SUBMISSION TO SIRA – CTP GREEN SLIP REVIEW:

Claims Handling & Insurance Super-Profits

By Philip W. Bates, 5.12.2016

1. I attended the recent SIRA public consultations on insurer super-profits (on 18.11.2016) and claims handling (on 21.11.2016). The following comments reflect some points I made that day.

2. I have been busy in my private bar practice, I hope these additional submissions will be considered.

DATA INTERPRETATION

3. I suspect that under the current scheme, injured claimants receive more than 45 cents in the dollar out of green slip premium income, after advance compensation received after their mva has been *'added back'*. Most injured claimants receive public hospital and Medicare services from the date of accident. Many claimants also receive weekly support in the form of Centrelink benefits. These are a form of advance compensation that is really part of the claimant's total benefits received by the end of their claim. The Health Insurance Commission (in respect of Medicare payments) and Centrelink recover the advance compensation when the CTP claim is finalised. These repayments do not show up in the final settlement cheques issued by CTP insurers to finalise the claim so give the false impression that total benefits are less than they actually are, and give the false impression that costs are higher than they actually are.

4. SIRA and the Government should defer any major reform of claims handling and benefits until enough time has passed to collect data to monitor the effect of the new costs regulations that commenced on and with effect from 1 November 2016 (by amendments made to the *Motor Accidents Compensation Regulation 2015).*

CAUSATION (ie nexus) DISPUTES

5. A no-fault scheme (even in a hybrid model) does not prevent causation (nexus) disputes, but the proposed no-fault scheme is likely to structure these and decide these disputes unfairly against injured claimants.

6. Even in a no-fault scheme, decisions must be made. and lines have to be drawn on causation issues such as: did the asserted injuries result from an mva or from another event; did the injury arise from a pre-existing condition or did it aggravate or accelerate or exacerbate a pre-existing condition? Is the aggravation continuing or permanent, or has the effect of the aggravation ceased? How are the physical and mental effects of pre-existing injury versus new (mva caused) injury/disability to be apportioned – what will be covered by the scheme? Causation questions turn on the

required nexus between the incident (mva) and the consequences (injuries, disabilities).

7. Claimants need access to *funded legal representation* to seek out answers to these causation issues. The proposed Claimant advocacy service, in none of its emanations in the discussion papers, will **not** provide the justice to claimants that their own lawyers routinely provide. This can readily be verified in another way, if SIRA asks the CTP insurers to provide SIRA with a list of all matters in which liability has been admitted (which is therefore similar to a no-fault scheme in that the claimant is eligible), but where the insurer has declined to approve specific section 83 treatment expenses (ie where there is dispute as to whether need for the medical expense was caused by the mva or is reasonable, eg, where the insurer refuses to pay for an MRI or an injection or surgery). If the parties remain at issue on this, the section 83 dispute is eventually resolved, presently, via an arbitral or adjudicative process, after the lawyers acting for the injured person have actively sought out medical opinion. The inherent weakness of administrative advocacy models (such as the suggested claimant advocacy service via SIRA) is that those advocates do not actively obtain new evidence. That shortcoming is demonstrated by the gross unfairness (in my opinion) of the changes made to workers compensation in 2012, which deprived injured workers of legal representation to put together evidence and to dispute work capacity reviews, and removed the jurisdiction of the Workers Compensation Commission in these disputes. The SIRA merits review process does not actively do what independent lawyers do, namely, to actively investigate and obtain put the claimant's best case forward. This has been gross injustice. In addition, the SIRA appointed merits reviewers are subject to subtle cultural and economic pressures to conform to conservative decision-making profiles, which affect key performance indicators that bear on whether they are re-appointed and given work.

CREATION OF INEQUITIES OF ACCESS

8. The design of any changes to the current green slip scheme should start with the acknowledgment that the Australian and NSW communities already have national schemes, via Medicare and Centrelink, which provide levels of benefits available to persons injured in an mva on a *"no fault"* basis as being the level of community benefits that can be reasonably afforded.

9. The changes to the green slip scheme should not dilute benefits to persons injured by fault in order to *'top up'* benefits to those who were at fault. *"Fault"* remains an important ethical basis for providing additional benefits to those are injured innocently.

10. The existing ANF (accident notification form) scheme already provides up to 5K to persons at fault which is adequate subsidy on top of Centrelink and Medicare.

11. It is inequitable to pay additional benefits to those injured by their own fault in mvas, while persons injured innocently in other types of accident (such as slip and falls, medical negligence) are confined to Medicare and Centrelink schemes. Persons injured innocently in any type of accident are more deserving of top up compensation than persons injured by their own fault in mvas.

WHOLE PERSON IMPAIRMENT THRESHOLDS

12. Whole person impairment ("wpi") is a poor indicator of who should have access to common law benefits.

13. I have not seen any reliable data on how many innocent injured mva victims reach a minimum of 11% wpi (ie greater than 10% wpi). My own experience suggests it would be about 5 in 100 injured persons.

14. Typical soft tissue whiplash injuries would usually be assessed anywhere between zero per cent wpi to 5% wpi only under the current AMA 4 wpi assessment guidelines. Zero per cent does not mean the person has recovered, but is adopted when the claimant has claimed symptoms that are subjective and cannot be objectively verified.

15. Even small wpi percentages may have very significant impact on a person. A no-fault scheme (even as part of a hybrid scheme) does not allow for functional impact of injuries on different people. Ankle fusions (not uncommonly needed by innocently injured motor bike riders) of 4% wpi may be devasting for a person who is in a physical occupation.

INSURER SUPER-PROFIT

16. The CTP insurers should be confined to 'reasonable' profit margins. Somewhere in the range 8% to 12% seems reasonable. There needs to be a mechanism to obtain a refund from insurers of super-profits. Perhaps insurers could be required to refund say 90% of any excess super-profits after the claims tail is finalised. The 10% buffer provides adequate incentive to innovate.

17. The present system of approving premiums is not robust enough in favour of public scrutiny. The insurers have been allowed to invoke "commercial in confidence" arguments as a reason to avoid any real scrutiny. SIRA's in house reviewers do not appear to have had enough information, expertise, power and resources to test the CTP insurer's data. The higher super-profit levels maintained over decades show the present system has short-changed the public and is a major contributor to green slip premiums.

LEGAL REPRESENTATION IS VITAL

18. The scheme reforms need to retain access by injured mva victims to individualised legal representation and to common law benefits.

19. Mr Matthews' profit review found that unrepresented claims obtained, on average, one eighth of their entitlements, not that legally represented victims obtained 8 times their entitlements. Legally represented claimants obtained their entitlements.

20. The gross injustice to workers compensation claimants of the deprivation of independent legal representation in work capacity reviews is a travesty that needs to be avoided in the mva sphere.

21. The recent costs amendments (of 1 November 2016) should be monitored before further reforms.

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