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26 August 2011

Ms Andréa Cullen
Secretary, Standing Committee on Public Accounts
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

By email and post: committees@parliament.act.gov.au

Dear Ms Cullen

Inquiry into the Road Transport (Third - Party Insurance) Amendment Bill 2011

I refer to the above Inquiry by the Standing Committee on Public Accounts.

I am pleased to provide the **enclosed** joint submission by the ACT Law Society, the ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance.

Do not hesitate to contact me on (02) 6247 5700.

Yours sincerely

Athol Opas
President

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ACT Standing Committee on Public Accounts Inquiry into the *Road Transport Amendment (Third Party Insurance) Bill 2010*

Joint Submission by:

Law Society of the ACT

Bar Association of the ACT; and

ACT Branch of the Australian Lawyers Alliance

26 August 2011

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Annexures:

Summary and Recommendations

1. The ACT Law Society ("**Law Society**"), Bar Association of the ACT ("**ACT Bar**") and the Australian Lawyers Alliance ("**ALA**") are pleased to provide the following submission to the Inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011 ("**the Inquiry**").

2. The Law Society, ACT Bar and ALA are united in opposition to the draft Bill for reasons set out in the detailed submission to the ACT Government entitled "Comments on Exposure Draft of the Road Transport (Third-Party Insurance) Amendment Bill 2010", which is annexed to this submission at **Annexure A**. The Bill is fundamentally unfair in denying proper compensation to over 80% of injured road users, even on the Government's figures. Our earlier submission on the Bill is not repeated in the body of the current submission which addresses the Inquiry's terms of reference under headings numbered in correspondence with those terms of reference.

3. The Government proposes to reduce the third party insurance premium by removing many of the benefits covered by the insurance policy, specifically access to general damages via the common law. It is common ground that this action will render 80% or more of current claimants ineligible to claim damages for pain and suffering.

4. Third party insurance is compulsory. It protects Canberra's motorists, cyclists and pedestrians from negligent acts of fellow motorists.

5. In 2002 the Government took a strong stance on the so-called "insurance crisis":

    - it refused to act before a careful examination of the facts
    - it refused, despite intense pressure, to limit benefits to injured claimants

6. In 2011 the Government proposed to severely limit benefits to third party insurance claimants without a public examination of all the facts, specifically the amounts the Government and the insurers are taking or retaining from the premium pool.

7. By direct appeal and through the *Freedom of Information Act 1989* the legal profession has sought the information that would allow us to understand why a scheme which has worked so well for so long to protect the welfare of people injured by the negligence of others is purportedly so badly broken that the only way to fix it is to radically limit access to it.

8. The Government proposes to do this in two ways: firstly by imposing a threshold on who is eligible to make a claim for damages for pain and suffering and, secondly, by limiting access to the common law. The threshold proposed is 15% whole person impairment (WPI) on the basis of the American Medical Association Guides to Evaluation of Permanent Impairment, Fifth Edition (AMA 5). It should be noted that AMA5 was developed by American doctors to communicate with each other, not as a mechanism to determine legal entitlement or otherwise. It cannot, in any

circumstances, replace a determination of a court because injuries affect different people in different ways. For example, an injury to the hand may have a markedly different effect on a singer than a pianist. That is the importance of access to the common law – access to the common law is a citizen's protection if a dispute arises with his or her insurer. All fair and reliable schemes of accident compensation have access to the common law as their centre piece.

9. The vast majority of motor vehicle accident injuries are not catastrophic but include serious injuries which require surgery and which could leave the victim with permanent incapacity. A majority of these would fall below the 15% WPI threshold. Examples of actual injuries below a 15% WPI include:

    - significant signs of loss of reflexes and muscle strength and atrophy above or below the knee
    - loss of all toes on one foot
    - amputation of a thumb or finger
    - most vertebral fractures requiring surgery

What should be done to protect the benefits of the insurance while exercising some control over premiums?

10. The legal profession repeats its offer to work with the Government in a staged approach to make the third party insurance scheme more efficient and in that way keep premiums as low as possible while not removing most of the value of the insurance policy. We recommend:

    - withdrawing the Bill
    - carefully analysing the 2008 amendments to the Act: early indications are that the 2008 reforms are starting to take effect and we expect that they will make much of the current Bill unnecessary
    - undertaking a transparent and public cost benefit analysis of the scheme which examines all payments, drawings and withholdings from the premium pool over recent years
    - promoting early non-adversarial resolution
    - reducing scheme inefficiencies
    - managing court delays
    - minimising cross-border difficulties

11. On behalf of people like our clients who are injured in motor vehicle accidents we submit that the Bill does not represent value to the citizens of Canberra.

1. Review of the operation of the *Road Transport (Third-Party Insurance) Act 2008* ("the 2008 Act")

A. Effect of the Act on recovery and rehabilitation of people who have been injured as a result of a road crash

12. As representatives of road accident victims, we are frequently receiving information concerning the impact of a road crash upon a victim, and concerning the treatment and rehabilitation assistance for such victims.

13. In our experience, the 2008 Act has improved the availability of treatment and rehabilitation for injured road users. We applaud the introduction of Part 3A of the 2008 Act which enables an accident victim to receive an initial sum to fund important treatment and rehabilitation, subject to notice to an insurer within 28 days of the accident and without involving any admission of liability or requiring police or other evidence. This appears to assist in early return to health and positive rehabilitation for many accident victims.

14. We encourage a review of section 72 of the Act to consider whether the arbitrary cut-off time of 28 days from an accident should be subject to some discretionary extension where there may be a good reason why an accident victim is not able to give the notification within that time, perhaps because of their injuries, or their ignorance of the notice provision.

15. Further, it would be helpful for there to be further public promotion of the availability of such assistance.

B. The effectiveness of the Act in meeting the Objects as set out in section 5A of the 2008 Act.

16. The Objects of the Act as set out in s5A are:

    (a) to continue and improve the system of compulsory third party insurance, and the scheme of statutory insurance for uninsured and unidentified vehicles operating in the ACT; and

    (b) to promote competition in setting premiums for compulsory third party insurance policies; and

    (c) to keep the costs of insurance at an affordable level; and

    (d) to provide for the licensing and supervision of insurers providing insurance under policies of compulsory third party insurance; and

(e) to encourage the speedy resolution of personal injury claims resulting from motor accidents; and

(f) to promote and encourage, as far as practicable, the rehabilitation of people who sustain personal injury because of motor accidents; and

(g) to establish and keep a register of motor accident claims to help the administration of the statutory insurance scheme and the detection of fraud; and

(h) to promote measures directed at eliminating or reducing causes of motor accidents and mitigating their result.

17. Our experience suggests that, in general, the 2008 Act has assisted in achieving Objects (a), (d), (e), (f) and (h).

18. The Government has refused to release data relevant to whether the 2008 Act has fulfilled objects (b), (c) and (g). Indeed, the Law Society has been forced to pursue this information through the ACT Civil and Administrative Tribunal concerning its freedom of information applications for such data. Both the Government and the sole TPI insurer, the NRMA, have sought to deny any public access to data which could allow a proper assessment of these objects (b), (c) and (g).

19. **Regarding Objects (a), (c) & (e)**: The claims procedures set out in Parts 4.2 and 4.3 of the 2008 Act require claimants and insurers to provide early notification of claims and defences and to disclose relevant documents to one another. Such procedures are sensible and lead to the early identification of issues, the provision of funding for treatment, and the early resolution of claims. Such an approach improves and reduces the costs of the TPI scheme and encourages the speedy resolution of claims.

20. Nevertheless, the Act should provide that "substantial compliance" with notice provisions or forms is sufficient. This would mirror s4(1) of the *Civil Law (Wrongs) Regulation 2003* and avoid arid and costly debates about such compliance. Our experience is that many notices are rejected for technical or arbitrary reasons concerning the possible omission of one or two minor details. This leads to further delay and costs.

21. The 2008 Act also introduced requirements for compulsory conferences and mandatory final offers prior to commencement of legal action. We support these procedures but note that the profession has regularly made representations about amendments to these provisions to remove impractical and costly complications associated with the current provisions. In this regard we refer to our attached prior submission to Government. The scheme could be significantly improved with further reduction of cost by adopting the amendments proposed below under the heading "*5.*

Alternative compulsory TPI scheme designs in other jurisdictions" and the proposed amendments are at **Annexure C**.

22. **Regarding Objects (a) & (c)**: The 2008 Act introduced changes to harmonise ACT arrangement with those in NSW and to limit the likely costs of the TPI scheme. There was a change of definition of "motor accident" to mirror the NSW legislation. For example, s7 of the 2008 Act excludes from the TPI scheme injuries arising from loading or unloading vehicles. This will limit claims and avoid costly dual insurance arguments in some cases. Further, there is a limitation of some risks such as those involving repeat use injuries (see sections 21 and 22 of the 2008 Act). These changes are likely to allow a downward shift in TPI premiums and fulfil Object (c).

23. **Regarding Objects (a) & (d)**: To facilitate handling of claims concerning uninsured or unidentified vehicles, the 2008 Act established the ACT Insurance Authority as the Nominal Defendant dealing with claims involving uninsured or unidentified drivers. These provisions appear to be operating satisfactorily.

24. **Regarding Objects (a), (c), (e) & (f)**: As identified in paragraph 13 above, the 2008 Act introduced without prejudice payments for treatment and rehabilitation where notice is given. This has contributed to fulfilling Objects (a), (e) and (f). It is also likely to allow a downward shift in TPI premiums and fulfill Object (c).

25. **Regarding Objects (c) & (e)**: To reduce legal costs and insurance costs, we support limiting legal costs recoverable in smaller matters where litigation proceeds. However, the cost provisions of the 2008 Act in s155, s156 and the *Regulation* are convoluted, difficult to understand, arbitrary and unfairly discriminate against disadvantaged accident victims who are young, elderly or otherwise out of the workforce. These 2008 Act cost provisions are so complex and arbitrary that they fail to fully achieve their stated aims. We have suggested improvements, simplification and extension of such costs provisions in amendments proposed below under the heading "*5. Alternative compulsory TPI scheme designs in other jurisdictions*".

26. **Regarding Objects (b), (c) & (d)**: While the 2008 Act included enhanced provisions for licensing of insurers (Part 5), at this stage, it appears that only one insurer is licensed and there is no indication of any change to that. Indeed, anecdotal evidence from insurers suggests that this it is unlikely that other insurers will seek to become registered providers of TPI in the ACT because of the very small market size in the ACT. An insurer who obtained, say, 20% of the market could have their premium pool wiped out by one or two catastrophic injuries.

27. As the comparison referred to in **Annexure B** indicates, the majority of jurisdictions do not have a market-based system and each of these, with the exception of the Northern Territory, cover a greater number of vehicles.

28. There appears to be no real correlation between scheme efficiency, benefits and whether there is a market-based approach. We question whether objective (b) should really constitute an aim in itself or whether it is merely a means to fulfilling the other objectives of the scheme.

29. In short, the 2008 Act has achieved several of its objectives. We have noted several aspects in which it could be improved. Unfortunately, the proposed Bill does not provide such improvements and, moreover, seeks to "improve" the TPI scheme by denying proper compensation to over 80% of negligently injured road users whether they are drivers, cyclists or pedestrians.

C. Effect of Act on premiums for third party insurance.

30. The Government has systematically refused to release any actuarial or other data on the effect of the 2008 Act on premiums, despite many requests from us. Indeed the Government is currently vigorously defending the secrecy of such data in proceedings before the ACT Civil and Administrative Tribunal. The 2008 Act requires Government approval for TPI premiums. Accordingly, detailed actuarial data should be available, including in relation to the amount of profit being taken from the scheme by insurers.

31. Despite the lack of available data, the 2008 Act should allow a reduction in premiums over time because of its improvements in the speed of claim settlement and its limiting litigation in smaller maters.

