss plus any discount that may have been imposed due to contributory negligence. The explanation was government concerns about damages' size. Also, the government

[1139] South Australia, *Parliamentary Debates*, House of Assembly, 6 March 2013, 4652 (Jack Snelling).
[1140] *Civil Liability Act 1936* (SA) s 56A(4)(a), as inserted by *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) s 4.
[1141] See *Civil Liability Act 2002* (NSW) s 15A, as inserted by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 1 cl 2; *Civil Liability Act 2003* (Qld) s 56; *Civil Liability Act 2002* (Tas) s 25(1), as inserted by *Civil Liability Amendment Act 2003* (Tas) s 9.
[1142] *Civil Liability Act 1936* (SA) s 52(3), as inserted by *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) sch 2 pt 2 cl 3(2).
[1143] South Australia, *Parliamentary Debates*, Legislative Council, 15 May 2013, 3906 (Ian Hunter).
[1144] *Civil Liability Act 1936* (SA) s 52(3), as inserted by *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) sch 2 pt 2 cl 3(2).
[1145] Ibid s 56A(5), as inserted by *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) sch 2 pt 2 cl 4.

introduced various 'impairment thresholds' that plaintiffs had to satisfy to recover NEL, damages for gratuitous services, damages for economic loss and loss of consortium.

Private stakeholders, and particularly the Law Society, Bar Association and Australian Lawyers Alliance, were integral to the final design of these impairment thresholds. This is because the government had initially proposed that the thresholds would be 15 points on new injury scale values that it inserted. However, after strident legal criticism,[1146] the values were reduced to 10 points for NEL,[1147] damages for gratuitous services[1148] and loss of consortium[1149] and 7 points for loss or impairment of future earning capacity damages.[1150] The government also halved the threshold at which legal costs were recoverable in motor accident claims from $50,000 to $25,000.[1151] Minister for Health and Ageing Snelling disclosed that the government revisions 'incorporated proposals' from groups that included health practitioners, disability experts, the Royal Automobile Association of Australia (RAA) and SA legal bodies.[1152] Indeed, based on the revisions made, the SA Law Society announced that it did 'not intend to oppose passage of the legislation or seek further changes' on 4 March 2013.[1153] The government also accepted an amendment that the Greens moved in response to SA Council of Social Services demands.[1154] This amendment permitted courts to award NEL even if the plaintiff did not meet the impairment threshold if the circumstances were 'exceptional' and the result of denying NEL would be 'harsh and unjust'.[1155]

[1146] For examples of legal bodies' concerns see Australian Lawyers Alliance, Submission to the Economic and Finance Committee, Parliament of South Australia, *Inquiry into South Australia's Compulsory Third Party Insurance Scheme 2012 Green Paper,* 9 November 2012, 1; Law Society of South Australia and Australian Lawyers Alliance, 'MAC Figures Fail to Support CTP Overhaul' (Media Release, 30 November 2012) 1 <http://www.lawsocietysa.asn.au/other/media_centre.asp>.

[1147] *Civil Liability Act 1936* (SA) s 52(4), as inserted by *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) sch 2 pt 2 cl 3(2).

[1148] Ibid s 58(4)(a)(i), as inserted by *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) sch 2 pt 2 cl 5.

[1149] Ibid s 65(2), as inserted by *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) sch 2 pt 2 cl 7.

[1150] Ibid s 56A(2), as inserted by *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) sch 2 pt 2 cl 4.

[1151] *Motor Vehicles Act 1959* (Vic) s 127C, as inserted by *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) sch 2 pt 4 cl 18. There was a concession so that parties seeking court approval of a compromise or settlement that related to a person under legal disability could recover costs and not have to satisfy the threshold: at s 127C(3).

[1152] South Australia, *Parliamentary Debates*, House of Assembly, 6 March 2013, 4656 (Jack Snelling).

[1153] Law Society of South Australia, 'Legal Groups Score Wins for Crash Victims' (Media Release, 4 March 2013) 2 <http://www.lawsocietysa.asn.au/other/media_centre.asp>.

[1154] See South Australia, *Parliamentary Debates,* Legislative Council, 15 May 2013, 3924 (Tammy Franks).

[1155] *Civil Liability Act 1936* (SA) s 52(5), as inserted by *Motor Vehicle Accidents (Lifetime Support Scheme) Act 2013* (SA) sch 2 pt 2 cl 3.

6.3.15 New South Wales

The Weatherill government success in securing support for revised statutory damages restrictions contrasted to NSW where a similar attempt at reform was thwarted. In part, this was because government failed to secure legal support which reflected lawyers' involvement in other unsuccessful attempts to restrict damages. The O'Farrell conservative government introduced the Motor Accident Injuries Amendment Bill 2013 (NSW) in May 2013 and it contained the dramatic proposal to introduce no-fault motor accident compensation.[1156] The Bill also proposed to restrict damages to 'more seriously injured' victims,[1157] which translated as rule precluding damages unless the degree of impairment exceeded 10 per cent.[1158] Further, the government proposed to cap the weekly rate of damages recoverable for loss of earnings and compensation for forgone superannuation contributions.[1159] Then Treasurer Mike Baird rationalised the Bill on altruistic grounds but also noted that the need for reform was 'pressing because premiums in NSW are now the least affordable in the country, with prices having risen 70 per cent since 2008'.[1160] Separately, Baird noted that NSW had the highest third party insurance premiums in Australia in June 2013.[1161]

The NSW statutory damages restrictions reflected interstate legislation and the proposal to introduce no-fault motor accident compensation meant that individuals formerly ineligible for assistance would recover compensation. However, legal groups, Labor and the Greens were opposed.[1162] These groups expressed concern about aspects of the government approach and specifically the decision to narrow no-fault motor accident compensation eligibility to seriously injured victims after five years.[1163] Labor parliamentarian Michael Daley insisted that the 'new principle is to pay all accident victims some benefits for five

[1156] Motor Accident Injuries Amendment Bill 2013 (NSW) sch 1 cl 68.
[1157] New South Wales, *Parliamentary Debates,* Legislative Assembly, 9 May 2013, 20385 (Mike Baird).
[1158] Motor Accident Injuries Amendment Bill 2013 (NSW) sch 1 cl 138. In Victoria, victims are precluded from recovering damages unless their permanent impairment exceeds 30 per cent: *Transport Accident Act 1986* (Vic) s 93(3).
[1159] Motor Accident Injuries Amendment Bill 2013 (NSW) sch 1 cl 140.
[1160] New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 May 2013, 20385 (Mike Baird).
[1161] Mike Baird, 'Government Acts to Address CTP Concerns' (Media Release, 19 June 2013) 1 <https://www.nsw.liberal.org.au/news/state-news/government-acts-address-ctp-concerns>.
[1162] For examples of legal groups' concerns see Letter from John Dobson, President of Law Society of NSW to Greg Pearce, Minister for Finance and Services, 17 May 2013, 1; New South Wales Bar Association, Law Society of NSW and Australian Lawyers Alliance, Joint Submission: Alternate Proposal to Reform the NSW CTP Scheme for the Motor Accidents Authority, 2013, 3.
[1163] Motor Accident Injuries Amendment Bill 2013 (NSW) sch 1 cl 68 (see proposed ss 65ZI(1) – (2)).

years and, after that, 90 per cent of them are on their own'.[1164] Barbara Perry, who was Shadow Minister for Disability, asked rhetorically 'Instead of disadvantaging the victims, why not attempt to funnel some of the serious profits made by insurance companies back to motorists?'.[1165] Greens member Jamie Parker concluded that motor accident victims would 'in effect, be forced to negotiate on their own against well-resourced insurance companies' because of proposed restrictions upon compensable legal expenses.[1166]

Labor and Greens opposition, which echoed legal groups' concerns, meant that passage of the Motor Accident Injuries Amendment Bill 2013 (NSW) depended upon support from the Shooters and Fishers Party (SFP) and Christian Democrats Party in the Legislative Council. However, the SFP opposed Bill aspects and it was subsequently withdrawn. *The Daily Telegraph* reported that the SFP opposed plans to restrict compensation for legal costs and implement an impairment threshold on children's eligibility for compensation[1167] in the context of strident opposition from NSW motorcycle bodies.[1168] *The Daily Telegraph* also disclosed that the NRMA had some concerns about the speed of reform[1169] and there were articles on close ties between then Finance Minister Greg Pearce and members of the insurance industry.[1170] Withdrawal of the Motor Accident Injuries Amendment Bill 2013 (NSW) meant that government placed no further limitations upon statutory damages restrictions. Table 6.13 (next page) incorporates the restrictions that the *Motor Accidents (Lifetime Support Scheme) Act 2013* (SA) made into Table 6.12.

[1164] New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 May 2013, 20512 (Michael Daley).
[1165] New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 May 2013, 20704 (Barbara Perry).
[1166] New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 May 2013, 20524 (Jamie Parker).
[1167] Andrew Clennell, 'Inside Run on Green Slip Law – Pearce Staffer Linked to Key Lobbyist', *The Daily Telegraph* (Sydney), 18 June 2013, 11.
[1168] See, eg, Motorcycle Council of NSW Inc, 'The CTP Battle' (19 August 2013) <http://www.mccofnsw.org.au/a/203.html>.
[1169] Andrew Clennell, 'NRMA's Fears for Green Slip Reforms', *The Daily Telegraph* (Sydney), 20 June 2013, 3.
[1170] Eg, Andrew Chennell, 'Green Slip Change Link to Pearce's Lib Mate', *The Daily Telegraph* (Sydney), 17 June 2013, 9; Andrew Chennell, 'Pearcing Questions', *The Daily Telegraph* (Sydney), 27 July 2013, 34.

Table 6.13 Statutory Damages Restrictions: 2013

Damages	Restriction						
	QLD	NSW	SA	WA	Tas	Vic	ACT
Total damages - serious injury threshold						✓	
Gratuitous services (GS) – ban					✓		
GS – weekly cap		✓	✓	✓			
GS – provider condition			✓				
GS – duration requirement	✓	✓					
GS – impairment threshold			✓				
GS – voluntary services excluded	✓	✓	✓	✓			
GS – interest ban	✓						
Discount rate – prescribed [rate bracketed]	✓[5]	✓[5]	✓[5]	✓[6]	✓[5]	✓[6]	
Loss of consortium – ban		✓		✓	✓		✓
Loss of consortium – impairment threshold	✓		✓				
Loss of services ('servitium') – ban		✓				✓	
Loss of servitium – weekly cap	✓						
Loss of servitium – impairment threshold	✓						
Investment managers' fees – ban			✓				
Exemplary/ punitive damages – ban		✓				✓	
NEL – cap	✓	✓	✓	✓	✓	✓	
NEL – minimum award			✓	✓			
NEL – formula calculation	✓	✓	✓	✓	✓		
NEL – impairment threshold		✓	✓				
NEL – interest ban	✓	✓	✓				
NEL – pre-judgement interest ban				✓			
Pecuniary loss – maximum cap						✓	
Pecuniary loss – minimum award threshold						✓	
Lost earning capacity – incapacity threshold			✓				
Lost earning capacity – maximum cap			✓				
Lost earning capacity – impairment threshold			✓				
Lost earnings/ earning capacity – discount			✓				
Lost earnings/ earning capacity – weekly cap	✓	✓			✓		
Forgone superannuation – cap	✓	✓	✓		✓		
Prescribed reduction – drunk, drugged	✓	✓	✓		✓		
Prescribed reduction – passenger	✓		✓				
Prescribed reduction – no seat belt			✓				
Prescribed reduction – no helmet			✓				
Damages reduction – no seatbelt/ helmet		✓					✓
Damages reduction – drunk, drugged		✓		✓			✓
Damages reduction – voluntary passenger		✓					✓
Liability precluded – injury during offence	✓	✓	✓		✓		✓

[Source: Original]

6.4 Conclusion

This chapter has explained the results of the third case study examined for this research. Its focus was the contribution that policy transfer made to legislated bans upon trial by jury in motor accident claims and statutory damages restrictions in Australia. The research period was from 1935 to 30 June 2014. The chapter asked what the source(s) of policy transfer were; what actors and transfer degree were involved; what were the explanation(s) for transfer; and what factors facilitated or restricted policy transfer particularly. Table 6.14 summarises the chapter findings.

Table 6.14 Summary of Policy Transfer Contribution[1171]

Carroll	**3**	**PHASE 4**			
	1935 - 1978	**1979 – 1985**	**1986 - 2001**	**2002 - 2005**	**2006 - 2014**
Source	1. UK 2. Interstate	1. NZ 2. Interstate	1. NSW 2. SA	1. Interstate	1. Interstate
Actor(s)	1. Inquiries 2. Labor 3. Lawyers	1. Actuaries 2. State insurer	1. State insurer 2. Actuaries 3. Lawyers	1. Inquiries 2. Lawyers 3. Actuaries	1. Actuaries 2. Lawyers 3. Inquiries
Degree	1. Copying	1. Emulation	1. Emulation 2. Copying 3. Inspiration 4. Combinations	1. Emulation 2. Copying 3. Inspiration	1. Combinations
Explanation	1. Lesson-d	1. Voluntarily 2. Coercion	1. Voluntarily 2. Coercion	1. Voluntarily 2. Coercion	1. Voluntarily 2. Coercion
Restrict/ Facilitate	1. Financial 2. Lead-following	1. Financial	1. Financial 2. Lead-following 3. Ideological	1. Financial 2. Ideological	1. Financial 2. Lawyers 3. Lead-following

Like the origins for compensation examined in preceding case studies, the source for the initial juror bans in this study and statutory damages restrictions were foreign. Specifically, the Tasmanian government copied UK legislation when it became the first to ban trial by jury in motor accident claims and NZ legislation inspired statutory damages restrictions. However, interstate transfer was the dominant form of transfer, consistent with the Carroll assertions about its prevalence in the fourth phase. The study provided no evidence that

[1171] Table items are listed in order of significance and are not exhaustive. 'Lesson-d' refers to lesson-drawing; 'Ideological' refers to different perspective among parliamentarians on the role of judges and governments modifying damages; 'Lead-following' refers to State governments enacting reform based upon interstate legislation.

any jurisdiction was more inclined to pursue policy transfer or that particular jurisdictions favoured transfer from one jurisdiction or another. Further, although it had been significant in the workers' compensation case study, political ideology was not determinative of policy transfer decisions. In the ACT for example, a Labor government criticised restrictions that the NSW Carr Labor government subsequently made.

Expert inquiries, parliamentarians, State insurers, actuaries and legal groups were the primary actors involved in policy transfer. Expert inquiries facilitated transfer by recommending reform, and actuaries and third party insurers were pivotal to statutory damages restrictions revision. Lawyers' and parliamentarians' primary function was to restrict policy transfer. Parliamentarians restricted transfer because of different perspectives on the appropriateness of damages restrictions and courts' role, even within the same political party, and different financial circumstances of State third party insurers. Tasmanian Labor Attorney General Judy Jackson praised the Tasmanian courts for 'acting responsibly' for example and the Labor Bacon government rejected restrictions that Labor governments made interstate.

Legal bodies rationalised their strident opposition to statutory damages restrictions and juror bans on altruistic grounds although self-interested concerns about the loss of income cannot be discounted. Lawyers' opposition was overcome if their numbers were split. For example, the NSW Askin government successfully restricted trial by jury in motor accident claims when the NSW Law Society and Bar Association divided on its appropriateness. Transfer was also possible despite legal opposition if sponsored by a senior judicial appointee. Retired Supreme Court judge Keith Sangster sat on a 1985 review that advocated multiple SA damages restrictions for example and NSW Supreme Court judge Jim Spigelman also nominated a number of concerns with the law of negligence that informed *Review of the Law of Negligence* recommendations.[1172] Severe financial losses in State third party insurers also facilitated statutory damages restrictions despite legal opposition as NT and Tasmanian experience demonstrated particularly. In the ACT, despite high insurance premiums, a monopoly insurer and strident legal opposition successfully thwarted restrictions.

[1172] See J J Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432.

Copying of statutory damages restrictions and juror bans were an aspect of this study although the most common transfer degrees were combinations and emulation. Governments (and their actuarial advisers) cherry-picked interstate restrictions that were considered most effective at moderating pressure to increase premiums. Governments also emulated interstate restrictions in ways that they thought would increase savings or ameliorate effects for particular groups. State insurer and actuaries' involvement meant that governments overwhelmingly transferred juror bans and restrictions 'voluntarily' on the Dolowitz and Marsh policy transfer continuum. That is, if governments disregarded actuarial advice to restrict damages or jurors, they risked imperilling the profitability of State insurers and compelling further, politically unpopular third party insurance premium increases. This had political and financial sensitivities. Like the workers' compensation case study, opposition parliamentarian demands also compelled some transfer decisions.

CHAPTER 7
NO-FAULT MOTOR ACCIDENT COMPENSATION (1973 – 1989)

7.1 Introduction

The preceding chapters have examined policy transfer and asked questions such as why transfer occurred. By contrast, this chapter focuses predominantly upon an example of non-transfer, namely the failure of no-fault motor accident compensation to transfer throughout Australia.[1173] As subsection 1.1 explained, most motor accident victims in Victoria, Tasmania and the NT may recover no-fault motor accident compensation. However, in other States and the ACT, motorists overwhelmingly must prove fault as the cause of their injury with some exceptions. This is despite expectations in the 1970s and early 1980s that all jurisdictions would provide no-fault motor accident compensation. An expert NT committee wrote in 1979, for example, that it seems 'likely' that 'all States in Australia' will eventually move towards no-fault motor accident compensation.[1174] Further, the Victorian Motor Accidents Board declared in 1980 that it seems 'probable that [no-fault motor accident compensation] will 'ultimately operate throughout Australia'.[1175]

This chapter examines why no-fault motor accident compensation did not transfer more widely within Australia given the transfer experience of other case studies. The chapter discovers that federal proposals to introduce national compensation disrupted early steps towards introduction in some States. Subsequently, negative lessons from the experience of no-fault motor accident compensation in jurisdictions that had legislated were a further disincentive as political conservatism also discouraged reform. The chapter divides its analysis into two main sections plus this introduction and the conclusion. Section 7.2 examines the genesis for no-fault motor accident compensation in Australia and its adoption in Victoria, Tasmania and the NT. Section 7.3 examines the factors that discouraged adoption in other States and the ACT.

