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Ms Julie Newman
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Via Online Submission: <http://engage.haveyoursay.nsw.gov.au/ctpstrategy>

Dear Ms Newman,

I write with reference to the recently released Motor Accident Authority discussion paper outlining proposed changes to the NSW Compulsory Third Party Green Slip Insurance Scheme, noting that when releasing this paper the Government announced a period of consultation.

Introduction

Slater & Gordon supports the joint submission of the Australia Lawyers Alliance (ALA), the Law Society of New South Wales and the NSW Bar Association addressing broad policy issues and benefit provision.

The submission outlined below proposes further options for streamlining and improving claims settlement and dispute resolution processes based on the experience of Slater & Gordon within Australia and the United Kingdom.

We also outline suggestions that encourage the goal of maintaining a strong and viable CTP scheme, the architecture of which promotes efficiency, cost effective advocacy and financial and medical support for injured motorists.

The options outlined here reflect Slater & Gordon's experience working cooperatively with legal professional organisations, insurers, and Government agencies in other jurisdictions, with all parties striving for an efficient, fair and sustainable compensation system.

In summary these options are:

- **Option 1:** The use of technology to achieve efficiency and innovation in resolving low value claims. For this, we point to the Road Traffic Accident "Portal" implemented in the UK in 2010.
- **Option 2:** A better designed legal costs model and the development of fair and agreed legal cost price points designed to discourage disputes, encourage early benefit delivery, and reduce costs associated with delays.
- **Option 3:** Protocols applicable to the legal representatives of claimants and insurers to guide early and cooperative dispute resolution. These protocols would include agreement around information sharing and the reduction of non essential disbursements.

Option 1 draws on our UK experience of a “Portal” program designed to settle low value claims. This innovative system was first put place in 2010 and our firm was a key partner in its design. We note that the UK system retains both access to common law and the continued right to for an injured person to seek legal assistance and advocacy.

In relation to Option 2, we note that current cost arrangements in NSW have some incentives towards early dispute resolution, but these incentives could be refined and strengthened. Slater & Gordon believes that cost arrangements should encourage both parties to focus on solving the real issues in dispute and discourage technical point making that result in delay and unnecessary cost.

Option 3 draws on our experience in Victoria, where motor vehicle accident compensation practitioners co-operatively abide by dispute resolution protocols developed in 2004. We believe there would be real value in adapting these protocols for the NSW scheme.

Reform Objectives

We acknowledge that the objectives of the NSW Government are to ensure:

- Green slips are affordable and competitively priced;
- Benefits are delivered as quickly and efficiently as possible;
- Disputes are minimised and legal costs are kept to a minimum; and
- No-fault benefits are increased.

About Slater & Gordon

Slater & Gordon is Australia's largest consumer law firm with lawyers providing services in over 70 locations across all Australian States and Territories, except the Northern Territory. Slater & Gordon also operates a large consumer law practice based in London, with offices in most major regions of the United Kingdom.

Slater & Gordon has been a lead partner in developing effective reforms to improve the efficiency of dispute resolution in Victoria and the UK.

The Slater & Gordon's approach to legal fees provides a high degree of transparency for clients and is underpinned by “value for money” which in turn is aimed at generating and maintaining client satisfaction. We believe in the principle that the transaction costs incurred must strive to be proportionate to the outcome reached for the claimant. We are committed to working with legal professional bodies and with scheme regulators to address concerns that the NSW Government has in relation to lawyers' standards of practice within the MVA compensation system.

In the UK, we have and continue to work with the Ministry of Justice on RTA compensation reforms and have been closely involved in the development of the low value claims “Portal”. Slater & Gordon participates in legal stakeholder groups that work closely with WorkSafe Victoria (WorkSafe)¹ and the Transport Accident Commission (TAC) towards joint objectives - to maintain strong, fair, sustainable and viable workers compensation and motor vehicle accident compensation schemes in Victoria.

