

May 2016

CTP that works for people



Drivers & Road Injury Victims Engagement



A SUBMISSION TO THE NSW GOVERNMENT REGARDING
THE PROPOSED CONTROVERSIAL REFORMS TO CTP

Overview

DRIVE represents a number of compensation lawyers who work with victims of motor accidents on a daily basis, and are concerned about the proposed Compulsory Third Party personal accident insurance (CTP) scheme in NSW.

DRIVE welcomes the NSW Government's CTP review as a historic opportunity to create an honest, fair and sustainable scheme that stands the test of time.

Our lawyers, through diligence and professionalism, work hard to ensure that victims rights are protected so they can achieve fair outcomes that compensate for the loss and trauma they have suffered, enabling them to get back on their feet again.

Lawyers acting for claimants have greater insights than other stakeholders into the actual needs of victims. As such, compensation lawyers are key stakeholders in the NSW Government's review of the CTP scheme.



We understand that the NSW Government intends a major overhaul to the legislation impacting compensation for victims of motor vehicle accidents. Behind the government's paper outlining various options, we fear an outcome that takes away proper compensation for the victims.

We value, as does the community, the significant rights for motor accident victims that are enshrined in the current scheme and we will fight to defend them. These rights include fair compensation for innocent victims that's tailored to their individual needs, and legal representation.

These rights protect the interests and values of the community – of ordinary individuals and families. They have been built over time and serve our society well.

They should not be discarded.

Summary

Conceptually, we strongly believe that road accident victims should not be penalised because of flaws in the system, and that every effort should be made to preserve that principle.

We oppose any move to a 'no fault' compensation system.

We believe that the main problem with the current scheme is excessive profit-making by insurers. If profits were controlled, then premium levels would be contained, and important features of CTP that protect compensation for innocent motor accident victims would be preserved.

There needs to be public transparency in the annual premium setting process by the insurers, coupled with a mechanism to ensure that over-optimistic premium setting can be curtailed, and excess profits recycled to the CTP system to offset future premium increases. Beyond these, no further changes are required at present.

Conceptually, we strongly believe that road accident victims should not be penalised because of flaws in the system, and that every effort should be made to preserve that principle.

However, if despite best efforts that is not possible, we accept, in part, the recommendations in the joint proposal (ALA, Law Soc, Bar Assoc) to the minister on 23rd March 2016. We applaud the fault-based principle it supports, but submit the fees to lawyers on small claims are unsustainably low in order to preserve effective legal representation.

We think it appropriate that minor claims (under \$30,000) have capped professional fees (\$5,000, plus medical reports and similar disbursements). This addresses a recent growth in whiplash claims, which the data shows to be the main area of escalation for minor claims.



1. The Interests of the Public Come First

The fundamental purpose of any insurance scheme is fair compensation to victims, and not to provide huge profits for the insurance industry.

The CTP reform proposals circulated by the government will punish innocent victims rather than curtailing insurers' excessive profit-making.

The key features and important values that our community needs to maintain are:

- Adequate compensation for innocent victims
- The right to legal representation to ensure adequate compensation
- Compensation tailored to individual needs
- Retaining the principle of fault as a proper basis for compensation.

Victims now have to fight insurance companies. The CTP reform proposals circulated by the government will punish innocent victims rather than curtailing insurers' excessive profit-making.

The government seems to be leaning towards a 'one-size-fits-all' approach that doesn't work in real life. However, injuries to different body parts affect different people in different ways.

For example, the loss of a finger might destroy a professional sportsperson's career, but the government wants to treat this the same as a finger on the non-dominant hand of a desk worker.

This must not happen.

The above outcome has already happened for Workers Compensation and Victims of Crime.

Seriously injured victims of crime are capped, such as \$10,000 for sexual assault involving serious bodily injury by multiple assailants including use of a weapon. The victims' payments are now so dismally low that the government calls it, not compensation, but 'recognition'.

Innocent motor victims who are blameless, and are injured by another driver's fault, are heading the same way.



2. Limit Insurance Companies' Profits

DRIVE contends that if insurer profits were curtailed to reasonable levels, the CTP scheme could continue in its present form without premium increases.

The central problem of the CTP scheme revolves around insurance companies over-estimating forward predictions. This is a flawed principle that leads to excessive profits.