[1173] As subsection 1.1 noted, 'no-fault motor accident compensation' is the label that this thesis uses to describe statutory benefits for personal injury or death from motor accident that do not rely upon proof of negligence or 'fault' as a condition of eligibility.
[1174] Third Party Insurance Committee, above n 849, 13.
[1175] Motor Accidents Board (Vic), *Seventh Annual Report* (Government Printer, 1980) 8. See also Garth Tomkinson, 'A Mosaic of State Schemes is Likely Compensation Road', *The Australian* (Sydney), 11 May 1983, 22.

7.2 No-fault Motor Accident Compensation Introduced

7.2.1 Pre-legislation

The notion of no-fault motor accident compensation had attracted policy attention in Australia for some years before it was pioneered in the *Motor Accidents Act 1973* (Vic). In 1959, a Royal Commission that the Victorian Bolte government tasked to examine third party insurance rejected the notion, voicing concern that it could have implications for the reciprocity of compensation among States.[1176] Subsequently, the WA Brand government also rejected the notion after then WA Supreme Court Chief Justice Sir Albert Wolff[1177] and successive *The West Australian* editorials demanded reform.[1178] Minister for Local Government Leslie Logan conceded in 1966 that no-fault motor accident compensation would be introduced if it had 'sufficient parliamentary support'.[1179] However, he felt that the notion could threaten reciprocity among States.[1180] There was also concern that the proposal would require a 'very considerable increase' in mandatory third party insurance premiums.[1181]

The interest in no-fault motor accident compensation stemmed from concerns about the adequacy of the law of negligence at handling motor accident claims. Labels such as 'expensive', 'cumbersome', 'crowded', 'elaborate', 'slow moving' and 'archaic' appeared in academic publications to characterise the litigation process.[1182] High Court Justice Sir Victor Windeyer declared that the law of negligence was 'outmoded in ordinary accident cases'[1183]

[1176] Coppel, above n 819, 39.
[1177] 'Judge Favours Insurance to Cover Hurt People', *The West Australian* (Perth), 27 February 1965, 2.
[1178] See, eg, Editorial, 'Injury Compensation Review is Needed', *The West Australian* (Perth), 22 June 1965, 6; Editorial, 'Review of Third-Party Vehicle Insurance', *The West Australian* (Perth), 12 August 1965, 6.
[1179] Western Australia, *Parliamentary Debates,* Legislative Council, 20 October 1966, 1576 (Les Logan).
[1180] Ibid.
[1181] Western Australia, *Parliamentary Debates,* Legislative Assembly, 24 November 1965, 2855 (Crawford Nalder).
[1182] See, eg, Ross Parsons, 'Death and Injury on the Roads: The Compensation of Victims in Western Australia' (1955) 3 *Annual Law Review (University of Western Australia)* 201, 287; Robert E Keeton and Jeffrey O'Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (Little, Brown and Company, 1965) 13, 22; James C McRuer, 'The Motor Car and the Law' in R A Woodman (ed), *Record of the Third Commonwealth and Empire Law Conference: Sydney - Australia 25th August - 1st September, 1965* (Law Book Company, 1966) 182, 201; Terence G Ison, *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation* (Staples Press, 1967) ch 2; A H Lahore, 'Fault or Accident Liability - A Study of Third Party Compulsory Insurance in Victoria' (LLM Thesis, Monash University, 1967) 247; Francis Renton Power, *Smash and Grab* (1967) ; P S Atiyah, *Accidents, Compensation and the Law* (Weidenfield and Nicolson, 1970) 603; Justice, *No-Fault on the Roads* (Stevens, 1974) 1.
[1183] Sir Victor Windeyer 'Addendum' to Justice Gordon Wallace, 'Speedier Justice (and Trial by Ambush)' (1961) 35 *Australian Law Journal* 124, 149.

and could 'delay or impede the recovery and rehabilitation of injured persons'.[1184] He insisted that negligence was the 'measuring of damages by unproveable predictions, metaphysical assumptions and rationalised empiricism'.[1185] Similarly, Victorian Supreme Court Justice Sir John Barry branded the legal approach towards motor accident claims 'wasteful and cumbersome'.[1186] The requirement for proof of some third party fault as a condition of recovering damages was particularly maligned. *The Medical Journal of Australia* suggested that drawing a distinction between victims based upon fault 'must surely be a bad one'[1187] and Atiyah suggested that 50 per cent of motor accident victims received no assistance from the courts because of the requirement.[1188] NSW Supreme Court Justices Gordon Wallace, Chief Justice Sir Leslie Herron and Justice Kenneth Asprey advocated the abolition of fault as a liability determinant[1189] and Sir John Barry branded the requirement 'anachronistic in concept and unjust in operation'.[1190]

7.2.2 *Motor Accidents Act 1973* (Vic)

The criticisms of the law of negligence facilitated no-fault motor accident compensation in Victoria first. As subsection 6.2.4 explained, Victorian Attorney General George (later Sir George) Reid had suggested abolishing trial by jury in motor accident claims in 1967 in response to concerns about congestion in Supreme Court handling of personal injuries claims. This reform did not occur but, as congestion and delays persisted, appetite for reform remained. Country Party parliamentarian Peter Ross-Edwards bemoaned delays in April 1969[1191] and in May, Labor asked Attorney General Reid what government was doing about the 'backlog of jury cases in the Supreme Court'.[1192] Reid replied that the backlog was under 'constant review by the Chief Justice, the Solicitor General and myself, and we are addressing ourselves to various means of [its removal]'.[1193] The following month, an expert

[1184] *Skelton v Collins* (1966) 115 CLR 94, 127. See also Keeton and O'Connell, above n 1182, 24-5.
[1185] *Skelton v Collins* (1966) 115 CLR 94, 136.
[1186] Barry, above n 448, 343.
[1187] Comment, 'Compensation' (1972) 2(23) *Medical Journal of Australia* 1273, 1273.
[1188] P S Atiyah, 'No-Fault Compensation' (1971) 45 *Law Institute Journal* 475, 475.
[1189] Justice Gordon Wallace, 'Speedier Justice (and Trial by Ambush)' (1961) 35 *Australian Law Journal* 124; Chief Justice Herron and Justice Asprey, 'The Motor Car and the Law' in R A Woodman (ed), *Record of the Third Commonwealth and Empire Law Conference: Sydney - Australia 25th August - 1st September, 1965* (Law Book Company, 1966) 169, 181.
[1190] Barry, above n 432, 344.
[1191] Victoria, *Parliamentary Debates,* Legislative Assembly, 24 April 1969, 4201 (Peter Ross-Edwards).
[1192] Victoria, *Parliamentary Debates,* Legislative Assembly, 6 May 1969, 4541 (Campbell Turnbull).
[1193] Ibid 4541 (George (later Sir George) Reid).

committee was tasked to 'examine the possibility of reducing the lag in settlement of claims and the cost of litigation in relation to motor car insurance'.[1194] Its members were the Government Statist, Deputy Insurance Commissioner and various industry and employer representatives, and it became known anecdotally as the 'delays committee'.

The delays committee recommendations were the first public steps towards no-fault motor accident compensation in the *Motor Accidents Act 1973* (Vic). The committee cited aspects of a report of the Royal Commission on Automobile Insurance in the Canadian province of British Columbia that recommended no-fault motor accident compensation. Also, the committee annexed criticisms of the law of negligence from NZ Supreme Court Justice Graham (later Sir Graham) Speight and noted details of the no-fault motor accident compensation schemes in the Canadian province of Saskatchewan and the American State of Massachusetts.[1195] The committee recommended a system of periodic payments on the same basis as was provided under the Workers Compensation Act.[1196] Essentially, the explanation for this recommendation was altruistic concerns for victims' welfare and predictions that no-fault motor accident compensation would ameliorate pressure upon premiums. However, the Bolte government and responsible Minister Chief Secretary Dick (later Sir Rupert) Hamer did not immediately act upon the committee recommendations.

Chief Secretary Hamer, who would succeed Bolte as Victorian Premier from 23 August 1972, has attracted criticism for lacking 'the power of decision' that his predecessor had.[1197] Hamer seemed anxious to obtain multiple perspectives on the optimal reform of motor accident compensation and to appease the Victorian Bar Council and Law Institute of Victoria particularly. Answering a parliamentary question on the state of play on 12 April 1972, Hamer noted that the Bar Council had pointed out 'a number of legal implications' of the delays committee recommendations and both the Bar Council and Law Institute had 'put forward additional or alternative suggestions' to reduce delays.[1198]

[1194] V H Arnold, *Report to the Chief Secretary on Delays in the Settlement of Third Party Insurance Claims* (Government Printer, 1969) 1.
[1195] See Ibid apps.
[1196] Ibid 9. This included payment of hospital, medical, ambulance and other associated therapeutic costs; replacement of lost income with periodic payments and payment of 'relatively small lump sums to compensate for permanent injuries and disfigurements': at 4.
[1197] G O Reid and Joan Webster, *In and About Parliament: The Life and Speeches of the Hon Sir George Reid Q.C 1903 - 1993* (Freelance Features, first published 1991, 2012 ed) 135.
[1198] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 April 1972, 4865 (Rupert Hamer).

Indeed, the bodies had developed their own reform proposal and sought to discredit transfer of international approaches. The bodies dismissed suggestions to adopt the comprehensive compensation approach from NZ for example, stating that 'a single State of the Australian Commonwealth would not be able to 'go it alone' with the limited financial resources available.[1199] The bodies also stressed that it was 'necessary to understand that precedents of no-fault systems enacted in individual States of America have emerged against a very different background and would be unsuitable' to Victoria.[1200]

The bodies stressed that reform should occur 'step by step gathering the necessary information along the way'.[1201] As such, they recommended that government should establish a consultative committee to enquire into and report upon 'the feasibility of … [no-fault motor accident compensation] …to operate alongside the present tort system'[1202] and this advice was accepted. A consultative committee comprising members of the delays committee, departmental officers and representatives of the Bar Council and the Law Institute of Australia was formed. On 18 October 1972, the Minister for Transport Vernon Wilcox advised parliament that the committee would develop the 'details' of 'a limited plan of 'no fault' compensation for road accident victims' that Cabinet had approved.[1203] The Bar Council committee nominee, Ken Marks QC, demonstrated the strong defence of damages entitlements that he would have brought to committee deliberations in an article criticising their abolition in the *Accident Compensation Act 1972* (NZ).[1204] Despite the Royal Automobile Club of Victoria (RACV) cautioning that there should be some 'restraint' upon victims' rights to damages when no-fault motor accident compensation was introduced or there could be an 'intolerable burden for motorists',[1205] the *Motor Accidents Act 1973* (Vic) did not restrict damages entitlements.

Chief Secretary Ray Meagher explained why government had transferred no-fault motor accident compensation. First, Meagher anticipated that the notion could result in a

[1199] Victorian Bar Council and Law Institute of Victoria, *No Fault Liability* (Hawthorn Press, 1972) 103.
[1200] Ibid.
[1201] Ibid 104.
[1202] Ibid.
[1203] Victoria, *Parliamentary Debates*, Legislative Assembly, 18 October 1972, 1053 (Vernon Wilcox).
[1204] See Ken H Marks, 'A First in National No-Fault: The Accident Compensation Act 1972 of New Zealand' (1973) 47 *Australian Law Journal* 516, 525.
[1205] Royal Automobile Club of Victoria, 'RACV Sees Fault in Victoria's No-Fault Act' (1973) (May) *ROYAKAUTO Journal* 5, 5.

'substantial reduction' in the costs of third party insurance by discouraging minor legal claims and associated legal expenses.[1206] This was significant because, as Chapter 6 revealed, moderating the size of mandatory third party insurance premiums was a perennial political sensitivity. Second, Meagher stressed altruistic benefits of no-fault motor accident compensation. Examples were relief from the legal 'deficiencies' that academics and judges had identified such as delays until settlement; the absence of damages for those unable to prove fault; and high legal costs. Meagher insisted that a 'substantial proportion' of third-party insurance premiums in Victoria at the time were paid in legal fees.[1207] Third, the evidence of no-fault motor accident compensation from other jurisdictions, and particularly the *Accident Compensation Act 1972* (NZ), was also likely influential. As Chapter 5 noted, the Hamer government had demonstrated its preparedness to transfer NZ policy when it copied NZ statutory criminal injuries compensation characteristics rather than emulate NSW legislation.

7.2.3 *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas)

The *Motor Accidents Act 1973* (Vic) commenced only days before the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas). Like its Victorian counterpart, the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) emerged following disquiet about the adequacy of the law of negligence to handle motor accident claims. The disquiet included criticisms from the Victorian Supreme Court Justice Sir John Barry to the Southern Tasmanian Bar Association that had motivated the Victorian legislation.[1208] There were also concerns about processing delays in motor accident claims. More than $300,000 was owed to the Royal Hobart Hospital alone from patients or former patients that awaited damages for treatment costs from motor accident injuries in 1969 for example.[1209] A 'substantial proportion' of the civil sitting time of the Tasmanian Supreme Court was also reportedly devoted to dealing with motor accident claims.[1210] Highlighting the disquiet, an address to the Medico-Legal Society of Tasmania advocated pure no-fault motor accident compensation whereby damages for personal injury or death from motor accident were

[1206] Victoria, *Parliamentary Debates*, Legislative Assembly, 11 April 1973, 5370 (Ray Meagher).
[1207] Victoria, *Parliamentary Debates*, Legislative Assembly, 28 March 1973, 4649 (Ray Meagher).
[1208] See Barry, above n 432.
[1209] Law Reform Committee, Parliament of Tasmania, *Recommendations for the Establishment of a No-fault System of Compensation for Motor Accident Victims* (1972) 29.
[1210] Ibid.

abolished. Surprisingly given the hostile attitude towards damages restrictions in Victoria, this proposal received 'strong support in general' from the Tasmanian Bar Association.[1211]

The first public steps towards no-fault motor accident compensation in Tasmania were taken following the surprise election of the conservative Bethune government on 26 May 1969. New Attorney General Max Bingham had installed a part-time chair of the Tasmanian Law Reform Committee and provided the Committee with a full-time secretary.[1212] Responding to academic and judicial concerns about the adequacy of the law of negligence for motor accident claims, and developments in Victoria, Bingham tasked the Committee to examine the 'problem' of providing compensation to motor accident victims and the 'feasibility of providing an alternative or an addition' to the law of negligence.[1213] Committee members for this inquiry were the permanent part-time chair Tasmanian Supreme Court Justice Frank Neasey; a Tasmanian Law Society representative (future Supreme Court judge and Law Reform Commissioner Henry Cosgrove); a Tasmanian Bar Association representative; a University of Tasmania legal academic and the Master and Secretary of the Tasmanian Supreme Court. Petrow explains that Bingham had instructed the Committee Chair, in respect of all inquiries, to 'draw largely on work done elsewhere'[1214] and the effect of this instruction was apparent in the Committee final report. The report cited international and interstate government sources, and academic criticism of the law of negligence from authors such as Keeton and O'Connell,[1215] Atiyah,[1216] Laycraft[1217] and Bombaugh.[1218] There were also extracts from the final report of the Royal Commission of Inquiry into Compensation for Personal Injury in NZ.[1219]

[1211] Ibid 28.
[1212] Stefan Petrow, 'Lost Cause? Law Reform in Tasmania 1941 - 1969' (1994) 13 *University of Tasmania Law Review* 369, 389.
[1213] Law Reform Committee, Parliament of Tasmania, above n 1209, 3.
[1214] Petrow, 'Lost Cause?', above n 1212, 389.
[1215] Robert E Keeton and Jeffrey O'Connell, 'Basic Protection - A Proposal for Improving Automobile Claims Systems' (1964) 78 *Harvard Law Review* 329.
[1216] Atiyah, 'Compensating the Accident Victim', above n 182; Atiyah, *Accidents, Compensation and the Law*, above n 1182.
[1217] J H Laycraft, 'Reforming the Automobile Tort System' (1971) 9 *Alberta Law Review* 22.
[1218] Robert L Bombaugh, 'The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform' (1971) 71 *Columbia Law Review* 207.
[1219] Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (Government Printer, 1967)

The Tasmanian Law Reform Committee recommended that government should introduce no-fault motor accident compensation 'broadly similar' to the NZ scheme.[1220] Unanimously, the Committee rationalised that no-fault compensation would reduce delays in claims' settlement, eliminate the need for adversarial legal proceedings and ensure that individuals unable to prove fault recovered assistance.[1221] The Committee also anticipated that no-fault motor accident compensation would reduce costs by discouraging many smaller claims and associated expenses.[1222] However, the Committee was not unanimous in its attitude towards retaining damages entitlements. The Committee majority felt that 'defects' in the law of negligence were so 'substantial' that complete abolition of damages for personal injury or death from motor accident was warranted.[1223] By contrast, the minority, which comprised Justice Neasey and the Master of the Supreme Court, favoured the less 'drastic' retention of damages.[1224]

The Committee provided its recommendations to Attorney General Bingham in the final months of the one-term Bethune government and they were accepted by the subsequent Reece Labor government. The Reece government introduced no-fault motor accident compensation in the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) and opted to copy the minority position. This was essentially for the reasons of caution that the minority noted and meant that eligible victims could recover both statutory compensation and damages. Media reported that the Reece government felt that no-fault motor accident compensation would 'keep premiums lower',[1225] which was one of its justifications. Transfer was also motivated by the altruistic desire to reduce the delays and expense that motor accident victims faced in securing settlement and the exclusion of compensation for victims unable to prove fault.

