and parcel' says Dr Griffiths 'of the growing concern that the community be seen to get value for money. Whilst there is little difficulty in identifying costs, the benefits tend to be less tangible: how do you put a financial value on the importance to an individual of being able to challenge an administrative decision?' Another voice that was added to this debate was that of Sir Arvi Parbo. Reported in the *Age*, 31 May 1983, he said that Federal and State Governments should be required to present economic impact statements to justify big changes in legislation or regulation of companies. 'We the public pay for new laws. It is only reasonable that we should know what effect they might have'. A similar proposal was recently urged on the Australian Senate by Senator Austin Lewis (Lib., Vic).

sobering thought. Finally, a sobering thought for complaining law reformers. The report of examiners on legal studies for the Higher School Certificate in the State of Victoria asked candidates to examine the role and effectiveness of a 'law reform body'. The examiners expected that, because of the high public profile of the ALRC, most would base their answers on that Commission:

> Examiners were surprised when almost every institution within the legal system, and many outside it, were dealt with by one candidate or another ... One student thought that a law reform body was 'a mental institution for insane people who have committed a crime but at the time of their action didn't know what they were doing'.

Perhaps some of the listeners to Mr Justice Dawson (above) would give the student first class honours.

fairer compensation?

'By trying, we can always learn to endure adversity – another man's.'

Mark Twain.

no fault. At the end of May 1983 the New South Wales Law Reform Commission issued a working paper on its accident compensation project. Titled *A Transport Accidents Scheme for New South Wales* the paper proposes that the common law action for damages for personal injury should be abolished for accidents arising out of the use of motor vehicles and most forms of public transport. In place of the present system of damages actions would be a statutory no-fault compensation scheme. The aim of the scheme would be to eliminate the element of chance in the amount recoverable for accident victims and to relate it directly to the seriousness of the injury suffered:

- totally incapacitated people would be paid 80% of pre-accident gross earnings;
- the maximum gross earnings for which compensation would be payable would be 125% of the average weekly earnings (about $408);
- payments would be indexed in line with increases in community average weekly earnings;
- special provision would be made for unemployed, children, school leavers and students;
- all medical, hospital and rehabilitation expenses would be met;
- additional compensation, to a maximum of $50 000, would be available for permanent disability, such as loss of limbs;
- compensation would be available to incapacitated non-earners such as full-time home makers;
- decisions to be made in the first instance by a statutory corporation with appeal to a judicial Transport Accident Appeals Tribunal. Appeals would lie by leave to the Supreme Court of New South Wales Court of Appeal.

Supporting the scheme, NSWLRC Chairman, Professor Ronald Sackville, said that in 1981 nearly 1300 people were killed and about 40 000 injured in motor vehicle accidents in the State of New South Wales. He estimated that about one third of traffic accident victims could not sue under the present third party system because there was nobody at fault. The proposed scheme had been costed by a Canberra firm of consulting actuaries. They es-

timated that it could be paid for by a charge of $112 per motor vehicle instead of $154 now paid by most motorists under the compulsory third party insurance system operating in New South Wales. The possible saving of $40 in third party premiums became a major 'selling point' of the NSWLRC working paper. A media release issued by the NSWLRC with the working paper pointed out that the estimate of $112 per vehicle in New South Wales compared favourably with the insurance cost of $181 per vehicle in Victoria, where a no-fault motor vehicle scheme exists, but without abolishing common law damages rights.

pros and cons. Needless to say, the working paper soon attracted praise and criticism. The editorial in the *Sydney Morning Herald* (31 May 1983) suggested that the NSWLC WP 'has a pretty fair chance of success, judging by early reactions'. It acknowledged that it was likely to attract significant opposition 'from only one interest group, lawyers, rather than several':

> It can be considered a first step towards a comprehensive accident compensation scheme, but in the meantime it should be discussed in isolation from its broader implications. It is limited in scope, but its advantages are too solid to be ignored. One, to which little attention has yet been paid, is that it would ease the strain on the NSW Supreme Court, which spends not far short of half its time on damages claims resulting from road accidents. Once this burden is lifted from it, the prospect of speedier justice at once opens up and that should appeal to those who go to law in this litigious State. The main advantage, however is that everybody involved in traffic accidents will be covered.

Another early supporter of the proposal was the New South Wales Attorney-General, Paul Landa. As reported in the *Sydney Morning Herald* (30 May 1983), Mr Landa said that the proposal 'could pave the way for a truly just and equitable no-fault compensation for victims of transport accidents'. Mr Landa said that he looked forward to 'informed community discussion' on the proposal. Critics of the scheme were not so kind:

- The President of the NSW Law Society, Mr Don McLachlan, said that the proposals would benefit some people but would 'seriously disadvantage those who are able to seek damages through the present system'. Mr McLachlan urged that New South Wales should follow the Victorian reforms and provide no-fault compensation in addition to, and not in substitution for, common law damages. He also cautioned that, in the long term, such systems of compensation could 'finish up with restricted benefits or taxpayers' money being used to make up the losses. Also a great cumbersome bureaucracy could be created with compensation benefits being decided behind closed doors'.