D. Effectiveness of the Act in encouraging increased competition

32. Again, we cannot comment in detail without the data the Government wants to keep secret. Nevertheless, we note that the NRMA effectively remains the monopoly provider of TPI in the ACT. As already noted, the relatively small premium pool, which we understand to be about $130Million, may be too small for several insurers to share. The reality is that, under current legislation, there is no legal restriction on other insurers entering the market, and an obsession with bringing competition into the market is misguided, particularly when it is at the expense of proper compensation for over 80% of negligently injured road users.

33. We repeat our comments in 27 and 28 above, namely that competition is a means to either achieving lower premiums or increasing benefits. In light of the interstate comparison, we submit that this ought not to be a goal in itself, i.e. we should not cut benefits to achieve competition.

2. Review the possible effects of the Bill on the provision of third party insurance in the ACT

34. The possible effects of the Bill are dealt with in detail in the submission of 30 November 2010 "Comments on Exposure Draft of the Road Transport (Third-Party Insurance) Amendment Bill 2010", which is **Annexure A** of this submission. In order to avoid repetition the following is a summary of the main effects of the Bill on the provision of third party insurance in the ACT.

35. The main components of the Bill impacting on the provision of third party insurance are:

    (a) **Whole person impairment thresholds for non-economic loss – Section 155F(a)**: The Bill proposes a 15% whole of person impairment threshold before a negligently injured road user would get compensation for non-economic loss, that is compensation for pain and suffering and the loss of enjoyment of life. This will preclude proper compensation for over 80% of victims negligently injured on the roads. The injuries required to get over the 15% threshold are severe, as exemplified in the case studies provided in our prior submission (**Annexure A**).

    (b) **Use of AMA Guides for determining thresholds – Section 155P**: The use of the AMA Guides to determine thresholds appears to be problematic. The Guides expressly say they were never intended for such use, as the following quotation indicates: “The Guides is not to be used for direct financial awards nor as the sole measure of disability. The Guides provides a standard medical assessment for impairment determination and may be used as a component in disability assessment”. The rationale for such improper use of the Guides is apparently just to preclude over 80% of negligently injured road users from being properly compensated. This would be an unjust way of limiting the costs of the TPI scheme.

    (c) **Use of medical panels to determine the issue of thresholds – Division 4.9 B.4**: The use of medical panels to conclusively determine thresholds appears to be flawed for two reasons. First, section 155N empowers the CTP regulator to appoint medical assessors to the assessment panel. Designating this power to the CTP regulator creates a conflict of interest and undermines the judicial process which must use such assessments. Second, section 155S provides that the assessor is immune from facing any consequences for exercising their functions negligently and that they cannot be required to explain to a court or any other authority the basis for their assessment. This undermines the required procedural fairness of the court processes.

(d) **Raising the "discount rate" from 3% to 5% - Section 155A**: The 5% discount figure rips off injured road users. It assumes that the injured person can invest the money at very low risk, for a continuing return of 5% after tax and after inflation. That is a quite unrealistic assumption and it flies in the face of the High Court of Australia judgment in *Todorovic v Waller* (1981) 150 CLR 402. The Bill would throw the burden of future treatment costs, future care and future wage loss onto injured road users and their carers. A seriously injured person on an average income of about $70,600 who is unable to work for the next 20 years because of their injury would get $132,000 less under the Bill's proposal.

(e) **Limiting payment of interest on damages to injured people – Section 156**: The Bill is unjust by denying negligently injured road users proper compensation by way of interest for payments they have been forced to make or for compensation delayed by the insurance and court processes.

(f) **Human rights concerns**: The Bill continues to discriminate against injured road users from vulnerable groups such as children, the elderly and the unemployed. These concerns are expanded upon in our annexed prior submission.

(g) **Cost-shifting**: The Bill would shift many treatment costs from the insurer onto the injured party and ultimately onto taxpayers. The tables included in our annexed prior submission demonstrate this shift.

36. The subtext of the Bill is to reduce insurance premiums. However, none of the evidence produced by the Government to date supports this assertion. Based on the experience of NSW following similar reforms the only beneficiary would be the insurer.

3. Review the operation of third party schemes in other Australian jurisdictions

37. A comparative table of third party insurance schemes across Australia is set out at **Annexure B**.

38. What is striking is that each scheme is so different. It is therefore difficult to draw direct comparisons between them. The differences are a result of statutory changes that have occurred over the last 25 years. Prior to this, all jurisdictions except the NT had unfettered access to fault-based common law, with workers compensation rights for 'journey claims' on a no-fault basis.

39. It is also worth noting that all but 2 jurisdictions have either a government run scheme or statutory monopoly insurer. Further, the ACT is the smallest jurisdiction, with the second lowest number of registered vehicles and therefore a smaller premium pool than most other jurisdictions.

40. There is no correlation between multiple insurers and more generous benefits or cost of CTP premiums, although direct comparison between schemes is difficult.

41. There are two ways in which schemes attempt to limit the cost of smaller claims. The first of these, and the fairest, is to set pre-trial procedures and limit legal costs. This is the approach adopted in the ACT with the 2008 Act (it is also the approach taken in Queensland and Tasmania). Although information has not yet been released by the ACT Government regarding the impact of those changes, it is understood the changes have seen a reduction in scheme costs. Various other changes are recommended in this submission to make those changes even more effective.

42. The other approach is to introduce thresholds, caps and other restrictions on the rights of injured claimants. This penalises those who are injured, discourages rehabilitation and disproportionately effects those who suffer no economic loss – e.g., retirees, the disabled, young people, carers and stay at home parents (most of whom are women).

4. Other factors that may influence the cost of registering a motor vehicle in the ACT

43. Based on material from ACT government websites, ACT registration fees are comprised of:

    (a) a Road Rescue Fee of about $16.00;

    (b) a Road Safety Contribution of about $2.00;

    (c) TPI (or CTP) insurance of about $487.50, but dependent on vehicle category; and

    (d) A registration fee set by Government, dependent on the weight of the vehicle, but up to almost half of the total cost of registering a vehicle.

44. Clearly the Government could reduce the total cost of registering a vehicle by reducing the registration fee. The Government has actually significantly increased the registration fee from 1 July 2011. This would certainly be preferable to slashing the compensation available to those negligently injured by other road users.

45. Perhaps more importantly, before benefits are cut, there should be some consideration of insurance as a proportion of the total costs of running a vehicle. Ideally, such costs should be actuarially calculated. However, the following table is one based on information from various ACT Government and insurer websites and it seeks to outline such direct costs (without factoring in any environmental costs).

Item *	**Small Car: (Hyundai Getz @ $17,000)**	**Large Car (Holden Commodore @ $40,000)**
Registration	$251.90	$414.80
Registration Duty	$00.00 (5 star rating)	$800.00 (4 star rating)
Road Rescue	$16.00	$16.00
Road Safety Contribution	$2.00	$2.00
TPI (CTP) Insurance	$487.50	$487.50
Comprehensive Insurance (average)	$516.96	$734.25
Depreciation	$2,469.00	$7,275.00
Fuel	$1,570.50	$2,712.00

Item *	**Small Car: (Hyundai Getz @ $17,000)**	**Large Car (Holden Commodore @ $40,000)**
Maintenance	$621.00	$625.50
Tyres	$243.00	$598.50
Parking	$2100.00	$2100.00
Total (First Year On-Road)	**$8,025.96**	**$14,550.75**

* All costs are based on 15,000 km per year).

46. While the tabulated costs may only be indicative, they do indicate that TPI insurance premiums are only about 3.4% to 6.1% of the costs of running a vehicle in the ACT for average car drivers. Changing TPI premiums a little will have a miniscule effect on average car drivers.

5. Alternative compulsory TPI scheme designs in other jurisdictions

47. As indicated earlier, there is little benefit from selecting parts of CTP schemes from other jurisdictions in Australia. We urge against developing a "mongrel" scheme by trying to pick different bits from different jurisdictions. Such a "mongrel" scheme is likely to involve parts of the scheme which do not work properly together.

48. Our primary submission is that the *Road Transport (Third Party Insurance) Amendment Bill 2010* ("**the Bill**") should be scrapped and the Road Transport (Third Party Insurance) Act 2008 should continue in its current form but subject to improvements which the profession has been recommending for some time, as outlined in **Annexure C**.

6. Examine the impact of TPI premiums on the sustainability of transport

49. To an extent, compulsory third party insurance already impacts on the sustainability of transport by providing a reduction in TPI premiums for smaller vehicles. For instance, in 2010 the TPI premium was about $70 less for a Mini (1195Kg) than a Utility (1530Kg). The Mini also attracted a Registration fee of around $125 less.

50. The issue of whether the Government wishes to further use the price of TPI as a mechanism to induce behavioural change in transport users and providers should, we believe, be regarded by the Committee as subsidiary to this Inquiry. Indeed the impact of road transport on the natural and built environment is a subject worthy of the separate and continuing study which it receives at all levels of government.

51. In our previous submission to Government (**Annexure A**) we raised the fact that, unlike other States, ACT TPI premiums are not risk rated. As in that submission, we suggest that the Public Accounts Committee consider whether ACT TPI premiums should be risk rated. We refer to 'Ways to improve the scheme' at page 29 in our submission at **Annexure A**. At present there is no incentive offered to improve driving behaviour and, as a result, safe drivers effectively subsidise poorer drivers. We submit that the introduction of risk ratings would impact positively on the sustainability of transport and indeed driver behaviour in the ACT.

52. At the association level the legal profession professes no special expertise on this subject. However it should be obvious to all that transport policy instruments, including TPI premiums, which encourage greater use of roads by cyclists and increasingly heavier motor vehicles will create obvious dangers for cyclists in the shared space. TPI policies which are devoid of the benefits of general damages are unlikely to be viewed with favour by such people.

53. Sir Isaac Newton's three laws of motion explain why the consequences of a particular vehicle collision will be more severe, respectively, upon a pedestrian, cyclist, motorcyclist or occupier of a small car than for the occupant of a heavy vehicle such as a 4WD. We are told that 4WDs are 'safer' for the occupants in a collision. This appears to have lead to an 'automotive arms race' which is devoid of principle on any grounds. A proper policy objective would be to discourage unnecessarily large and heavy vehicles from our roads; it appears incongruous to penalise those injured because they have little or no physical protection, from a collision with a heavy vehicle.

54. The most severely injured and the young will be the worst affected by the proposed alteration in discount rates. This is because they are likely to receive greater components for attendant care and over a longer time period. It is the young who more often use small vehicles or bicycles for lifestyle and economic reasons.

55. Common law systems can provide effective deterrence against negligent behaviour. We applaud the concept of personal responsibility. Thresholds do however limit the liability of the negligent and lead to unsustainable burdens on the public health and social security systems.

56. Against that background the profession encourages the Committee to concentrate on the principal issue at hand: whether the Bill contains any real benefit for accident victims in particular and road users in general.

7. The long-term viability of the TPI scheme in the ACT

57. There is no evidence to suggest that the current scheme is not financially viable in the short or long term.

58. In the absence of a more transparent approach by the government and the scheme's current sole third party insurance provider, it is difficult to assess the long-term viability of the current TPI scheme in the ACT.

59. The questions must also be asked: "From whose point of view should we assess viability?" and "What sort of viability are we looking for?"

60. From the scant data we have been provided and from our experience with schemes in other jurisdictions, we know that the changes set out in the Bill do not guarantee the financial long-term viability of the scheme.

61. We need only to look at the NSW experience, where insurer profits have increased exponentially, but premiums, (as a result of changes similar to the ones set out in the Bill), have not fallen, to know that. Of course, it should be said that those changes certainly guaranteed the financial viability of the insurers who participated in the scheme in NSW. (For details, please see our submission referred to in part 3 of this submission.)

