Questions on possible options

1. What should be the most important features in any scheme reform?

Ensuring the best outcomes for all persons injured in motor vehicle accidents, and preserving the right of claimants to seek and obtain legal advice.

2. On balance, which option or combination of options do you believe best addresses the priorities for improving the scheme and why?

Option 1. The current scheme sets an appropriate level for damages, however parts of the scheme require adjustments to aid efficiency, such as the compulsory steps prior to referral for assessment.

3. Does fault in an accident remain the most acceptable way of determining eligibility for benefits or is it more important that anyone injured on the road is covered, even if this means fewer savings in any reform?

Fault remains the most acceptable way of determining eligibility for benefits, however some consideration may be given to extending at-fault benefits. The focus of the scheme must be on innocent victims.

4. Is it more important to reduce CTP prices or to extend benefits to more people?

Neither. Persons who are injured in motor accidents deserve proper compensation. Benefits should not be compromised by extending the scheme or in a bid to reduce CTP prices by a nominal amount.

5. Are people better looked after if receiving a negotiated lump sum (often years) after the accident or receiving prescribed weekly benefits shortly after making their claim?

A negotiated lump sum allows injuries and their impacts to be ascertained and quantified. A weekly benefit scheme may of some use in conjunction with this, particularly for persons incapacitated for employment.

6. Should a greater proportion of funds go to the more severely injured, even if this means capping benefits or introducing an excess for low severity injuries?

Severely injured persons are already appropriately compensated, save for the limits upon general damages (which are often insufficent), and the impact of Lifetime Care upon independence and self-determination.

7. If Government retains common law, should there be tighter restrictions and caps on various benefits as is the case in other States, or if the Government adopted defined benefits should the caps and thresholds reflect what is paid in other States?

The current common law scheme strikes an appropriate balance and reflects the development of the law in NSW in accordance with policy objectives, fairness and equity. Defined benefits should not be adopted.

8. If the Government retains common law, what is the best method and threshold to determine eligibility?

All claimants should be eligible to pursue their rights at common law. A threshold approach does not allow for individual circumstances to be taken into consideration, which may deprive many claimants.

9. If Government retains common law, what mechanisms should be adopted to resolve claims more quickly and avoid lengthy negotiations and disputes?

Remove or amend the restrictions on applications being made to the CARS, as the technical steps involved can prolong matters where insurer's dispute certain aspects of claims without justification.

10. Should there be limits to legal expenses, especially for small claims, and should legal expenses be linked to the work performed or the value of the claim?

No. Legal costs are currently adequately managed by SIRA through the disclosure process, and the dispute mechanisms under the Uniform Law. More attention should be paid to the increasing profits of insurers.

Questions continue on the next page

Questions on other policy considerations

1. Should there be support or a safety net for anyone injured on the roads by vehicles that are not part of the insurance system (like bicycles) even if that increases the overall cost of CTP?

Persons injured by bicyclists should be covered by the nominal defendant scheme, or alternatively cyclists should be required to carry details of third party insurance provided by memberships of cycling associations.

2. Is it better to make a claim against your own insurer as opposed to the insurer of the at-fault driver, if so why?

There is no benefit, as long as claimants are treated with respect and are entitled to claim the benefits they deserve. The at-fault scheme should however be retained.

3. Should Government retain competitive private underwriting, or give consideration to a return to public underwriting delivery?

Private underwriting is appropriate. Consideration should be given to competition within the market and single companies operating under multiple brands. Premiums rise annually with no increase in benefits.

4. How should Government best deal with fault (including injuries without another party to sue), illegal acts and contributory negligence in any reform?

The current scheme is appropriate. Illegal acts should continue to be barred from the scheme, save for where those acts affect innocent victims. Severely injured persons continue to benefit from Lifetime Care.

5. What changes to the CTP scheme could increase competition?

Prohibiting single insurer's to hold mulitiple licences operated under different brand names.

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State Insurance Regulatory Authority
Motor Accidents Insurance Regulation,
Level 25, 580 George Street, Sydney NSW 2000
General phone enquiries 1300 137 131 or
Claims Advisory Service 1300 656 919

Website www.sira.nsw.gov.au

NSW GOVERNMENT | SIRA State Insurance Regulatory Authority

WYATTS
LAWYERS & ADVISORS

Our Reference: MCB

22 April 2016

State Insurance Regulatory Authority
Level 25
580 George Street
Sydney NSW 2000

By email: CTP_Review@sira.nsw.gov.au

Dear Sir/Madam

Review of the NSW Compulsory Third Party (CTP) Insurance Scheme

We refer to the above matter and the recently published discussion paper entitled "*On the road to a better CTP scheme – Options for reforming Green Slip insurance in NSW*".