7.2.4 *Motor Accidents (Compensation) Act 1979* (NT)

The NT was the third jurisdiction to transfer no-fault motor accident compensation in the 1970s. This was as part of 'frenzied' legislative activity following the acquisition of

[1220] Law Reform Committee, Parliament of Tasmania, above n 1209, 31.
[1221] See Ibid 14-5.
[1222] Ibid 30.
[1223] Ibid 30-1.
[1224] Ibid 33.
[1225] 'No-Fault Insurance Bill Out this Year?', *The Advocate* (Burnie), 19 September 1972,4.

self-government on 1 July 1978.[1226] As subsection 6.3.1 noted, the Motor Accidents (Compensation) Bill 1979 (NT) was facilitated by some alarming financial conditions in the NT third party insurance scheme. From March 1969 to August 1978, third party insurance premiums on private motor vehicles in the NT had increased by more than 600 per cent[1227] and the federal Actuary had recommended a further 50 per cent increase in March 1978.[1228] The increases provoked a petition from approximately 4,000 NT residents that expressed concern about third party insurance premiums' level. This represented more than three per cent of the NT population to 31 December 1978.[1229] Further, the NT had the largest proportion of motor accidents and road deaths per head of population of any Australian jurisdiction.[1230] This made the prospects for any reduction or moderation in the size of premiums slim.

Like the introduction of statutory damages restrictions that Chapter 6 examined, actuarial advice was integral to the NT government decision to implement no-fault motor accident compensation. Chief Minister Paul Everingham had sought advice from the recently retired Commonwealth actuary, Sid Caffin, and he advised that third party insurance premiums could only be moderated 'if the scheme offered some fixed maximum schedule of benefits'.[1231] This was the first suggestion of no-fault motor accident compensation. Subsequently, Everingham nominated the 'inevitable prospect of ever-increasing premiums'; 'complex, expensive and delayed court proceedings'; lump sum settlements and 'monumental' insurer losses as further explanations for reform.[1232] Also, the expert committee that government tasked to examine the Motor Accidents Compensation Bill 1979 (NT) endorsed no-fault motor accident compensation. Thus, like Victoria and Tasmania, no-fault motor accident compensation in the NT was facilitated by altruistic concerns for victims' welfare, a desire to moderate third party insurance premiums' level and expert recommendations to reform.

[1226] Alistair Heatley, 'Constitutional, Legislative and Political Developments' in D Jaensch and P Loveday (eds), *Under One Flag: The 1980 Northern Territory Election* (George Allen & Unwin, 1981) 16, 17.
[1227] Third Party Insurance Committee, above n 849, 1.
[1228] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 8 March 1979, 1110 (Paul Everingham).
[1229] Australian Bureau of Statistics, *Population and Vital Statistics: December Quarter 1978* (1978) 5.
[1230] Third Party Insurance Committee, above n 849, 1.
[1231] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 8 March 1979, 1111 (Paul Everingham).
[1232] Ibid 1113.

7.3 No Fault Motor Accident Compensation Rejected

The following subsections explain why other State governments and the ACT did not introduce no-fault motor accident compensation in response to multiple opportunities in the 1970s and 1980s.

7.3.1 National Compensation Bill 1974 (Cth)

The Whitlam government commitment to a National Rehabilitation and Compensation Scheme and the related National Compensation Bill 1974 (Cth) was an initial disruption of State government deliberations about no-fault motor accident compensation. Prime Minister Gough Whitlam had signalled his commitment to national compensation in his pre-election speech before the 1972 federal election and there had been media speculation about some federal national compensation policy in the preceding months and year.[1233] Whitlam established a committee that NZ Supreme Court Justice Owen (later Sir Owen) Woodhouse chaired to inquire into and develop the Scheme (known anecdotally as the 'Woodhouse Committee').[1234] The Woodhouse Committee terms of reference explained that the Scheme would rehabilitate and compensate 'every person who at any time or in any place suffers a personal injury (including pre-natal injury) and whether the injury be sustained on the road, at work, in the home, in the school or elsewhere or is an industrial disease'.[1235]

The National Rehabilitation and Compensation Scheme was a national equivalent of State and Territory no-fault motor accident compensation. As such, it was a legitimate reason for State governments to shelve any deliberations about the notion, which duly transpired in NSW, WA and Queensland.[1236] In Victoria and Tasmania, progress towards reform was too far advanced. The Victorian Chief Secretary declared that no-fault motor accident compensation would operate in Victoria until any federal arrangements took effect in

[1233] See, eg, 'Labor Has New Compensation, Insurance Plans', *The Sydney Morning Herald* (Sydney), 24 August 1972, 3; 'Labor Plan for 'Tied' Pensions', *The Age* (Melbourne), 24 February 1971, 14.
[1234] Allan Barnes, 'Cabinet Appoints Three-Man Committee of Inquiry: National 'Compo' on the Way: Special Income Tax Levy to Pay the Cost', *The Age* (Melbourne), 24 January 1973, 3.
[1235] National Committee of Inquiry, *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry: Volume 1* (Australian Government, 1974) 16.
[1236] For acknowledgement of the 'preliminary' Queensland considerations that were 'postponed' due to the federal scheme, see Queensland, *Parliamentary Debates*, Legislative Assembly, 11 September 1975, 346 (Sir Gordon Chalk). See also: Queensland, *Parliamentary Debates,* Legislative Assembly, 31 October 1972, 1428 (Sir Gordon Chalk).

April 1973[1237] and the Tasmanian Labor government was similarly determined. Subsections 7.3.1(a) and 7.3.1(b) explain the steps towards no-fault motor accident compensation that the NSW and WA governments had taken that the National Rehabilitation and Compensation Scheme proposal disrupted.

7.3.1(a) New South Wales

The NSW Askin conservative government steps towards no-fault motor accident compensation reflected those that had been taken in Tasmania and Victoria. Indeed, those jurisdictions' actions and shared concerns about the law of negligence likely inspired NSW action. The Askin government tasked an expert committee to examine no-fault motor accident compensation in October 1972 amid clear commitments to reform. Minister for Transport Milton Morris declared that he 'favoured the idea of something being done' for example[1238] and opposition leader and future Premier Neville Wran declared that Labor was 'anxious to see a no-fault scheme introduced'.[1239] However, the committee was short lived. Whitlam approached Premier Askin to release its chair, NSW Supreme Court Justice Charles Meares, to serve upon the Woodhouse Committee and Askin agreed. As a consequence, the committee activities ceased and any materials that it had were provided to the Woodhouse Committee. There was no further active consideration of no-fault motor accident compensation in NSW while the Whitlam government held office. However, the notion was not dismissed entirely. On 20 August 1975 for example, Transport Minister Wal Fife declared:

> In the absence of a satisfactory outcome to the National Compensation Bill with a clear indication of a reasonable timetable for commencement of a viable scheme …, the New South Wales Government will resume its own investigation of a no-fault scheme.[1240]

7.3.1 (b) Western Australia

The WA Tonkin Labor government was more advanced in its deliberations about no-fault motor accident compensation than the NSW government when the Whitlam government committed to national compensation. The government had been elected on 20 February 1971 with a policy to introduce no-fault motor accident compensation, largely based upon

[1237] Victoria, *Parliamentary Debates*, Legislative Assembly, 11 April 1973, 5370 (Ray Meagher).
[1238] New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 August 1972, 59 (Milton Morris).
[1239] New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 October 1972, 1411 (Neville Wran).
[1240] New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1975, 557 (Wal Fife).

altruistic concerns for motor accident victims' welfare. Premier John Tonkin also explained that his government had predicted that 'a much lower premium cost of motor vehicle insurance' would result if no-fault motor accident compensation was implemented.[1241] Tonkin declared that research into no-fault motor accident compensation had been 'in progress for several months' and a scheme would be 'initiated as soon as possible' in August 1971 following the February election.[1242] However, progress stalled and no reform would be made while the government encountered political and economic obstacles.

The political obstacles to no-fault motor accident compensation in WA stemmed, in part, from the circumstances of the Tonkin government election. The government had won a bare majority of one in the 51 seat WA Legislative Assembly and it held only four members in the 15-member Legislative Council. This meant that it faced continual obstruction of its legislative program such that Premier Tonkin lamented to the media that the opposition 'won't let me govern'.[1243] Compounding the situation, the government speaker in the Legislative Assembly suddenly died in October 1971 which forced a by-election and imperilled the government. Labor won the by-election but there were delays while it and the associated campaign took place. This meant the government could not progress legislation. Subsequently, worsening economic conditions in WA forced the government to 'reject or defer a number of proposals'.[1244] This apparently included its commitment to no-fault motor accident compensation which was delayed.

The government leader in the Legislative Council declared in March 1971 that 'special consideration' was necessary before a no-fault motor accident compensation Bill could be introduced although every effort was being made to 'submit legislation as early as possible'.[1245] Six months later, this sentiment was repeated[1246] and the legislation deadline became March 1973,[1247] which is the month that the Tonkin government advised that it was deferring progress on reform altogether. This deferral followed Whitlam government advice that the National Compensation Bill 1974 (Cth) would be 'along the same lines' as the Bill

[1241] J T Tonkin, 'Western Australian Labor Party's Policy Speech for 1971' (Speech delivered at the WA Labor Party 1971 State Election Policy Launch, Perth, 3 February 1971) 9.
[1242] Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 August 1971, 619 (John Tonkin).
[1243] Quoted in Ronda Jamieson, *Charles Court* (St George Books, 2011) 249.
[1244] Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 October 1972, 3627 (John Tonkin).
[1245] Western Australia, *Parliamentary Debates,* Legislative Council, 25 March 1972, 15 (Bill Willesee).
[1246] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 September 1972, 3026 (John Tonkin).
[1247] Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 October 1972, 4022 (John Tonkin).

that the Tonkin government proposed.[1248] Publicly, therefore, the Tonkin government shelved its no-fault motor accident compensation policy because of the proposed Whitlam government Scheme. No doubt this decision was facilitated by the significant political and economic obstacles that it faced to reform however.

7.3.1(c) States' Rights

The Whitlam government national compensation proposal was an option for 'national' no-fault motor accident compensation in its own right. This is because the National Compensation Bill 1974 (Cth) proposed to compensate all forms of accidental injury and disease, including from motor accidents. However, the Bill failed after the Senate Standing Committee on Constitutional and Legal Affairs, which comprised both Labor and Coalition parliamentarians, unanimously rejected its contents.[1249] The Committee directed government to further explain how the Bill would impact State insurers, the States and the economy generally.[1250] It also felt that the Bill benefits should extend to other groups and noted 'serious doubts' about the constitutional validity of its proposal to abolish individuals' rights to court-ordered damages for personal injury or death from accident.[1251] The Whitlam government revised its Bill in response to the Committee report and hoped to re-introduce an amended version.[1252] However, the government was dismissed on 11 November 1975 and lost the subsequent federal election.

The principal assistant to the Woodhouse Committee, Professor Geoffrey Palmer, nominated four key groups that he believed had 'political weight' in the fact that the National Compensation Bill 1974 (Cth) failed. They were State governments, the legal profession, insurers and trade unions.[1253] Palmer was unflattering about the motivations of insurers and lawyers at times. Singling out one insurer proposal for example, Palmer reflected that it was among 'the most unabashedly self-serving proposals ever advanced to

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[1248] Western Australia, *Parliamentary Debates,* Legislative Council, 28 March 1973, 332 (Jerry Dolan).
[1249] Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Clauses of the National Compensation Bill 1974* (1975) 7.
[1250] Ibid 8.
[1251] Ibid 7.
[1252] Commonwealth, *Parliamentary Debates,* Senate, 22 October 1975, 1975 (John Wheeldon).
[1253] Trade unions wanted the proposed benefits to match pre-injury earnings rather than a consistent proportion of pre-injury earnings which was the Whitlam government proposal: see, eg, David Twomey, 'Compo Plan Rejected', *The Australian* (Sydney), 25 November 1974, 1.

a policy-making body'.[1254] Similarly, in respect of lawyers' demands, Palmer suggested that 'much' of their opposition was 'motivated by financial self-interest'.[1255] Palmer insisted that lawyers' opposition was integral to Victorian government hostility to national compensation[1256] and the fact that conservative governments presided in all States but SA and Tasmania was important. This is because relations between Prime Minister Whitlam and some conservative State Premiers, particularly in Queensland and WA, were acrimonious. There was also real concern from State governments about the financial implications of national compensation for State insurers. The WA Minister for Labour and Industry Bill Grayden explained, for example, that the Court government had opposed the National Compensation Bill 1974 (Cth) as:

> [w]e felt it to be an attack on the right of the State to administer compensation. State schemes have been tailored to their own individual needs so far as was practicable and by personnel experienced in the catering to those needs. It would have resulted in serious calculable financial loss to Western Australia and a further greater financial loss, the extent of which we were unable to calculate[1257]

7.3.2 'Co-operative' National Compensation

Defeat of the National Compensation Bill 1974 (Cth) did not signal the end of federal attempts to implement national compensation. Before the 1975 federal election, the Fraser government had committed to 'co-operative' national compensation[1258] and on 10 May 1976, the Minister for Social Security Senator Margaret Guilfoyle convened a meeting with State Ministers to discuss the policy.[1259] Guilfoyle explained that the meeting purpose was to ascertain whether State Ministers 'wished to co-operate with the Commonwealth [and introduce national compensation] …; whether they preferred to

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[1254] Geoffrey (later Sir Geoffrey) Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, 1979) 195.
[1255] Ibid 184. See also George Negus, 'Money and Morality as Lawyers Turn Lobbyists', *The Australian Financial Review* (Sydney), 24 October 1974, 2.
[1256] Palmer, above n 1254, 175. For an outline of Victorian government opposition to national compensation see: 'State Against National Compensation', *The Age* (Melbourne), 16 October 1973, 2; Ian Hamilton, 'State to Fight Compo Scheme', *The Herald* (Melbourne), 15 October 1973, 1.
[1257] Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 May 1976, 950 (Bill Grayden).
[1258] See Stuart Simson, 'Liberals' New Compensation Scheme', *The Australian Financial Review* (Sydney), 18 November 1975, 1. Labor had also committed to compensation reform: see 'Labor Pledge on No-Fault Third Party', *The Australian* (Canberra), 29 November 1975, 8.
[1259] This meeting complemented discussions that were taking place between government and private insurers, welfare organisations, motorists' organisations, employers, unions and the legal profession: see, eg, 'States Asked to Talks on Compensation', *The Canberra Times* (Canberra), 10 March 1976, 10.

develop plans separately on a State-by-State basis, or whether they preferred to continue with existing arrangements'.[1260] Guilfoyle described the 'burdensome cost to motorists' of existing approaches and the 'unsatisfactory treatment' of motor accident victims before the legal system as justifications for reform. The Minister hoped that national compensation could improve the 'financial protection' for victims and also 'reduce the cost burden' for motorists and employers.[1261]

The Fraser government had a model on which to base its proposal for 'co-operative' national compensation. In their submissions to the Senate inquiry into the National Compensation Bill 1974 (Cth), all State governments besides the Dunstan government in SA had expressed support for an 'alternate' compensation scheme. This scheme involved State governments providing no-fault motor accident compensation for all accidental injuries sustained by wage earners and motor accident victims for the first 52 weeks of injury and then the federal social security system would compensate injuries that lasted longer.[1262] As the NSW submission explained, this scheme was advocated because the funding sources for compensation were 'readily available' in State-based accident compensation schemes but States were 'no longer capable of coping with long-term incapacity'.[1263] In SA, the Dunstan government did not endorse the alternate scheme but nonetheless indicated support for no-fault motor accident compensation as part of a 'no-fault system' that gave 'full cover to everyone 24-hours a day regardless of whether they are at work or at home, whether they are members of the workforce or not'.[1264] The WA Motor Vehicle Insurance Trust (MVIT) submitted that no-fault motor accident compensation could be 'instituted and operated …

[1260] Margaret Guilfoyle, 'The Progress on Compensation', *The Sydney Morning Herald* (Sydney), 21 May 1976, 6.
[1261] Margaret Guilfoyle, 'New Help for Road Victims', *The Australian* (Sydney), 10 June 1976, 10.
[1262] See Evidence to Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, Perth, 11 April 1975, 2150-1 (Edward Morton, General Manager, State Government Insurance Office of Western Australia); Tasmanian Government, Submission No 38 to Senate Standing Committee on Constitutional and Legal Affairs, *Clauses of the National Compensation Bill 1974 (Cth),* 2 April 1975, 4; New South Wales Government, Submission No 29(pt 1) to Senate Standing Committee on Constitutional and Legal Affairs, *Clauses of the National Compensation Bill 1974 (Cth)*, December 1974, 3; New South Wales Government, Submission No 29 (pt 2) to Senate Standing Committee on Constitutional and Legal Affairs, *Clauses of the National Compensation Bill 1974 (Cth),* April 1975, app.
[1263] New South Wales Government, Submission No 29 (pt 1), above n 1262, 3.
[1264] Evidence to Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, Adelaide, 14 April 1975, 2451.