62. From the point of view of the premium payer in NSW, the financial viability of the scheme must be regarded as something to be determined in the future, because in the last year, CTP premiums have risen substantially in NSW. The same would apply to the premium payer in the ACT.

63. From the point of view of accident victims in NSW, the financial viability of the scheme is non-existent; the injured person now subsidises the scheme by not being able to claim proper compensation, undermining their ability to rehabilitate and their own financial viability. This is proposed for accident victims in the ACT.

64. In our view, the current scheme broadly reflects the democratic instinct and sense of fairness held by most ACT citizens. A scheme such as the one outlined in the Bill would fail in terms of long-term human rights viability.

65. It should not be ignored that there are other, more equitable, ways of ensuring the long-term viability of the scheme in the ACT than those proposed in the Bill; some examples have been suggested earlier in this submission.

8. Other Relevant Matters

66. The Law Society of the ACT has, since 30 November 2010, been trying to obtain from the Government directly and through the *Freedom of Information ACT 1989*, the information which forms the policy foundation for the proposed reforms.

67. In summary the information which we have sought is set out below:

    i) The total ACT CTP premium pool for each of the financial years 2006-07 to 2010-11 to date, inclusive.
    ii) In respect of the premium pool for each of the years identified in 1 above, the amounts retained by or paid out of the premium pool to:

        - accident victims by way of compensation
        - accident victims by way of medical expenses
        - Medical practitioners
        - Other medical professionals
        - Legal fees paid to plaintiff lawyers
        - Legal fees paid to defence lawyers
        - NRMA Insurance
        - The ACT Government
        - ACT Government departments, directorates, agencies and statutory authorities
        - Others (specified)
        - Total

68. This information is crucial to ascertain the effectiveness of the current legislation and to determine whether reform is necessary. To this point our request has been unsuccessful. It is hoped that the data will be made available to the Public Accounts Committee.

69. If the Committee were to obtain this information, we request access to it (if necessary on a confidential basis) so that we can make further submissions to the Committee.

70. In the promotion of the Bill the Government has made a public issue of legal fees. Their supporting narrative suggests that legal fees account for a large proportion of scheme costs. This is incorrect and unfounded. We say that once the requested information is provided the figures will show that the proportion of the premium pool attributable to legal fees is statistically insignificant. Indeed, in the Government's own information already released it states that:

'*[C]laim sizes to date under the revised legislation are lower than under the previous legislative regime. Much of the reduction is attributable to a reduction in legal costs'*.[1]

71. The Government's own intelligence demonstrates that the 2008 reforms are working. The only effect of the proposed reforms is that there will be a clear shift in the premium pool moving away from accident victims to the profitability of the insurers. Indeed, the reforms will have the opposite effect to that suggested by the Government.

[1] Letter of 30 June 2010 from David Heath of Cumpston Sarjeant Consulting Actuaries to Tom McDonald, Director Legal and Insurance Policy, ACT Treasury. Folio 91 of Actuarial Report (Cumpston Sarjeant Consultant Actuaries): ACT CTP Scheme – Impact of proposed legislative changes with respect to whole person impairment.

Annexure A

actlawsociety

Lawyers for the People AUSTRALIAN LAWYERS ALLIANCE

Comments on exposure draft of the *Road Transport Amendment (Third Party Insurance) Bill 2010*

The Treasurer, the Hon. Katy Gallagher MLA

30 November 2010

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Executive Summary

This submission responds to the exposure draft of the *Road Transport Amendment (Third Party Insurance) Bill 2010* (**the draft Bill**). The draft Bill will amend the *Road Transport (Third Party Insurance) Act 2008* (**the 2008 Act**) to severely restrict the rights of plaintiffs injured on ACT roads by negligent drivers.

This submission demonstrates that:

1. Whole person impairment (WPI) thresholds, based on the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment* (the *Guides*), provide a very poor assessment of the impact of injury on a person's life.

2. The proposed 15% WPI threshold for physical injury will affect ACT residents who suffer very serious injuries in accidents involving motor vehicles, not only 'minor' claims. A 15% WPI threshold will remove access to damages for pain and suffering from approximately 90% of injured people and seriously limit access to justice as a result.

3. A WPI threshold takes no account of pain and suffering, continuing disability, or loss of enjoyment of life due to injury. It also ignores the actual impact of an injury on a person's capacity to work in their chosen field or engage in sporting or recreational activities.

4. A 20% WPI threshold for psychological injuries suggests that psychological injuries are somewhat less debilitating than physical injuries and is offensive to, and discriminates against, those affected by psychological illness.

5. The proposed cap on damages for pain and suffering and the increase in the discount rate from 3% to 5% are unprincipled and inimical to the putative objectives of the draft Bill. These changes will reduce compensation for medical care and lost income and will impact most harshly on the youngest and most severely injured people.

6. There is no evidence that ACT CTP scheme is not operating effectively, which brings into serious doubt the logical basis for the changes proposed by the draft Bill.

7. Limits on legal costs, in excess of already existing limits, tend to restrict access to justice on the part of those who most need legal advice and assistance. No evidence has been presented that this limitation is necessary or will have any impact on the cost of the scheme.

8. The ACT CTP scheme underwent a major change from 1 October 2008. Any further changes should only occur after an inquiry into the performance of the scheme since the 2008 Act was introduced and the likely impact of these proposed changes.

9. There is nothing in the draft Bill which will ensure the intended savings for CTP insurers, arising from severe restrictions to the common law rights of the insured, are passed on to vehicle owners as premium reductions.

This submission also outlines some positive suggestions for improvement of the CTP scheme, without stripping away the common law rights of ACT residents, including:

(a) risk rating for CTP insurance polices, which occurs in other jurisdictions, including in NSW;

(b) improving provisions of the 2008 Act dealing with compulsory conferences;

(c) improving provisions concerning mandatory final offers;

(d) clarification of the costs regime in the 2008 Act, which would reduce litigation in "small" claims;

(e) developing guidelines for non-economic loss damages based on precedent in the ACT, in consultation with the courts and the legal profession, as is done in the UK.

(f) a combination of improved costs limits and guidelines for non-economic loss damages could greatly reduce costs and uncertainty around "small" claims;

The ACTLS, ACT Bar and ALA strongly recommend that the draft Bill not be introduced in its present form and certainly not before a thorough inquiry is carried out into the impacts of the 2008 Act and the likely impacts of the draft Bill on the rights of those insured in road accidents in the ACT.

Introduction

The ACT Law Society (**ACTLS**), Bar Association of the ACT (**ACT Bar**) and the Australian Lawyers Alliance (**ALA**) are pleased to provide the following submission in response to the exposure draft of the *Road Transport (Third Party Insurance) Amendment Bill 2010* (**the draft Bill**).

The ACTLS, ACT Bar and ALA are united in opposition to the draft Bill. Details of the ACTLS, ACT Bar and ALA are provided at **Attachment A**.

The draft Bill, if enacted in its present form, will do the following (among other things):

- introduce a whole person impairment (WPI) threshold of 15%, whereby any accident victim who is not assessed as having suffered permanent physical impairment of more that 15% of their bodily functions under the American Medical Association Guidelines (5th edition) (**the Guides**) is not entitled to damages for non-economic loss (**NEL**) (that is, damages for pain and suffering and loss of enjoyment of life);

- introduce a 20% WPI threshold for psychological injuries for access to NEL (noting that physical and psychological assessments cannot be added together);

- provide for the appointment of medical panels, which will conclusively determine an injured person's level of WPI under the Guides;

- increase the 'discount rate' applying to damages from 3% to 5%, substantially reducing compensation for future medical treatment and loss of income;

- cap damages for pain and suffering and loss of enjoyment of life at a maximum award of $270,000; and

- limit payment of interest on damages to injured people.

These proposed changes will create the most draconian restrictions on the rights of negligently injured motorists ever seen in the Australian Capital Territory. Further, the Bill will make the ACT motor accidents compensation scheme the most restrictive privately underwritten motor accidents regime in the country.

The process by which this legislation has been conceived, drafted and introduced does not even come close to acceptable standards of open and transparent government. The Explanatory Statement accompanying the draft Bill fails to explain why these changes are necessary in the current economic and insurance environment and does not attempt to explain to the legislature what the regulatory impact will be, for example by reference to the experience of other jurisdictions which have enacted similar provisions. This submission addresses those matters, by reference to available data from the insurance industry and the real-life experiences of those who are now suffering under similar draconian laws in other jurisdictions.

This submission strongly argues that the draft Bill should not be introduced, as it will impact deleteriously on the rights of all ACT road users, primarily for the benefit of CTP insurers. It is submitted that the changes proposed by the draft Bill are unnecessary, will

have unforseen consequences and should be rejected by the ACT Government and Legislative Assembly.

Background and history

Tort law "reform"

In 2002, the Federal, State and Territory Governments commissioned the Negligence Review Panel, Chaired by the Hon Justice David Ipp ("the Ipp Review"), to recommend changes to personal injury laws for the primary purpose of reducing the numbers of litigated claims and size of court awarded compensation payments to injured claimants.[1]

The review was commissioned in response to the so-called "insurance crisis" of 1999-2002, during which the cost of public liability and professional indemnity insurance rose to unsustainable levels. A number of reasons for the insurance crisis were identified, including fall-out from the 11 September 2001 terrorist attacks in New York and an unsustainable local insurance industry, which had been struggling to compete with reckless pricing practices that ultimately led to the collapse of HIH insurance.

Higher claim costs associated with common law claims were also identified as a factor and the insurance industry, media and even governments of some jurisdictions ran an effective campaign arguing that Australia was becoming a "litigious society" with "Santa-Claus judges" and a diminishing sense of personal responsibility. In fact, after the hysteria surrounding the insurance crisis had dissipated, it was found that all of these claims were untrue. It is noted that:

(a) In 2005, the Law Council of Australia commissioned an independent report into litigation trends in Australia from 1995-2005.[2] The report found that:

> "…*contrary to widespread belief, litigation rates had not, generally, been increasing in the period leading to the Ipp Review. This finding provides no empirical foundation for the premises underlying tort law reform as a strategy for addressing the insurance crisis in 2002.*
>
> *"It is evident that the reformers could have had no empirical foundation, either for predicting the impact of the reforms on personal injury litigation in their jurisdictions, or for determining by how much it was desirable to reduce it. The reforms introduced by the state and territory legislatures have caused a substantial decline in personal injury litigation rates in most jurisdictions. The 'corrections' in the three largest states, New South Wales, Queensland and Victoria, have been particularly dramatic."*

(b) Apart from a few isolated judgments, the trend in judicial decisions in personal injury matters in Australia, as seen in senior appellate and High Court appeals, had already been reversed, with renewed emphasis on personal responsibility.[3]

[1] Negligence Review Panel, 'Review of the Law of Negligence: Final Report', 30 September 2002. See http://revofneg.treasury.gov.au/content/home.asp
[2] Prof. Ted Wright, 2005, *National Trends in Personal Injury Litigation: before and after "Ipp"*, Justice Policy Research Centre, University of Newcastle.
[3] Justice Spigelman, 'Negligence: Is recovery for personal injury too generous?', speech to the 14th Commonwealth Law Conference, 14 September 2005.

Regardless of the lack of any evidential basis for attacking individual rights to compensation, the Federal, State and Territory governments convened the Ipp review to identify ways to restrict common law compensation.

The recommendations of the Ipp Review were almost universally ignored by governments. Those jurisdictions which implemented tort law changes continued to cite the Ipp review as the putative basis for restricting common law rights of their citizens, whilst largely ignoring Ipp's actual recommendations and evidence about the severe impact of thresholds and other measures on the rights of injured people.

It was encouraging that, on 19 November 2002, Attorney-General and Chief Minister Jon Stanhope told the ACT Legislative Assembly:

> *"There is a major danger in relation to some of the tort law reform on which we are set – that we may disenfranchise great swathes of the community…"*

Now, eight years later, citizens of the ACT will be disenfranchised if the Bill is enacted.