For these reasons Slater & Gordon is uniquely qualified to make a valuable contribution to the consultation process.

Option 1: Efficient resolution of low value claims – The Road Traffic Accident Portal UK

The Road Traffic Accident Compensation scheme in the UK commenced a trial of “Portal” arrangements in 2010 designed to resolve low value claims (£10,000 or less) quickly and with

¹ WorkSafe Victoria publishes its Legal Liaison Group membership at <http://www.worksafe.vic.gov.au/forms-and-publications/file-resources/?a=16566>

minimal costs. These arrangements have recently been reviewed and will be further improved and expanded to include claims for up to £25,000.²

The small claims resolution arrangements in the UK include the following:

- Fixed recoverable legal costs aligned to set stages of a claim;
- An electronic portal (with privacy protection) that provides for 'real time' provision and information exchange between the parties of documents required to resolve a claim;
- Streamlined processes and simplification of documents that need to be prepared and exchanged;
- Procedures and behaviour of the parties are guided by agreed protocols; and
- Protocols curtail multiple medical reports - generally one medical report is provided, unless the practitioner that prepared the report recommends an additional report be obtained, and subject to an experts view detailed patients records are not sought.

The Portal process is limited to claims where liability is admitted and involves three stages.

- **Stage 1** – provides for notification of a claim and allows 15 days within which the insurers must admit or deny liability.
- **Stage 2** – liability is admitted and the claimant provides a medical report and records of disbursements, and specifies the amount claimed. Settlement negotiations take place.
- **Stage 3** – is for cases not settled (but negotiations may continue). An application is made for Court assessment which can occur based on papers or at a hearing.

It is suggested that Stage 3 above (Court assessment) could take place in CARS.

Option 2: A better designed legal costs model

A well designed legal costs model will assist faster resolution of claims and reduce levels of disputation. Such a model can also drive positive behavioural change among insurer and claimant representatives to encourage early benefit delivery and minimal disputation.

The current NSW cost regulation achieves this in part, but could be restructured to encourage open exchange of information and early decision making by means of costs point pressures that discourage unnecessary delay and protracted disputation. This is a model that has been successfully employed in Victoria pursuant to the protocols.

In 2004, the TAC with the Law Institute of Victoria successfully negotiated a series of agreed legal costs price points as part of a suite of alternative dispute resolution processes collectively called the TAC Protocols.³

Price points can be effective in the context of the protocol processes because there is an agreement to pay fair agreed legal costs in exchange for:

- A mutual exchange of material which the parties agree is necessary to assess a claim⁴ or for the TAC to make an informed decision;⁵

² "Evaluating the Low Value Road Traffic Accident Process", Professor Paul Fenn, Nottingham University Business School, July 2012

³ Victorian Government Media Release 13 October 2004, *Transport Accident (Amendment) Bill 2004* (Vic) Hansard (Victoria) Legislative Assembly,

14 October 2004, p 1067, Michael Lombard Transforming the Transport Accident Scheme (2005) 79(3) LIJ 28

⁴ The TAC Protocols are prescriptive about what the TAC and a TAC client needs to provide

⁵ The TAC Impairment Assessment Protocols and the serious injury section of the Common Law Protocols are about improving initial decision making

- Conferencing and/or mediation with a view to settling claims or at least identifying the real issues in dispute that need to be addressed to achieve resolution; and
- Stipulated time frames designed to meet earlier benefit delivery targets.

A costs model weighted towards early decision making and to discourage prolonged disputes could be further developed and made relevant to the NSW system to achieve these goals.

Legal costs incentives for claimants and their lawyers should be complemented by key performance indicators for insurers such as an indicator (or target) for pre assessment stage settlement. It is common for key performance indicators to be linked to financial incentives and bonuses paid to scheme insurers.

Option 3: Towards greater co-operation in dispute resolution – The Protocols

The protocols in place in Victoria apply to all categories of disputes arising out of the Transport Accident Scheme including common law.

