

THE CASE FOR COMPULSORY THIRD PARTY INSURANCE REFORM IN THE AUSTRALIAN CAPITAL TERRITORY

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Sixty years ago, on 14 November 1947, Herbert Victor Johnson, Minister of State for the Interior in Ben Chifley's government, signed a notice pursuant to s 2 of the *Motor Traffic Ordinance 1947* (Cth). That notice fixed 2 February 1948 as the date on which the Ordinance was to commence and, with it, the present third-party insurance scheme for the Australian Capital Territory.

By February 1948, when the Ordinance commenced, a total of 16 insurers were touting for business in the ACT. So competition among insurers offering compulsory third-party insurance, or CTP as it is generally abbreviated to, was very much a reality in the ACT in 1948.

Among the original insurers was NRMA Insurance Ltd, which has offered CTP insurance in the Territory from then to this day. Today it is our only authorised CTP insurer. In fact, for the last 30 years since 1980, NRMA Insurance has held a de facto

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monopoly largely due to the fact that the legislation then governing the scheme failed to change with the times.

In 2008, this legislation was finally updated with the introduction of the *Road Transport (Third-Party Insurance) Act 2008* (ACT) (2008 CTP Act) commencing 1 October 2008. In essence, the 2008 reforms were designed to be the foundation for further reforms to the scheme. The 2008 CTP Act introduced significant baseline reforms in areas such as premium setting, insurer regulation, claims and litigation procedures, legal costs and the provision of necessary and early rehabilitation. These reforms have set the foundations for a modern CTP scheme fit for the 21st century. Initially, these reforms have led to a slight increase in medical and rehabilitation costs paid under the CTP scheme, therefore partially aligning the outcomes of the CTP scheme with the objectives outlined in the 2008 CTP Act. However, there continues to be substantial upwards pressure on premiums in the ACT. The Government has therefore examined all potential reform options with the aim of addressing cost pressures on premiums in the ACT, while simultaneously maintaining access to the common law for all CTP claimants.

CTP schemes exist to ensure that there will be funds available for return to health for persons injured due to the negligence of motor vehicle drivers. Despite significant differences of detail in design of schemes, the need for a regulated scheme to provide compensation for people injured in motor vehicle accidents is almost universally accepted. CTP is therefore compulsory in every country with a developed economy and legal system. The ACT scheme involves approximately 250,000 motor vehicles

and handles around 800 to 1,000 claims per year. For the vast majority (over 99.5%) of motorists the premium is compulsorily paid even though they do not incur a claim. The nature of the scheme is that negligent drivers are not penalised for the damage that they cause. All drivers are required to share the burden of a few negligent drivers. It is essential that any scheme be fair and efficient for both the premium payers and the injured persons.

Approximately 20% of the total cost of the ACT scheme is spent in legal costs. This does not include payments of legal fees and disbursements made by clients to their legal representatives, otherwise known as solicitor-client costs. Medical and rehabilitation costs (including, where necessary attendant/domestic care and home/vehicle modifications) are less than half what they are in NSW. The scheme needs to change and that change needs to cement the directions of the 2008 CTP Act, consistent with the objectives set out in s 5A of that Act. The perverse incentive under the common law to maximise the compensation given to claimants still exists. This operates to the detriment of claimants as claims take longer to resolve and with that, legal costs and disbursements are allowed to increase. Prior to the 2008 reforms claims in the ACT took an average of 1,161 days to resolve, compared with half that in Queensland. This pursuit of maximum compensation, as distinct from full or fair compensation, is also at the expense of all those that pay CTP premiums who must bear the total scheme costs in the price they pay for CTP premiums.

Under the current monopoly situation, there is little incentive for either the claimant or the insured to improve the efficiency or effectiveness of the system. There is also

little incentive for other insurers to enter the market under the current circumstances. The ACT market is small, so the initial costs of entry will not be rewarded by a large increase in premium revenue that might be expected in another, larger jurisdiction. With high transaction costs and uncertainty regarding award payments, the relative risk for insurers is greater. The consequence is that the ACT community, most of whom are car owners, face the highest premiums in the country and arguably the least effective management of health outcomes.

There is a need for further reform within the ACT CTP scheme, and that these reforms are required to more closely align the outcomes of the scheme with the objectives as outlined in s 5A of the *Road Transport (Third-Party Insurance) Act 2008* (ACT) (2008 CTP Act). These objectives include promoting the rehabilitation of people injured in a motor accident, encouraging the speedy resolution of claims, keeping the costs of insurance at an affordable level and promoting competition for CTP premiums in the ACT.