- The President of the N.S.W. Bar Association, Mr Michael McHugh QC, also criticised the NSWLRC proposal. Specifically, he criticised the abolition of the right to sue at common law for lump sum damages. He suggested that the main beneficiaries of the NSW scheme would be the Federal Government, the legal profession and motorists. He claimed that the scheme would involve 'a massive transfer to the Commonwealth of funds collected from NSW motorists. He pointed out that a quadriplegic who, under present law would receive compensation of a million dollars, would now receive $51 000 and 80% of his average weekly earnings up to a maximum limit, together with hospital and medical expenses. Professor Sackville retorted that benefits proposed by the NSWLRC could 'turn out actuarily' in the long run to be worth more than the lump sum award, many of which were soon overtaken by inflation. Mr McHugh was not convinced. In a letter to the *Sydney Morning Herald* (2 June 1983) he said that the system was based on the scheme of compensation paid to Federal employees which had proved slow and unfair. He disputed the NSWLRC assertion that one third of

accident victims miss out on compensation. He described this as 'almost fatuous'. He pointed out that NSW judges and juries had always 'bent over backwards to find fault on the part of the defendant'. He also pointed out that many motor car cases were already covered by no-fault compensation under workers' compensation legislation.

- Trade union reactions to the scheme are not yet fully known. However, Mr McHugh in his letter to the *Sydney Morning Herald* said that the unions were likely to be 'furious' about it. He claimed that it would be 'absurd' that a worker who slipped on a greasy floor at work would be entitled to full common law damages but a workmate knocked over by a registered forklift nearby would not, because it fell under the transport injuries legislation.

ongoing debate. The continuing examination of the NSWLRC working paper will get a head start with a major conference organised at the Wentworth-Sheraton Hotel in Sydney on 4 August 1983. The convenor of the conference is Professor Michael Chesterman, newly appointed ALRC Commissioner. Aspects of the NSWLRC scheme will be explained by Professor Sackville and Mr James Wood QC, NSWLRC Commissioner. Professor Chesterman is to speak on the integration of common law with a statutory scheme of compensation. That well known commentator on compensation, Mr Harold Luntz (University of Melbourne) will examine the principles to be followed in determining benefits. It can be expected that the critics of the scheme will endeavour to outline the suggested faults and anomalies. Meanwhile, elsewhere in Australia, the NSW debate is being closely watched:

- The Law and Justice Policy of the new Federal Government included an undertaking to move to the introduction of a national accident compensation scheme, in consultation with the States.

- Commenting on the NSWLRC proposals, the President of the Law Institute of Victoria, Mr Jack Harty, said that the Institute would be closely studying the working paper and the accompanying figures. However, the proposal for the abolition of common law damages as the price of a no-fault compensation scheme might not cut ice in the legal profession in Victoria, where there is both a no-fault scheme and the retention of common law damages where fault can be proved.

- In the *Australian* (27 May 1983) there was a report that four State Governments plan a joint working party to look at improving workers' compensation schemes. The proposal is said to have emerged from a meeting between representatives of Victoria, NSW, South Australia and Western Australia, four States with Labor Governments. The Victorian Minister for Labour and Industry, Mr W Landeryou, said after the meeting in Melbourne that the working party would aim to maximise benefits to genuine claimants, ease the burden of premiums paid by employers and cut the waiting times for hearing claims. If they can achieve all of these objects simultaneously, they will be doing well.

other developments. In the meantime, a few other developments that could be noted:

- The Administrative Review Council has been conducting its own examination of the Compensation (Commonwealth Government Employees) Act 1971, which Mr M McHugh QC says is the basis of the NSWLRC proposal. The Act has certainly attracted many complaints and criticisms, particularly directed at the delays in the administrative decision-making which is a precondition to independent review by the

Administrative Appeals Tribunal. The ARC report, proposing important administrative reform, has been sent to the Attorney-General after a committee of the ARC had a lengthy meeting with the Minister for Social Security, Senator Don Grimes.

- Defects in the NSW compensation law are once again called to attention by Mr Justice Enderby in *Spurway* v *Linnane and Ors*, unreported, 11 April 1983. In that case a young man was rendered quadriplegic in circumstances giving rise to a damages claim. In a normal case, the man would have recovered 'perhaps $1 million'. However, there was a limit on the defendant's insurance cover, resulting in a net actual recovery of a much lower sum. Mr Justice Enderby commented that the result was that the plaintiff 'is inadequately compensated'. He said that this situation had arisen 'not so much from any defect in our law of negligence, but rather from the inadequacies of our general system of insurance. It is a simple, straightforward statement to say that our system of compensating people by lump sum payments cannot operate unless given a proper backup system of insurance'.