It is important to note that, when NSW enacted thresholds and other restrictions on the capacity for injured people to claim fair compensation between 1999 and 2002, this was done in reaction to a so-called "insurance crisis". There was significant conjecture about the cause of the crisis, however the easiest method identified by governments to control spiralling insurance premiums was to substantially limit the liabilities of insurers (and the rights of their insured).

However, this Bill is not being proposed in the context of any insurance crisis or major public concern about insurance affordability. Further, there is no mention of any public interest or objective that will be served by the Bill, other than to encourage swift recovery from injury. This is despite that there is nothing in the draft Bill aimed at enhancing recovery at all. Moreover, no evidence is provided by the Government to demonstrate that rehabilitation rates will improve if injured people have their common law rights dramatically curtailed. To the contrary, the draft Bill actually reduces compensation for future medical treatment and care.

The purpose of CTP insurance

CTP insurance is a form of insurance that, through the pooling of premiums from all owners of motor vehicles, establishes funds to provide compensation in the form of damages to those injured on the roads by the negligence or fault of others.

Currently, the ACT scheme is run by the NRMA and provides full and comprehensive coverage to those injured by other drivers' negligence.

There would need to be compelling reasons to alter a scheme that is fulfilling its objectives.

What are damages for non-economic loss?

Damages for non-economic loss (**NEL**) are recognition that not all injuries can be simply translated to loss of income or the incurring of medical expenses.

In this sense, NEL damages are compensation for the actual injury itself, pain and associated trauma, loss of amenities, loss of life expectancy and loss of enjoyment and quality of life. Compensation will never fully restore the accident victim's enjoyment of life,

but it is recognised that some form of restitution can go a little way toward achieving that objective.

It is noted that NEL damages usually make up only a relatively small proportion of any given award. It makes up a larger proportion only for children with life-long injuries, the long-term 'unemployed' (including home parents) and the elderly (who have little quantifiable economic loss).

A primary criticism of damages for NEL made by would-be proponents of the present Bill is that "pain and suffering" is not easily quantifiable with any degree of accuracy. In a largely unsuccessful attempt to address this in some jurisdictions, WPI thresholds have been introduced to assess pain and suffering according to degrees of physical impairment. As will be discussed further in this submission, this is a completely arbitrary and unfair way to measure a person's loss of quality of life.

In particular, it is a bizarre development in the laws of some jurisdictions that the right to access damages for "pain and suffering" is being assessed using the AMA Guides, which precludes any assessment of the pain and suffering a person has endured as a result of injury and impairment.

Objectives of the draft Bill

The Explanatory Statement, which sets out the Government's reasons for putting the draft Bill forward, explains that the "key objective of the CTP Act is to…facilitate better health outcomes".[4] It implies that the amendments to the Act contained in the Bill will further that aim.

The Explanatory Statement says that the draft Bill will replace compensation for pain and suffering with a "modern, evidence based statutory entitlement process". It is explained that NEL damages, "are now a largely outdated measure, arising in the common law at a time in history when an injured party was unlikely to have the medical and rehabilitation facilities available to recover from an injury sustained in an accident". This statement is wrong, lacks any justification and appears to imply that pain and suffering no longer exist in the modern world, or that those who cause injury to others should not have to face any consequences for their actions.

The Explanatory Statement says, on page 2, that "These amendments will enable scheme funds to be redirected to those with major/severe injuries where these funds are needed as far as possible to return motor crash victims to a state of health and wellbeing." However, there is nothing in the Bill that redirects money, which would otherwise be paid to road accident victims in compensation for pain and suffering, to health and rehabilitation services. There is nothing in the draft Bill to guarantee that reductions in claims costs and compensation payments to injured people will be largely subsumed by CTP insurers as profits, with only a portion being passed on to the community by way of reduced insurance premiums – which has been the experience in NSW. Further, the existence of a virtual monopoly in the ACT CTP insurance market, which was maintained by statute for many years, will significantly reduce any incentive for insurers to pass on savings in claims costs to ACT residents and substantially increase the profitability of the local insurance sector, while dramatically reducing the value of CTP insurance to ACT motorists.

[4] Draft Explanatory Statement for the draft *Road Transport (Third Party Insurance) Amendment Bill 2010*, page 2.

The 2008 Act has achieved much, including earlier identification and treatment of injuries, paid for by the insurer, without long arguments about liability. The success of the 2008 Act has been held up by the Government in recent statements to the Legislative Assembly by the Treasurer:

> "I am pleased to inform the Assembly that we are starting to see evidence that the new scheme is meeting the expectations of the government in providing better health and wellbeing outcomes for those injured in a motor crash, with more of the scheme costs being spent on medical and rehabilitation costs. Overall, the new scheme is on track with its focus on better outcomes for those injured in a motor crash and a fairer proposition for all motorists who are compelled to purchase compulsory third-party insurance."[5]

We agree. The advances of the 2008 Act should be allowed to continue and then be evaluated before unnecessarily stripping away compensation rights for ACT residents.

Logically, the only way this Bill can improve health outcomes is if the non-payment of compensation for pain and suffering, *in itself*, has the effect of improving health outcomes. If it is being suggested that injury compensation has a negative impact on health outcomes, evidence should be presented by the Government in support of that proposition. Ordinarily this argument is put by proponents of no-fault schemes, who argue that adversarial court procedures encourage malingerers and reward those who do not assist their own recovery. However, there is no suggestion in the present Bill that the Government intends to establish a no fault scheme – just that it intends to severely restrict common law rights to those who have suffered injury, whilst failing to mention that primary beneficiaries of the draft Bill will be CTP insurers in the ACT.

It is a stronger argument that the swift receipt of compensation for pain and suffering and loss of enjoyment of life by victims of injury has a therapeutic effect. The victim has their experience acknowledged by society and they are paid compensation to improve their enjoyment of life and appease their innate sense of justice. It is submitted that justice, following a swift claims resolution process, has a significantly better impact on health outcomes than limiting rights to fair and reasonable compensation for injury.

Missing from the Explanatory Statement is any acknowledgment that the primary, perhaps only, objective of the Bill is to reduce claims costs for insurers in the hope that market forces will drive compulsory third party (CTP) insurance premiums down. The Explanatory Statement obfuscates, attempting to convince the public that these are "progressive" reforms, aimed at "assisting recovery", "modernising" the CTP insurance scheme and directing compensation toward "major/severe injuries".

We submit that the central components of the draft Bill are entirely inimical to the objectives outlined in the Explanatory Statement, and these are discussed in detail below.

CTP insurance premiums

It is noted that the average cost of CTP insurance premiums in the ACT is $487.50, whereas the average CTP premium across NSW is $453.97.[6] It is noted that the draft Bill is apparently modelled on the NSW provisions restricting compensation for motor accident victims in that State and, accordingly, this submission compares the relevant aspects of the ACT and NSW schemes.

[5] Hansard, 19 August 2010, page 3603, per Ms Gallagher MLA. See http://www.hansard.act.gov.au/hansard/2010/week08/3603.htm

[6] Finity Consulting, *CTP News – Spring 2010*, October 2010.

It is noted that difference between the average CTP premium in NSW (which implemented a >10% WPI threshold in 1999) and the average ACT premium is just $33.53 per annum, or $2.79 per month (or 64c a week). To place this in context, the cost of introducing a >10% WPI threshold in NSW has been an 80% reduction in the number of people who are able to claim compensation for pain and suffering.[7] Taking these figures at face value, if ACT residents understood what they were giving away for a premium reduced by just $2.79 per month, we strongly doubt whether the electorate would consider it to be a reasonable trade-off. See **Attachment B** for tables setting out more detailed comparison of premiums in the ACT and NSW.

As clearly demonstrated by the tables under Attachment B the average insurance premiums outlined above do not identify variations in average premiums charged, for example, in Sydney as opposed to Wollongong, Newcastle or country NSW. This is acknowledged by the ACT Department of Treasury, which advises:

> "Both NSW and Victoria are divided into zones for the purpose of setting CTP premiums, with motorists paying much higher premiums in Sydney and Melbourne than in country areas. NSW also risk-rates premiums, with insurers able to charge much higher premiums than in the ACT for motorists they consider to be high-risks (e.g. young drivers up to 25 years old, or those with recent "at fault" accidents, those with older cars or with demerit points on their licences). In the ACT, all motorists pay the same CTP insurance premium, which is a community-rated premium that applies to each vehicle class."[8]

Clearly, if residents of Sydney and Melbourne pay much higher premiums, not withstanding the fact that common law rights are severely restricted in those jurisdictions, then insurance premiums in the ACT (where the vast majority of residents live in a metropolitan area) represent relatively good value for money, in light of the substantially better rights that ACT residents enjoy under their CTP insurance policies.

It is worth mentioning also that comparisons between premiums in most jurisdictions is a fairly pointless exercise due to a preponderance of different laws and frameworks. For example, in Victoria the Transport Accident Commission (TAC) operates a no-fault scheme, with limited rights to sue at common law. A no-fault system also exists in Tasmania, which allows negligently injured people to sue at common law. In Western Australia, a threshold of 5% of the "most extreme case" applies, with a cap on general damages of $337,000, indexed annually. Furthermore, given ACT residents enjoy the highest average level of disposable income of any other jurisdiction, the average CTP premium is actually lower than a number of other jurisdictions when considered as a proportion of average weekly earnings.[9]

Accordingly, caution should be exercised when considering the "average premium" for CTP insurance in the ACT, as opposed to other jurisdictions. From the above analysis, it is clear that:

- restrictions on common law damages are not the most significant driver of premiums in other jurisdictions; and

[7] NSW Motor Accidents Authority, Annual Report 2005/06.
[8] See http://www.treasury.act.gov.au/compulsorytpi/act_CTP_faqs.pdf
[9] For example, the average annual income for Canberrans is $75,348, or average weekly earnings (AWE) of $1,449. This is compared with the national average of $64, 594 (or AWE of $1,242) and NSW average of $65,707 (or AWE of $1,263). Taking these figures at face value, ACT CTP premiums amount to 35% of AWE, whereas NSW greenslip premiums are around 36% of AWE. Data extracted from Australian Bureau of Statistics publications.

- NSW, which applies one of the most restrictive fault-based motor accident compensation schemes in the country, does not compare favourably with other jurisdictions, where the actual value of CTP insurance products is substantially greater, in terms of benefits to accident victims.

Finally, whilst the government declares that the average premium in the ACT is the highest in the country, average CTP premiums in NSW rose by more than the ACT between July 2009 and July 2010.[10] This is despite the application of a 10% WPI threshold in that State since 1999.

If the ACT government is serious about introducing greater competition into the ACT CTP insurance market, perhaps consideration should be given to introducing risk-rated premiums that are used in NSW. As noted above, the ACT operates a controlled CTP premium market, such that drivers pay the same premium regardless of age, driving record, make/model/age of vehicle, residential district etc. In NSW and other jurisdictions, the majority of CTP insurers take these factors into account to produce a unique premium for each premium payer, according to risk. It is submitted that these differences in policy with respect to the setting of premiums are largely the cause of interstate insurers' reluctance to enter the ACT CTP market.

Insurer profits

In NSW, CTP insurers have reaped enormous profits since the introduction of the >10% WPI threshold for pain and suffering compensation. To enable the Government and other members of the Legislative Assembly to understand the enormity of the increase in profitability in the NSW CTP insurance sector as a result of these changes, it is worth considering the following comparison between insurer profitability in NSW from 1991-99 to 1999-2004.

Insurer profitability in NSW

Prior to 1999, NSW drivers enjoyed many of the same rights of ACT drivers. Subsequent to the introduction of changes in 1999 however, NSW drivers have been subject to some of the most severe restrictions on compensation of any motor accidents scheme in the country. It is further noted that, following the 1999 changes, NSW 'greenslip' insurers have enjoyed unprecedented profits, notwithstanding reductions in premiums.