The protocols are designed to facilitate nominated objectives and include:⁶

- Agreed mutual information exchange requirements, next step and decision making time frames;
- Compulsory settlement conferences within prescribed time frames;
- Accommodating third party facilitation of dispute resolution – e.g. the use of mediators;
- Incorporating agreed cost price points that attach to the kind of dispute when it resolves; and
- Accommodating feedback, opportunities for modification and goal and performance monitoring.

Under the protocols, claimant lawyers are required to adopt a proactive approach in the collection of medical and financial information. This reduces the claims handling cost to the insurer, as much of the administrative burden is shouldered by the claimant's representation.

There is nothing novel about pre-issue dispute resolution arrangements and they are a feature in NSW scheme. However, we believe there is room for improvement and the TAC Protocols provide a model which has proved successful, we believe, because they were developed through consultation and are founded on co-operation.

Representation is a critical part of a successful MVA CTP scheme

Access to qualified assistance is an essential part of a fair and balanced compensation scheme and protects the integrity and standing of the scheme. This principle stands irrespective of the best efforts at simplification.

The role and importance of independent legal advice is recognised in all Australian motor vehicle accident insurance schemes. In 1986 Victoria reformed insurance for motor vehicle accidents and created the TAC scheme, including the extension of no fault benefits. The changes were implemented by the Government with the legal profession cooperatively. The rights of individuals to obtain expert advice and representation and to have insurer decisions remain the subject of review remain one of the schemes strengths today. In making these changes in 1986 the Government stated that;

"Individuals should have full rights of appeal against the determinations of the Transport Accident Commission, to give them protection against capricious or unjust decisions".⁷

⁶ No Fault Dispute Resolution Protocols clause 2 and Common Law Protocols clause 2

Whilst we acknowledge that claimant legal costs should be appropriately managed, we strongly believe access to legal representation is critical to the standing and integrity of the CTP scheme.

Our belief is supported by the following:

- Legal representation avoids a David v Goliath imbalance between injured motorist and insurer. Motor vehicle accident injuries typically result in a high level of vulnerability and trauma with victims often suffering a cognitive impairment. Age and background can also compound vulnerabilities caused by accident related injuries and trauma. Access to expert advice for claimants provides an important counterbalance for injured motorists to the greater resources and knowledge of insurance companies.
- Claimant lawyers routinely explain entitlements and assist injured motorists and families to deal with insurance companies at no cost to the system. We facilitate communication between insurance companies for injured motorists when they cannot get phone calls or correspondence answered and are unable to navigate the system themselves.
- Injured motorists will continue to be the subject of poor decisions with unfair consequences and will continue to need assistance to prepare material and engage in dispute resolution processes. Irrespective of changes to benefits, insurer decision making is not and will never be a perfect science despite the best intentions.
- Insurers will continue to make minor and major errors that impact upon access to all benefit types. It is noted that additional no-fault benefits may alter the type of entitlements in dispute, but it will not of itself reduce disputes.
- The legal profession is governed by professional and ethical standards, lawyers have disclosure obligations in relation to legal fees, fees must be charged in the context of a legal costing framework and practitioners are subject to repercussions for poor conduct. The Government has legitimate concerns and requires assurance that lawyers conduct themselves appropriately. It is submitted that this can be achieved by re-invigorating and improving existing regulations.

Conclusion

Slater & Gordon supports a fair and financially sustainable compensation scheme that keeps the interests of those injured in motor vehicle accidents front and centre. We are committed to working constructively with government and stakeholders in developing and achieving this objective.

The options outlined here are drawn from extensive actual experience in compensation schemes in other jurisdictions in Australia and the UK and, we believe, meet the reform objectives of the Government.

Slater & Gordon's aim is to make a real and constructive contribution to this consultation process. We look forward to meeting with you to discuss the options outlined in this submission.

Yours faithfully,



Genevieve Henderson
State Practice Group Leader NSW – Motor Vehicle Accident Compensation
SLATER & GORDON