in a very short time' by the Trust with 'minimal, if any, increase in the cost of administration'.[1265]

These statements supported the prospects for no-fault motor accident compensation and in May 1976, Minister Guilfoyle acknowledged that her talks with State Ministers had identified the 'alternate' scheme as the 'starting point for further planning'.[1266] However, the alternate scheme did not proceed. The Labor Ministers from SA and Tasmania lampooned the 10 May talks,[1267] which caused Guilfoyle to lament that 'some States consider it necessary to play politics on this issue'.[1268] Nonetheless, a steering committee to examine and develop reform options was appointed. By October 1976 however, the group had met twice with no progress.[1269] Guilfoyle acknowledged that not all States were 'prepared to commit themselves to participating' in reform in November 1976[1270] and media quoted government sources declaring that there was little hope for legislation.[1271] Minister for Health Ralph Hunt reiterated Fraser government support for co-operative national compensation in February 1977.[1272] However, in June, Guilfoyle acknowledged that both the SA Dunstan government and the Queensland Bjelke-Petersen government were reluctant to co-operate.[1273] Nine months later, the Fraser government was still to ascertain whether there was 'any mood among the States' for reform.[1274] In September 1978, Guilfoyle acknowledged that the government did not expect 'to be making an imminent announcement' about national compensation.[1275]

Three key factors discouraged State governments from collaborating with the Fraser government on co-operative national compensation. First, State governments sought a 'financial contribution' from the federal government if they were to introduce no-fault

[1265] Motor Vehicle Insurance Trust of Western Australia, Submission No 21 to Senate Standing Committee on Constitutional and Legal Affairs, *Clauses of the National Compensation Bill 1974 (Cth),* 25 November 1974, 2.
[1266] Guilfoyle, 'The Progress on Compensation', above n 1260.
[1267] See, eg, 'Compensation Talks Waste of Time - Ministers', *The Sydney Morning Herald* (Sydney), 11 May 1976, 2.
[1268] Guilfoyle, 'The Progress on Compensation', above n 1260.
[1269] See discussion of committee activities at Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 October 1976, 2853 (Bill Grayden).
[1270] Commonwealth, *Parliamentary Debates,* Senate, 9 November 1976, 1709 (Margaret Guilfoyle).
[1271] See David Broadbent, 'States Go Cold on National Compo', *The Age* (Melbourne), 10 November 1976, 3.
[1272] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 1977, 482 (Ralph Hunt).
[1273] Commonwealth, *Parliamentary Debates,* Senate, 2 June 1977, 1853 (Margaret Guilfoyle).
[1274] Commonwealth, *Parliamentary Debates,* Senate, 15 March 1978, 587 (Margaret Guilfoyle).
[1275] Commonwealth, *Parliamentary Debates,* Senate, 19 September 1978, 680 (Margaret Guilfoyle).

motor accident compensation.[1276] This is because new classes of victim would acquire compensation eligibility. However, the Fraser government was unwilling to increase funding. In addition, adding a further complication, some States had committed against increasing the financial burden upon their constituents. In Queensland, for example, the Bjelke-Petersen government had pledged 'no increases in rates of government taxes, charges, fares or freights' and a 'zero overall growth policy' in the number of Queensland public servants.[1277] This made reform unlikely.

The second key factor that discouraged State governments from co-operative national compensation was acrimony with the Fraser government over its 'New federalism' policy. 'New Federalism' was a revised approach to federal-State financing arrangements that permitted States to levy personal income tax[1278] and receive a fixed percentage of federal personal income tax revenue determined by the Commonwealth Grants Commission.[1279] The policy was received enthusiastically by State governments at first as they welcomed this alternative to the 'centralist' Whitlam government policies but this position shifted. State governments were 'dismayed' at the Fraser government's proposed limitations upon the percentage of federal personal income tax revenue that they could receive.[1280] They also drew 'little consolation' from their ability to levy personal income tax and did not support the decision to index federal personal income tax thresholds.[1281] Conservative WA Premier Charles Court declared that there were 'shades of the Whitlam government' in aspects of 'New Federalism'[1282] and that its elements were 'evil'.[1283] SA Labor Premier Don Dunstan asserted that:

[1276] See, eg, Western Australia*, Parliamentary Debates*, Legislative Assembly, 17 August 1977, 669 (Bill Grayden).
[1277] Queensland, *Parliamentary Debates,* Legislative Assembly, 22 September 1977, 870 (Bill (later Sir William) Knox).
[1278] *Income Tax (Arrangements with the States) Act 1978* (Cth).
[1279] See *Advisory Council for Intergovernmental Relations Act 1976* (Cth); *Commonwealth Grants Commission Act 1976* (Cth); *Local Government (Personal Income Tax Sharing) Act 1976* (Cth); *States (Personal Income Tax Sharing) Act 1976* (Cth); *Income Tax (Arrangements with the States) Act 1978* (Cth).
[1280] R S Parker, 'Political and Administrative Trends in Australian Federalism' (1977) 7(3) *Publius* 35, 50.
[1281] Ibid.
[1282] A Peachment and G S Reid, *New Federalism in Australia: Rhetoric or Reality?* (Australian Political Studies Association, 1977) 24.
[1283] 'Premiers Join in Attack on Federal 'Intrusion'', *The Age* (Melbourne), 1 February 1977, 14.

> [t]he Prime Minister and the Treasurer seem intent on destroying the ability of the States to operate as viable regional units and on ensuring that units of State government have neither the financial nor constitutional powers to increase the measure of local community control[1284]

It is unlikely that, given this acrimony, State governments would collaborate with the federal government on co-operative no-fault motor accident compensation.

Indeed, some State governments made political capital from appearing at odds with the federal government, which is the third key factor that discouraged State governments from co-operative national compensation. Patience wrote that Premier Bjelke-Petersen maintained a 'populist political struggle against Canberra' throughout his time in office for example.[1285] Similarly, in SA, the Dunstan government was accused of 'entrenched anti-centralism'.[1286] The Bjelke-Petersen animosity was strongest against the Whitlam government[1287] but the Premier also criticised the Fraser government and federal-State relations were described as 'frosty rather than poisonous' once Fraser assumed office.[1288] Indeed, following a period of heightened acrimony after Fraser banned sand mining on Queensland's Fraser Island in 1977, Bjelke-Petersen mused about an independent Queensland, drawing comparisons between Queensland and sovereign nations such as NZ, Papua New Guinea and Nauru.[1289] The Premier reflected that 'Queensland would run its own affairs' and have 'its own flag, seat in the United Nations, international airline, and overseas ambassadors', and concluded that 'I am here to say we are not Australians – we are Queenslanders'.[1290] It was unlikely while the Queensland government mused about independence that it would co-operate on national compensation.

[1284] South Australia, *Parliamentary Debates*, House of Assembly, 12 April 1977, 3289 (Don Dunstan).
[1285] Allan Patience, 'State Politics in Australia: Queensland and the Emerging Crisis in Australian Federalism' in Allan Patience (ed), *The Bjelke-Petersen Premiership 1968 - 1983 Issues in Public Policy* (Longman-Cheshire, 1985) 3, 13.
[1286] Allan Patience, 'Federal Relations' in Andrew Parkin and Allan Patience (eds), *The Dunstan Decade: Social Democracy at the State Level* (Longman Cheshire, 1981) 238, 253.
[1287] See discussion in Hugh Lunn, *Johannes Bjelke-Petersen: A Political Biography* (University of Queensland Press, 2nd ed, 1984) 148.
[1288] John Wanna and Tracy Arklay, *The Ayes Have It: The History of the Queensland Parliament 1957-89* (ANU E Press, 2010) 377.
[1289] See Lunn, above n 1287, 257.
[1290] Quoted in Raymond Evans, *A History of Queensland* (Cambridge University Press, 2007) 228-9.

7.3.3 State and Territory Considerations

The failure of successive federal attempts at national no-fault motor accident compensation did not signal the end of policy deliberations about the notion at State level. As subsection 7.3.2 noted, all State governments had expressed support for no-fault motor accident compensation in submissions to the Senate inquiry into the National Compensation Bill 1974 (Cth). Further, *Cover Note* reported that State governments were examining the Victorian scheme in 1976 'because it settles claims quickly'[1291] and in 1977, the Insurance Council of Australia declared that all State Premiers had expressed support for no-fault motor accident compensation to it.[1292] This suggested that reform could occur but as the following subsections explain, governments for the ACT, NSW, Queensland, SA and WA failed to act.

7.3.4 Australian Capital Territory

The anticipated cost was the most significant factor that discouraged no-fault motor accident compensation in the ACT. Throughout the 1970s and early 1980s, no-fault motor accident compensation attracted strong support in the ACT from academics, *The Canberra Times*[1293] and expert inquiries. In 1979, for example, an independent report recommended that a Trust should be established in the ACT like the WA MVIT to administer a no-fault scheme.[1294] Subsequently, in 1980, a select committee of the advisory ACT House of Assembly urged the implementation of no-fault motor accident compensation 'as a matter of urgency'[1295] and there was also support from the Council of ACT Motor Clubs.[1296] Altruistic benefits were one explanation for the support of no-fault motor accident

[1291] Centre for Professional Development (Vic), 'Other States May Follow Vic MAB 'No Fault' Scheme' (1976) 2(11) *Cover Note* 4.
[1292] Letter from Insurance Council of Australia to Minister for Social Security, 13 May 1977, 2-3 in National Archives of Australia, Minister for Social Security, A12909, Second, Third, Fourth and Fifth Fraser Ministries – Cabinet Submissions (with Decisions), 1975-1983, 1827, Submission No 1827: Proposed Commonwealth/State National Compensation Scheme – Decision 4360, 1977, 17.
[1293] See, eg, Crispin Hull, 'Time for a Fight', *The Canberra Times* (Canberra), 23 February 1981, 12; Nicholas, Seddon, 'Fault Principle in Insurance', *The Canberra Times* (Canberra), 1 April 1981, 29; Alastair Morrison, 'The Advantages of a No-Fault System of Third-Party Insurance', *The Canberra Times* (Canberra), 14 August 1981, 2; Editorial, 'A Matter of Justice', *The Canberra Times* (Canberra), 1 July 1982, 2; Editorial, 'Vested Interests', *The Canberra Times* (Canberra), 1 July 1982, 2; Editorial, 'Compensation for Injury', *The Canberra Times* (Canberra), 5 July 1983, 2.
[1294] M A Bassett, *Report on Compulsory Third Party Motor Vehicle Insurance in the ACT* (Department of the Capital Territory (Cth), 1979) 9.
[1295] See Select Committee, Australian Capital Territory House of Assembly, *Report of the Select Committee on Compulsory Third Party Motor Vehicle Insurance for the ACT* (1980) 51. See also Carol Sides, 'No-fault Accident Plan to Contain Premiums', *The Canberra Times* (Canberra), 8 October 1980, 1.
[1296] Alex McKernan, 'Third-Party Insurance', *The Canberra Times* (Canberra), 29 July 1985, 2.

compensation although, like other jurisdictions' experience, there were also anxieties about ACT third party insurance premiums' levels. In 1979, Morrison noted that ACT third party insurance premiums were 10 times the level of the equivalent premium in the NZ capital, Wellington for example.[1297] Some explanations for third party insurance premiums' level in the ACT were higher average wages, high hospitalisation charges and the absence of an intermediate court to determine claims.

The ACT demands for no-fault motor accident compensation preceded a 1984 announcement from federal Attorney General Gareth Evans that the Hawke government had agreed 'in principle' to no-fault motor accident compensation for the ACT.[1298] This agreement was part of a Hawke government commitment to facilitate 'co-operative' national compensation,[1299] which would begin with the introduction of pure no-fault motor accident compensation in all States and Territories.[1300] Evans rationalised that the law of negligence was an 'erratic lottery'[1301] and a 'great many badly injured people get nothing at all' while others were 'under or over-compensated'.[1302] Evans also expressed concerns about the 'mounting costs' of compulsory third party insurance.[1303]

Evans wrote to all State Premiers and the NT Chief Minister seeking their support for the Hawke government proposal and the federal Minister for Territories and Local Government assumed responsibility for progressing no-fault motor accident compensation in the ACT.[1304] An actuary was costing this option when Evans made his announcement[1305] and the Law Council suggested that a 'pilot scheme' could be established in the ACT to guide any interstate reform proposals.[1306] The ACT Law Society warned that characteristics peculiar to

[1297] Alastair Morrison, 'Trapped on the Third Party Roundabout', *The Canberra Times* (Canberra), 2 December 1979, 7.
[1298] Gareth Evans, 'The Commonwealth Government's Perspective' in Faculty of Law, Australian National University and Attorney-General's Department (Cth) (eds), *Personal Compensation for Injury: Proceedings of a Seminar* (AGPS, 1985) 142, 148.
[1299] See Gareth Evans, 'Law and Justice Policy' (Speech delivered at the Federal ALP Policy Launch, Melbourne, 23 February 1983) 8; Gareth Evans, 'Labor's Law and Justice Program: The First Four Months' (Speech delivered at the Australian Society of Labor Lawyers National Conference, Brisbane, 2 July 1983) 14.
[1300] See Angela Bowne, 'Labor's Legal Package' (1983) 18(2) *Australian Law News* 9, 11.
[1301] Commonwealth, *Parliamentary Debates,* Senate, 4 May 1984, 1604 (Gareth Evans).
[1302] Gareth Evans, 'Law and Justice Policy', above n 1299, 8.
[1303] Gareth Evans, 'The Commonwealth Government's Perspective', above n 1298, 146.
[1304] Ibid 148.
[1305] Ibid 148-9.
[1306] Law Council of Australia, 'Reminder to Government on No-Fault Compensation Plans' (1984) 19(9) *Australian Law News* 30, 30.

the ACT such as 'higher average weekly earnings' and fewer motorists to contribute premiums meant that no-fault motor accident compensation would be more costly than anticipated.[1307] Indeed, the NRMA, who was the monopoly third party insurer in the ACT, cautioned that no-fault motor accident compensation would increase the number of claims 'considerably' and produce no reduction in the level of premium.[1308] In 1981, the NRMA estimated that no-fault motor accident compensation could increase ACT premiums by between 10 and 20 per cent.[1309]

The prospect of significantly increased third party insurance premiums was an obvious disincentive to no-fault motor accident compensation in the ACT. In addition, the Hawke government did not progress its plan for co-operative national compensation. *The Canberra Times* editorialised in 1989 that a 'lot of the heat' had gone out of demands for no-fault motor accident compensation 'because of the record of state-run no-fault compensation systems … [which] … have been at best costly at worst inefficient, unworkable fiascoes'.[1310] Citing the example of Victoria for example, where the estimated outstanding liability for the Motor Accidents Board reached $161.2 million at 30 June 1986,[1311] the newspaper concluded that 'no-fault schemes cost too much'.[1312] Cumpston also blamed federal government refusals to provide additional funding as a further explanation for non-transfer.[1313] In his initial announcement, Evans had disclosed that he was authorised to enter discussions about 'possible forms of [federal] assistance for governments contemplating the introduction of a no fault Transport Accident Scheme and broader no-fault compensation schemes'.[1314] However, as economic conditions deteriorated in the 1980s, no federal funding was forthcoming. Thus, the Hawke government decision against reform, negative lessons interstate and no federal funding discouraged no-fault motor accident compensation in the ACT.

[1307] David Harper, 'Discussion' in Faculty of Law, Australian National University and Attorney-General's Department (Cth) (eds), *Personal Compensation for Injury: Proceedings of a Seminar* (AGPS, 1985) 152-3, 152.
[1308] K H Wilson, 'Third Party Insurance', *The Canberra Times* (Canberra), 4 September 1979, 2. See also NRMA, 'Why Every Motorist Has to be Covered by Third Party Insurance', *The Canberra Times* (Canberra), 31 July 1979, 7.
[1309] Teresa Mannix, 'NRMA's No-Fault Proposal', *The Canberra Times* (Canberra), 15 August 1981, 3.
[1310] Editorial, 'Injury Without Compensation', *The Canberra Times* (Canberra), 13 July 1989, 8.
[1311] Motor Accidents Board, *Thirteenth Annual Report* (Government Printer, 1986) 19.
[1312] Editorial, 'Injury Without Compensation', above n 1310.
[1313] J R Cumpston, 'Australia's Accident Compensation Muddle' (1989) 14 *Insurance Record of Australia and New Zealand* 309, 312.
[1314] Evans, 'The Commonwealth Government's Perspective', above n 1298, 148.

7.3.5 New South Wales

NSW deliberations about no-fault motor accident compensation advanced to a later stage than the preliminary explorations in the ACT. Before the 1978 NSW State election, the Wran Labor government committed to introduce no-fault motor accident compensation.[1315] This followed a 1975 assertion by future Minister for Transport Peter Cox that there was a 'real need' for the concept[1316] and the State Labor Council also lobbied the Attorney-General to enact reform in 1976.[1317] Wran disclosed that the Government Insurance Office in NSW (GIO) had assured the government that no-fault motor accident compensation could be introduced 'without increasing premiums and with no additional cost to motorists'.[1318] This removed a factor that had discouraged policy transfer interstate. However, as the NSW Law Reform Commission (NSWLRC) disclosed in 1984, progress towards implementation was slow. In 1979, a letter to government from the General Manager of the GIO outlined a proposal that included no-fault motor accident compensation.[1319] This led to an inter-departmental committee and a Cabinet submission that broadly adopted the GIO proposal.