A 2006 review of the performance of the NSW MAA found that:

> "…profit estimates prepared by the MAA indicate that insurers will realise profits substantially higher than those estimated in premiums filings. Some Inquiry participants suggested that insurers had unduly profited whilst claimants had received inadequate damages. The Committee inquired into this issue and found that the primary cause of increased profits was an unexpected fall in the claim frequency in NSW."[11]

According to NSW Government commissioned actuarial advice, profit margins generally in the range of **4½ - 6%** of gross premium for a CTP insurer are considered reasonable (which may vary between individual insurers).[12]

[10] Finity Consulting, *op cit 5*.
[11] Standing Committee on Law and Justice, *Review of Exercise of the Functions of the Motor Accidents Authority and Motor Accidents Council*, Report 31, Sept 2006, NSW Legislative Council, page
[12] Letter from Greg Taylor, Taylor Fry Consulting Actuaries to David Bowen, General Manager, Motor Accidents Authority of New South Wales (4 October 2001) Paragraph. 6.3-6.5 (p 12). See also, letter from Greg Taylor, Taylor Fry Consulting Actuaries to Motor Accidents Authority of New South Wales (21 December

Between **1 July 1991** and **30 June 1999** NSW CTP insurers:

- collected **$8421m** in CTP premiums (avg. **$1052m** p.a.);
- paid **$5331m** in CTP claim payments (**63%** of CTP premiums);
- paid **$2073m** in associated costs such as reinsurance and administration (**25%** of CTP premiums);
- made an estimated profit of **$1034m** (discounted value) which is equivalent to **12%** of CTP insurance premiums collected.[13]

Between **1 October 1999** and **30 September 2004** NSW CTP insurers:

- collected **$6859m** in CTP premiums (avg. **$1372m** p.a.);
- are projected to ultimately pay **$3646m** in CTP claim payments (**53%** of CTP premiums);
- are projected to pay **$1412m** in associated costs such as reinsurance and administration (**20%** of CTP premiums);
- are projected to make a profit of **$1860m** (discounted value) which is equivalent to **27%** of CTP insurance premiums collected (range **$1324m to $2128m 19% - 31%**).[14]

Even prior to the introduction of a >10% threshold, caps on damages payments and other restrictions were introduced in 1999, NSW CTP insurance profits were considerably above the margin of 4.5% – 6% considered reasonable by actuaries advising the Motor Accidents Authority of New South Wales. However, profits made by CTP insurers in NSW since 1999 have been nothing less than remarkable, at close to 5 times the upper limit of what is considered by the MAA to be 'reasonable' profitability.

Insurance companies are commercial entities and are required to act in the best interests of their shareholders. Accordingly, it is unsurprising and hardly the fault of insurers that they have profited from the extreme changes to motor accidents compensation introduced in NSW. However, it is surprising that the NSW Government has failed to respond to the clear imbalance against accident victims that now exists under the scheme as a result of the 1999 changes, as evidenced by the enormous profits in NSW CTP insurance, despite substantial reductions in premiums.

<u>Likely impact in the ACT</u>

When considering the data above concerning insurer profitability in NSW, legislators should also consider that the changes proposed under the draft Bill will, if enacted, restrict the rights of injured people to an even greater extent than under the NSW motor accidents scheme.

While in NSW, a WPI threshold of >10% applies, it is proposed that a >15% WPI threshold will be applied in the ACT. Further, the cap on damages for pain and suffering in NSW is $408,000; however the ACT Government proposes to cap general damages at

2004) Paragraph. 1.2 (p 1-2). These documents were obtained by the Law Council of Australia from the NSW Motor Accidents Authority under the *Freedom of Information Act 1989* (NSW).

[13] Gould Adrian, Report to Motor Accidents Authority: Estimates as at 30 June 2005 of profitability of past NSW compulsory third party premiums written by insurers, 12 October 2005. Table 2.1 (p 3).

[14] Gould Adrian, Report to Motor Accidents Authority: Estimates as at 30 June 2005 of profitability of past NSW compulsory third party premiums written by insurers, 12 October 2005. Table 2.3 (p 6) and Table 10.2 (p 28).

just $270,000, while also increasing the 'discount rate' from 3% to 5% and restricting access to interest on damages, the impact of which will be discussed further below.

At the time of writing this submission, the ACT Government had not released a regulatory impact statement, nor any relevant financial analysis or data to indicate what impact the Government expects the draft Bill may have on the number of common law claims, the average cost of CTP insurance or the profitability of CTP insurers in the ACT.

Proposed Changes

Whole person impairment thresholds

Under section 155F of the draft Bill, it is proposed that damages for NEL cannot be claimed unless:

(a) the degree of permanent physical impairment, excluding any psychological injury, is more than 15%; or

(b) the degree of permanent psychological or psychiatric injury is more than 20%.

"Non-economic loss" is defined as including: "pain and suffering; loss of amenities of life; loss of expectation of life; disfigurement."[15]

The 15% threshold is based on a WPI assessment under the Guides, which are discussed further below.

A key concern with respect to thresholds based on the WPI scale under the AMA Guides is that measures of functional impairment replace any assessment of the actual impact of injury upon the plaintiff. A person may suffer a back injury which effectively ends their career as a labourer or trades-person, destroying their business and threatening their family's financial security, as well as their emotional and psychological well-being. However, the WPI assessment has been specifically designed to exclude any consideration of the actual impact of the injury on the person's life. It is very strange that access to damages for pain and suffering should depend on an assessment tool which precludes any consideration of the pain and suffering that has resulted from the injury.

The likely impact of a >15% WPI threshold on the rights of plaintiffs may be demonstrated, in part, by the experience in NSW, where a >10% WPI threshold has applied to motor accident claims for more than 10 years. However, the NSW threshold is >10% for both physical and psychological injuries. Even with their lower level of >10%, the NSW thresholds have had the effect of reducing successful claims by more than 80%. It must be assumed that thresholds of >15% and >20% proposed under the draft Bill will result in substantially greater disenfranchisement of injured people, solely to benefit insurers.

The following table demonstrates the impact of the >10% WPI threshold which applies in NSW:

Accident Period	**Percentage of claims resulting in any payment for NEL**[i]
Old Scheme 1996-1999	58%

[15] Proposed section 155B

New Scheme 2000-2005	**11%**
Difference	47%
Change (%)	**-81%**

The above table[16] shows that, in NSW where a >10% WPI threshold applies, just 11% of people injured on NSW roads are now able to claim damages for NEL. This represents a reduction of 81% compared to the previous scheme where no threshold applied. In addition, it must be considered that the draft Bill proposes a >15% WPI threshold, which is a substantially higher bar and is likely to result in a much greater reduction in NEL claims.

The fact that the assessment of "whole person impairment" must disregard psychological injury when assessing the effect of physical impairment[17] further compounds the unfairness of the assessment. How can such an assessment be a measure of "whole person" impairment? It should also not be ignored that the proposed amendments prescribe an assessment of "permanent" impairment. Significant pain and impairment that lasts for 5 or 10 years is not compensable under the proposed amendments on the basis that it is not "permanent". Moreover, requiring psychological injuries to be assessed against a >20% rather than a >15% threshold is unfairly discriminatory against those with psychological injuries and no justification for this has been offered (as discussed further below).

The following are examples of the kinds of injury that would not result in any compensation for pain and suffering under a 15% WPI threshold:

- vertebral fractures resulting in up to 25% compression with ongoing pain (5-8%);
- spinal fusion requiring multiple surgeries with ongoing pain (up to 14%);
- surgically treated disc lesion with ongoing pain (10%);
- loss of fingers or thumb (5-11%);
- pelvic fractures with displacement deformity (2-10%);
- disorders restricting ability to walk up mild gradients and stairs, sit down in deep chairs, rise to a standing position or walk long distances (1-9%);
- brief repetitive or persistent alteration of state of consciousness or awareness (0%-14%).

<u>Case studies</u>

The following are real-life examples of the >10% WPI threshold in operation under the NSW MAA scheme, demonstrating injustices that regularly result under that scheme:

- Claudia, a childcare worker, was rear-ended in her new car at a T-intersection. As a result of the accident, Claudia's car was written off (such was the force of the collision) and she developed immediate pain in her neck, radiating down her arm. She was subsequently diagnosed with carpel-tunnel syndrome. Claudia was unable to do any lifting at work (a significant restriction for a childcare worker) and was placed on lighter duties. As a single mother, she is forced to work despite

[16] This table was developed using data from the Annual Report of the NSW MAA 2005-2006 and a letter from Taylor Fry Consulting Actuaries to the Deputy General Manager of the Motor Accidents Authority of New South Wales (11 April 2006), obtained under FOI.
[17] Proposed section 155I (2)(b)

ongoing pain, has had to cope on a part-time wage and finds it increasingly difficult to cope with basic household tasks. Claudia was assessed at 1% WPI and was therefore ineligible to claim damages for pain and suffering, and loss of enjoyment of life.

- Craig was driving when another car, travelling 100km/h in a 60km zone, bounced off another car and flipped, landing on top of Craig's car. He suffered severe injury to his neck and left-shoulder. He subsequently underwent 2 shoulder operations and suffers ongoing pain. Following the accident, Craig required 6 months off work. At the time of his injury, he was a State manager for a golf-buggy retailer and often played golf with clients to close a deal (many of them pro-golfers). He also competed in up to 3 Pro-Am tournaments a week, holding a handicap of 9. Craig was subsequently unable to play golf or engage in many other activities he used to enjoy. He was ultimately retrenched from he job. Notwithstanding the seriousness of Craig's injuries, he was assessed below the 10% WPI threshold for access to general damages in NSW.

- Frank was negligently injured while riding his motorcycle in Nowra, NSW, when a car turned unexpectedly in front of him causing a collision which catapulted him over the vehicle and onto the bitumen. Frank was hospitalised for 6 weeks with serious injuries, including a broken leg, ligament and tissue damage and lower back injuries. He required immediate surgery and subsequent operations over the next two years, plus ongoing physiotherapy. Today, Frank is severely restricted by his injuries. He can't squat, run or use stairs without railings. He has a permanent limp, life-long scarring and he experiences constant pain in both legs and his lower back. Since the accident, Frank has been unable to return to his job as a plant operator. Specialists have told him that his injuries will preclude him from doing any heavy work in the future. Frank's injuries have had a dramatic effect on his lifestyle. He can't fish, scuba dive or play sport with his three kids – activities he once enjoyed. Despite their severity, Frank's injuries were assessed at 3 per cent whole person impairment, well below the 10% WPI threshold required to receive compensation for pain and suffering in NSW. Frank's own doctor and another accredited specialist have assessed his impairment at more than 20 per cent, but there is no proper right of appeal against the decision of MAA appointed medical assessors.

- Gary was just 18 years old when he was badly injured while riding his motorbike in Penrith. A car crossed on to the wrong side of the road and collided with Gary head-on. Gary broke both legs, fractured his pelvis and suffered serious arm, head and back injuries. He was in a wheelchair for six months and on crutches for a further six months. Pins have been inserted into Gary's ankles and he walks with the aid of a cane. He lost his job at a Sydney scrap-metal yard and now works as an office junior on "permanent light duties". Difficulty finding employment meant Gary found it nearly impossible to support his partner and five-year-old daughter. Even though Gary is in constant pain and his injuries are likely to restrict him for the rest of his life, his injuries did not meet the 10% WPI threshold required to receive compensation for pain and suffering in NSW.

