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State Insurance Regulatory Authority
By email: CTP_Reform@sira.nsw.gov.au

Dear colleagues,

CTP INSURANCE REFORM IN NSW
OUTLINE SUBMISSION

Background

I have been a solicitor from 1992 and barrister since 2011. In that period of 24 years I have practiced almost exclusively in CTP insurance claims in NSW. I have handled claims under the 1942, 1988 and 1999 schemes. Most of my practice has been for insurers although I also do plaintiff work.

What's wrong with the current (1999) scheme?

Broadly, the Labor government at the time promoted the 1999 scheme as keeping claims out of 'court'. It invented CARS and MAS to turn the process of compensating individuals into an administrative one.

Over time, the attempt to turn the measurement and compensation of human suffering from injuries from a judicial into an administrative process has failed. There are several broad reasons for this:

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CARS' political imperative

The system, aimed at keeping claims out of court, gives claimants the exclusive right to go to court if they are unhappy with the outcome. Inevitably, CARS must give the claimants at least as much as a judge would give in order to stop them going there.

In practical terms, this leads to CARS assessors rarely having the courage to deny damages when they should be doing so. Awarding something to 'keep the peace' has ultimately led to higher and higher expectations, especially in 'cushion' awards for future heads of damage.

Reviewable administrative decisions

Early years in the 1999 scheme featured few if any attempts at challenging MAS and CARS decisions. The first CARS decision ever set aside was 7 years later, in 2006.

The legal profession has now lost its fear of challenging administrative decisions in the Supreme Court. In many ways the procedural fairness duties on assessors are far more onerous than those existing in the judicial system. A simple comparison between a CARS award and a District Court arbitration decision shows the latter as simpler, more efficient and considerably less time and cost consuming.

Making substantial legal entitlements depend on appointed Assessors who are skilled as doctors or personal injury lawyers rather than administrative law experts leads to the obvious: substantial and repeated errors. This is worse in MAS than CARS. Now that the limitations are being repeated demonstrated in the Supreme Court nearly every week, the unsuitability of fitting the compensation "square peg" into an administrative "round hole" is no longer capable of being hidden.

Fraud and exaggerated claims

The attempt to replace the court system with an administrative one single-handedly removed all the features Courts had available to prevent dishonesty. These include:

a) Rules of evidence;

b) Evidence under oath;

c) Perjury;

d) Public hearings;

e) Subpoenas to produce;

f) Subpoenas to give evidence, and witness compulsion generally;

g) Cross-examination of experts, particularly doctors, to hold them accountable for their written findings;

h) Pleadings that must be supported by a lawyer certifying reasonable prospects of success;

i) Costs orders adverse to claimants;

j) Limitation period.

All of the above issues have worsened with the maturity of the 1999 scheme. Ambit claims are rife. Witness statements are prepared scripts made by solicitors, often bearing no resemblance to the witness' own evidence. Prior and subsequent accidents can be concealed by the inability of insurers to investigate. Doctors can report whatever they wish in the comfort of knowing they cannot be held to account. Lies are never punished. Exaggeration carries no penalty. Evidence is almost impossible to obtain from neutral parties who would add objectivity - in practice the only 'interested' witnesses are those supporting the claimant.

The mantra of "all cards on the table, face up" worked until every card became an ace.

Gaming the system

Another systemic problem with administrative injury compensation is that rules must be set for the administrator to apply. Once the rule is made, it can be gamed. Unlike judges and arbitrators, who use judicial discretion to see through such gaming, administrators have no such defence.

In MAS, claimants have learned to hide information and present only with what gets them over the line. Inevitably the stoic claimant fails, while the claimant who is good at complaining succeeds. It actively promotes dishonesty and punishes the claimant who rehabilitates.

CARS was originally intended as a lawyer-optional jurisdiction. Its rules and guidelines have now swollen to the point where it would be easier for a claimant to litigate in person than bring their own assessment application.

Both procedures can bury claims in the system for years before eventually coming to a conclusion.

Cost drivers

Legal costs have blown out, not by any increasing greed in the legal profession but by the disproportionate and regularly ,meaningless work required to put even the simplest of claims through the administrative scheme.

The following is a comparative list of a standard claim procedure under the 1988 and 1999 schemes:

1988 scheme	1999 scheme
Claim form	Accident Notification form
Request for particulars	Claim form
Statement of claim	Request for particulars
Obtaining medical evidence	Provision of multiple particulars
Arbitration or Hearing	Preparation and exchange of statement evidence
	Obtaining medical evidence
	MAS assessment
	MAS review, further assessment
	Exchanging submissions and schedules
	Settlement conference
	Written offer exchange
	CARS assessment application
	CARS conference

The 1999 scheme list is really an optimistic view, because it does not include court proceedings, administrative law challenges, complications with MAS, adjournments of CARS conferences, many preliminary conferences, MAS disputes over treatment and various other procedures.

Of course the 1999 scheme costs more. Lawyers are entitled to be paid for this work. The frustrating irony is that it leads to poorer outcomes, at a cost way higher than the 'costly' court process it replaced.