- On the other hand, responding to the large rise in claims for compensation in the courts, the Queensland Government has decided on a different approach. As reported in the *Sydney Morning Herald* (11 May 1983) the Queensland State Cabinet has approved imposing a limit of a maximum of $300 000 in awards for third party motor vehicle claims. Legislation is said to be planned for later in the year. The decision is reported to be a response to recent awards of $1 million and other high payments blamed for a significant increase in third party premiums in the State. At the same time, the Queensland Cabinet was reported to have agreed to changes that will raise physical and mental injury awards arising from criminal conduct to a maximum of $38 380 for physical injury and a maximum of $20 000 for mental or nervous shock, much higher than Criminal Compensation maxima elsewhere in Australia.

- All figures now being produced by insurance companies show a marked increase in premiums for compensation insurance. A report in the *Australian* (19 March 1983) records that weekly compensation payments to injured workers could rise by 50% nationally to an 'astounding' $540 million this year. The study by Dr Greg Taylor of ES Knight and Co (the consultant actuaries for the NSWLRC) blamed the increase on 'the recession, fears of unemployment and the possibility that some employers are abusing the workers; compensation insurance system). The item was followed up by the claim that the huge burden of compensation was 'crushing Australian industry'. By the same token, injuries 'crush' the injured worker and his family too and require just compensation laws and procedures.

- Ms Susan Thompson of the Women's Bureau of the Federal Department of Employment and Industrial Relations told a conference in May 1983 that workers' compensation legislation should be reassessed to make it more accessible and relevant to occupational hazards, particularly those faced by women. She said the women were often not aware of their legal rights to workers' compensation and lacked confidence in confronting safety officers and workers' compensation courts. She also said that safety legislation in Australia concentrated on frankly dangerous tasks rather than simple repetitive tasks such as factory work and use of electronic keyboards on which women could suffer repetitive

injuries. She said that there was not much point in reviewing compensation laws without having regard to the knowledge of victims about the defence of their legal rights.

- Finally, in launching a book, 'Sport, the Law and You', for the Confederation of Australian Sport, the ALRC Chairman called attention to the growing number of sporting contests which 'end up as legal contests'. He referred to the decision of Mr Justice Fox in *McNamara* v *Duncan* (1971) 26 ALR 584 where compensation was awarded for injuries received in a breach of the rules of Australian rules football. He also referred to various moves towards statutory sporting injury compensation schemes. He said that moves for special schemes for sporting injuries, crime injuries, industrial injuries and motor vehicle injuries should all be seen as 'staging posts' on the journey of the law to a more just, coherent and principled approach to the compensation of victims of accidents.

aboriginal law cont'd

Racism is the snobbery of the poor.
Raymond Aron

end fiction? The ALRC continues its work on the inquiry into the recognition of Aboriginal customary laws. The reference, begun in 1977, asks whether it would be desirable to recognise Aboriginal customary laws (ACL) and, if so, what form the recognition should take. Recognition could be partial or complete, geographically confined to Aborigines living in tribal areas only, or not so confined. The most recent report on the work on this inquiry is contained in [1982] *Reform* 125. Since then, under the leadership of Professor James Crawford, the Commission has been actively pursuing its program of research and consultation. On the weekend of 7-8 May 1983 a major workshop was held in Sydney jointly organised by the ALRC and the Australian Institute of Aboriginal Studies. Present were leading consultants of the ALRC, including anthropologists and lawyers from all parts of Australian. The meeting was opened by the new Federal Minister for Aboriginal Affairs, Mr Clyde Holding. Mr Holding gave the participants a 'pep talk' on the need to reconsider the view taken by the High Court of Australia concerning the basic relationship between white and Aboriginal Australians. In the course of his talk, Mr Holding called attention to the decision of the High Court in *Coe* v *Commonwealth* (1979) 53 ALJR 403. In that case, the Court held that Australia owed no recognition to Aboriginal laws because the country had been acquired as a 'settled colony' rather than by conquest. Wherever Britain acquired territory by conquest it followed international law and arranged a treaty with the conquered peoples. Such treaties generally offered some recognition of local laws. Treaties of this kind were effected in America, India and Africa. No such treaties were ever made in Australia, because of the theory that the country had been virtually uninhabited and so acquired by settlement, not conquest. Mr Holding told the ALRC workshop that this was nothing more than a 'legal fiction'. He urged the Commission to reconsider the 'fiction' and to explore the implications of an acknowledgement, 200 years on, that Australia had been acquired from the Aboriginal people by conquest, not by settlement. In the light of the Minister's statement, the ALRC Chairman said that the Commission would be examining this question. The Senate Standing Committee on Constitutional and Legal Affairs, which met the ALRC Commissioners on 21 June, is already inquiring into the constitutional and legal implications of a Makarrata or treaty with the Aboriginal people.

resolutions passed. The 25 participants in the Sydney workshop gave special attention to the feasibility of introducing a form of local justice mechanism within traditional Aboriginal communities. The aim would be to enable the communities to deal with their community disputes and local law and order problems. Various models were discussed, emphasis be-