Minister Dominello – Speaking Notes
Australian Lawyers Alliance
NSW State Conference
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CHECK AGAINST DELIVERY

Introduction

Good morning.

Thank you for the opportunity to talk to you today.

Before I commence I wish to acknowledge the Gadigal people of the Eora Nation, the traditional custodians of this land and pay my respects to Elders both past and present.

Today I would like to discuss the Government's announcement of a review of the Compulsory Third Party (CTP) Insurance Scheme.

I am also keen to hear from you, so I will leave some time at the end for questions and comments.

2013 learnings and new approach

I think it's important to start by acknowledging the Government's proposed reforms to CTP in 2013.

I'm reminded of that old traveller's quip – the lost tourist pulls over and asks a local: "Excuse me – how do I get to the next main town from here". "Gee mate," says the local, "if you want to get there, I wouldn't be starting from here!"

Clearly the 2013 process didn't produce the result the Government had hoped for.

There was strong language used during the debate and this created a level of acrimony that made it difficult to achieve positive reform.

Upon becoming Minister for Aboriginal Affairs in 2011, I was quickly taught by the communities that collaboration and consultation were prime ingredients for meaningful reform. It is a lesson I was reminded of this constantly over my four years in the job.

Consultation has been a hallmark of my approach when taking on big reforms and responding to contentious issues. In my experience consultation with experts in the field almost always produces a better result.

I am determined to involve the legal fraternity and other scheme providers in the reform process and to ensure that all of us are on a journey to achieving better outcomes for people injured on our roads as well as for the state's motorists who fund the scheme.

I'd like to thank the ALA for the genuine, collaborative and constructive approach you have demonstrated to date. In particular, I acknowledge Roshana May, Andrew Christopoulos and Andrew Stone SC.

When we sat down with SIRA a few months ago and ran through the latest scheme performance data.

The data shows a significant spike in legally represented low-severity claims, compensation claims for children and evidence that the claims farming practices which have plagued the UK scheme, have migrated to NSW.

Everyone agreed that reform is needed.

Since then my office and I have been in regular dialogue with Andrew Stone and the ALA discussing possible solutions. In many ways, this is just the start of the journey.

Through close collaboration, I believe we will obtain better reform outcomes.

Today I would like to discuss three areas:

1. What I see as the problems with the current scheme
2. What a well-functioning scheme should look like; and
3. Potential options for reform.

History and objectives of Compulsory Third Party Motor Accident Insurance

Before discussing these three areas, I'd like to reflect on why the CTP scheme matters, as I think this provides a good guiderail for reform.

I hardly need to tell the legal fraternity this, but many people - including myself - sometimes forget why we have a CTP scheme.

- It ensures people injured on our roads are covered for their medical and rehabilitation costs.
- The scheme ensures they are covered for financial losses due to time off work or reductions in future earning capacity.
- And it protects motorists who might otherwise face the prospect of being sued to pay for any injuries they caused.

We have in the NSW CTP scheme a critical social safety net for injured people and motorists, and I want to acknowledge the important role played by the legal profession in this.

Evolution – is the current scheme fit for purpose?

That said, I think we can all agree that the safety net provided by the current scheme is not serving injured people and motorists as well as it could.

(Time)

People injured in motor accidents often wait too long to receive benefits, with some waiting up to five years or longer.

Even at the lower end of the scale, people with whiplash and soft tissue injuries wait on average 18 months.

(Premium prices)

Green slip prices are rising quickly – most of the state's 5 million policy holders have incurred an average 70 per cent increase in premiums since 2008.

Sydney motorists are now paying on average $637 a year on green slips – among the highest in Australia – and further increases are expected this year of up to 20 per cent.

No government can sit by and allow the status quo to continue.

This is particularly hard on motorists on low incomes, and is simply not sustainable.

According to the Australian Council of Social Service (ACOSS), around 15 per cent of people living in NSW live below the poverty line – that is less than $400 per week for a single person or around $850 for a couple with two children.

People on low incomes do drive.