The Cabinet submission was brought before Cabinet in 1980 but withdrawn on 13 January 1981 amid concerns about cost.[1320] The NSW economy had been sluggish since the Wran government election in 1976 and in 1980-81, an escalation in drought relief expenditure contributed to a budget deficit of more than $29 million which was followed by a deficit approaching $60 million in 1981-82.[1321] The Wran government funded the additional relief expenditure by 'cutbacks in other areas of government spending'[1322] and one apparent casualty was the commitment to no-fault motor accident compensation. Like the ACT, the government nominated funding considerations and the fact that other

[1315] See discussion of policy commitments in Scott Bennett, 'The 1978 Election' in Michael Hogan and David Clune (eds), *The People's Choice: Electoral Politics in 20th Century New South Wales 1968 to 1999 Volume Three* (Parliament of New South Wales and University of Sydney, 2001) 147, 162.
[1316] New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1975, 555 (Peter Cox).
[1317] See discussion at New South Wales, *Accident Compensation: A Transport Accidents Scheme for New South Wales*, above n 886, 103.
[1318] Neville Wran, 'Policy Speech' (Speech delivered at the 1978 NSW State Election Australian Labor Party Campaign Launch, Ryde, 19 September 1978) quoted in New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 August 1981, 132 (Bruce McDonald).
[1319] New South Wales Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for New South Wales*, above n 886, 104.
[1320] Ibid.
[1321] Russell Ross, 'The Economy', in Troy Bramston (ed), *The Wran Era* (Federation Press, 2006) 143, 149.
[1322] Ibid.

countries' schemes had 'run into financial difficulties' as the reason for shelving its commitment.[1323]

The Wran government had not rejected no-fault motor accident compensation for NSW altogether however when it shelved its 1978 election commitment. Within months, the government had commissioned the NSWLRC to inquire into aspects of compensation for injury or death from transport accidents generally. This included an entreaty to consider whether no-fault motor accident compensation should be implemented and whether statutory no-fault benefits should replace common law rights.[1324] The NSWLRC inquiry was a forum that could recommend no-fault motor accident compensation and legal bodies in both NSW and Victoria voiced anticipatory concerns about any proposal to abolish or restrict damages.[1325] The Law Society of NSW outlined a draft no-fault motor accident compensation scheme but the NSWLRC was unpersuaded.[1326]

The NSWLRC felt that retaining damages for personal injury or death from motor accident disproportionately assisted victims with minor injuries that could prove fault compared to seriously injured victims that were unable to prove fault.[1327] The NSWLRC recommended that the government should introduce pure no-fault motor accident compensation whereby individuals' rights to damages for personal injury or death from transport accident were abolished.[1328] In addition to the altruistic benefits of assisting individuals that would otherwise not receive compensation or would receive significantly less compensation, the NSWLRC also reasoned that pure no-fault motor accident compensation was 'more likely to control costs.[1329] Indeed, Neave estimated that the Victorian approach, which retained

[1323] New South Wales, *Parliamentary Debates,* Legislative Assembly, 13 August 1981, 132 (Bruce McDonald).
[1324] New South Wales Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for New South Wales*, above n 886, v.
[1325] See, eg, Don McLachlan, 'President's Message' (1983) 21 *Law Society Journal* 263, 263; Law Society of New South Wales, 'No-Fault Accident Compensation Proposals' (1983) 21 *Law Society Journal* 272; David Miles, 'The Lack of Compensation in Total No-Fault Compensation' (1983) 57 *Law Institute Journal* 960; Michael Tubbs, 'NSW Accident Compensation Scheme: No Fault or No Rights?' (1983) 8 *Legal Service Bulletin* 209; Law Institute of Victoria, 'Institute Campaigns for Enhanced Victorian Dual Compo System' (1984) 58 *Law Institute Journal* 39, 39; Louis A Coutts, 'The Rule of Law and the Common Law' (1985) 59 *Law Institute Journal* 72, 73.
[1326] Law Society of New South Wales, 'The Society's No-Fault Transport Injury Compensation Proposals' (1984) 22 *Law Society Journal* 208, 208.
[1327] New South Wales Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for New South Wales*, above n 886, 158.
[1328] Ibid xxxix.
[1329] Ibid 147.

damages entitlements, was likely to be '60 per cent more expensive' than the scheme that the NSWLRC proposed.[1330]

The NSWLRC recommendation entreated government to transfer a notion that had been accepted in NZ and for most drivers in the NT but there was no transfer. Rather, acting entirely in response to actuarial advice of what was necessary to reduce third party insurance premiums, the Unsworth Labor government introduced the Transcover scheme ('Transcover'). As subsection 6.3.6 explained, Transcover abolished damages for personal injury or death from transport accident in favour of statutory benefits as the NSWLRC recommended. However, rather than rely upon proof of injury to decide statutory benefits' eligibility (no-fault), Transcover required applicants to prove that their harm was the result of another's negligence. Treasurer Ken Booth explained that 'NSW simply cannot afford the substantial additional cost of a no fault scheme',[1331] which was estimated to cost up to 4.3 per cent more than an equivalent type fault scheme.[1332] As subsection 6.3.6 explained, the Unsworth government lost the 25 March 1988 NSW State election and the Greiner government abolished Transcover in the *Motor Accidents Act 1988* (NSW).

The *Motor Accidents Act 1988* (NSW) did not introduce no-fault motor accident compensation. Victorian experience had demonstrated that combining court-ordered damages and no-fault motor accident compensation could involve prohibitive costs. As such, severe damages restrictions or even their abolition were warranted. Yet, the Greiner government had been elected on a platform to restore motor accident victims' damages entitlements so it could not consider their abolition. Further, some influential stakeholders demanded damages' retention. The NRMA, for example, accepted that no-fault motor accident compensation would involve 'considerable savings, mainly in the cost of litigation' but insisted that damages entitlements should remain.[1333] Similarly, the NSW legal bodies supported no-fault motor accident compensation but maintained their strident opposition to abolition of damages entitlements.[1334] The Greiner government had pledged to reduce third party insurance premiums which provided a further disincentive to no-fault motor

[1330] Marcia Neave, 'Why No-Fault Compo Scheme Needs improving', *The Australian* (Sydney), 8 August 1983, 7.
[1331] New South Wales, *Parliamentary Debates,* Legislative Assembly, 14 May 1987, 12229 (Ken Booth).
[1332] New South Wales, *Parliamentary Debates,* Legislative Council, 29 May 1987, 1308 (Jack Hallam).
[1333] Editor, 'Case for No-Fault Injury Insurance' (1982) 60(2) *Open Road* 3, 3.
[1334] See, eg, M H McHugh, 'Some Compensation Facts', *The Sydney Morning Herald* (Sydney), 2 June 1983, 8; Tim Dare, 'Lawyers Want Right to Sue with No-Fault Compensation', *The Australian* (Sydney), 4 August 1983, 9.

accident compensation and the government opted against reform. Subsection 6.3.6 explains the significant statutory damages restrictions that government made in the *Motor Accidents Act 1988* (NSW) even without no-fault motor accident compensation.

7.3.6 Queensland

The Queensland Bjelke-Petersen government expressed support for 'the introduction of the 'no-fault' concept' in its supplementary submission to the Senate Standing Committee inquiry into the National Compensation Bill 1974 (Cth).[1335] However, in the years immediately following, no steps were taken to introduce the notion or co-operate with other opportunities for reform. As subsection 7.3.2 explained, the Bjelke-Petersen government was an early opponent to collaborating with the Fraser government co-operative national compensation proposal and did not act upon a draft scheme that the Queensland Law Society prepared for it in 1979 with Bar Association endorsement.[1336] Further, there was no co-operation with the Hawke government co-operative national compensation plan.

The Bjelke-Petersen government showed some further interest in no-fault motor accident compensation in 1983 but again decided against reform. Attorney General Nev Harper stated that there was 'some merit' in the notion[1337] and a special committee that government tasked to examine third party insurance premiums was supportive.[1338] The committee felt that introducing the notion 'ought not to present any real difficulty' based upon Tasmanian experience[1339] and recommended that the 'possibility' of no-fault motor accident compensation should 'be kept under review'.[1340] This produced no reform. However, in 1985, the committee was 'reactivated' to consider the 'no blame situation" and 'staggered payments'.[1341] The impetus was a rise in claims' cost to the State Government Insurance Office (SGIO) from $93 million in 1983 to $151 million in 1985.[1342] The committee could recommend no-fault moor accident compensation but when Deputy Premier Bill Gunn

[1335] Queensland Government, Submission No 5 (suppl) to Senate Standing Committee on Constitutional and Legal Affairs, *Clauses of the National Compensation Bill 1974*, 10 April 1975, 2.
[1336] See discussion in G A Murphy, 'The Case Against No-fault Accident Compensation' (1985) 15 *Queensland Law Society Journal* 317, 318-9.
[1337] Queensland, *Parliamentary Debates*, Legislative Assembly, 1 December 1983, 436 (Nev Harper).
[1338] Committee of Inquiry, *Report of the Committee of* Inquiry, above n 1054, 67-68.
[1339] Ibid 68.
[1340] Ibid 69 (rec 25).
[1341] Queensland, *Parliamentary Debates*, Legislative Assembly, 22 August 1985, 90 (Bill Gunn).
[1342] Ibid.

released a proposal to amend motor vehicle third party insurance in February 1987 that stemmed from its deliberations,[1343] there was no mention.

The positive financial position of the Queensland third party insurer was one explanation why no-fault motor accident compensation did not transfer to Queensland. Unlike its interstate counterparts, the SGIO was not experiencing significant losses on third party insurance. Rather, when the SGIO became Suncorp in 1987, the new insurer reported a surplus on its third party insurance business[1344] and Premier Bjelke-Petersen praised the 'financial strength and stability' of the organisation.[1345] This 'financial strength' relieved the government of political sensitivities associated with third party insurance premium increases that had facilitated reform interstate. Indeed, from 1967-68 to 1982-83, the cost of third party insurance relative to consumer prices and average weekly earnings in Queensland decreased for most motorists.[1346] As a consequence, third party insurance involved 'no greater financial strain on most motorists [in 1983] than it did 15 or 16 years ago'.[1347] Deputy Premier Gunn claimed that the Queensland third party insurance system was 'sound [in November 1985] whereas those in southern States are in dire financial straits'.[1348] This 'soundness' was facilitated by the fact that damages awards in Queensland were lower than other States, 'particularly NSW and Victoria', according to Bjelke-Petersen.[1349]

The absence of significant political and stakeholder demands for no-fault motor accident compensation was another explanation why the notion did not transfer to Queensland. As previously mentioned, the Queensland Law Society developed a draft no-fault scheme proposal in 1979 but by 1988, Labor parliamentarian and future Treasurer Keith De Lacy noted that both the legal profession and insurers had reservations about the notion for Queensland.[1350] Indeed, one Labor parliamentarian insisted that no-fault motor accident compensation did not transfer due to opposition from FAI Insurance Ltd (a major third party

[1343] Queensland, *Parliamentary Debates,* Legislative Assembly, 17 March 1987, 679 (Bill Gunn).
[1344] Suncorp, *Annual Report 1987* (1987) 13.
[1345] Ibid 2.
[1346] Committee of Inquiry, *Report of the Committee of* Inquiry, above n 1054, 4.
[1347] Ibid 5.
[1348] Queensland, *Parliamentary Debates*, Legislative Assembly, 5 November 1985, 2203 (Bill Gunn).
[1349] Queensland, *Parliamentary Debates*, Legislative Assembly, 13 May 1981, 1195 (Joh (later Sir Joh) Bjelke-Petersen).
[1350] Queensland, *Parliamentary Debates*, Legislative Assembly, 27 October 1988, 2083 (Keith De Lacy).

insurer in Queensland).[1351] Jim Fouras also blamed federal government unwillingness to reimburse Queensland for the anticipated federal savings in Medicare and social security benefits.[1352] Queensland Labor did not commit to the notion and there was little public demand for reform. Indeed, Morrison criticised Australian motorists for displaying a reticence to campaign for no-fault motor accident compensation in 1979[1353] and in Queensland, according to Charlton, residents resisted policy change 'more readily and more effectively' than other Australians.[1354] The Queensland media, who could have championed reform, attracted criticism both for a 'profound lack of competition[1355] and for reflecting the 'predominant conservatism'.[1356]

Compounding the external disinterest in no-fault motor accident compensation was the dynamics of policy development within the Bjelke-Petersen government itself. As Walter explains, the 'dominance' of Bjelke-Petersen in Cabinet meant that its 'deliberative capacity was reduced, authority became more and more concentrated in the Premier and his own advisers, and [the Premier] established a monopoly over central agency permanent heads'.[1357] This suggested that if no-fault motor accident compensation was to proceed, it needed the support of Bjelke-Petersen. However, according to Wanna and Arklay, Bjelke-Petersen 'generally neglected' social policy and community welfare policy.[1358] Atiyah also identified a 'general ebbing of enthusiasm' about no-fault motor accident compensation among governments in the early 1980s that he traced to a 'conservative backlash' against further expansion in government activity and increases in taxes and social security.[1359] Atiyah reasoned that the belief in individual responsibility that conservatives' favoured 'couples well' with retention of the law of negligence[1360] and Bjelke-Petersen government sentiments provided support. Attorney General Bill Lickiss declared that 'as a

[1351] Queensland, *Parliamentary Debates,* Legislative Assembly, 4 September 1985, 736, 934-5. (Jim Fouras).
[1352] Ibid 932.
[1353] Morrison, 'Trapped on the Third Party Roundabout', above n 1297, 7.
[1354] Peter Charlton, *State of Mind: Why Queensland is Different* (Methuen Haynes, 1983) 234.
[1355] John Wallace, 'Reporting the Joh Show: The Queensland Media' in Margaret Bridson Cribb and P J Boyce (eds), *Politics in Queensland 1977 And Beyond* (University of Queensland Press, 1980) 203, 206.
[1356] Colin A Hughes, *The Government of Queensland* (University of Queensland Press, 1980) 307.
[1357] James Walter, 'Johannes Bjelke-Petersen: The Populist Autocrat' in Denis Murphy et al (eds), *The Premiers of Queensland* (University of Queensland Press, 2003) 304, 321.
[1358] Wanna and Arklay, above n 1288, 461.
[1359] P S Atiyah, 'No Fault Compensation: A Question That Will Not Go Away' (1980) 54(2) *Tulane Law Review* 271, 274.
[1360] Ibid.

general statement, there is nothing unjust in a person not being held liable [to fund compensation] where he is not at fault'.[1361] The Bjelke-Petersen government also positioned itself as a 'small government' reformer favouring reduced or abolished taxes.[1362] Both sentiments did not support the extension of government responsibilities to provide no-fault motor accident compensation. Thus, the absence of a financial imperative to reform; absence of obvious demand for reform; negative lesson drawing and political conservatism provided explanations for why no-fault motor accident compensation did not transfer to Queensland.

7.3.7 South Australia

The Bjelke-Petersen government disinterest in no-fault motor accident compensation contrasted to the approach of successive governments in SA. In February 1976, the Minister for Labour and Industry in the Dunstan Labor government declared that he believed SA should 'look seriously at a more comprehensive no-fault scheme'.[1363] Subsequently, after the May 1976 'exploratory talks' on co-operative national compensation between State Premiers and Minister Guilfoyle, Dunstan advised that 'the various aspects of third party insurance, including no-fault compensation, are being investigated' and a report would be submitted to Cabinet.[1364] This offered the promise for reform but there was no further announcement and it seemed that government interest waned. In his policy speech before the 17 September 1977 State election,[1365] Dunstan did not mention no-fault motor accident compensation at a time when, according to Patience, a recession struck the SA economy 'suddenly and savagely'.[1366] The 1977 State Budget had forecast a deficit of $18.4 million and the Premier explained that the Budget was 'being brought down against a backdrop of a steadily deteriorating national economy with markedly increasing unemployment and no reduction in inflation'.[1367] In February 1978, the estimated deficit in SA had risen to $26 million after a $6 million shortfall in receipts and a $5 million increase in

[1361] Queensland, *Parliamentary Debates*, Legislative Assembly, 1 May 1979, 4347 (Bill Lickiss).
[1362] Wanna and Arklay, above n 1288, 378.
[1363] South Australia, *Parliamentary Debates*, House of Assembly, 11 February 1976, 2254 (John Wright).
[1364] South Australia, *Parliamentary Debates*, House of Assembly, 27 July 1976, 185 (Don Dunstan).
[1365] Don Dunstan, 'Policy Speech' (Speech delivered at the 1977 SA State Election ALP Policy Launch, Festival Theatre, 28 August 1977).
[1366] Andrew Parkin, 'Embracing the Dunstan Decade: A Tale of Two Elections' in Dean Jaensch (ed), *The Flinders History of South Australia* (Wakefield Press, 1986) 475, 479.
[1367] South Australia, *Parliamentary Debates*, House of Assembly, 6 October 1977, 27 (Don Dunstan).

expenditure.[1368] Unemployment reached 7.5 per cent of the SA working age population in September 1977, which was a fifth greater than the national average.[1369]

The adverse economic conditions did not mean that the possibility for no-fault motor accident compensation had disappeared from SA political debate altogether. This is because, on 6 April 1977, the Tonkin Liberal opposition announced a no-fault motor accident compensation policy. The policy was apparently facilitated by altruistic concerns for victims' wellbeing and was 'based largely on the Victorian Government's scheme'.[1370] Opposition leader David Tonkin estimated that the proposal would, on average, likely add $10 to the average cost of $90 for third party insurance but he felt that this was warranted in light of the anticipated benefits.[1371] Tonkin explained that the proposal was intended to 'reduce the delays and high costs of legal and litigation procedures'. He also quoted from an article that was critical of the law of negligence and reiterated sentiments from SA Supreme Court judge Keith Sangster.[1372] Tonkin was hopeful that the Liberal scheme 'may spread, and apply in all States and Territories'.[1373] However, the Liberal opposition was defeated at the 1977 SA State election.

