

SUBMISSIONS ON CTP REFORM IN NSW

15 April 2016

The discussion paper "On the road to a better CTP scheme" deals with possible models for reforming the current NSW CTP scheme. It identifies areas where the scheme may require improving. New issues have also arisen due to the explosion of "small claims."

My view is that the NSW CTP scheme is in its *concept* and current regulatory framework, superior to other States in that it provides reasonably fair compensation to injured persons and in particular to seriously injured persons. The central criticism of the discussion paper focuses on the disproportionate amount of premiums going to injured persons (45%) and the overall cost of the scheme, including legal expenses, insurer's expenses and administrative expenses (36%). The discussion paper cites CTP Insurer profits at 19%. There is also criticism at the average length of time for matters to resolve.

In the current climate, there is the added factor of what the NSW State President of the Australian Lawyers Alliance describes as *"a radical and unexpected escalation in claim numbers, predominantly in south western Sydney where the increase is in excess of 300% but more broadly across the Sydney basin. The increase is seen in low severity injury legally represented claims. Over the same period there has not been any corresponding increase in accident numbers."* email from ALA NWS State Committee 5 April 2016.

The "radical and unexpected escalation in claims" is directly related to the infiltration in NSW of companies mainly from the UK who are in the business of purchasing data basis from various sources which provide details of people involved in motor vehicle accidents. Call centres (usually overseas) cold call the identified persons and encourage them to "make a claim" by promising them compensation if they go and see a particular legal firm. Many of those called would probably not have bothered to make a claim given the minor nature of any injury, if they had an injury, if not for the inducement of a financial reward. *Some* of those called would inevitably have a legitimate claim due to injury and one would assume would make a claim in any event.

In return for procuring a client for a particular legal firm, the legal firm pays a “referral fee” of about \$3000.00 or thereabouts. The government being aware of this problem introduced the amendments to the Motor Accident Regulations last year banning the payment of referral fees. However this practice continues unabated in some cases.

Most responsible and ethical personal injury lawyers would agree the above practice is detrimental to the scheme as a whole and unfortunately would seem to be driving a renewed push for a radical upheaval of the NSW CTP Scheme.

In my submission I believe the focus should firstly be on enforcing the prohibition of the payment of referral fees. Removing this practice would likely see a reverse to the current trend upwards relating to minor claims which are legally represented.

PROPORTION OF BENEFITS

a) SIRA Expenses 3%

With respect to the disproportionate amount of premiums going to injured people, SIRA expenses are only 3% according to the statistics provided. I *assume* this relates to the expenses of administering the Claims Assessment Resolution Service and the Motor Accident Assessment Service and the cost of engaging CARS Assessors and MAS Assessors.

This figure has not increased since the 2013 Reforms Paper. The current regulatory system with respect to the assessment process would not seem to be the issue then.

b) Legal and Investigative Expenses 18%

The discussion paper does not break down the legal and investigative expenses attributable to the insurer or claimant. The investigative expenses I would assume are attributable to the insurers investigations as any investigative expenses incurred on behalf of the claimant are absorbed in the claimant’s legal costs. In any event, at 18% according to the statistics provided, it would be reasonable to see more of these expenses going to the injured person. This portion which combines both claimant and insurer legal costs and investigative expenses is still less than the portion of CTP premiums which is going towards insurance company profit.

With respect to the percentage of the scheme going to the claimant's legal costs, the portion of those costs being regulated surely could not be the issue. The regulated costs are not generous particularly in small claims. With respect to solicitor/client costs, SIRA have already implemented a means for monitoring the amount being charged in any given CTP matter by making it mandatory to provide a comprehensive breakdown of a settlement, including the cost component to SIRA at the conclusion of a matter. This initiative provides a means of regulating the claimant legal costs component of the scheme. Solicitors can be referred for professional misconduct if it appears they are charging excessively after taking into account the complexity of a particular matter. Whether this "big brother" approach is acceptable to legal practitioners is a different issue.

I would also submit that the statistics obtained to date from SIRA re the proportion of legal costs charged as against the overall value of the claim, is likely influenced by the escalation of legally presented smaller claims. Returning to my primary submission, enforcing the prohibition of the payment of referral fees should reverse this trend.

The discussion paper does not provide any detail about the insurers legal costs and investigation expenses and whether there is any framework available to assess the reasonableness of them.

c) Insurer Profit 19%

The 2013 reform paper indicated Insurer profits were 19%. The 2016 discussion paper indicates they have remained at 19%. Yet the CTP insurers argue that the premiums should be increased. 19% is a huge profit. Given the Insurer profit margins have been consistently high, the arguments provided by the insurer for justifying an increase in premiums cannot in my view be justified.

One option is that some of that profit could be redirected to the injured persons given the arguments against the current scheme delivering benefits proportionately as compared to the cost of premiums.