And applying the statistics from ACOSS to the CTP scheme would suggest that possibly as many as 500,000 people living below the poverty line in NSW are Green Slip purchasers.

These are people with low disposable incomes, who pay their green slip premiums year after year, the majority of whom never make a claim on the system.

For these people, a 20 per cent increase can mean not being able to send a child on a school excursion or missing a rental payment.

I believe the affordability of premiums is a matter of fairness.

I'm determined to create **a fairer and more affordable scheme** that works in the interests of **all** road users.

And I will be looking at all the reform options through a consumer lens.

I will certainly welcome your input, both through the written submissions and the industry roundtables we are conducting later this month.

When we have those discussions and reform options are put forward, I will be asking some simple questions:

Will this change put a downward pressure on the cost of a green slip and make it more affordable for motorists on low income?

Will this change result in a higher proportion of benefits going towards the most seriously injured road users?

Will this change reduce the time it takes to resolve a claim?

Will this change make it harder for people to make fraudulent and exaggerated claims?

History shows that most statutory insurance schemes require a 'refresh' every 8-10 years to ensure the intent of the scheme continues to be met.

In other words, to ensure that outcomes are focused on injured people and scheme sustainability. This applies whether it's workers compensation, home warranty insurance or CTP.

Other than the introduction of the **Lifetime Care and Support Scheme** and some incremental changes such as blameless accidents and the expansion of some no-fault benefits, it has been more than 16 years since we've seen major reform to NSW CTP.

Over the life of the scheme, the percentage of injured road users making a CTP claim has grown. The claims and assessment process has become more sophisticated and the cost of scheme providers, including insurers, lawyers and medical professionals has increased as a proportion of overall funds in the scheme.

One factor behind ballooning premiums – and I emphasise it's only one factor - is fraud and exaggerated claims.

We estimate this adds up to $75 to premiums.

Of concern, the state insurance regulator SIRA has detected large increases in recent times of questionable claims.

According to the SIRA's Scheme Performance Report in 2015 the number of reported road casualties declined by around 12%[1] from 2008 to 2013. Yet, the frequency of CTP claims being made by people injured in accidents has *increased* by 40 per cent.

Minor severity claims **make up more than half** the claims in the scheme and are growing quickly.

The main contributor is the increased number of claims for minor injuries involving legal representation – this has increased by 111 per cent between 2008 and 2015.

Despite being deemed as minor injuries, these are still costing around $100,000 on average.

This equates to more than $200 on each green slip.

I am certainly not suggesting that all minor, legally represented claims are fraudulent or exaggerated, but I am concerned at the magnitude of the increase, the nature of some claims and the overall impact on the scheme.

[1] 25,000 in 2008 vs 22,000 in 2013 (presented at hospital or reported by Police). Note that serious injuries (ie hospitalisations) has gone up by 14% or 10,974 to 12,581 according to Centre for Road Safety.

We are seeing an increase in minor claims involving single car accidents with many claimants - there are even cases with more claimants than the car can seat!

We are also seeing increases in claims for injuries as a result of low speed accidents which cause minimal damage to the car.

Comparisons with the UK experience

What appears to be at least partially behind the increases in UK-style ‘claims farming’, where people who have been in accidents are cold called and encouraged to make minor claims.

The UK has been dubbed the ‘whiplash capital of Europe’.

As you would be aware, in November last year the UK Government announced wholesale changes to its scheme which severely restricts the ability of injured road users to claim compensation including:

- Increasing the threshold for personal injury claims in the UK small claims court from £1000 to £5000.
- Removing the right to general damages for certain types of injuries, particularly minor severity injuries such as whiplash
- Imposing a range of restrictions on legal and medical service providers.

It is anticipated the British Government’s changes will result in a £50 reduction in premiums across the board.

This strong government response came after a significant increase in low severity claims over a number of years driving up premium costs. Over 80 per cent of motor accident claims in the UK are for whiplash and soft tissue injuries – this represents a £2 billion annual cost. By comparison, only 3% of motor accident claims in France were for whiplash.