The 1977 election result did not signal the end of deliberations about no-fault motor accident compensation in SA. While Premier Dunstan may not have pursued the notion, his successor, Des Corcoran, committed to reform after Dunstan suddenly resigned due to ill health on 15 February 1979. Like interstate pledges, this commitment was facilitated by a deteriorating financial position of the State Government Insurance Commission (SGIC). A 10 per cent increase in the maximum third party insurance premium in 1979 had exerted limited impact upon an underwriting loss on the SGIC third party insurance business of more than $17 million.[1374] Thus, when describing the reform, a March 1979 discussion paper noted that high third party insurance premiums and 'substantial legal costs' were reasons for reform. Also, the paper noted altruistic considerations such as the subjectivity of courts' approaches to deciding compensation; protracted delays in damages awards and social

[1368] South Australia, *Parliamentary Debates*, House of Assembly, 2 February 1978, 1741 (Don Dunstan).
[1369] Humphrey McQueen, *Gone Tomorrow: Australia in the 80s* (Angus & Robertson, 1982) 11.
[1370] South Australia, *Parliamentary Debates*, House of Assembly, 6 April 1977, 3244 (David Tonkin).
[1371] Ibid 3245.
[1372] Ibid 3244.
[1373] Ibid 3245.
[1374] State Government Insurance Commission (SA), *Annual Report 1979* (1979) 6.

justice inadequacies.[1375] Minister of Transport Geoff Virgo suggested that legislation was imminent on 12 August 1979.[1376] However, no reform eventuated after the Corcoran government called an early election for 15 September 1979 that it lost.

The Corcoran government electoral loss did not preclude further attempts at no-fault motor accident compensation in SA. New Premier David Tonkin had made a 'firm' commitment to introduce the notion from opposition in 1977 as mentioned[1377] and this commitment had been reaffirmed by a member of the new government in February 1979.[1378] No-fault motor accident compensation was not mentioned in Liberal policy speeches before the September 1979 State election however[1379] and there was no reference in the first Budget speech. Tonkin emphasised that government would be examining all programs and activities 'to achieve further economies of operation',[1380] which cast doubt on the prospects for no-fault motor accident compensation. Also, the Tonkin government had committed to 'small government' and 'stringent financial controls'.[1381] It seemed that financial considerations may defeat the notion but in 1980, government tasked an expert committee to examine and report on implementing a no-fault motor accident compensation scheme 'based upon the Victorian Motor Accident Act'.[1382] This was an opportunity to recommend no-fault motor accident compensation and that duly occurred.[1383] However, no reform ensued.

The primary explanation why the Tonkin government failed to transfer no-fault motor accident compensation was negative lessons from the experience in Victoria. Within months of expressing interest in the notion, Minister of Transport Michael Wilson acknowledged that 'some worries' about the Victorian scheme had emerged.[1384] Specifically, as subsection 6.3.5 explained, outstanding liabilities against the Victorian Motor Accidents Board were

[1375] South Australian Department of Transport, *Proposal for Change to Present Compulsory Third Party Insurance Arrangements: Discussion Paper* (South Australian Government, 1979) 1.
[1376] South Australia, *Parliamentary Debates*, House of Assembly, 21 August 1979, 585 (Geoff Virgo).
[1377] South Australia, *Parliamentary Debates*, House of Assembly, 6 April 1977, 3245 (David Tonkin).
[1378] South Australia, *Parliamentary Debates*, House of Assembly, 28 February 1979, 3098 (Ted Chapman).
[1379] See, eg, Michael Wilson, *Liberal Party Transport Policy* (Liberal Party of Australia, South Australian Division, 1979) .
[1380] South Australia, *Parliamentary Debates*, House of Assembly, 11 October 1979, 17 (David Tonkin).
[1381] See discussion in Andrew Parkin, 'Transition, Innovation, Consolidation, Readjustment: The Political History of South Australia Since 1965' in Dean Jaensch (ed), *The Flinders History of South Australia* (1986) 292, 325.
[1382] Committee, *Report of the Committee Appointed to Examine a No Fault Third Party Insurance Scheme for South Australia* (1980) 2.
[1383] Ibid 19. See also State Government Insurance Commission (SA), above n 1374, 9.
[1384] South Australia, *Parliamentary Debates*, House of Assembly, 17 September 1981, 1002 (Michael Wilson).

high and escalating. The Board reported estimated outstanding liabilities of $41.5 million at 30 June 1979,[1385] which became $48.8 million at 30 June 1980[1386] and $48.2 million at 30 June 1981.[1387] Attorney General Trevor Griffin insisted that the Tonkin government was 'making progress on the research' in October 1981.[1388] However, both Griffin and Transport Minister Wilson had indicated that they did not want to implement a scheme that increased the costs to taxpayers and the road user.[1389] Wilson stated in September 1981 that, in light of the Victorian experience, further inquiries were undertaken because the government had to be certain that whatever reform was introduced was the 'best value available'.[1390] Subsequently, Griffin cautioned that the 'experience' in Victoria, Tasmania and the NT meant that if government introduced a scheme 'without adequate research', the policy could 'end up costing a substantial amount more' than envisaged.[1391] These sentiments did not bode well for no-fault motor accident compensation in SA and when the Tonkin government lost the 6 November 1982 State election, no reform had been made.

Like the outcome of preceding elections, the Tonkin government electoral loss did not necessarily mean the end of deliberations about no-fault motor accident compensation in SA. Rather, in April 1983, new Minister for Transport Roy Abbott established a committee to 'look at third party insurance rates and to advise the government on a no-fault system'.[1392] This inquiry was another opportunity for government to receive a recommendation to implement no-fault motor accident compensation in the context of circumstances that facilitated reform interstate. The Bannon government had announced that SA third party insurance premiums would increase by 12.5 per cent following its election and the SGIC had made a $12 million loss.[1393] Minister for Transport Abbott explained that the 'problem' of controlling third party insurance premium increases was 'massive' and blamed higher damages awards, particularly for pain and suffering; a 'greater willingness to pursue claims'

[1385] Motor Accidents Board, *Sixth Annual Report* (Government Printer, 1979) 11.
[1386] Motor Accidents Board, *Seventh Annual Report* (Government Printer, 1980) 11.
[1387] Motor Accidents Board, *Eighth Annual Report* (Government Printer, 1981) 9.
[1388] South Australia, *Parliamentary Debates,* Legislative Council, 27 October 1981, 1568 (Trevor Griffin).
[1389] South Australia, *Parliamentary Debates*, House of Assembly, 17 September 1981, 1002 (Michael Wilson); South Australia, *Parliamentary Debates,* Legislative Council, 27 October 1981, 1568 (Trevor Griffin).
[1390] South Australia, *Parliamentary Debates*, House of Assembly, 17 September 1981, 1002 (Michael Wilson).
[1391] South Australia, *Parliamentary Debates,* Legislative Council, 27 October 1981, 1586 (Trevor Griffin(.
[1392] Jottings, 'South Australia: No-fault Insurance' (1983) 8 *Insurance Record of Australia and New Zealand* 139, 139.
[1393] South Australia, *Parliamentary Debates*, House of Assembly, 10 May 1983, 1357 (Roy Abbott).

and higher salaries, hospital and medical costs especially.[1394] However, there was again no reform.

As subsection 6.3.3 explained, concerns about third party insurance premiums' level in SA facilitated statutory damages restrictions in the *Wrongs Act Amendment Act 1986* (SA). However, there was no movement on no-fault motor accident compensation. Apparently, this was because the Hawke government refused to commit federal funding as part of its co-operative national compensation commitment. The 1985 expert committee report that recommended statutory damages restrictions declared that '[u]ntil such time as the Commonwealth government is prepared to acknowledge the substantial financial advantage it derives from any pure State scheme … and to give States credit for it, a 'no fault' scheme even with very limited benefits faces problems'.[1395] There continued to be negative lessons from the experience of no-fault motor accident compensation in Victoria also. Thus, through a combination of electoral defeats, negative interstate lessons and absent federal funding, multiple SA proposals for no-fault motor accident compensation were defeated.

7.3.8 Western Australia

Like most other governments that failed to enact no-fault motor accident compensation in the research period, the WA Court government had expressed support for no-fault motor accident compensation when it endorsed the 'alternate' scheme submitted to the Senate inquiry into the National Compensation Bill 1974 (Cth). However, within months, this support apparently dissipated as on 24 November 1975, only days after the Whitlam government dismissal, Premier Court declared that 'no action is proposed to establish [a no-fault] scheme'.[1396] Publicly, this implied that government had lost interest in the notion. However, within government, it still attracted attention. Archival records reveal that on 5 April 1976, the WA Cabinet approved the establishment of a committee to advise government on no-fault motor accident compensation.[1397] Committee members were a recent President of the Royal Automobile Club of WA as chair plus the General Manager of the State Government Insurance Office, a consultant actuary and the longstanding manager

[1394] Ibid.
[1395] Daniell and Sangster, above n 896, 100.
[1396] Western Australia, *Parliamentary Debates,* Legislative Assembly, 24 November 1975, 5222 (Sir Charles Court).
[1397] Cabinet Minutes and Decisions, 1976/057 v02, Minute and *Decision – 5 April 1976*. State Records of Western Australia, WAS 1228, Cons 1819.

of the MVIT. This committee was a forum that, like equivalent committees interstate, could recommend no-fault motor accident compensation. However, so long as the Fraser government countenanced co-operative national compensation, the committee seemed reluctant to progress its inquiry. The committee had made no recommendations or even met formally when WA went to a State election on 19 February 1977 and that would remain the case more than a year and a half later. When the Fraser government indicated that no announcement on national compensation was imminent in September 1978,[1398] the WA Cabinet disbanded the committee. This was subject to the Minister for Local Government, June Craig, advising Cabinet on the progress of the 'Commonwealth enquiry', the constitutional position of the Commonwealth and the State 'in this field' and 'what further action (if any) should be taken in the long or short term'.[1399]

The Cabinet entreaty to Minister Craig was an opportunity for no-fault motor accident compensation to progress in WA. However, the Minister recommended against the notion. Craig relied heavily upon the fact that there was 'very little pressure for further action' and 'no real progress' on national compensation for her recommendation.[1400] Intriguingly, the Minister also submitted that 'it is of doubtful equity that no fault insurance should be introduced purely in respect of motor vehicle accidents'.[1401] In other words, Craig suggested that if the Court government was to implement no-fault motor accident compensation, then it should be in the context of a universal accidental injury compensation scheme. The absence of any media or stakeholder demands for reform likely facilitated the ministerial recommendation. Despite their question about no-fault motor accident compensation in November 1975, Labor parliamentarians were silent. Significantly, the MVIT was also trading profitably in WA, which meant that a critical factor that had facilitated transfer of no-fault motor accident compensation interstate was also not present.

The political disinterest in no-fault motor accident compensation persisted in subsequent years. The conservative government and Labor opposition did not mention the notion in their policy statements before the 1977 WA State election. This was in contrast to election

[1398] Commonwealth, *Parliamentary Debates,* Senate, 19 September 1978, 680 (Margaret Guilfoyle).
[1399] Cabinet Minutes and Decisions, 1978/190 v3, *Minute and Decision – 16 October 1978,* State Records of Western Australia. WAS 1228, Cons 1819.
[1400] See Ibid 2
[1401] Ibid 3.

commitments in SA and NSW. Also, although Premier Court acknowledged that no-fault motor accident compensation was 'being considered' in November 1979, he stressed that 'no action is proposed to introduce such a scheme'.[1402] There was no mention of no-fault motor accident compensation in a 1980 Court government report on its first six years in office[1403] and there was no mention of the notion by the subsequent O'Connor conservative government.

The government position on no-fault motor accident compensation shifted following the 25 February 1983 WA State election when the Burke Labor government was elected. New Minister for Transport Julian Grill explained that WA Labor was committed to a national system of compensation for accident victims irrespective of fault.[1404] This accorded with the Hawke government co-operative national accident compensation commitment[1405] and WA Minister for Transport Grill signalled that the Burke government had corresponded with federal Attorney General Evans on the subject.[1406] This suggested that reform could occur. However, despite the Hawke government proposal purportedly emanating from discussions with State Labor Attorney-Generals,[1407] the WA government took no action.

There are four likely explanations why the Burke government appetite to transfer no-fault motor accident compensation dissipated. First, there was no indication that the Hawke government would provide any funding to support the transfer which, as the experience in SA and other jurisdictions demonstrated, provided a disincentive. Second, the financial circumstances that facilitated no-fault motor accident compensation in other States such as significant losses on third party insurance or unsustainable pressure to increase premiums were not present in WA. As subsection 6.3.4 mentioned, the MVIT was purportedly a 'well-run, tight ship' at this time[1408] and 'highly regarded' and 'performing well'.[1409] Third, the fact that government could expect strident stakeholder opposition was another likely disincentive. The Hawke government planned to abolish damages for personal injury or

[1402] Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 November 1979, 5222 (Sir Charles Court).
[1403] See Liberal/NCP Government of Western Australia, *The First Six Years, 1974-1980* (1980) .
[1404] Western Australia, *Parliamentary Debates,* Legislative Assembly, 2 May 1984, 7723 (Julian Grill).
[1405] See Evans, 'Law and Justice Policy', above n 1299, 8; Evans, 'Labor's Law and Justice Program', above n 1299, 14.
[1406] Western Australia, *Parliamentary Debates,* Legislative Assembly, 2 May 1984, 7723 (Julian Grill).
[1407] Angela Browne, 'The Compensation Time Bomb', *The National Times* (Sydney)*,* 6-12 March 1983, 37.
[1408] Western Australia, *Parliamentary Debates,* Legislative Assembly, 3 July 1986, 1313 (Richard Court).
[1409] Ibid 1314.

death from motor accident as part of its national compensation proposal which, as was the case interstate, attracted criticism from trade unions, legal bodies[1410] and the insurance industry. Highlighting the financial interests at stake, which influenced stakeholders' response, one insurer advised that loss of damages would 'probably reduce their incomes by about one third'.[1411] Fourth, by the time the Burke government came to consider the Hawke government proposal, the aforementioned concerns about the cost of no-fault motor accident compensation, particularly in combination with damages, had begun to emerge. Together, these considerations discouraged transfer of no-fault motor accident compensation.

7.4 Conclusion

This chapter has explained the results of the fourth case study examined for this research. Its focus was the factors that facilitated and more particularly restricted policy transfer of no-fault motor accident compensation within Australia from 1973 to 1989. The chapter found, consistent with the origins of statutory injury compensation in other case studies, that the source for no-fault motor accident compensation was policy in other Anglosphere nations, namely NZ, Canada and the US. Reform was facilitated by dissatisfaction with the law of negligence and its requirement for proof of fault. Also, governments perceived that no-fault motor accident compensation could alleviate pressure upon government to increase third party insurance premiums. No-fault motor accident compensation had support from expert inquiries who, like other case studies, were an important transfer agent. However, despite strong expectations, no-fault motor accident compensation did not transfer beyond Victoria, Tasmania and the NT.

A Whitlam government proposal to introduce national compensation was an initial disruption of NSW and WA plans for no-fault motor accident compensation. Political and economic obstacles also made the prospects for reform in WA unlikely. The Whitlam proposal incorporated an option for 'national' no-fault motor accident compensation but it did not proceed. This followed concerns about the constitutionality of a proposed clause that abolished damages for personal injury or death from accident and State government

[1410] See, eg, Law institute of Victoria, 'How Would the Injured Fare Under National Compo?' (1983) 57 *Law Institute Journal* 523; Law Council of Australia, 'Reminder to Government on No-Fault Compensation Plans', above n 1306.
[1411] See Browne, above n 1407, 37.

fears about adverse financial implications for State insurers. Successive Fraser and Hawke government attempts to facilitate co-operative national compensation also failed amid concerns about cost, strained relations between the federal and State governments and federal unwillingness to provide additional funding. These considerations defeated transfer of no-fault motor accident compensation to the ACT, which was predominantly a federal responsibility in the research period.

Governments in NSW, Queensland, SA and WA examined no-fault motor accident compensation independently of the federal attempts at legislation. Indeed, governments or oppositions in all four jurisdictions endorsed or committed to the notion during the research period but none legislated. There were three factors that defeated government commitments particularly. First, on two occasions in SA, government and opposition commitments foundered at election when the proponent party lost. Second, and particularly in WA and Queensland, the case for reform was not met. That is, no stakeholders campaigned for reform, State third party insurers traded profitably and/ or conservative political ideology discouraged reform. Third, and most significantly, statements in all four jurisdictions suggested that governments did not pursue no-fault motor accident compensation in large part because of negative lessons from the experience of governments that had.

This evidence of lesson drawing discouraging policy transfer in this study contrasted to other studies' experience. It was common in other studies for the passage of beneficial legislation to precipitate interstate political pressure for governments to act. Alternatively, as Chapter 6 and the 'backlash' against statutory criminal injuries compensation demonstrated especially, interstate legislation could illustrate ways that governments might moderate compensation expenditure. By contrast, interstate legislation in this study discouraged transfer due to the rapid deterioration in financial performance of no-fault motor accident compensation in Victoria particularly. No-fault motor accident compensation, particularly when combined with damages entitlements, was perceived as prohibitively costly and the political sensitivities of damages abolition were too severe. Hence, there was no transfer.