- Maya, mildly intellectually disabled since birth, was spending the day with her trainer, learning how to board buses, purchase a ticket and identify her stop. As it was raining heavily, Maya's trainer was driving her home by car. Maya's trainer asked her to step out of the car while she completed some paper work. Confused and disoriented, Maya walked to the back of the car. Not seeing Maya, the trainer reversed and hit her. She ended up unconscious underneath the car. Maya was taken to hospital with triple fractures to her right leg, a dislocated shoulder and severe bruising to her face. A metal shaft was inserted into Maya's leg to hold the

bones in place. She was released from hospital two weeks later. Before the accident, Maya was a highly motivated 26-year-old, with the aim of one day gaining independence. As a result of the accident, she has frequent pain in her shoulder and her right leg is permanently 1.5cm shorter than her left. Her personality has also changed dramatically She has developed a fear of cars, has difficulty sleeping, suffers from mood swings and no longer enjoys or participates in the social activities she used to love. Maya's parents are her sole guardians, and are concerned how she will be cared for when they are no longer able to. Maya has been assessed at below the >10% WPI threshold to access compensation for pain and suffering in NSW.

- Susan was standing in front of her car, which had broken down on the side of the road, when it was struck from behind by another vehicle, trapping her beneath the car. Susan was rushed to hospital with a crushed left hip, broken collarbone, serious head injuries and extensive cuts and bruises. After spending a month in hospital, where she underwent a hip reconstruction, Susan was confined to bed for six months, then spent a further six months on crutches. Susan walks with the aid of a cane, has 50 staples in her right leg and experiences continuous hip and shoulder pain. She also suffers regular nightmares and driving causes her extreme anxiety. Susan can no longer do the things she once took for granted, such as housework and. grocery shopping. She is heavily reliant on her family for support. Her teenage daughter deferred university to care for her. Despite the seriousness of her injures and ongoing pain and suffering, Susan was assessed below the >10% WPI threshold applying under the NSW motor accidents compensation scheme.

The above case studies demonstrate the impact of a >10% WPI threshold, which is a substantially lower bar than is being proposed under the draft Bill. It is submitted that the imposition of a >15% WPI threshold for access to general damages (or >20% for psychological injuries) would be grossly unfair to ACT residents. A >15% threshold is likely to prevent more than 90% of people injured by negligent drivers from claiming NEL damages (an 80% reduction on the number able to presently access NEL damages). The primary beneficiary of this would be the insurance industry. Further, the change is being proposed without any evidence of an insurance crisis or any real concern about insurance affordability.

There are many ways the government may be able to place downward pressure on CTP insurance premiums and encourage entry of more insurers into the market, which do not involve severing rights to fair compensation for hundreds of ACT residents negligently injured in motor vehicle accidents each year.

Higher threshold for psychological injuries

Proponents of the draft Bill have set a higher WPI threshold of >20% for psychological/psychiatric injuries.

This seems to indicate mistrust of psychiatric/psychological injuries, despite centuries of medical and academic research and universal recognition of the serious impacts of psychological injury on enjoyment of life and capacity to maintain employment. In mild cases, mental illness can seriously affect a patient's well-being and relationships; and more serious cases can result in self-harm or suicide.

The ACTLS, ACT Bar and ALA submit that the present approach, which implies that those suffering from psychological injury are somehow 'making it up' is based on a callous, misguided point of view. In addition, the current approach of preventing WPI

assessments for physical and psychological injury being considered together is nothing more than a crude attempt to prevent those suffering clinical depression, anxiety and related disorders as a result of their physical injuries and disabilities gaining access to general damages for pain and suffering.

For example, a secondary psychological injury might include any of the following very debilitating consequences of injury:

- severe depression as a result of, for example, chronic severe back pain;
- adjustment disorder as a result repeated surgery or of side effects of surgery such as a golden staph (Staphylococcus Aureus) infection;
- chronic pain condition arising from an initial back or shoulder injury; or
- permanent cognitive impairment resulting from a problem in surgery to correct an injury.

Psychological injuries can cause permanent impairment and can be significant disabilities preventing accident victims from engaging partially, or at all, in work or social activities and significantly disabling them in their domestic lives. The Explanatory Statement provides no justification for treating those who have suffered psychological injuries with such contempt.

The approach under the Bill discriminates against those suffering psychological illness and may in fact be inconsistent with the ACT *Human Rights Act 2004*. There is further discussion about the human rights implications of the Bill below.

Use of AMA *Guides* for determining thresholds

All assessments are carried out using the AMA Guides (5th edition), and this is the sole determiner of whether an injured road accident victim is able to claim general damages from the CTP insurer of a negligent driver. However, it is well known that the AMA Guides were never intended to be used for this purpose. Every single edition of the Guides contains the following cautionary note:

> "The *Guides* is not to be used for direct financial awards nor as the sole measure of disability. The *Guides* provides a standard medical assessment for impairment determination and may be used as a component in disability assessment,"[18] (emphasis added)

Remarkably, many jurisdictions have adopted the *Guides* for precisely this purpose – to definitively determine financial awards, as the sole measure of impairment or disability. It should be concerning to all ACT residents that the ACT Government now proposes to introduce the *Guides* here, for the same purpose, using an even higher threshold than applies in most other jurisdictions.

It has been noted that:

> "The *Guides* is not the objective, medical evaluative system it purports to be and that has been so appealing to legislators and other decision makers. Instead, like any impairment rating scheme, it rests in large part on important and difficult normative judgments. Yet the *Guides* obscures this from the reader; it is laden with hidden or

[18] *Guides to the Evaluation of Permanent Impairment,* Fifth Edition, p. 12.

poorly explained value judgments that frequently are gender-biased. The *Guides'* flawed promises of objectivity are especially troubling because they appeal to the craving of legislators and other decision makers for certainty and clarity in the difficult arena of impairment and disability assessment."[19]

In the United States, the *Guides* are almost exclusively used only for statutory workers compensation assessments. They are regarded as an improvement on the "Table of Maims" approach and have been widely adopted for that use. However, the Guides are not used in "common law" matters in the United States.

The Texas Court of Appeals found that: "The impairment ratings generated from use of the *Guides* have no adequate scientific base and have no reasonable relationship to true impairment:

1. the 15% threshold as a qualification for supplemental benefits is arbitrary in and of itself and further that it is based upon an arbitrary use of the Guides; and
2. a significant number of workers … who sustain disabling injuries will have less than 15% impairment based on the *Guides* and thus will be totally denied access to supplemental income benefits under the Act."[20]

These findings have not been contradicted in subsequent appellate cases in the US. As pointed out in *Understanding the AMA Guides in Workers Compensation,*[21] the 6th edition of the *Guides* criticises previous editions for not being comprehensive or based on evidence, and not having accurate ratings. Chapter 1 of the 6th edition quotes an article in the Journal of the American Medical Association, which stated that the numerical ratings in the *Guides* were more "legal fiction than medical reality". Section 1.2a of *AMA Guides* (6th edition, 2008) says that the 5th edition used "antiquated and confusing terminology" and had "limited validity and reliability of the ratings."

Given the criticism of the *Guides* both by commentators and within the *Guides* itself, adoption of the *Guides* in the ACT for uses not sanctioned or recommended by the *Guides* would be utterly unprincipled. The *Guides* has been introduced into a number of Australian compensation schemes. However, many authorities in this field have consistently argued that they should not be used to determine disability for the purposes of financial compensation and that they are a tool for limiting financial liabilities and for cost-shifting rather than for identifying genuine need.[22]

It is noted that use of the *Guides* in this way has not been recommended in any report or inquiry seeking to limit damages or restrict access to common law. For example, the Ipp review into the law of negligence in 2002 recommended the development of an Australian version of the *Guidelines for the Assessment of General Damages in Personal Injury Cases*, based on a model presently operating in the United Kingdom.[23] The UK Guidelines do not engage in artificial attempts to measure impairment as a basis for financial award, but set upper and lower limits for awards of damages for different types of injury.

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[19] Ellen Pryor, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment,* 103 Harvard L. Rev. 964, at 965, 968, 976 (1990).
[20] *Texas Workers' Comp. Comm'n v Garcia*, 893 S.W.2d 504, 519-20 (Tex. 1995).
[21] Babitsky & Mangraviti, 4th edition, p. 3-4.
[22] Duncan, G, *Moral hazard and Medical Assessment* (2003) 34 VUWLR, page 433. See also Martha McCluskey "The Illusion of Efficiency in Workers' Compensation Reform" (1998) 50 Rutgers L Rev 657; Ellen Smith Pryor "Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment" (1990) 103 Harv L Rev 964; E Michael Shanahan and Leon le Leu "The American Medical Association's Guides to the Evaluation of Permanent Impairment" (1993) 10 Journal of Occupational Health and Safety - Australia and New Zealand 323.
[23] Negligence Review Panel, Ibid, *op cit 1*, recommendation 46.

The misuse of the *Guides* under proposed section 155Q would result in great injustice for ACT residents negligently injured in motor vehicle accidents and should be rejected. The ACT Government should instead inquire into other ways to bring greater consistency to damages awards, both for the benefit of injured persons and insurers.

Likely impact of a >15% WPI threshold

On its face, most people might consider a threshold of >15% impairment to be relatively mild. In order to get a true understanding of how restrictive such a threshold might be, it is worth considering the experience of other jurisdictions which have applied such a threshold. NSW is the closest comparable jurisdiction and it is worth noting that, since the introduction of a >10% WPI threshold in 1999, in motor accident claims:

- common law claims have reduced by over 80%;
- there have not been any significant changes in rehabilitation rates;
- insurers' "claims handling expenses" have significantly increased;
- CTP 'greenslip' premiums fell by around $100, but have now risen again close to 1999 levels (in nominal terms);
- insurers profits between 1999 and 2004 were around 30% of collected premiums (reliable data on post-2004 profits is not available, however there is little reason to suspect profit levels have fallen significantly); and
- NSW CTP premiums are only around $2.79 cheaper per month than in the ACT.

Use of medical panels to conclusively determine issue of thresholds

Division 4.9B.5 of the draft Bill provides for the appointment of medical practitioners to a medical panel, established to assess injured people against the WPI scale using the Guides.

Under the proposed Bill, it is noted that the CTP regulator will appoint the medical assessors. This will require the establishment of a new mini-bureaucracy to appoint, allocate and supervise assessors. If the CTP regulator itself performs this role, there will be a strong perception of bias given the underlying objective of the draft Bill is to reduce the amount paid out to claimants. In NSW, a district court judge held that interference by the Motor Accidents Authority with a medical assessment report constituted "an absence of procedural fairness", went "beyond power and [was] unauthorized" and was "suggestive of bias on the part of the MAA".[24]

Under proposed s 155J, medical assessor must provide a "medical assessment certificate" to the CTP regulator for peer review. If the peer reviewer is satisfied with the certificate, the certificate is final and conclusive of the degree of WPI. A person can only apply to have the assessment set aside if they can prove to a court that admitting the certificate into the proceedings would case "substantial injustice". However, medical assessors are unaccountable for anything done 'honestly and without recklessness' when exercising their functions (s 155T(1)) and are not compellable to give evidence in any proceeding or matter in which the assessor was involved in the exercise of their functions (s 155T(3)). Therefore, not only is a medical assessor immune from facing any consequences for exercising their functions negligently, but they cannot be required to explain to a court or any other authority the basis for their WPI assessment.

[24] *Catsicas v Mullaney*, unreported, District Court at Newcastle, Sidis DCJ, 30 July 2004 (No 17 of 2003).

The absence of a cheap but general appeal mechanism ignores the fact that such WPI assessments can include factual, medical or legal errors and will force those subject to wrong assessments to take expensive legal action in the Supreme Court either under the *Administrative Decisions (Judicial Review) Act 1989* or by way of the modern equivalent of prerogative writs: see Part 3.10 of the *Court Procedures Rules 2006,* without any possibility of compelling an assessor to submit to questioning or cross-examination over the basis for their decision. This is an extremely circumscribed form of review..

Finally, it is submitted that the assessment process can (and in NSW, does) cause delay. In NSW, a medical assessment takes a minimum of 6 months, with delays often extending this to 10 months. This is likely to add to the time taken to resolve a matter.