Currently in NSW around 40% of total claims comprise of whiplash and soft tissue injuries - not quite the levels reached in the UK, but the trend is concerning.

Through this reform process, we need to work together to address issues that threaten the sustainability of the NSW scheme enabling us to avoid the far-reaching solutions pursued in the UK.

Disturbingly, the cold callers now targeting NSW consumers seem to have some knowledge of who has been in accidents.

These practices push up the cost of the scheme and hence premiums and divert resources away from people who need it most.

The Government will not tolerate gaming of the system, and the regulator's investigations have already assisted insurers to take legal action against some individuals.

However more needs to be done.

Accordingly, in the last week the Government has established a fraud taskforce to further identify and investigate fraud in the system.

We have also set up a CTP fraud hotline to allow people to report suspected fraud.

I welcome feedback from the legal fraternity on other ways to minimise fraud and exaggerated claims.

What an effective CTP scheme should look like

The Government has approached reform by not just looking at specific problems but by asking itself: 'What does an effective CTP scheme look like?'

That is, what should be the guiding objectives for an effective CTP scheme?

In order to maintain a well-functioning scheme, reform should be focussed on **four key objectives**:

1. increasing the proportion of benefits provided to the most seriously injured road users
2. reducing the time it takes to resolve a claim
3. reducing opportunities for claims fraud and exaggeration
4. reducing the cost of Green Slip premiums.

These objectives allow us to measure the overall performance of the current scheme and to guide the development of reform options.

The first objective is about ensuring that injured people get the benefits they need and a fair share of funds collected through CTP premiums.

Excluding the Lifetime Cares scheme, can the current scheme be described as fair when injured people only receive 45% of CTP funds?

I'll put that another way. Would the average motorist think it reasonable that only 45 cents in every dollar collected by the CTP insurer ends up in the hands of injured road users?

Is it fair that such a large proportion of these funds are going to minor injuries, and not the most seriously injured?

There is also a debate to be had about whether it is fair that at-fault injured people do not receive benefits.

Of the 25,000 people injured on our roads each year, around 7,000 people receive little or no support from the CTP scheme. For the majority of the 7,000 this is because they are deemed to be the 'at-fault' driver or rider.

There are also other accident types which are not covered, for example accidents involving off-road motorbikes, quad

bikes, pedestrians and others hit by cyclists, as well as other accidents that occur on private property. These people do not choose who injures them, yet they are excluded from help.

How do we explain to a pedestrian hit by a bicycle at high speed that they will not be looked after in the scheme designed to protect injured road users?

Using the statistic that I mentioned earlier from ACOSS this means that potentially more than 1,000 people each year who live below the poverty line cannot currently access the full range of benefits this scheme provides. This is despite the fact they are paying Green Slip prices in line with the rest of the community.

The existing 'at-fault' scheme essentially acts as a form of rationing –limiting the allocation of funds in the scheme to injured road users deemed to be most in need.

I think it is worth exploring the policy rationale behind this. We have in place a raft of penalties for breaking the road rules. Does exclusion from the CTP scheme create a perverse double punishment for those injured road users who, as a result of a minor driving infraction, are precluded from access to CTP benefits?

The Government does not have a pre-determined position on this, but it is one that has been raised by many stakeholders and is worthy of examination in any review of the CTP scheme.

The second CTP scheme objective is timeliness - ensuring benefits are delivered as quickly as possible to injured people.

Can the current scheme be described as providing timely access to benefits when injured people can wait 3, 5 and even 10 years, in the most extreme cases to receive benefits?

The third objective is around having a robust scheme that minimises opportunities for fraud.

The current scheme could hardly be described this way given the significant rise in fraud and exaggerated claims I outlined earlier.

The fourth objective is affordability - ensuring all vehicle owners can afford to pay their premiums.

NSW premiums are not affordable for many vehicle owners and are on track to become even less so in the near future with major increases on the cards.