As a direct response, the *Road Transport (Third Party Insurance) Amendment Bill 2011* (ACT) (CTP Amendment Bill 2011) was introduced by the Government into the Legislative Assembly earlier this year on 17 February 2011. This Bill builds on the 2008 reforms by proposing the introduction of a permanent impairment threshold for non-economic loss damages (more commonly known as general damages or ‘pain and suffering’). The purpose of setting the threshold at 15% whole person impairment (based on the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 5th edition) is to distinguish between relatively minor injuries which

make up the majority of claimants from those claimants with major or severe injuries. The outcome of this change will be better health outcomes.

It is logical that in order to achieve the best possible health outcome for an injured individual, rehabilitation should commence as soon as possible after the accident. The proposed changes to the CTP scheme will expand on the 2008 reforms, which obliged insurers to meet the first \$5,000 of an injured person's medical expenses incurred within six months of a motor vehicle accident on what is effectively a no-fault basis. In addition, once an insurer admits liability, it has an ongoing obligation to meet reasonably incurred medical expenses and to make reasonable and appropriate rehabilitation services available to the claimant pending settlement of the claim. However, disturbingly, it appears that claimants are not currently getting the benefit of these early payment provisions, with only 7% of claimants applying for the \$5,000 virtually no-fault payment for medical expenses.

For persons with injuries that do not exceed the 15% whole person impairment threshold, the CTP Amendment Bill 2011 replaces the subjective payment of non-economic loss damages with best practice medical treatment and rehabilitation. This legislative change is designed to shift the focus for claimants towards their rehabilitation and return to health and away from the current situation in which there is strong incentive for delaying treatment for those that have suffered relatively minor injury in favour of an ongoing litigious culture. These amendments will remove the incentive to delay treatment for those injured persons below the threshold impairment

and will mean that it is unambiguously in their best interests to undertake all the necessary rehabilitation, at the expense of the insurer, as soon as possible.

Those people that do not meet the whole person impairment threshold will however still retain their access to all other categories of common law compensation including medical expenses, rehabilitation costs, loss of past and future earnings and where applicable domestic care and modifications to their home and/or vehicle.

Legislative changes such as this are important. They are necessary to improve the CTP scheme in the ACT and its focus on health outcomes. Many jurisdictions both internationally and in Australia have adopted similar reforms. These reforms vary from complete overhauls of the insurance system from tort to no-fault, or a hybrid system that retains the common law but places restrictions on damages. Restrictions on common law damages range from draconian to almost negligible. The ACT has the least restrictive limitation of the common law. The CTP Amendment Bill 2011 retains common law in the ACT as a fault based CTP scheme. However, the further reform of the kind proposed in the CTP Amendment Bill 2011 is clearly in line with the direction of CTP insurance across Australia.

The idea that restricting access to non-economic loss improves overall health outcomes is not limited to Australia. In Canada there have been significant legal reforms that have placed greater emphasis on immediate access to medical treatment and injury management. For example, in Saskatchewan, where accident compensation systems were changed from tort to no-fault in 1995, a study published in the *New*

*England Journal of Medicine*¹ in 2000 revealed that the number of claims for pain and suffering caused by whiplash injuries decreased, partially due to an increased focus on payments made for medical care. The study also found that median time to claims closure were reduced and that there was a strong association between lower levels of pain, higher levels of physical functioning and the shorter time for closures experienced under the reforms.²

Closer to home, NSW has also undertaken significant reforms to its CTP scheme. In 1999, the *Motor Accidents Compensation Act* (NSW) introduced a whole person impairment threshold for the payment of non-economic losses, set at 10% (based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition), early notification and treatment processes, the introduction of compulsory injury management and lastly lifetime care for individuals injured in motor vehicle accidents while maintaining fault-based common law damages. In introducing the Motor Accidents (Lifetime Care and Support) Bill (NSW) on 4 April 2006, the Minister responsible for these reforms, the Hon John Della Bosca MLC, outlined the impacts of the 1999 reforms:

In the reformed scheme the average payment to the most seriously injured has increased by 19 per cent while the average payment for non-economic loss or general damages is 23 per cent more than in the old scheme. The reformed scheme has also seen a dramatic decrease in administration costs, with legal costs almost halving and investigation costs having reduced by more than 40 per cent. ... For motorists, green slip premiums are at their most affordable for

¹ J.D. Cassidy et al, 'Effect of Eliminating Compensation for Pain and Suffering on the Outcome of Insurance Claims for Whiplash Injury' (2000) 342 *New England Journal of Medicine* 1179.