Raising the "discount rate" from 3% to 5%

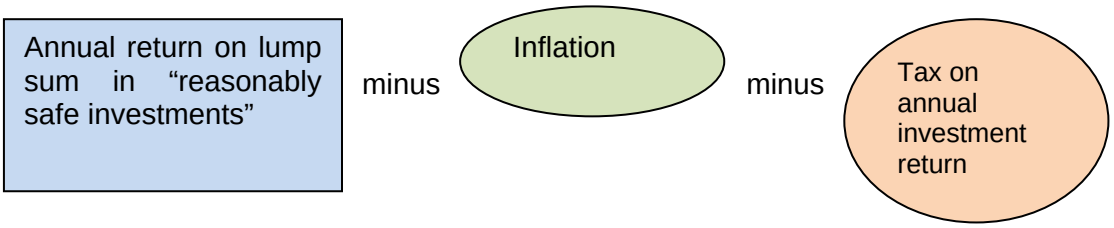
Proposed section 155A provides that the current discount rate of 3% on lump sum payments for "future economic loss" (set by the High Court in *Todorovic v Waller* (1981) 150 CLR 402) will be increased to 5%. This applies to loss of earnings, loss of expectation of financial support and "the value of future services of a domestic nature or services relating to nursing and attendance" or "a liability to incur expenditure in the future".

No explanation is offered in the Explanatory Statement as to why it is proposed that the discount rate should be raised from 3% to 5%. There is also no indication that the Government has even considered what impact this change will have, particularly on the most catastrophically injured people to whom the Government purports to redirect compensation.

Rationale for discount rates

The rationale for discount rates is to account for the benefit gained by the plaintiff in receiving a payment today for losses and expenses incurred in the future. This sum can theoretically be invested at a reasonable rate of return. The discount rate is therefore, in theory, intended to be roughly equivalent the annual return the plaintiff might receive if the lump sum were immediately invested in "reasonably safe investments", which is reduced by inflation and taxation of the annual return on the investment.[25]

That is, the discount rate should be approximately equal to:



As noted by the Ipp review panel:

> "…in the Panel's opinion, 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."[26]

[25] (1981) 150 CLR 402, per Gibbs CJ and Wilson J.
[26] Negligence Review Panel, *op cit 1,* page ,210.

Impact of discount rates set too high

The following table illustrates the damaging impact of setting discount rates too high.

			Age when injured			
Net income	**Weekly**		**20yrs**	**35yrs**	**45yrs**	**55yrs**
$56,000.00	$1,076.92	**3%**	$1,427,246	$1,117,846	$848,508	$486,446
		5%	$1,035,462	$885,231	$717,662	$444,662
Difference			**$391,785**	**$232,615**	**$130,846**	**$41,785**
$100,000.00	$1,923.08	**3%**	$2,548,654	$1,996,154	$1,515,192	$868,654
		5%	$1,849,038	$1,580,769	$1,281,538	$794,038
Difference			**$699,615**	**$415,385**	**$233,654**	**$74,615**
$141,000.00	$2,711.54	**3%**	$3,593,602	$2,814,577	$2,136,421	$1,224,802
		5%	$2,607,144	$2,228,885	$1,806,969	$1,119,594
Difference			**$986,458**	**$585,692**	**$329,452**	**$105,208**

As indicated, a 20 year old who earns $56,000 per annum after tax, who is catastrophically injured such that he or she will never work again, might receive $1,427,246 for future loss of earnings, on the assumption that they will continue to earn that amount until they reach retirement age (discounted at a rate of 3%). An increase the in discount rate from 3% to 5% will reduce the award by $391,785.

Similarly, a 35 year old earning net income of $100,000, who is catastrophically injured with no prospect of returning to work, is projected to lose around $415,385 if the discount rate is increased from 3% to 5%.

This can also have a devastating effect on coverage of an accident victim's future care need. For example, a person who is incapacitated at the age of 30, requiring constant care costing $1,000 per week has a life expectancy of 55.21 years. With a 5% discount, he or she will receive a lump sum to pay for their care needs of $997,000, instead of the lump sum of $1,418,000 they would have received with a 3% discount. A lump sum discounted by 5% will run out long before they dies, forcing them to find care worth $421,000 elsewhere.

How should the discount rate be set

As noted in the following table, recent actuarial analysis[27] suggests the appropriate rate is currently 2.65%. The most compelling aspect of this analysis is that, having regard to the long-term government bond rate, the after tax investment rate and the long term investment rate, the net, after-tax investment rate (which should be generally equivalent to the discount rate) has remained within the 2-3% range, despite large variations in inflation and interest rates over the last 30 years.

	1981	2010
Long term government bond rate	13.00%	5.33%
plus bond premium	3.00%	1.40%
Long term "market" bond rate	16.00%	6.73%
less allowance for taxation	23%	22%
After-tax investment rate	12.32%	5.25%
less long-term inflation rate	-10.00%	-2.60%
Net, after tax investment rate	**2.32%**	**2.65%**

It is submitted therefore that the ACT should not simply follow an unprincipled approach, by choosing to adopt a 5% discount rate. It is noted that:

> "The statutory rates are usually higher than the rate set by the High Court, which itself is probably too high. They therefore protect insurers, and the premium paying public, at the expense of seriously injured people."[28]

Adopting a 5% discount rate would:

(a) impact most severely on the youngest and most severely injured people, in particular those who will require a lifetime of care and support; and

(b) contradict the stated objective of the Bill, "to redirect compensation toward major/severe injuries."

Limiting damages for pain and suffering to $270,000

Proposed section 155M limits damages for non-economic loss to a maximum of $270,000 (indexed).

No justification is offered in the Explanatory Statement for the cap. Nor is any reason offered for setting the cap at $270,000, which is substantially lower than the cap applicable in a number of other jurisdictions. For example, in NSW the cap is set at $408,000 (indexed annually), in Western Australia it is $337,000 (also indexed).

[27] Plover & Sarjeant, *Financial compensation – inconsistencies, absurdities and bad judgments*, available at http://www.cumsar.com.au/PDF/Financial_Compensation.pdf.
[28] Luntz, H., *Assessment of Damages for Personal Injury and Death (4th Edition)*,[7.4.9] p. 413.

While most other jurisdictions have set a higher cap than is proposed for the ACT under the draft Bill, it is acknowledged that there is no apparent basis for the level of the cap applying in other jurisdictions. The fact that no principled basis exists for setting caps (other than creating certainty for insurers) brings into question the very basis for their existence. Setting an upper limit on damages clearly impacts most severely on the most catastrophically injured. It is hardly a case of protecting insurers from sudden shocks, given there would have been very few awards of damages for non-economic loss over this amount in recent years.

It is bizarre that, in a draft Bill which the Government asserts will "enable scheme funds to be redirected to those with major/severe injuries", there is a provision designed specifically to place an arbitrary limit on the amount of compensation that cohort should receive.

It is submitted that the cap is nothing more than an attempt to arbitrarily limit insurers' indemnity and usurp the rights of the most severely injured.

Limiting payment of interest on damages to injured people

Proposed new section 156 of the draft Bill states that interest is only payable on damages (for the period between the date of injury and the payment of compensation) if:

(1) the insurer has failed to make an offer of settlement or has failed to meet the claimant's medical expenses as required under the Act; or

(2) if the claimant is awarded damages more than 20% higher than the settlement offer by the defendant and that offer was unreasonable.

The proposed amendments will arbitrarily remove the right to recover interest unless the insurer behaves particularly badly. The amendments will place unfair pressure on the plaintiff, regardless of how serious their injuries are. The provision ignores the function of interest and penalises the victim of negligence. The policy justification is that "the Act is designed to put claimants on the road to recovery almost immediately after being injured in a motor crash and as such interest payments (made necessary in a litigious framework where delays are the norm) are no longer required."[29] Thus, it is contended that the proposed Bill will result in virtually instantaneous payment of damages to a claimant on the date of their injury and, because interest is a function of time expiring, if there are no delays there will be no interest payable.

This justification for removing the injured person's right to recover interest is patently absurd. Even if the Bill was enacted in its present form, a few very severely injured people may continue to have a common law claim. Those claims may take some time to be resolved given the full particulars of the claim must be realised before it can be finalised. Sometimes it takes time for injuries to stabilise in order to understand the extent of the victim's injuries and the exact nature of their future treatment and care needs (which is no different in schemes that do not permit access to common law). Generally, it will also take some time to reach agreement with the defendant/insurer as to the particulars of the claim. What is being proposed is that, in the event of any delay, the injured person will be arbitrarily deprived of any right to claim interest on damages that were incurred years ago. Of course, if the Bill is successful in reducing delays (as claimed in the Explanatory Statement), then interest payments would be reduced without the necessity for the heavy handed approach of the proposed new s156.

[29] Explanatory Statement, page 8.

There can be no reasonable basis upon which this is being proposed, other than the 'unspoken' basis (not mentioned in the Explanatory Statement), which is to arbitrarily limit the liabilities of insurers. But why do so in relation to interest? There is no inherent uncertainty with respect to the calculation of interest on damages. ACT courts apply a standard formula for calculating interest, of 2% on past general damages. The only variables are the amount of the award and the period of time which has elapsed since injury. Moreover, payment of interest on monies prior to judgment is a common experience for most people in our society and is an entitlement for all civil claims under the *Court Procedures Rules 2006*. Why should insurers be exempt from paying interest on what effectively amounts to a debt? Few institutions would be more capable of earning a return on money if judgment is delayed.

It is submitted that this provision will, again, impact most harshly on the most severely injured people and should be rejected.

Other comments

Human rights concerns

It has been submitted that the costs regime introduced into the Act in 2008 indirectly penalises anyone who is not working full time and therefore may be inconsistent with the *Human Rights Act 2004*, as it discriminates against the young, the elderly, the unemployed, the part-time employed, students and women, as pointed out in the opinion of the ACT Human Rights and Discrimination Commissioner.[30] These opinions may now equally apply to the proposed amendments that make the availability of non-economic loss damages rare for crash victims. In particular, the following is noted:

Section 7 Other Rights

The *Human Rights Act 2004* is not exhaustive of the rights an individual may have under domestic or international law. Compensation for personal injury is a basic right of protection of the person which citizens have had for hundreds of years. It should not lightly be removed or cut down. If the right to compensation is removed, it is unlikely ever to be restored.

Tort law provides compensation when somebody has been *wrongfully* injured. This right is not the creation of governments. It is not the gift of the State provided under a statutory scheme to be expanded and contracted by the governments from time to time. It is everyone's right as a person not to be damaged physically, psychologically or economically by deliberate or negligent behaviour.

The right to sue for personal injury has been recognized as a valuable right. In *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 the High Court held an attempt by the Federal Parliament to take away injured workers' accrued rights of action against the Commonwealth and its agencies to be an unjust acquisition of property and unconstitutional.

While caps and thresholds will not affect the right of every potential plaintiff, they will clearly affect the damages payable to some injured people and in other cases completely obliterate an injured person's cause of action. In *John Pfeiffer Pty Ltd v Rogerson* (2000)

[30] Letter from ACT Human Rights Commissioner Dr Helen Watchirs to Attorney General Simon Corbell, dated 31 March 2009.

203 CLR 503, the High Court held that laws limiting the assessment of damages to be a matter of substance and not a matter of procedure.

This adverse effect on the injured affects the welfare of a "vulnerable group" in the community and it falls within "Main Objects" of the Human Rights Commission as set out in paragraph 6(2)(b) and (c) of the *Human Rights Commission Act 2005*:

> *(b) identify and examine issues that affect the human rights and welfare of vulnerable groups in the community; and*
>
> *(c) make recommendations to government and non-government agencies on legislation, policies, practices and services that affect vulnerable groups in the community*

It would be a peculiar outcome if the Assembly:

(a) enacted the *Human Rights Act 2008* and the *Human Rights Commission Act 2005* to protect rights such as freedom of movement, freedom of thought, peaceful assembly, freedom of expression, taking part in public life, the right to liberty and security of the person, humane treatment when deprived of liberty and compensation for wrongful conviction; and

(b) legislated to provide compensation if people have their rights infringed[31] in some cases; but

(c) in the case where someone has been physically or psychologically injured so that the person's ability to enjoy those rights is destroyed or diminished – legislates to take away or reduce that person's ability to obtain compensation.