I think it is appropriate to attach competitiveness to the objective of affordability - having a competitive insurance market for green slip premiums will help to ensure motorists do not pay more than they should.

Following the departure of Zurich, we effectively have only **four insurers** left in the scheme (operating under 6 licenses). Back in 1998 we had 14 separate insurance licenses in the CTP scheme - a significantly higher level of competition.

An overarching objective for me is increasing competition and attracting new market entrants. While the comprehensive vehicle insurance market is teeming with new entrants, the NSW CTP scheme has remained stagnant.

Given CTP insurance is compulsory, the Government has an obligation to ensure there is sufficient competition amongst existing CTP insurers and that there are low barriers to entry for new market entrants.

As many of you would know, an independent review of insurer profit in the CTP scheme has recently been conducted.

The Review included an examination of premium system design and competition issues as well as opportunities for

improving the regulation of the scheme so that insurers cannot find clever ways of making profits by avoiding their share of bad risks.

The Review makes constructive recommendations on mechanisms that can be put in place to better manage risks and potentially limit future premium growth.

The review considered barriers to entry for potential new insurers including the capital requirements of our scheme, its long tail nature, the economies of scope and scale and the requirement to write policies for all vehicle classes.

While action has commenced on addressing the Review's regulatory and administrative recommendations, the Government will consider the recommendations requiring legislation, as part of broader scheme design.

Let me also make it very clear, insurers continuing to realise profits that are more than double what they anticipate when they set their prices, is not acceptable in a compulsory insurance scheme.

Regardless of the reform option we embark upon, what some might call insurer 'super profits' together with significant premium hikes are not acceptable.

If we are to achieve genuine scheme reform, in the interests of all road users, then both lawyers and the insurers must be willing to make compromises.

And to that point, the Government will put private underwriting to the test as part of this comprehensive review process.

Reform options

With these problems and objectives in mind, the Government has developed an Options Paper with four potential reform models.

Before discussing these options, I want to stress that the Government does not have a preferred option.

We have no pre-determined position – my sole focus is to make the scheme work the way it was intended for injured people and motorists - a focus we hope you share.

We will consult extensively before reaching a preferred option, both through submissions to the Options Paper and via stakeholder and community discussions.

And any proposal for substantial reform will be subject to further consultation prior to being adopted.

Broadly speaking the reform options involve, either making enhancements to the current fault-based scheme **or** moving more towards a no fault scheme with defined-benefits.

These options are not exhaustive and there are variations within each option.

In looking at each option, the Options Paper has considered how it addresses the four key objectives of an effective CTP scheme namely fairness, timeliness, integrity and affordability.

The Government recognises there are myriad of potential reform options. Among the many experts here today, I encourage you to put forward your suggestions on how to make the scheme work better through the consultation process.

I'd now like to briefly cover each option.

Option 1 involves retaining the current common law, primarily fault–based scheme but making process improvements, particularly in cases where there are high levels of dispute.

Examples of possible improvements include:

Mandatory assessment processes after a certain time period rather than allowing claims to remain open indefinitely.

Internal review processes and compulsory mediation in claims prior to legal assessment.

New regulatory powers to address insurer premiums and profit.

Tighter caps on legal expenses.

Option 2 would involve making process improvements like Option 1 as well as adjusting benefit levels.

This option could involve one or a combination of changes:

One would be to adjust payments for non-economic loss or ‘pain and suffering’.

To provide greater certainty and reduce disputes, consideration could be given to lowering the current cap of $511,000 or having a graduated system of payments linked to overall impairment.

However I acknowledge this option would be less flexible than the current system in catering for individual circumstances.

Another idea is to adjust payments for economic loss.

Returning to the theme of fairness, this would involve cutting the current cap for economic loss of $4688 per week, which is well above caps in other states. Why are we paying so much to compensate the highest earners in our community, compared to other States, while the least well off have to pay such high premiums?

Tighter caps, however, could be offset by allowing payments to be made progressively rather than at final settlement.

It could also involve adjustments to care payments.