In addition to the completed submission paper **enclosed** to this letter, we also wish to make the following brief submissions as to the proposals made in the paper.

This Firm

At the outset, Wyatts has been representing persons injured in motor vehicle accident claims for over two decades. We have past and current experience in claims under the CTP schemes operating in NSW, Victoria, Queensland and the ACT and so are familiar with the different models of third party insurance schemes operating within Australia, and the benefits available to claimants under those schemes.

Submissions

1. We are concerned at the movement of Government away from ensuring that injured persons are properly protected and compensated for injuries suffered as a result of the negligence of other drivers. The movement of policy objectives away from fair and proper entitlements available under common law is concerning.

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2. The argument for reform is based upon a false economy of lowering premiums. Arguments put forward by Government and industry groups are primarily based on an argument that reform will result in reduced CTP premiums of perhaps $50 per year. These arguments play on a perceived saving by the general public, even though such a saving in the average household budget is a 'drop in the bucket'.

   What is not being disclosed is the impact that the premium-lowering reforms will have on their rights and entitlements should they be injured in a motor vehicle accident. Further submissions are provided below in this regard.

3. A drop in premiums of $50 per year is not a sustainable argument for reforms to be adopted. Any savings would soon enough be subsumed by inflation and/or insurer's actions in raising premiums. A saving of $50 per year does not offset the loss in benefits payable to injured persons if a defined and/or capped benefit scheme is adopted.

4. There is rarely a mention of the rising profits of insurers who issue CTP policies. The scheme currently operates with profit margins approaching 20%.

5. Third party insurance is compulsory. It is compulsory for a reason, and that reason is to ensure that persons who are injured through no fault of their own are properly cared for and compensated for their losses.

6. At fault drivers who are injured in motor accidents are currently included in the ANF scheme for payments of up to $5,000.00 in medical treatment and/or loss of earnings. If there is concern for at-fault injured persons, consideration could be given to raising the threshold for payments under the ANF for at-fault persons. These restrictions should not apply to innocent victims who should continue to have full access to their existing (modified) rights at common law.

7. At-fault injured persons who are severely disabled currently have access to the Lifetime Care and Support Scheme and this scheme should continue for those persons. However, as the scheme is currently applicable to all severely injured person (who are deemed eligible), regardless of whether or not they are at fault, insurers should be required to make a higher contribution tot eh running and funding of the scheme. This is justified on the basis that the scheme is funded by the NSW Government and not by the insurer who wrote the policy. This may reduce the levy payable by motorists.

8. Consideration should be given to allowing injured persons to elect whether they wish to participate in the Lifetime Care and Support Scheme or pursue their rights at common law, with a preserved ability to 'buy in' to the scheme at a later date should they wish. This will ensure that insurers are responsible for the payment of treatment and care costs for claims made under their own policies, and that such cost are not 'palmed off' to the Government for seriously injured parties.

9. More importantly, it will also improve outcomes for severely injured persons, who in our experience are frustrated at the red-tape and bureaucratic process of the Lifetime Care and Support Scheme, and who resent that they have been placed in the Scheme, often without their consent, to the detriment of their own rights to receive compensation and determine their own care and medical treatment without resort to a third party. Severely injured persons invariably want to regain independence and control over their lives as far as is possible and lump sum payments are best suited to this goal.

10. There is Government concern at the rising level of claims which are apparently fraudulent. The current fraud provisions of the Act are currently sufficient to deal with these claims, which are in the small minority of total claims. It would be a tragedy to those persons who are legitimately injured for their benefits to be slashed due to the dishonest behaviour of a few.

    Consideration may be given to allowing allegedly fraudulent claims to be exempted from admininstrative assessment at an early stage on the production of conclusive evidence that a claim is fraudulent. This would require Court proceedings to be commenced, and if solicitors are involved at that point they would then face the risk of misconduct action if the matter is continued.

11. Genuine claimants should not be disadvantaged by reforms of which an alleged aim is to reduce the number of fraudulent claims, which we suspect are of a very low number compared to total claims. In the case of claims where fraud is alleged then those cases should be tested by the Courts. Injured persons should not be disadvantaged as a the result of the dishonesty of a few.