SIRA data collection at the end of claims can shed some light on the percentage of premiums going into legal costs, but they miss the more obvious point: a sideways comparison with how low costs are under the *Civil Liability Act* 2002 - the modern equivalent to the 1988 motor accident scheme, which continues to work so well today.

Damages provisions

Aside from the intense "gaming" mentioned above, the all-or-nothing threshold on general damages has led to more speculative and less credible claims for economic loss and domestic assistance. These claims are ideally-suited to the dishonesty-friendly way in which CARS assesses them (see above). This is particularly true for voluntary domestic assistance, a head of damage for which there are no independent witnesses.

As a participant in 3 motor accident schemes I have seen repeated reform reasoning based on the logic of "if we take away x, claims will be x cheaper". Few people anticipate behaviour changes on other entitlements.

Voluntary domestic assistance should be removed, in exchange for a return to the sliding scale for general damages that exists and functions well under the *Civil Liability Act* 2002. The judicial system is excellent at determining what injuries mean for individuals - e.g. the textbook example of a concert pianist losing a middle finger, vs a bricklayer with the same injury.

The best way ahead

Premiums can be substantially reduced for NSW motorists by a combination of

a) ending the unwieldy administrative system for damages assessment;

b) making changes to damages entitlements; and

c) capping costs, subject to exceptions for undesirable conduct by an opponent.

Specific proposals for achieving this outcome are as follows:

Sunset clauses for MAS and CARS

After a prescribed date of accident, claims would no longer fall under these jurisdictions. New damages and claims processes would apply. Most of these new provisions can be taken directly from the 1988 legislation.

CARS assessors would transition to being appointed as District Court arbitrators, progressively, as the claims load transitions.

MAS can easily be scaled down to suit decreasing demand.

Funding previously required for SIRA's claims operations would instead be levied by the NSW Court system, direct from insurers in accordance with premium market share. Remaining court funding will come from filing fees, as a 'user pays' component.

The above transition would happen gently over 3 to 4 years, corresponding to limitation periods.

Beyond 6 years post amendment, all remaining claims eligible for CARS would be automatically exempt and required to proceed to court, under the 1999 damages provisions.

Non-economic loss (general damages)

The sliding scale under the *Civil Liability Act* 2002 and *Motor Accidents Act* 1988 should be reinstated.

Maximum damages should be capped at $300,000, adjustable (up or down) at the Minister's discretion, with the only relevant consideration being scheme affordability.

Voluntary domestic services

Damages for voluntary replacement of a claimant's services (Section 15B Civil Liability Act) and care provided to a claimant (Section 141B of the Motor Accidents Compensation Act 1999) should be abolished.

Lifetime care and support scheme

I recommend retaining this, but with a review set for say 2019 to examine whether it is sustainable longer term, or perhaps redundant following full implementation of the NDIS.

Legal costs

A claimant's costs and all disbursements should be capped at 30% of net damages up to $100,000 and 25% on amounts exceeding $100,000. Contracting out should not permitted. The rules do not apply to the successful applicant on an Offer of Compromise, in which case additional costs can be recovered for work done after the relevant offer.

Specific provisions should be introduced to prohibit the awarding of costs to claimants on statutory limitation issues.

Advertising

The previous ban on the advertising of legal services for personal injury needs to be reimposed, leaving no doubt that 'cold calling' by or on behalf of legal practitioners is an offence.

Why other options won't work

Any amendment that leaves MAS and CARS in place carries with it the same unwieldy, high cost, high delay and fraud-friendly disadvantages I have listed above.

The idea of 'defined benefits' for smaller claims seems attractive, as no doubt it did to the Wran government's abortive attempt at doing so with Transcover. The problem is in the definition, and the inevitable gaming of whatever thresholds are prescribed. As we have seen with CARS and MAS, only judicial discretion avoids a constant spiralling of administrative rules and the gaming of those rules.

The mistakes of Transcover should not need to be learned again.

Small defined benefits are also synonymous with fraud, as experience with workers compensation has shown. Insurers, faced with the choice of paying $5,000 without question or spending an extra $3,000 to investigate, will simply pay the $5,000. No amount of lip service, nor even legislated duties to investigate or defer fraud, will change these economic drivers. Under this kind of scheme the system will collapse with the volume of claims, not the amount per claim.

No fault benefits similarly invite fraud, particularly since the driver in a set up accident would no longer need to be a 'sacrifice' for other claimants. Longer term, no fault jurisdictions become bankrupt. Journey claims should however be restored to workers compensation entitlements, to assist workers in a return to work regardless of who caused an accident.

An offer of assistance

The 1988 scheme worked. I have seen this in thousands of claims over nearly 25 years. With appropriate cost and damages protections it could work again, bringing premiums down significantly and deterring fraud using the justice system that we already have and pay for.

I would gladly be involved in a genuine consideration of a return to modified common law, even to the point of drafting proposed legislation to enable it to happen.

Yours faithfully

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