Care costs have risen dramatically over the past decade, with the scheme actuary finding costs have increased from $18 per policy in 2004 to $42 in 2014.

The rise in care costs is most notable for injured people who have minor, legally represented claims.

One change would be to exclude certain types of care for payment, such as gratuitous care provided by family and friends.

Legal costs now exceed medical costs in the scheme, so consideration could be given to having minimum thresholds before legal expenses can be made and to link legal payments to work performed rather than a percentage of a claim.

This option could also require claimants to pay a medical excess before being eligible to make a claim for benefits, as occurs when making a health insurance claim.

I'm sure there are many other options for changing benefits and incentives, so again I welcome any feedback from the profession.

Option 3 involves moving to a hybrid no-fault, defined benefits scheme but with common law benefits retained for the most seriously injured.

The aim of this option would be to ensure that injured people receive immediate and ongoing benefits in accordance with need.

The majority of claims that involve relatively minor injuries would be finalised without the need to negotiate a settlement amount. Given the current influx of unmeritorious small claims, I think we definitely need to do something about better managing these, either within the current system or in a hybrid system.

The Government put forward a hybrid scheme in 2013, however it should be noted that there are different hybrid approaches outlined in the Options Paper.

To that point, a key issue for discussion is the method to determine eligibility for common law or access to payments for pain and suffering.

Key considerations include, should a whole person impairment percentage be used? Or should we consider alternative ways of calculating pain and suffering and access to common law benefits?

Measure such as ‘percentage of worst case’, points scales or a narrative test are used in other jurisdictions.

Another issue for discussion is whether access to common law should be an alternative to defined benefits or an addition to defined benefits, and at what point common law would apply.

Other hybrid variations could include:

> Payment of medical, treatment and rehabilitation costs to anyone irrespective of fault, while maintaining fault for lost income and pain and suffering.
>
> Increase the threshold of the current no-fault Accident Notification Form to a higher level and retain common law for all claims above that.
>
> Introduce benefits on a no-fault basis for anyone catastrophically injured that is not already covered by the Lifetime Care and Support Scheme but retain a fault based approach for less severe injuries.

Option 4 involves moving to a fully no-fault, defined benefits scheme with no common law.

Like Option 3, it would aim to improve certainty and timeliness of payments to injured people and increase certainty for insurers in their pricing.

The Government acknowledges that no-fault schemes have both benefits and limitations.

While no-fault can lead to more timely access to benefits and greater certainty about costs, the quantum of compensation cannot easily be compared with lump sum schemes.

One of the potential downsides of a defined benefits scheme is that benefits cannot be fully tailored to individual circumstances.

This means some minor injury claimants may receive lower overall compensation than in a lump sum scheme - although they are likely to gain access to payments much sooner.

No-fault schemes are also criticised for providing benefits to people who cause accidents.

As mentioned earlier, 7,000 at-fault motorists each year are currently excluded from receiving benefits, and some people argue that if this group are included in the CTP scheme costs and premiums would go up, not down. Others argue that these extra costs would be a reduction in legal disputation under a no-fault scheme.

Putting caps in place on defined benefits for less serious injuries would also offset the cost of extending coverage to at-fault motorists.

But some people would argue it is unfair that benefits for injured motorists who are not at fault should be reduced to pay benefits to the motorists who caused their injuries.

Another option would be to adopt the workers compensation benefit structure which could, depending on scheme design, potentially reduce the cost of a Green Slip anywhere from $100 to $150.

Conclusion

None of the reform options are a silver bullet and each involves judgments and trade-offs.

There is no perfect solution, just important choices to be made.

But I believe it's possible to make the scheme work a lot better for injured people and motorists. I unashamedly stand here as the representative of these road users.

And I want the legal fraternity to engage fully in the reform process and contribute ideas to improve the system.

As I have also said to the insurance industry, the Government expects all industry stakeholders to focus on the public interest, not their sectional interests.

If we are to achieve long term sustainable reform, we all need to work together. Let's start from here.

Thank you.