LAW COUNCIL OF AUSTRALIA

Comments on evidence given by Treasury officials to the ACT Legislative Assembly's Public Accounts Committee on 6 October 2011

The Law Council has read the transcript of evidence presented to the Committee by the Treasurer and representatives of the Treasury Directorate. The following addresses some comments and statements placed on the record, which the Committee may wish to explore further in these proceedings or raise with Treasury representatives when they reappear at a later date.

- **Treasury stated that**, in their view, there may not be any reduction in CTPI premiums as a result of these changes. That is, they have been advised by the NRMA Ltd and perhaps by other prospective entrants to the CTPI market, that the best we might hope for is a reduction in the rate of increase in CTPI premiums.[1]

  Comment: This is a remarkable admission and one which should not be glossed over in this inquiry. By way of comparison, in the first year after introduction of a 10% whole person impairment (**WPI**) threshold in NSW, average CTPI premiums in NSW fell from $418 in September 1999 to $332 in September 2000, and continued to fall gradually, reaching $319 in September 2005. Throughout the same period, NSW CTP insurers were able to claim average profits of around 27 per cent.

  This experience stands at odds with the apparent claim by insurers, referred to by Mr Hargreaves MLA, that "there is no such thing as a reduction in charges for premiums."[2]

- **Treasury stated that** "the legislative changes...are very similar to those in other jurisdictions that these insurers are used to working in. They will be familiar with the legislative environment which provides them with certainty or sovereign certainty in a sense."[3] The Treasurer further stated that "The ACT is perhaps one of the last places to come to this issue."[4] Mr Hargreaves MLA also commented that "I understand we are actually stone motherless last in all of this stuff."

  Comment: These statements are incorrect and misleading. In fact there are only 2 jurisdictions which apply a Whole Person Impairment (WPI) threshold to motor accident claims – NSW and Victoria. As Victoria is a publicly underwritten, hybrid no-fault scheme, it cannot reasonably be compared with the changes under the present Bill, as the Bill does not propose to introduce a no-fault scheme in the ACT. Therefore, the only comparable scheme is NSW, where a 10 per cent WPI threshold applies.

  Of the remaining schemes in Australia, there is unrestricted access to common law under the CTPI schemes in Queensland, Tasmania, Western Australia and South

[1] Public Accounts Committee, Proof Transcript of Evidence, Thursday 6 October 2011, p.3
[2] Id, p.3.
[3] Id, p.4.
[4] Id, p.8.

Australia. A statutory no-fault scheme exists in the Northern Territory. Whist there are a number of differences between Australian schemes which allow access to common law, the ACT is not at odds with the majority of CTPI schemes in Australia in terms of common law access.

- **Treasury stated that** there is "quite a lot of anecdotal evidence" that injured claimants do not seek treatment in order to increase their chances of a larger payout.

  Comment: There is no evidentiary basis for this claim other than unsupported theory that claimants may be avoiding treatment in the hope of a larger payout. Notwithstanding the lack of any evidence that this is true, the 'solution' proposed by the Government is to restrict compensation for non-economic loss for over 80% of claimants on the assumption that those people will divert their focus toward accessing treatment and rehabilitation services through the scheme.

  The Law Council recommends that such statements should be treated with considerable caution. There is no data or documentary evidence available to support Treasury's claim and it is contrary to the common experience of legal practitioners, who encourage access to early treatment in the best interests of their client.

  There may be many reasons why injured motorists have not availed themselves of the $5,000 early treatment facility. Most commonly, it may be several weeks or months following an accident before a claimant decides to approach a lawyer concerning a motor accident claim and they might not even be aware of the early treatment incentive before expiry of the 28 day notice period.

- **Treasury stated that** (in response to the statement that the AMA Guides contains a preambular statement that *The Guides is not to be used for direct financial award nor as the sole measure of disability. The Guides provides a standard medical assessment for impairment determination and may be used as a component of disability assessment*) "No, I do not think that is correct. The proposal is to use it as a threshold not for direct compensation...those who fall over the threshold will have nothing to do with AMA."[5]

  Comment: With respect, this is misleading. Under this Bill, the AMA Guides would be used to determine whether an injured person can claim compensation for non-economic loss. Compensation for non-economic loss is a "direct financial award", therefore the threshold determines whether a claimant will receive that direct financial reward. Whilst Treasury appears to have interpreted this to only preclude the benchmarking of awards against particular levels of impairment (i.e. 15% = $X, 20% = $Y, 25% = $Z), this appears to be nothing more than an argument drawn from a particularly narrow construction of the cautionary note contained in the preambular paragraphs of the AMA Guides.

  Moreover, the Guides also state that they are not to be used "...as the sole measure of disability." That is precisely what is proposed under the present Bill. There will be no opportunity for assessment of the impact of an injury on the claimant's quality of

[5] Id, p. 19

life if an assessor determines they have not sustained greater than 15% WPI under the AMA Guides.