CHAPTER 8
DISCUSSION

8.1 Introduction

This Chapter consolidates findings from the four case studies examined in Chapters 4 – 7. Its aim is to synthesize insights from the studies and address the research question while contributing to academic knowledge on policy transfer. The chapter is organised in accordance with the questions that Dolowitz and Marsh developed to assist policy transfer researchers (sections 8.2 to 8.7 tackle each of these questions in turn). Each section elaborates policy transfer characteristics that this research identified and addresses the evidence for assertions about policy transfer from past studies. This includes evidence for the characteristics of transfer in Australia that Carroll asserted in 2012.[1412] According to the research findings, policy transfer made a substantial contribution to the evolution of statutory injury compensation in Australia. There were three broad explanations for transfer, five key actor groups and transfer traced a consistent pattern beginning with the transfer of foreign policy and then interstate transfer. Copying was initially the most popular transfer degree but this gave way to combinations of policies, and then emulation and inspiration. Governments transferred multiple policy transfer objects and there were varied factors that facilitated and restricted policy transfer. The following sections explain.

8.2 What is transferred?

The 'objects' transferred in this research reflected the eight objects that Dolowitz and Marsh identified in their 1996 and 2000 articles, namely policy goals, policy content, policy instruments, programs, institutions, ideologies, ideas and attitudes, and 'negative lessons'.[1413] At the start of the twentieth century, the hard transfer of policy content and instruments occurred almost exclusively before the soft transfer of notions and ideas, not necessarily accompanied by content, increased in the second half of the twentieth century. Negative lessons were an important transfer object within the research as Chapter 7 demonstrated particularly.

[1412] Carroll, above n 56.
[1413] Dolowitz and Marsh, 'Learning from Abroad', above n 41, 12.

8.3 From where are lessons drawn?

The three locations for lesson-drawing that Dolowitz and Marsh identified, being the 'international', 'national' and 'local' levels, were sources for transfer in this research. The most common source was between sub-national or 'local' governments. However, as the following subsections explain, transfer also occurred from the international to sub-national levels; from the sub-national level to the national level; from foreign sub-national levels to the Australian sub-national level and from the national level to the sub-national level.

8.3.1 'International' level

International transfer, being transfer from and between international bodies and institutions, was not a significant source of policy transfer in this research. In part, this reflected the limited attention that international bodies gave to the examples of statutory injury compensation examined in this research. Only one study incorporated transfer from an international document (the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*) and this was facilitated by the involvement of SA Attorney General Chris Sumner and a SA crime victims' representative. The ILO produced Workmen's Compensation Conventions but, as section 4.7 explained, these were not ratified in the research period.

8.3.2 'National' level

Transfer from the national level occurred in all case studies as the federal, State and Territory governments copied, emulated and were inspired by foreign nations' policy. The influence of foreign lessons was most pronounced at the inception of statutory injury compensation in each study. This supported the Dolowitz and Marsh finding that an 'international movement' toward reform facilitated transfer.[1414] However, there were examples of national transfer after schemes' inception, typically from the UK and NZ. Because State and Territory governments had primary responsibility for statutory injury compensation examined in this research, the incidence of transfer from the domestic national level to sub-national level(s) was limited. The workers' compensation case study provided some of the few examples.

[1414] Ibid 17.

There were no examples of national transfer from non-English-speaking nations. Indeed, only in passing was the policy of non-English speaking governments noted and then generally only in expert inquiry reports. Further, the only English-speaking nations that governments transferred policy from were Anglosphere nations. This was despite the presence of fellow Commonwealth, English-speaking nations in Asia that relied upon similar statutory injury compensation characteristics. The *Workmen's Compensation Act 1923* (India), for example, compensates any personal injury 'caused to a workman by accident arising out of and in the course of his employment'.[1415] Emulating no-fault motor accident compensation legislation, the *Motor Vehicles Act 1988* (India) also confers an amount of compensation for death or 'permanent disablement'[1416] arising out of the use of a motor accident irrespective of any wrongful act, neglect or default of the person in respect of whose death or disablement the amount is sought.[1417] A recommended outcome of this research is that policy makers explore opportunities for more transfer from non-Anglosphere and non-English speaking nations (see Chapter 9).

8.3.3 'Local' level

Transfer among States or Territories at the local level (interstate transfer) was the most popular source of policy transfer in this research. The transfer occurred during the development of colonial employers' liability legislation and continued and accelerated post-federation. No States were more likely to transfer than others and no States favoured transfer from one State or Territory over another. The research revealed that once one State or Territory legislated, this significantly increased the likelihood that other States and Territories would legislate as it precipitated demands for reform and comparative analysis. It was clear in all case studies that governments and their political oppositions monitored interstate developments. Stakeholders acknowledged interstate experience in their submissions to government and a standard aspect of expert inquiry reports was a section

[1415] *Workmen's Compensation Act 1923* (India) s 3(1). See also *Work Injury Compensation Act* (Singapore, cap 354, 2009 rev ed).
[1416] 'Permanent disablement' means any injury or injuries involving: (a) permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint; (b) destruction or permanent impairing of the powers of any member or joint; or (c) permanent disfiguration of the head or face': *Motor Vehicles Act 1988* (India) s 142.
[1417] *Motor Vehicles Act 1988* (India) s 140(4). See also *Motor Vehicles (Third Party Risks and Compensation) Act* (Singapore, cap 189, 2000 rev ed).

that compared interstate positions. There were also forums such as the Standing Committee of Attorney Generals that facilitated discussion and the exchange of ideas among members.

The local level transfer in this research occurred not only between Australian sub-national governments but also from foreign sub-national governments. Examples were the aspects of Washington State and West Virginian legislation transferred to the *Workers' Compensation Act 1915* (Qld). Details of Canadian province and US State approaches towards no-fault motor accident compensation also informed local reform. As with national transfer, the foreign sub-national governments that governments transferred statutory injury compensation characteristics from were exclusively English-speaking jurisdictions and specifically US States and Canadian Provinces.

8.4 Who are the key actors involved in the policy transfer process?

There were five key actor groups involved in policy transfer in this research. They were parliamentarians; expert inquiries; interest groups; actuaries and judges.

8.4.1 Parliamentarians

Parliamentarians' involvement stemmed from their responsibilities for introducing, scrutinising, debating and, at times, drafting legislation that transferred policy. Parliamentarians facilitated transfer by effectively acting as transfer agents for reform. SA Labor Attorney General Chris Sumner pioneered and promulgated UN Declaration characteristics in Australia for example. Further, conservative NSW Attorney General Kenneth (later Sir Kenneth) McCaw was instrumental to NSW enacting statutory criminal injuries compensation. Parliamentarians also insisted upon transfer of combinations of policy as the workers' compensation case study demonstrated. More commonly in this research however, parliamentarians restricted transfer predominately due to two broad concerns. First, there was anxiety about the financial implications that a particular statutory injury compensation characteristic could have for businesses and/ or individuals, which was an aspect of the workers' compensation case study. Second, parliamentarians' opposition could stem from altruistic considerations. An example was Tasmanian Legislative Council members' opposition to an attempt to emulate aspects of the Assistance approach to statutory criminal injuries compensation, essentially because it reduced monetary compensation.

8.4.2 Expert inquiries

Expert inquiries, which were typically undertaken by retired or serving judges, bureaucrats, academics or other subject matter experts, were an important actor in this research. Governments relied upon expert inquiries in all case studies to examine and recommend options for statutory injury compensation and frequently inquiry recommendations framed government legislation. Inquiry recommendations dictated the transfer that governments pursued, the sources of transfer, the degree of transfer and whether transfer occurred at all. There was no evidence that inquiries transferred policy from standard sources or jurisdictions aside from the aforementioned bias towards Anglosphere nations. Similarly, no governments were more inclined to accept or reject inquiry recommendations or favour recommendations of particular content. The research revealed that the estimated cost of a recommendation, unsurprisingly, influenced whether it was accepted or not. Further, governments could drastically alter the effect of a recommendation when they enacted their response based upon concerns about cost. The Unsworth government Transcover scheme that was introduced following a NSWLRC recommendation for pure no-fault motor accident compensation provided a stark illustration.

8.4.3 Interest groups

Interest groups such as legal bodies, private insurers, trade unions and crime victims' advocates facilitated and restricted policy transfer. In SA, the VOCS and its executive director Ray Whitrod were active in facilitating transfer of UN Declaration Principles in 1986 for example. Trade unions also campaigned for governments to transfer aspects of NZ legislation in early workers' compensation legislation. Further, private third party insurers facilitated transfer of NSW third party insurance aspects to the ACT. More commonly however, and increasingly in the later periods of this research, interest groups' actions frustrated policy transfer. As Chapter 6 illustrated, legal bodies consistently opposed attempts to restrict damages for personal injury or death from motor accident. This was often by releasing alternate reform proposals that were then adopted by opposition parliamentarians or government. Legal bodies' ability to marshal former clients that attested to the benefits of damages entitlements aided their demands. Lawyers may also have benefited from the perception that they were apolitical as opposed to some other

interest groups such as unions or business groups that were perceived as aligned with the Labor and Liberal Parties respectively.

8.4.4 Actuaries and financial advisers

Actuaries and other individuals that advised government on compensation financial implications were a fourth key actor group involved in policy transfer in this research. Across the three studies that encompassed periods from 1950, governments frequently under-estimated the cost of statutory injury compensation. Governments under-estimated the take up of motor vehicles following World War II and the associated third party insurance claims from motor vehicle accidents for example. They also failed to anticipate the growth in claims following the significant increases in monetary statutory criminal injuries compensation, no-fault motor accident compensation introduction and higher damages awards. Governments' under- and mis-estimation of statutory injury compensation expenditure meant that they were forced to seek ways to moderate compensation expenditure which is why actuaries became important. Actuaries, either in their own capacity or as employees of government bodies such as State insurers, identified reforms that governments could take or characteristics they could transfer to moderate expenditure.

The strongest evidence of actuary and financial advisers' involvement was from the two motor accident compensation case studies. Actuaries assessed the savings that governments could make from no-fault motor accident compensation and this facilitated its transfer to Victoria, Tasmania and the NT. Predicted savings also motivated governments' decisions to restrict or abolish trial by jury in motor accident claims and dictated the design of statutory damages restrictions. Actuaries' recommendations stemmed from internal calculations of what was necessary to moderate total expenditure. There was also clear evidence of actuaries monitoring the financial performance of statutory injury compensation characteristics interstate and recommending transfer of restrictions that saved expenditure. As Chapter 7 revealed particularly, actuarial evidence of interstate statutory injury compensation characteristics proving too expensive could also discouraged policy transfer.

8.4.5 Judges

Judges were the fifth key actor group involved in policy transfer in this research. Judges involvement occurred in three ways. First, judges were members of expert inquiries as subsection 8.4.2 noted. The Law Reform Commission inquiry that recommended no-fault motor accident compensation in Tasmania was chaired by Supreme Court Judge Sir Frank Neasey for example. Second, judges were involved in transfer through their participation in drafting legislation that transferred statutory injury compensation characteristics. Future Queensland Supreme Court Chief Justice Thomas McCawley, while in his capacity as Crown Solicitor, was integral to the inclusion of US policy in the *Workers' Compensation Act 1915* (Qld) when he prepared a compendium outlining US scheme aspects. Third, judges were involved in transfer as advocates of reform in speeches, judgements and articles. In this capacity, their role was analogous to that of some media commentators and academics. No jurisdiction was more likely than others to accept judicial transfer recommendations and there was no evidence that judges had necessarily become more involved in transfer decisions. Judges were vocal in their demands for reform of the law of negligence before the introduction of no-fault motor accident compensation and continued to express criticisms before the 2002 *Review of the Law of Negligence*.

8.5 What are the different degrees of policy transfer?

Every degree of policy transfer that Dolowitz and Marsh identified in their articles such as 'copying', 'combinations', 'emulation' and 'inspiration' was present in this research. The evidence of 'copying' was strongest before and around federation when parliamentarians were comparatively inexperienced and/ or beholden to the Imperial parliament. 'Combinations' increased after the *Workmen's Compensation Act 1906* (UK) when predominantly conservative parliamentarians transferred *Workmen's Compensation Act 1897* (UK) characteristics and conservative interstate legislation. 'Emulation' and 'inspiration' emerged as the predominant degrees of policy transfer from the mid twentieth century and in the statutory criminal injuries compensation and motor accident compensation case studies.

Parliamentarians' reduced dependence upon copying reflected a more discerning approach to policy transfer across the research period. At the turn of the century, opposition parliamentarians had compelled copying of British and/or NZ workmen's compensation

characteristics in part because of unfamiliarity with the financial implications of this new legislation and deference to established foreign policy and institutions. Subsequently, dependence upon the UK declined and parliamentarians' increased familiarity with statutory injury compensation and preference to pursue their own objectives facilitated emulation. The statutory criminal injuries compensation case study demonstrated the factors that shaped transfer degree in the latter decades of this research. The UK and NZ had developed examples of government-provided criminal injuries compensation that Australian governments could copy. However, most governments emulated NSW legislation that had adapted a *Crimes Act 1900* (NSW) approach. This was because of concerns about the novelty of statutory criminal injuries compensation, cost and differing opinions of State governments' responsibility to provide compensation. As Chapter 5 explained, governments subsequently transferred interstate statutory criminal injuries compensation characteristics and then emulated Queensland and Victorian legislation or pursued individualist approaches.

8.6 Why do actors engage in policy transfer?

There was no standard explanation for why policy transfer occurred in this research. In broad terms, reflecting past studies, transfer was explained by dissatisfaction with aspects of existing policy[1418] and it typically lay towards the 'voluntary' end of the Dolowitz and Marsh transfer continuum (see Figure 2.1). The exceptions were when political demands or fiscal imperatives to reduce compensation expenditure produced indirect coercive transfer or governments were compelled to transfer characteristics such as when conservative parliamentarians insisted that governments copy the *Workmen's Compensation Act 1897* (UK). Altruistic, political and financial considerations especially explained policy transfer in this research as subsections 8.6.1 – 8.6.3 explain.

8.6.1 Altruistic explanations

Altruistic explanations, such as the desire to compensate accident victims that would otherwise receive no or inadequate compensation, were prominent at schemes' inception. They motivated mandatory third party insurance legislation that included bans upon trial by jury in motor accident claims. This is because governments were concerned that without some assurance that negligent motorists held insurance, there may be no compensation.

[1418] See, eg, Evans, 'Policy Transfer in Critical Perspective', above n 143, 259.

Altruistic concerns that crime victims may not receive adequate compensation from offenders because they lacked sufficient resources also explained statutory criminal injuries compensation. Further, in large part, altruistic considerations explained significant increases in crime victims' support during the 'phase of victim consciousness'.

Altruistic considerations were rarely the sole explanation for policy transfer in this research however. Political considerations, such as the desire to appease interest group or political opposition demands, were a factor when governments appeared to act altruistically. Opposition parliamentarians and media had demanded transfer of mandatory third party insurance for some years before governments legislated for example. Further, Labor demands and increased public sympathy for crime victims' wellbeing precipitated statutory criminal injuries compensation. Employers' liability legislation and early workers' compensation legislation was also enacted in the context of an increasingly franchised working class and politically active trade union movement. Naturally, financial considerations also tempered the extent to which governments could transfer statutory injury compensation characteristics altruistically.

8.6.2 Political explanations

'Political explanations' describes emotions such as the desire to: appease stakeholder or political opposition demands; secure public support; accord with Imperial or international tradition; and/or neutralise political opposition. Political explanations could manifest as stakeholders' insistence that government transfer interstate or international statutory injury compensation characteristics. Alternatively, stakeholders could oppose interstate or international/ national transfer. Explanations for stakeholder demands could include ideological concerns like the strident Labor opposition to transfer of a ban upon trial by jury in motor accident claims in NSW and Victoria. Stakeholders could also be motivated by self-interest, which was an accusation levelled against legal bodies for their strident opposition to statutory damages restrictions. The bodies themselves insisted that altruistic considerations motivated their actions. Parliamentarians also insisted that governments copy *Workmen's Compensation Act 1897* (UK) characteristics, in large part because its characteristics were perceived as less likely to adversely impact business.

8.6.3 Financial explanations

Financial considerations, and specifically governments' desire to control the cost of statutory injury compensation, were an increasingly dominant explanation for policy transfer in this research. It is unsurprising that financial considerations factored into parliamentarians' transfer deliberations. If governments were not funding statutory injury compensation themselves, then responsibility fell to businesses and individuals through mandatory insurance premiums. This meant that government and parliamentarians were always mindful of moderating the size of compensation expenditure and mandatory premiums in all periods of the research. However, the significance of financial considerations increased as it became clear that initial cost estimates for statutory injury compensation were under-estimated. Increasingly, throughout all case studies that examined transfer from the second half of last century, governments transferred characteristics that were explained purely or predominantly on the basis of what was expected to moderate compensation or pressure to increase mandatory premiums. Statutory damages restrictions were an obvious example. As Chapter 7 revealed, financial considerations also primarily explained why governments decided not to transfer no-fault motor accident compensation.

8.7 What restricts or facilitates the policy transfer process?

There was no one factor that facilitated or restricted policy transfer in this research. Actors' actions and the three broad explanations for policy transfer in section 8.6 were significant. 'Contextual' factors[1419] such as political conditions, language, history and culture were also important. The following subsections examine the contribution of some factors that had been found to be significant policy transfer influences in other studies.