² *Ibid*, 1184.

over a decade. Injured people are receiving faster treatment and rehabilitation and those that are more seriously injured are, on average, receiving increased compensation payments.³

With lower premiums resulting from the 1999 reforms, in recent years NSW has been able to offer catastrophically injured people long-term care on a no-fault basis. This means that even those at-fault in a motor crash who are severely injured but who are denied compensation by the common law are now able to receive long-term care and support.

A study funded by the NSW Motor Accident Authority and reported in *Injury Prevention* in 2006 compared health outcomes of whiplash associated disorders (WAD) at three months, six months, and two years after injury. It confirmed earlier international findings that early claim closure was associated with a higher report of recovery.⁴ A further study by PricewaterhouseCoopers presented at the Institute of Actuaries of Australia XIth Accident Compensation Seminar 1-4 April 2007⁵ on the 1999 changes to the NSW CTP scheme found in relation to individuals with whiplash injuries that the reforms had led to better health outcomes, better physical health and higher rates of recovery two years after the injury. It concluded that medical payments were higher in the first 6 months of a claim, which indicates that there was increased utilisation of earlier access to treatment. Claim costs were also lower on average for

³ New South Wales, *Parliamentary Debates*, Legislative Council, 4 April 2006.

⁴ T Rebeck et al 'A Prospective Cohort study of health Outcomes Following Whiplash Associated Disorders in an Australian Population' (2006) 12 *Injury Prevention*, 97.

⁵ Sarah Johnson et al, *Whiplash Claimants Health Outcomes and Cost Pre and Post the 1999 NSW CTP Legislative Reforms* (2007) Institute of Actuaries Australia
<http://www.actuaries.asn.au/library/4.c_ACS07_paper_Johnson_Feyer_Whiplash%20claimants%20health%20outcomes.pdf>.

smaller claims and higher for larger claims due to increased medical and economic loss payments.

Another study reported in the *Journal of the Neurological Sciences*⁶ in 2005 argued that health outcomes for people with whiplash injuries were improved after legislative changes such as the removal of compensation for pain and suffering, early acceptance of compensation claims and early access to treatment.

The dynamics for reform are therefore quite clear: similar reforms in other jurisdictions have shown that substantial benefits are accrued by the most important stakeholders in a CTP scheme, the claimants. While the Government has no desire to convert the ACT scheme into a no-fault insurance system, like the one that operates in Victoria, the intention of the reforms is to create a hybrid system that operates with the injured party in mind, and focuses on displacing damages for pain and suffering for relatively minor injuries with early medical and rehabilitation interventions that should reduce actual pain and suffering in the longer term.

The increased emphasis under the proposed Bill on injury management is not a ploy by government to reduce the awards made for pain and suffering to the satisfaction of insurance companies, but a reform designed to shift the focus of the CTP scheme to getting injured motorists on the road to recovery as soon as possible. This will facilitate better health outcomes with a quicker return to health for patients.

⁶ I Cameron, et al 'Legislative Change Improved Health Outcomes for People with Whiplash: Pre and Post Comparison' (2005) 238 *Journal of the Neurological Sciences*, S85.

The benefits of the reforms are expected to also include the reduction of premiums paid by ACT motorists due to lower costs for the scheme and the introduction of competition for the first time in 30 years and greater choice. The 2008 CTP Act requires proposed premiums in the ACT to be approved by the CTP regulator, and this will enable costs savings resulting from the reforms to be passed onto the motorist. The CTP regulator has not allowed any increases in overall insurer profit margins since the 2008 reforms were introduced.

As stated, the reforms will also encourage the entry of competitors into the ACT CTP market. The relatively small size of the market (approximately 250,000 motor vehicles) and the volatility of claim sizes and premiums in recent years have made the ACT less attractive to would-be insurers. The proposed reforms will further assist in reducing the time required for settlement of smaller claims and there will be increased certainty and transparency in regards to scheme costs and damages awarded. This will reduce the risk of volatility and should encourage new CTP insurers to enter the ACT market.

The proposed reforms to the CTP will help ensure that the ACT scheme over time will deliver an affordable system for motorists, fair treatment to those who are injured, improved performance of scheme providers and an effective governance and management regime for the scheme. The reforms will more closely align the operation and outcomes of the CTP scheme with the objectives of the 2008 CTP Act: the results of similar reforms in other jurisdictions have shown the substantial efficacy of early

medical treatment as against non-economic loss damages. The Government is confident that these reforms will lead to substantial improvements in the overall health outcomes for those injured in motor vehicle crashes in the ACT.