12. Claims in which infants are injured, particularly in terms of psychological injuries, are currently subject to the Court's supervisory jurisdiction. The Court has the power to review settlement and make recommendations to the parties in terms of settlement. Consideration may be given to modifying the Court practice notes for infant approvals to make the approvals process more rigourous, if there are concerns as to the veracity of such claims.

    Consideration may also be given, as suggested by the joint submissions lodged by the Law Society of NSW, to proposals to cap legal costs in infant matters by reference to the value of claims. This would encourage early resolution of claims of this nature.

13. There are concerns in regard to the time taken to resolve claims. In our experience most claims resolve within 18-24 months of a claim being lodged. This is highly dependent upon the circumstances of a claim and the attitude taken by the relevant insurer.

    Many injuries take a great deal of time to either stabilise for the purpose of medical assessment, such as brain injuries and spinal injuries requiring extensive treatment and rehabilitation. Treatment regimes for pscyological

injuries may also be lengthy, preventing matters from being finalised at an earlier stage.

There is a great deal of delay caused by section 89A-E of the current Act. The removal or amendment of this section would aid the process of claims greatly, by removing technical steps to be followed before a matter can be referred for assessment. It is not unheard of for matters to proceed to two or three settlement conferences, following the provision of all relevant information, before an insurer is willing to treat the conference as one held under section 89A.

It is also the case that delays are experienced where parties are unwilling to participate in settlement discussions unless and until there is certainty as to whether non-resolution will allow immediate referral for assessment. A requirement for settlement discussions should remain, but the discussions should not need to be specifically categorised to allow referral for assessment if settlement does not occur.

14. Care must be taken to ensure that injured motorists, pedestrians and cyclists are properly compensated. Defined weekly benefits and/or limited periods for compensation will not properly take into consideration the different needs of claimants. Whilst injuries such as whiplash may be similar in terms of nature and definition, a whiplash injury may impact upon one person's earning capacity in a much greater way than another claimant. The current lump sum scheme allows for such variations and those variations are justified. We agree with the discussion paper on page 15 where it is stated that:

> *"... lump sum settlements have the benefit of allowing the recipient to make their own choices about how they support themselves into the future, while the insurer in turn is removed from ongoing liability for payments. It also permits negotiation for a settlement that is more closely linked to the needs of the individual, rather than relying on a pre-determined funding formula, and ongoing dependence on the insurance system."*

15. The various options put forward in the discussion paper deliver different outcomes to both injured persons and insurers. However the scales are, in our view, always tipped toward the insurers, who have a disproportionate ability to lobby Government, and put forward reasons for reform based on politically-attractive arguments of lower costs for motorists (with no comment as to drastically reducing benefits).

16. Option 1 is the scheme which is best suited to continue high levels of benefits to motorists, with consideration to be given to suggestions made above to some minor reforms for efficiency gains. All injured persons should have the right to pursue their claim before the Court, as is the case under the current arrangement (although noting the restrictions to matters where liability is admitted by an insurer).

17. Any option for reform in which statutory benefits are imposed upon injured persons is opposed on the following bases:

    a. Statutory benefits and defined sums do not allow differing circumstances of injured persons to be properly accounted for.

    b. The majority fo injured persons would fall under this statutory benefit scheme, as the threshold of 10% is a high bar to jump for all but the most seriously injured persons.

    c. Accordingly, a disproportionate number of claimants (the majority) would be worse off under a statutory benefits scheme.

    d. Any scheme where benefits are 'cut off' after a set period of time should be avoided. The impact of injuries cannot be defined with any degree of certainty. The impact of an injury on one person is different to that on another and to force injured persons with continuing loss of income on to welfare benefits (which would be the practical effect of a weekly benefits system) is against public policy objectives.

We are concerned that over the course of our years of practice in this area, there has been an unrelenting progression toward cutting the rights of injured persons under the guise of reducting green slips premiums, however the only practical benefit is to increase insurer profits. Further, proposed cuts to access to legal representation will only result in insurers riding roughshod over injured people in the most vulnerable of situations.

The general public has at no time been given proper disclosure or education of the beenfits available under the current system versus what would be applicable to a claimant in the same situation under the new system. It is our view that if case study examples were provided and valued, the general public would be made aware of the gross injustice of the proposed reforms, and the increased profit incentives for insurers under a reformed scheme would be exposed.

We seek that the proposed reforms be rejected, or that any reform proposal retain the fault-based system and the current levels of benefits to injured persons. We welcome the opporuntity to work with Government in achieving better outcomes for injured persons under the current CTP scheme.

Yours faithfully
Wyatts

[redacted]

Mitchell Broom
Associate
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