For example, road safety campaigns, random breath testing, double demerit points, improved road maintenance and signage have reduced the rate of increase in accidents that was predicted by insurers constantly each year as they applied for premium increases, which the government accepted.

The insurers have constantly over-predicted accident rates, thereby collecting more annual premiums than they have needed, and which the insurers have not refunded back into the system, and which the government has not forced them to refund.

The government's own data shows that insurance companies have ripped-off the public with super-profits for shareholders every year for the past 14 years. The profits levels have ranged between 19% and 30% from 2000-2011. And even in the years since 2011, the profit rates are still in double figures.

This greatly exceeds the 8% profit margin that the government and the insurers considered was a reasonable profit margin over each of those years. **DRIVE** does not consider that there is any proper basis to increase the 8% benchmark for the future.

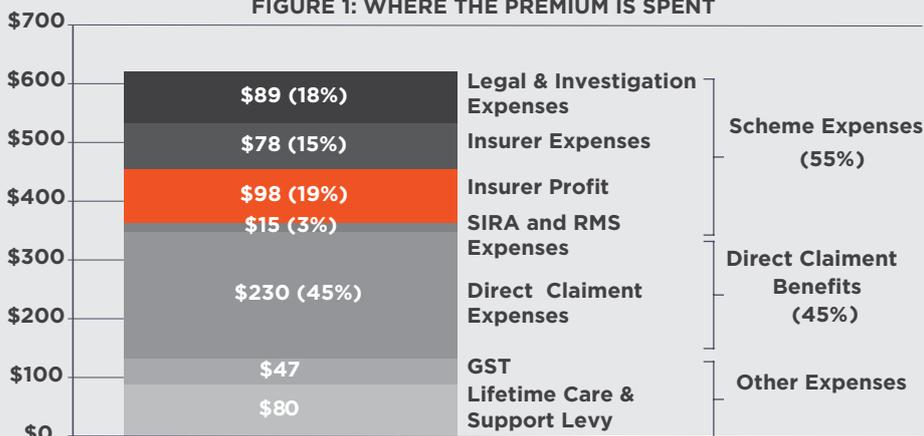
The public should have a right to make representations in an open and transparent way to force insurers to justify their premiums. The premium setting process should be reformed to allow the public to know what premium increases are proposed by the insurers to the government, to be set for the following year before they are approved. In addition, a mechanism needs

to be put in place that requires insurers to refund profits that exceed the specified profit margin.

The Government's data indicates that in real inflation adjusted terms, green slip premium prices "are comparable to those of 14 years ago" (according to the State Insurance Regulatory Authority report of the independent review of insurer profit within the CTP scheme).

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FIGURE 1: WHERE THE PREMIUM IS SPENT



Source: 'On the road to a better CTP scheme' (NSW Government)

3. The Importance of the Fault Principle

Diluting the premiums to provide no fault compensation to those at fault will short change innocent victims who will be under-compensated.

The CTP scheme is designed to compensate innocent people for their injuries when you, a driver, causes a car accident. The government should preserve the principle that premiums are collected primarily to compensate innocent victims of motor accidents.

This should be done at adequate levels, tailored to victims' own circumstances, and facilitated by legal representation for injuries, disabilities, treatment needs and economic losses caused by the negligent driving of other people.

People should not be rewarded for being at fault. **DRIVE** opposes any reform of the CTP scheme which would reduce entitlements of innocent victims by diluting the premiums collected to include payments to persons injured by their own fault, also known as 'no-fault' compensation.

Our community already provides no-fault compensation known by other names as universal health care (Medicare) and social welfare benefits (CentreLink). The current scheme provides no fault compensation by paying up to \$5,000.00 for medical expenses to persons injured in motor vehicle accidents regardless of fault. In addition, the current scheme does provide no-fault compensation for a very small group of gravely injured persons as part of what is known as the 'Lifetime Care and Support Scheme'.

There is also another small category known as blameless victims. **DRIVE** submits that there should be no further extensions of no-fault compensation, and that the compensation should remain primarily a scheme to provide adequate compensation to innocent persons who have been injured by fault.

There is no proper ethical reason to modify the CTP scheme to pay drivers who are at fault more than the entitlements they already have for the same access to universal health care and social welfare as any injured or sick citizen.

Diluting the premiums to provide no-fault compensation to those at fault will short change innocent victims who will be under-compensated. That is not fair.