It is also worth noting that, where the AMA Guides are used in Australia, they are used ostensibly as an *objective* tool to determine whether someone will be eligible to claim compensation for "pain and suffering", which concerns the *subjective* impact of an injury on their life. Accordingly, if a medical assessor determines that a 15% loss of range of movement in the right arm, together with 90% loss of wrist function equates to 12% whole person impairment, that person is effectively deemed to have suffered 0% loss of enjoyment of life, despite the fact they might not be able to engage in many of the activities they once enjoyed and suffer regular or constant pain and discomfort.

- **The Treasurer said that** "this reform is inevitable. It is just a matter of when it occurs and when someone plucks up the political courage to see through the usual interest groups."[6]

  Comment: As noted earlier, the only jurisdiction with a privately-underwritten CTPI scheme which has imposed similar restrictions on injured claimants is NSW. In that jurisdiction, those changes have enabled insurers to claim profits in the range of 25-31% since 1999 – in a competitive market – despite significant reductions in average premiums. These issues have recently lead the NSW legislature to seriously question whether the drastic restrictions on common law rights have been in the best interests of NSW motorists.

  Accordingly, the Law Council rejects the statement that the changes proposed in this Bill are "inevitable". The Law Council acknowledges CTPI premiums have risen in the ACT. However, there are many ways this could be addressed without stripping away the common law rights of over 80% of negligently injured ACT road users.

- **Treasury stated that** "We looked at the outcomes of endless studies that showed improved health outcomes by streaming injured crash victims into a particular regime – from Sydneham to Saskatchewan, to be blunt – and in every case the studies show a singular line of outcome, that is better health outcomes, so long as you are able to channel people into t a structured, equitable mechanism by which they can return to health."[7]

  Comment: This is incorrect. Numerous studies have been conducted into the impact of compensation or litigation on health outcomes. Whilst many of these studies are either inconclusive or have been pilloried on the basis of perceived bias or lack of rigor, the most recent authoritative meta-study, concluded in 2009, found no conclusive link between compensation or litigation and recovery from injury.[8] It important to note that paper reviewed a number of other previous studies and found fault with each one.

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[6] Id, p.30.
[7] Id, p.35.
[8] Spearing, N. and Connelly, L. 2009, 'Is Compensation "bad for health"? a systematic meta-review', *International Journal of the Care of the Injured*, vol 41 no 7, pp 683-92

- **Treasury stated that** "[harmonisation] was slightly more relevant in relation to the discount rate, but really the *Todorovic* discount rate was set by the High Court in 1981 and it is a long time since then and the cost of living has changes and the whole economic structure of the nation has changed..."[9] They further stated "[Raising the discount from 3% to 5%] is an issue of parity with other jurisdictions and around creating greater stability of risk."[10]

  Comment: The Government appears to have overlooked the original justification for imposing a discount rate. The discount rate is intended to ensure that compensation awards for future loss of income and future treatment and care expenses are reduced by an amount equal to the interest the plaintiff might earn on the lump sum if it were invested for the expected period of injury. That is, it should be set at a level which takes account of the benefit received by a plaintiff for the early receipt of future money.

  Adopting a scientific approach to the discount rate would also require the compensation authority to take into account the effects of inflation and taxation of any returns on the investment. Estimates of this vary, however actuaries Cumpston Sarjeant Pty Ltd have estimated the correct discount rate is around 2.65%, having regard to the effects of inflation, taxation and the average return on reasonably safe investments. Cumpston Sarjeant estimates this is broadly the same as the expected return in 1981, when *Todorovic* was decided, despite the different economic circumstances and investment environment.

  For the youngest and most catastrophically injured, for example a 20 year old with a acquired severe brain injury or quadriplegia, an increase in the discount rate from 3% to 5% could result in a 27% reduction in the award for future treatment and care and future loss of income.[11] Clearly, this will leave the accident victim without the capacity to fund their own care for almost one-third of their life.

  This is not an issue of "creating greater stability for risk", as suggested by Treasury. Discount rates are set in most Australian jurisdictions as a means of arbitrarily reducing compensation awards. The 5% discount rate has no scientific basis – and the Negligence Reivew Panel chaired by Justice David Ipp recommended specifically against raising the discount rate from 3%, noting that "using a discount rate higher than can reasonably be justified by reference to the appropriate criteria would be an unfair and entirely arbitrary way of reducing the total damages bill.

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[9] Id, p.35.
[10] Id, p.26.
[11] See ACT Law Society, ACT Bar Association, Australian Lawyers Alliance, Submission in response to the Exposure Draft *Road Transport Amendment (Third Party Insurance) Bill*, 30 November 2010, page 22.