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CTP Review
State Insurance Regulatory Authority

ctp_review@sira.nsw.gov.au

Dear Sir / Madam

Response to New South Wales Government Paper "On The Road to A Better CTP Scheme – Options for Reform in Green Slip Insurance in New South Wales"

We write with reference to the Government's options for reform of the New South Wales CTP Scheme as outlined in its Option Paper released on 11 March 2016.

About Slater + Gordon

Slater + Gordon is Australia's largest consumer law firm with lawyers providing services from over 70 locations across all Australian States and Territories, except the Northern Territory.

Slater + Gordon specialises in the area of personal injuries and employs accredited personal injuries specialists in all jurisdictions. Many of our clients are extremely vulnerable and require multi-disciplinary support. Clients experiencing complex non-legal issues receive referral and support from social workers employed by the firm, who have specific expertise working with people and families traumatised as a result of a catastrophic accident.

Our approach to legal fees provides a high degree of transparency for clients and is underpinned by a "value for money" approach aimed at generating and maintaining client satisfaction. We believe in a zero tolerance approach to practitioners who overcharge and are committed to working with legal professional bodies and the Government to address concerns in relation to any practitioners who do not uphold appropriate standards of practice within the Motor Accidents compensation system.

We seek to make an individual and distinct contribution to this consultation process as one of the largest providers of legal services to injured people in NSW.

Reform Objectives

Our submission proposes options for streamlining and improving claims settlement and dispute resolution processes, putting an end to fraudulent claims and delivering a fair and equitable result for those injured on our roads. We unashamedly argue for a scheme design that favours the social justice aspects of support and welfare of the injured, even if that comes at a cost. The consumer of the CTP product is the injured person just as much as he or she is the purchaser of the green-slip. At the same time, however, we acknowledge a system cannot continue unless it is affordable.

Through association of our lawyers with the Australian Lawyers Alliance (ALA) and others in the profession, we are aware that an enormous amount of collaborative work is being done to provide the government with a comprehensive response to all the matters raised in the Options Paper, including positive proposals around scheme efficiency and scheme affordability. We anticipate that

when the submissions of each of the legal professional bodies are released, we will be in strong agreement.

This paper does not seek to address all aspect of the Options Paper.

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Executive Summary

- We support a hybrid fault based scheme.
- Fault is the fairest method of allocating compensation. The current scheme is a hybrid, incorporating significant no fault components for children and the catastrophically injured (LTCS).
- Economic loss benefits must remain. The retention of proper economic loss benefits for those who can prove loss of earnings and loss of earning capacity is the fairest and most socially responsible method of allocating compensation.
- A Whole Person Impairment (WPI) gateway is not a fair mechanism to differentiate between small claims and large claims. The impact of applying such a threshold would shift the financial burden onto the public health and welfare systems.
- Exaggerated and fraudulent claims for children medically unlikely to have experienced nervous shock can and should be discouraged and deterred. The blow out in small claims with little or no merit needs to be contained.
- A case management process to promote early resolution of claims, particularly for those cases where the overall cost is less than $100,000, should be introduced.
- Access to qualified assistance is an essential part of a fair and balanced compensation scheme and protects the integrity and standing of the scheme.

Preferred Option – Hybrid Scheme

We provide qualified support for a hybrid fault based scheme with an appropriate mix of fault based and no fault benefits. In this regard, the 2013 Bill did not strike the right mix. In our view, it went too far in stripping away benefits.

Fault v No Fault

Fault remains the fairest method of allocating compensation from a finite fund of money.

The current scheme is a hybrid, incorporating significant no fault components including the ANF, children's benefits and LTCS for the catastrophically injured. Any extension of no fault benefits should not be done at the expense of those who have suffered long-term losses through no fault of their own.

Benefits and Benefit Allocation

The retention of proper economic loss benefits for those who can prove loss of earnings and loss of earning capacity is essential to social justice and fairness, which should underpin any CTP scheme. This is what stops an injured person (and their loved ones) falling into financial hardship and becoming a burden on their family and society.

The value of a claim (whether it be small or large) is properly measured by the economic consequences of the injury, rather than by injury type.

A WPI gateway is not a fair mechanism to differentiate between small claims and large claims. The only fair way to judge the severity of an injury is in its economic consequences. To do otherwise

would create a different problem, with the injured moving from the CTP scheme to the public health system, reliant on charities and/or forced to consider expensive income protection products.

Fraud and Claims with No Merit

Exaggerated and fraudulent claims for children medically unlikely to have experienced nervous shock can and should be discouraged. The blow out in small claims with little or no merit needs to be contained. Slater and Gordon supports the steps already taken in this regard in addition to the joint suggestions already put forward by the NSW Bar, the Law Society and the ALA.

A Better Designed Legal Costs Model

We support the introduction of a case management process to promote early resolution of claims. In addition, we support remodelling the cost structures for small claims.

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 amongst insurer and claimant representatives to encourage early benefit delivery and minimal disputation.

The current NSW costs 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 suit of alternative dispute resolution processes collectively called the TAC Protocols.

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 claim or for the TAC to make an informed decision;
- Conferencing and/or mediation with a view to settling claims or at least identifying the real issued 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 against prolonged disputes could be further developed.

Legal costs incentives for claimants and their lawyers should be complemented by key performance indicators for insurers 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.

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:

- Agreed mutual information exchange requitements, 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 agrees cost price points that attach to the kind of dispute when it resolves;

- 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; and

- There is nothing novel about pre-issue dispute resolution arrangements and they are a feature in the 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 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 Australia 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 strengths today. In making these changes in 1986 the Government stated that;

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

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 injured and trauma. Access to expert advice for claimants provides and important counter/balance for injured motorists to the greater resources and knowledge of insurance companies.

- Claimant lawyers routinely explain the entitlements and assist injured motorist 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 dispute resolution processes. Irrespective of changes to benefits, insurer decision making is not and will never be a perfect science despite the best intention.

- Insurers will continue to make errors that impact upon access to all benefit types. It is noted that addition of 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 charges in the context of all 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 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 meaningful reform with this underlying principle in mind.

Slater + Gordon's aim is to make a real and constructive contribution to this consultation process.

We understand that other stakeholders are also responding to the reform proposal and we would value the opportunity to provide further comment once these are published.

Yours faithfully

Genevieve Henderson
State Practice Group Leader (MVA NSW)
SLATER AND GORDON