The other difficulty with no-fault compensation is that it is usually associated with equal small benefits to everybody, also known as 'defined benefits'. This would be a 'one-size-fits-all' approach, which does not take account of differing individual needs for compensation.



4. Don't Demonise Lawyers

Case Study

Disturbingly, one of our law firms was instructed by a claimant in 2014 who had previously represented himself against a major CTP Insurer.

The claimant, despite his serious injuries, was encouraged to enter into a full and final settlement 3 months after the accident for just \$13,000, directly with the insurer.

Less than six months later, with the assistance of a lawyer, that same claimant was offered and accepted \$450,000 in full and final settlement, which was the fair and reasonable compensation.

Some in the government are blaming lawyers for the flaws in the current system, but they are just using lawyers as a scape-goat having been subjected to intense lobbying by insurance companies.

Accident victims who are represented by a lawyer receive an average of eight times the compensation of innocent victims who represent themselves. Lawyers protect people who can't protect themselves against insurance companies. This is simply the justice system doing its job, ensuring victims receive what they deserve. Victims who represent themselves have historically been short-changed. (See case study)

The changes to Workers Compensation laws since 2012 show the terrible things that can happen to ordinary people without Lawyers' involvement. Workers compensation victims now have their weekly benefits terminated based on insurer arranged work capacity reviews. Those decisions can't be challenged, as victims have had the right to appeal these decisions stripped from them. This is a gross injustice that has caused many workers and their families grave hardship.

The role of compensation lawyers has been to ensure everyday Australians receive justice in an adversarial contest that has developed between victims and insurers protecting their profits.

Lawyers in this area usually act on a "no-win-no-fee" basis, which provides access to justice for those who cannot afford to pay. The government does not provide legal aid in this area.



The lawyers **DRIVE** represent work at the coal face of motor accidents on a daily basis. More than anyone we understand the traumas both physical and emotional that motor accident victims and their families suffer, often for the rest of their lives.

This gives us a unique perspective to bring to the reform process.

The government has been monitoring lawyer/client fees in finalised matters since October 2015. Lawyers disclose all fees and costs to their clients from the time they first attain instructions to act, up until the time the matter is resolved, and clients have longstanding statutory rights to challenge excessive fees. This does not require further reform.

5. The Public's Right to Know

It is allowing the tail to wag the dog, to allow the insurers to argue that because they're trying to catch some crooks, everyone else who has a legitimate claim should miss out on compensation.

The CTP scheme is designed so that all innocent victims of road accidents can be compensated for their injuries.

It's also a fundamental principle of our free society that citizens are entitled to be informed of their rights. Advertising is well accepted in all forms of commercial activity in Australia. In the past, many people have been unaware of their rights. The recent increase in Whiplash claims arises, in almost all instances, out of genuine accidents in which people are innocent victims of faulty driving by other people.

Insurers will tell us that too many people are making claims. We argue that, rightly, more innocent victims of road accidents are now aware of the purpose of the insurance scheme.

Insurers preferred it when most NSW citizens did not know their rights and, as a consequence, were not compensated. Now, more innocent victims are making claims. It is fair that a person innocently injured by another person's fault gets compensation at a proper level.



DRIVE accepts that there may be a small number of fraudulent claimants who lodge bogus claims. The justice system already has adequate powers to catch crooks, which is no reason to deprive almost everybody else of their proper entitlements. It is allowing the tail to wag the dog, to allow the insurers to argue that because they're trying to catch some

crooks, everyone else who has a legitimate claim should miss out on compensation. This is no reason to diminish the compensation entitlements of innocent victims.

It is a gross distortion to assert fraud is significant. In our experience, this is rare and almost all claimants who are legally represented either settle their claims, after negotiations, for a proper level of compensation; or, if the parties cannot agree, are decided by an Arbitrator (called an Assessor) or, in a very small proportion of cases, are decided by a judge in court. We estimate that over 90% of cases are decided by negotiation taking account of proper compensation, tailored to individual circumstances.

Conclusion

A short term problem does not require a long term draconian fix.

DRIVE believes the current CTP system will continue to work effectively if insurer profit -making is curtailed, and fraudulent behavior is punished.

If we get this wrong, and discard valuable foundations of the scheme we have today that provide fairness and equity, it is the victims of motor accidents who will suffer long into the future.

To get involved go to www.nswdrive.com.au