Another option is to reduce the cost of premiums.

d) Insurer Expenses 15%

I am unable to make any comment about the reasonableness of insurer's expenses given no specific information is provided. No comment or criticism is made in the discussion paper as to the proportion of total premiums going towards Insurers expenses.

TIMELINESS OF PAYMENTS

The discussion paper states that the majority of payments are made between three and five years after the accident. These statistics surprise me particularly given the focus on the large proportion of legally represented small claims stated to be one of the major problems in the scheme. The current regulatory framework has a means for matters to be moved in a timely manner through the system. It would not be in the interest of a claimant's lawyer to drag a small matter out for years given the regulated costs recoverable in such matters.

All participants in a personal injury scheme appreciate the need for an injured person's injuries to stabilise. Medical assessment will not as a rule take place for at least 6 months after an injury has occurred and in more serious injuries or psychiatric injuries it can take much longer. However ensuring all of the evidence is available before finalising an injured persons claim is completely desirable in my view if the objective of the scheme is to fairly compensate a person, who through no fault of their own has suffered loss. In a no fault scheme this may not be a primary consideration and in any event is unlikely to be commercially viable.

With respect to making preliminary payments to injured people in an earlier time frame, treatment payments are already made in this way. Making interim payments for economic loss is in my view problematic as a general concept within the current scheme. The scheme already provides for the application of a hardship payment for economic loss prior to settlement, with the right to have the issue adjudicated if need be.

More information would need to be provided to support the discussion paper's conclusion that the *majority* of claims take between three and five years to resolve for me to be in a position to make further comment.

SCHEME INTEGRITY

The government has already set up a "Fraud Task Force." This is entirely appropriate in my view and is a reasonable way to deal with the inevitable small percentage of fraudulent claims. All responsible and ethical participants in the NSW CTP scheme would encourage any objectives which would eliminate fraud from the scheme.

The discussion paper does however identify a number of examples of what it describes as "fraudulent behaviour" which it says arise due to exaggeration as to the extent of the injury or the effect of injury or relating to the extent of the collision as compared to the injury claimed. In my view, these examples should not be included as examples of fraud. We have in place a highly competent assessment process and highly competent and well trained assessors who are capable of weighing up all of the available evidence and making considered judgments about the weight to be afforded to the evidence as a whole.

Also it is a well-known fact that you can have a high impact MVA with little or no injury and a relatively minor impact MVA which nevertheless causes a more significant injury.

Enforcing the prohibition of referral fees would also reduce the propensity for some claimants to pursue compensation without merit.

PREFERRED OPTION FOR REFORM

I am in favour of Option 1 on the basis I think we have a superior CTP scheme which delivers fair compensation to those who deserve it. I do think the scheme can be improved. The NSW scheme is more expensive however not only do we provide a means for fairly compensating those injured through no fault of their own, we also provide protection for the catastrophically injured and for minors. We also have a limited no fault component to our scheme.

I am not in favour of a no fault based system as this would penalise the innocent victim. Drivers at fault, also payers of CTP premiums, may gain, but at the expense of those not at fault.

I agree that in order to maintain our current superior CTP scheme, the costs of premiums must be contained and we must find ways to ensure the distribution of those premiums are in accordance with the objectives of the scheme.

Options for significantly reducing benefits available in claims under \$50,000.00 and the further restriction of legal costs to discourage the prosecution of small claims are fair considerations. However care must be taken to not disadvantage legitimately injured people who nevertheless do not have large claims, in particular those on pensions who do not have a claim for economic loss. If those people could not find legal representation in situations where an Insurer may not be acting reasonably, this would seem to me to be unfair. If only statutory costs are available, at their current level it may be commercially unviable for some matters to be taken through to a CARS determination by a lawyer. I am in favour of an option which would base statutory costs on work required (event based) to bring a matter to conclusion rather than based on the value of the claim.

Whilst overall I am of the view that Option 1 out of those presented in the discussion paper is the preferred option, there should be a parallel emphasis on the government enforcing the prohibition of referral fees. The measures recently introduced by the government to monitor legal costs and reduce the existence of fraud should also assist.

I concede that the adversarial nature of coming to an agreement as to the appropriate value of the claim contributes to the cost of administering the scheme. Claimants may sometimes be unreasonable but so too can Insurers be. The difference is that claimant's will be penalised by the extra legal costs involved with proceeding to formal assessment. Insurers have less to lose, at the very most will have to pay a small increase in regulated costs, hardly a deterrent.

I support the proposal for internal review processes and compulsory mediation noting it is already compulsory to attempt settlement prior to lodging at CARS. A mediator may assist in moderating entrenched positions.

Finally, consideration should be given to whether consistent insurance profits of 19% are justifiable given the reasons being canvassed for reform of the NSW CTP scheme. Sustained profits at the current level, in my view, make the argument for an increase in CTP premiums unsustainable.