8.7.1 'Families of Nations'

The historical and cultural ties between Australia and the UK have been acknowledged as a factor that facilitated policy transfer in past studies and that finding was supported in this research. Colonial parliaments copied multiple provisions of the *Employers' Liability Act 1880* (UK) and British provisions were also copied in early workers' compensation legislation. Subsequently, British legislation was a consistent transfer source that policy makers considered and emulation continued into recent decades. The research made it

[1419] See Benson and Jordan, above n 122, 372.

clear that parliamentarians and external stakeholders monitored discussion of statutory injury compensation in other Anglosphere nations. Overviews of UK, NZ, US and Canadian legislation were a fairly standard component of expert inquiry reports as mentioned previously. British and NZ Bills concerning statutory injury compensation circulated in Australian parliaments. Judges and academics also cited Anglosphere sources in their speeches, judgements, articles and reports. Further, at the turn of the twentieth century, British parliamentary debates were summarised in domestic newspapers.

The shared language, political structure and legal system between Australia and other Anglosphere nations was an obvious factor that facilitated this policy transfer. The synergies meant that when governments wanted to address a policy problem, there were familiar contacts and established consultation processes that they could follow. Government materials were in the same language. The research also revealed communication between Australian policy makers and their equivalents in the UK and NZ, including via delegation visits and exchange of materials. Transfer from NZ, in particular, was also likely assisted by its geographic proximity to Australia and membership of intergovernmental forums where information could be exchanged.

8.7.2 Political structure

The federal structure of Australia was another factor that past research suggested could facilitate and/ or restrict policy transfer. Authors such as Wolman contend that proximity between jurisdictions, such as between the States of Australia, facilitates policy transfer as policy makers can compare the experience of policy in familiar circumstances.[1420] This research revealed considerable evidence of interstate comparative analysis and transfer. Once one Australian State enacted a statutory injury compensation characteristic, this frequently prompted demands of other governments to transfer that characteristic. Australian governments and their advisers also had established processes to exchange views about the benefits and sensitivities of particular legislative approaches such as the Standing Committee of Attorneys-Generals.

Importantly however, the research revealed that the Australian federal structure could also restrict policy transfer as was the experience in another federal jurisdiction, the US.

[1420] Wolman, above n 141, 14.

Dolowitz has written that the 'very ability of State and local entities to develop their own law, codes and practices hinders the transfer process [in the US], even when promoted by the federal government' and that was the experience at times in Australia.[1421] Contrasting to NZ, multiple governments, advisers and interest groups must endorse statutory injury compensation characteristics for them to be accepted in all Australian jurisdictions and this multiplicity of interests provided opportunities for disagreement and non-transfer. Government responses to the *Review of the Law of Negligence* demonstrated the obstacles. Despite uniform acceptance of the need for a review and an entreaty from the Ipp Panel that State governments implement its recommendations in full, responses diverged. The reasons were different experiences of courts awarding 'excessive' damages and different attitudes towards the appropriateness of statutory damages restrictions. State government responses to federal attempts to transfer the notion of national compensation provide another example of the obstacles that a federal structure could present. In NZ, the Marshall government enacted the *Accident Compensation Act 1972* (NZ) but three successive federal attempts in Australia failed.

8.7.3 Political Ideology

Shared political ideology played a 'dominant' role in deciding where actors looked for lessons and what lessons they transferred according to Dolowitz.[1422] However, its effect in this research was limited to the workers' compensation case study. In that study, conservative parliamentarians insisted that governments transfer British Conservative party policy or conservative interstate governments' policy and Labor parliamentarians demanded transfer from the NZ and US plus legislation of other Labor governments. Shared political ideology had limited influence in the remaining case studies. As Chapter 6 discovered, Labor parliamentarians in NSW and Victoria stridently opposed abolition of trial by jury in motor accident claims. However, Labor parliamentarians in other States tolerated and even initiated bans. Similarly, although the Kennett conservative government enacted the

[1421] David P Dolowitz, 'Low Impact Development (LID): The Transfer That Was Not? How the Federal Relationship in the Area of Environmental Protection Facilitates Innovation but Mitigates Against Transfer' in Peter Carroll and Richard Common (eds), *Policy Transfer and Learning in Public Policy and Management: International Contexts, Content and Development* (Routledge, 2013) 50, 62. See also Richard Common, 'When Policy Diffusion Does Not Lead to Policy Transfer: Explaining Resistance to International Learning in Public Management Reform' in Peter Carroll and Richard Common (eds), *Policy Transfer and Learning in Public Policy and Management: International Contexts, Content and Development* (Routledge, 2013) 13, 26.
[1422] Dolowitz, 'Policy Transfer: A New Framework of Policy Analysis', above n 118, 27.

'Assistance' approach to statutory criminal injuries compensation, its characteristics were transferred by the Carr and Bligh Labor governments. Statutory damages restrictions were also enacted by both Labor and conservative governments but to different extents.

8.8 Policy Transfer in Australia

This research provided strong support for the segmentation and characteristics of policy transfer that Carroll described in 2012.[1423] As Table 8.1 (next page) explains, characteristics for each phase that Carroll identified matched case study findings well. Having said this, a few differences were apparent. Some embellishments of Carroll findings were evidence of transfer from British opposition policy and NZ policy in the second phase and considerable evidence of 'combinations' in the third phase. In the fourth phase, the research revealed no evidence of collective managed transfer and only one example of transfer based upon international agreements that Carroll reasoned were 'typical transfer characteristics' of that phase.[1424] Few international agreements have dealt with statutory criminal injuries compensation and motor accident compensation, which provides an explanation for this limited finding.

[1423] Carroll, above n 56, 658.
[1424] Ibid 663.

Table 8.1 Assessment of Transfer Sources and Carroll

Phases	Carroll	Case Studies
Phase 2 **1851 - 1901**	- 'Continuing but declining and more selective transfer' from the UK - '[A] growth of policy innovation' - '[A] marked increase in the extent of transfer between the Australian colonies, most frequently from NSW and Victoria to the newer, smaller and … less well-endowed colonies'.	- Considerable transfer from UK legislation, including substantial copying - Attempts to transfer British opposition policy, with some success - Limited policy innovation - Transfer from NZ legislation - Inter-colonial transfer, not necessarily most frequently from NSW and Victoria
Phase 3 **1902 - 1945**	- Continuing, if less frequent, transfer from the UK - Continuing transfer between the States - '[C]o-operative transfer from the States to the Commonwealth' - Growth of multilateral or 'managed' transfer pursuant to intergovernmental agreement, initially somewhat coercive	- Continuing transfer from the UK, particularly at legislation inception. - Considerable NZ transfer and a notable example of transfer from the USA - Interstate transfer emerges as the dominant transfer source - Increased policy 'innovation' as governments or conservative parliamentarians adapted British legislation to favour local business interests or advance worker interests
Phase 4 **1946 - 2012**	- Decline in transfer from Britain and increased combination of British policy with policy from other sources, including the USA and Canada; local invention and international organisations - Acceleration in collective or managed transfer, particularly from the 1990s - More rapid growth in transfer on the basis of international agreements - Continuation in long-established tradition of transfer between the State governments	- Significant decline in transfer from the UK until its almost non-existence - Transfer from NZ - One example of transfer from an international (UN) declaration - Continued, significant incidence of interstate transfer

8.9 Conclusion

This chapter has consolidated findings from the four case studies examined for this research. The chapter organised its analysis in accordance with questions from the Dolowitz and Marsh research framework and also assessed the assertions about policy transfer in Australia that Carroll made. The chapter found evidence to support the Carroll findings, although the research indicates that governments combined policy and sourced characteristics from nations besides the UK earlier than Carroll found. The research provided three broad explanations for policy transfer and, consistent with past findings, revealed that parliamentarians, interest groups, expert inquiries and judges were all key actors. Further, actuaries were also influential, particularly in more recent decades, which reflected the increased cost to government that statutory injury compensation presented. The statutory injury compensation characteristics or 'objects' transferred in this study were drawn from the 'international', 'national' and 'local' levels that Dolowitz and Marsh identified. Policy transfer processes followed a consistent pattern that began with copying or emulation of foreign policy and progressed to interstate policy transfer. A general exception to governments' increased practice of emulating or being inspired by external legislation was copying provisions that were felt to reduce costs.

The research also identified multiple factors that facilitated or restricted policy transfer. Shared political ideology had been an important factor that facilitated transfer in past studies but its impact in this research was limited. Transfer from Anglosphere nations was frequent. Indeed, highlighting the importance that shared language and cultural heritage played, there was no transfer from non-English speaking jurisdictions in any case study. The federal political structure permitted comparative analysis and interstate dialogue that facilitated transfer. However, relative to a jurisdiction such as NZ, the division of policy responsibilities among multiple States also restricted transfer as there were more actors to satisfy and different local considerations. Chapter 9 suggests some strategies to improve policy transfer based upon these case study findings.

CHAPTER 9
CONCLUSION

9.1 Introduction

This thesis has examined the research question: *what was the contribution of policy transfer during the evolution of statutory injury compensation systems in Australia?* Its methodology was a case study approach that examined four case studies drawn from the more than 170-year evolution of statutory injury compensation in Australia. The definition of policy transfer was based upon that from Dolowitz and Marsh with two minor modifications. They were that the transferred compensation characteristics had to be clearly identifiable and transfer had to occur as the result of intentional transfer. Data was compiled from documentary sources such as legislation, explanatory materials, parliamentary debates, newspaper reports, journal articles, secondary sources and archival materials. Chapter 8 synthesized the evidence of policy transfer from the case studies and this chapter suggests some improvements to future policy transfer and policy development. Section 9.2 outlines some measures that policy makers could take to improve policy transfer and reform more generally. These build upon some general suggestions for reform from other authors such as Rose.[1425] Section 9.3 contains concluding observations and suggestions for further studies.

9.2 Improving Policy Transfer

9.2.1 Broadening transfer sources

This research revealed that governments in all Australian jurisdictions have historically relied upon transfer from limited sources and policy fields when reforming statutory injury compensation. Yet, Dolowitz and Marsh and other authors explained that policy transfer, at least in concept, is possible from any jurisdiction, governance level or policy 'field'. Subsection 8.3.2 outlined some non-Anglosphere English-speaking nations that, given the overlap of their legislation with Australian practice, might have been expected to feature more in historic reform deliberations. The subsection also noted the absence of transfer

[1425] See, eg, Rose, *Learning from Comparative Public Policy*, above n 32. On page 115 (Box 8.4), Rose lists steps that policy makers might take to examine and compile external lessons. They include asking unfamiliar foreign officers questions about existing programmes; estimating the 'money, personnel and political capital available to support new measures' and brainstorming what change might be introduced. Rose also suggested some steps that policy makers could take to improve the likely success of transferred policy (see Box 9.2, page 122). Examples included adding a national feature to make a policy appear more politically attractive and accepting political demands for additions, 'so long as the cost of doing so is marginal rather than destructive of the programme's purpose'.

from non-English speaking jurisdictions. An implication of this research could be that policy makers reappraise the scope of English speaking jurisdictions whose statutory injury compensation policy they examine. Further, policy makers may also wish to increase their understanding of statutory injury compensation policy in non-English speaking jurisdictions. Rose has criticised '[i]ntroverted policymakers who ignore programmes that are developed by people who are 'not like us''.[1426] He wrote that 'programmes of countries that are unfamiliar are more likely to offer fresh and challenging insights precisely because they are distant and different'.[1427]

The study also found limited evidence of transfer across statutory injury compensation schemes or 'fields'. That is, there was little transfer from statutory criminal injuries compensation to workers compensation or from workers' compensation to motor accident compensation and vice versa for example. Transfer across compensation fields may be more accessible if schemes are conceived as comprising four key components that may be transferred across schemes. The components are: (1) benefits structure; (2) eligibility conditions; (3) funding source(s) and (4) complaints or application handling mechanisms. Lessons from empirical studies of the therapeutic benefits for crime victims of VISs may inform workers' compensation and motor accident compensation reform deliberations for example. Similarly, there may also be learnings from counselling provisions in statutory criminal injuries compensation. Given their shared objects to compensate individuals that suffered accidental injury, there would seem advantages from greater learning across statutory injury compensation fields.

9.2.2 Interrogating Transfer characteristics

The research revealed that, in all jurisdictions, governments mis-judged the financial implications of policy transfer and statutory injury compensation costs. This suggests that governments would be advised to reappraise their processes for interrogating the financial costs of policy transfer. This could involve improved assessments of the stakeholders that are expected to benefit or lose and better assessment of the implications of geography, demography, interest groups, media and parliamentary system. Assessments should also be mindful of evolving conditions and trends. In contrast to the situation when Australian

[1426] Rose, *Learning from Comparative Public Policy*, above n 32, 48.
[1427] Ibid 42.

governments enacted workers' compensation for example, 'IT-related industries employ nearly as many people in Australia as the mining industry'.[1428] Further, industry continues to demand greater harmonisation of workers' compensation benefit structures.[1429] Table 9.1 suggests some specific questions that policy makers may wish to ask about a policy for transfer.

Table 9.1 Questions to ask about the policy for transfer

1. Who were the intended beneficiaries (and losers) of the policy in the transferor jurisdiction and who actually benefited/ lost? 2. Were there individuals in the transferring jurisdiction that were expected to benefit/ lose that are not present in the transferor jurisdiction (and vice versa)? 3. What characteristics of the transferring jurisdiction differ from those in the transferor jurisdiction and could affect transfer (i.e. population size, geography, industry composition, parliamentary system, parliamentary composition)? 4. Do any aspects of the transferring jurisdiction necessitate revision of the policy for transfer, possibly due to a 'double recovery' rationale/other? 5. Why should the policy differ from an interstate approach, recognising the benefits of consistency in benefits among schemes?

In addition to questions about the policy for transfer, analysts may wish to reappraise their assessment of anticipated behavioural responses. This is because, in all case studies, governments under-estimated behavioural responses to transfer. The under-estimation included failing to anticipate: (1) an increase in claim rates following the introduction or reform of statutory injury compensation; (2) lawyers' strident opposition to attempts to restrict damages or compensation; (3) rising damages awards; and (4) wages inflation and technological change. Going forward, the case studies suggested some consistent stakeholder behavioural responses that governments should anticipate. Compensation increases have precipitated lawyers soliciting for more claims for example. Also, victims have been increasingly more likely to claim statutory injury compensation and damages. This was evidenced in the statutory criminal injuries compensation case study and the higher proportion of motor accident injuries that manifested as claims. Table 9.2 (next page)

[1428] Commonwealth Treasury, *2015 Intergenerational Report: Australia in 2055* (2015) x.

[1429] See National Insurance Brokers Association, Submission to David Murray, Chairman, Financial System Inquiry, *Financial System Inquiry,* 31 March 2014, 17; Suncorp General Insurance, Submission to David Murray, Chairman, Financial System Inquiry, *Financial System Inquiry,* 31 March 2014, 21.

suggests some questions that analysts may wish to ask about anticipated behavioural change.

Table 9.2 Questions about the transferring jurisdiction

1. What behavioural shifts followed introduction of the policy in the transferor jurisdiction (if any)?
2. How did stakeholders in the transferor jurisdiction that are also present in the transferring jurisdiction respond to the policy?
3. What behavioural shifts are expected from key actors i.e. lawyers, victims, insurers?
4. How will government respond to an increase in claims/ compensation demands?

9.2.3 Options besides Policy Transfer

The finding that policy transfer made a substantial contribution to the evolution of statutory injury compensation in Australia begs the question whether governments would be advised to explore more opportunities for innovation. Innovation could be informed by empirical findings of how hypothetical compensation characteristics performed against accepted benchmarks or localised experience and feedback. To the extent that they existed, innovations in this research responded to lesson drawing from the experience(s) of other jurisdictions and/or financial considerations. There was little evidence of empirical research about optimal statutory injury compensation characteristics informing government approaches. As Chapter 5 mentioned, although various governments insisted that restrictions upon statutory criminal injuries compensation reflected research findings, the details of this research were never publicised.

9.3 Concluding remarks

This research revealed that policy transfer made a substantial contribution to the evolution of statutory injury compensation in Australia. In light of this finding, it is important that government approaches to policy transfer are adequate. This means that there should be no inherent biases in transfer sources and the processes to interrogate implications of transfer must be comprehensive among other considerations. As the case studies revealed, governments' historic approaches to policy transfer have at times been inadequate. This chapter provided some suggestions to improve governments' approaches. Given the contribution that policy transfer has made, however, it is important that governments do not overly rely upon policy transfer. The research provided only limited examples where,

based upon internal considerations and the desire to moderate compensation expenditure, governments pursued innovation.

The research results may be the basis of further studies. Carroll wrote in 2012 that there was 'an exciting potential' for the study of other national experiences with policy transfer and for comparative studies.[1430] There is clearly huge potential to learn from non-English speaking jurisdictions and/ or non-Anglosphere, English speaking jurisdictions, and much more remains to be done in this respect. Equally, there is also much potential to learn from evidence based studies in Australia and local compensation research. Whatever reform options are considered in the future, there is little doubt that the evolution of statutory injury compensation in Australia will be an interesting learning and reform journey ahead. There is also little doubt that the extensive policy transfer ideas analysed throughout this thesis will remain relevant for decades to come. The path ahead in statutory injury compensation is likely to be just as fascinating as the paths we have followed to date.

[1430] Carroll, above n 56, 665.

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F.4 Northern Territory

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F.5 New South Wales

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F.8 Tasmania

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F.9 Victoria

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