Section 8 - recognition and equality before the law

The Act ensures protection of human rights without distinction or discrimination of any kind. The caps and thresholds draw a distinction between psychological injury and physical injury. This is discriminatory. It also prevents the aggregation of psychological injury with physical injury when determining whole person permanent impairment.

The CTP legislation proposes a cap on general damages of $270,000. As a quadriplegic receives around $400,000 in general damages, this cap will affect the most seriously injured – typically people with substantial disabilities. It will therefore have a disproportionate impact on the most profoundly disabled plaintiffs.

Section 21 - fair trial

The appointment of medical assessors by the "CTP regulator" raises questions about a competent, independent and impartial court or tribunal providing a fair and public hearing of a person's rights. The ability to contest this determination in a court is either non-existent (cl 155J(4)) or extremely limited (cl 155K(2)). Although the ultimate determination of a case would be by a court, medical assessment of 15% WPI or less would mean no compensation for non-economic loss is available in CTP cases.

Section 28 - human rights may be limited

This section has no application to legislation of this kind. The third party insurance premium is a single premium in the ACT. Taking away rights to reduce that premium by

[31] Sections 18 and 23 HRA

say $50 or $100 would be difficult to describe as “demonstrably justified in a free and democratic society”.

Even if there is a particular desire to reduce premiums, there may well be “less restrictive means reasonably available”[32] to achieve the same objective which have not been explored.

There is a requirement that there be a single CTP premium for particular classes of vehicles in the ACT.[33] There are a range of premiums which are higher and lower than the ACT in other States. Risk rating premiums in the ACT has not been tried and the existence of such an alternative does not suggest that substantially limiting or in some cases abolishing common law rights is “demonstrably justified in a free and democratic society” in order to reduce insurance premiums.

There are a number of other factors which might suggest that compulsory third party insurance premiums might naturally be higher in the ACT than in other jurisdictions. These include that:

- the ACT has higher average incomes;
- it is said by the government that the ACT has a higher motor vehicle accident rate because of higher road speeds; and
- to the extent that Canberra has a younger population, it may result in a higher risk profile for insurance purposes.

Cost-shifting

It is submitted another negative outcome of the proposed WC Bill, if enacted, will be the shifting of costs of caring for injured workers from insurers to the tax payer.

Whenever an injured person receives treatment through the public health system or bulk-billing practice, which is covered by Medicare, the cost of that treatment is recovered by Medicare from any statutory or common law compensation payment. This ensures that Australian taxpayers do not pay for medical treatment that should be met by private insurance companies. A simple way of measuring this cost-shifting effect is to examine the number of claims registered with Medicare Australia and amounts recovered by Medicare from compensation sums awarded by courts, tribunals or other compensation authorities.

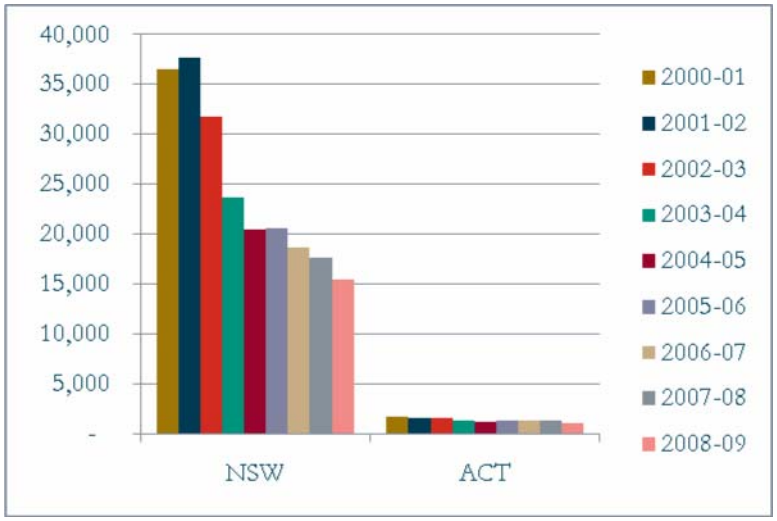
The simple fact is this: injured motor vehicle accident victims who are prevented from claiming compensation for medical and treatment expenses from their employer’s workers compensation insurer will fall back on Medicare and Centrelink. Accordingly, treatment expenses that would previously have been met by insurers in accordance with indemnity arrangements under insurance policies will instead be paid for by tax payers through Medicare and Centrelink.

Much of the cost of hospital treatment in the ACT will also fall onto the taxpayer, because of injured people not making insurance claims under the proposed amendments. This places greater pressure on the public health system, including hospitals and bulk-billing practices.

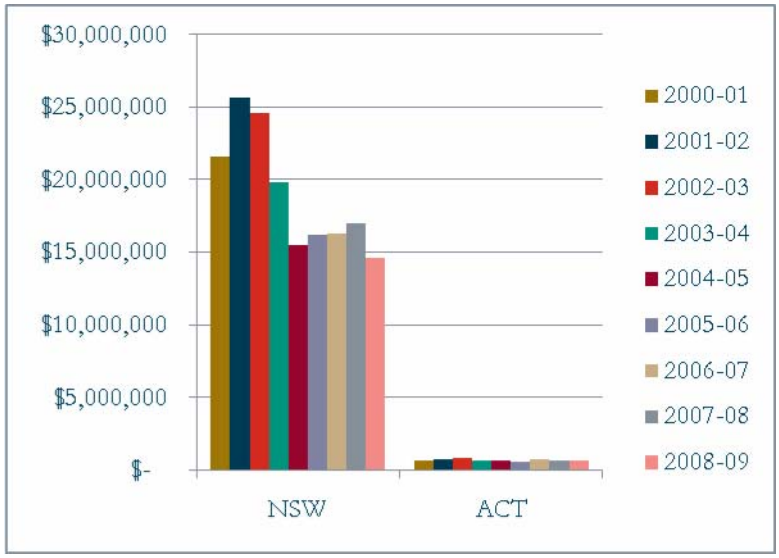
[32] Paragraph 28(2)(e)
[33] Part 3 *Road Transport (Third-Party Insurance) Regulation 2008*

The following tables demonstrate the extent of cost shifting that has occurred in NSW, compared to the ACT, as a result of WPI thresholds and higher discount rates:

Total cases



Total compensation recovered



The above tables show the number of claims each year between 2001-2009 which were registered with Medicare as requiring reimbursement of medical expenses and the total amount of treatment costs recovered by Medicare from insurers. Clearly, there has been a substantial reduction in treatment expenses recovered in NSW, where a >10% WPI threshold applies to CTP matters. This is because the >10% threshold in NSW has forced more people to seek treatment through the public health system, placing more pressure on public hospitals and bulk-billing medical practices.

This simply places even greater pressure on the public health system, which must absorb the additional cost and additional patients. The only beneficiaries of this are CTP insurers.

The following table demonstrates numerically the impact of the restrictive NSW CTP scheme on compensation recoveries:

Year	*Total recoveries ($)*	*Total cases*
2000-01	$5,816,734	9,462
2001-02	$5,740,395	7,538
2002-03	$5,087,884	5,723
2003-04	$4,515,055	4,969
2004-05	$4,536,055	4,787
2005-06	$5,126,591	5,277
2006-07	$5,852,678	5,580
2007-08	$5,989,230	5,435
2008-09	$5,187,110	4,773

This information was provided by Medicare Australia to the Law Council of Australia. It is not clear how many cases were notified to Medicare for reimbursement of medical expenses to the Commonwealth prior to 2000-01. However, it is clear that numbers of cases in which insurers have been required to compensate for medical expenses since the introduction of a >10% WPI threshold in 1999 have more than halved.

This indicates that there has been a significant shift in the cost of medical treatment from NSW CTP insurers to Australian taxpayers. It is submitted that the same is likely to happen in the ACT if the draft Bill is ultimately enacted in its present form.

This will simply place even greater pressure on the public health system, including already overstretched ACT hospitals and bulk-billing medical practices, which must absorb the additional cost and additional patients. It will also place greater pressure on injured workers, who will invariably have to cover the "gap" in medical treatment expenses from doctors and specialist, over and above the Medicare scheduled fee.

The only winners from this will be CTP insurers.

Ways to improve the scheme

If it is one implied aim of the Bill to reduce cost and uncertainty associated with "small" claims, there are some alternative improvements that could be made.

Primarily, it must be noted that insufficient time has been given to analyse the impact of reforms introduced in October 2008. For many years, the ACT Government sanctioned a CTP insurance monopoly, which will clearly affect the pace of premium reductions. Those reforms must be given time to have effect.

It was the aim of the 2008 Act that rehabilitation and medical treatment be promptly supplied to those injured in motor accidents and several provisions of that Act were targeted towards that aim. Although figures have not been formally released, it appears from conversations with government officials that the aims of the 2008 Act are being achieved. All the trends appear to be in the direction sought by the Act, as noted by the Treasurer in statements to the Legislative Assembly.[34] It therefore seems that the radical restriction on the rights of ACT residents proposed by the draft Bill would be, at best, premature and, at worst, completely unnecessary.

However, there are several ways in which the Bill could improve the ACT CTP scheme. Some of these improvements, which should be investigated or pursued, are presented briefly below:

Risk rating

- Risk rating for CTP insurance polices applies in other jurisdictions, including in NSW. This means that drivers with higher risks of claims are charged more for CTP premiums. This could be investigated in the ACT, which does not apply risk rating to drivers and vehicles insured under CTP policies. At present, good ACT drivers effectively subsidise poorer drivers who have greater risks of incurring claims and there is therefore less incentive for drivers to exercise reasonable care on the roads.

Improvements to compulsory conference provisions

- The Bill fails to remove an important impediment to the holding of Compulsory Conferences which is in the existing legislation. The problem is that as a pre-cursor to a compulsory conference, a lawyer for a party must certify that the matter is not only ready for the compulsory conference but also ready for trial: s139(3)(a)(ii).

- Lawyers cannot reasonably be expected to certify that a matter is ready for trial at a time when the Act prevents any statement of claim or defence being filed in court. A solicitor who so certified at this time could be guilty of negligence because the issues in dispute are not even certain. This problem has required additional court applications to dispense with the compulsory conference: see *Furler v Haureliuk* [2010] ACTSC 68, which has only added to the costs of the process.

- This issue could be readily resolved by removing the requirement to certify the matter is ready for trial. This would encourage active participation in compulsory conferences and remove the need for expensive applications to court to dispense with the compulsory conference. The proposed compulsory conference provisions in the exposure draft of *Workers Compensation Amendment Bill 2010* are sensible and practical and could replace this part of the CTP Bill.

Improvements to mandatory final offer provisions

- Provisions concerning Mandatory Final Offers could be improved by requiring the parties to settle at a midpoint if the offers are not more than a specified amount apart (and if the lowest offer is not zero). This would preclude the expenditure of costs and court time in the pursuit of relatively minor amounts. So long as the "specified amount apart" was kept modest, it would not unfairly disadvantage any parties.

[34] Ibid, *op cit 5*.

Clarification of costs provisions

- The ACTLS, ACT Bar and ALA have previously made submissions in relation to the costs regime imposed by the 2008 Act, which have thus far been ignored by policy makers and legislators in this area. Quite simply, the costs regime contained in the 2008 Act is not sufficiently clear to have the desired effect of reducing litigation in "small" claims.

- The Bill should simplify the existing costs provisions for "small" matters in a way consistent with the policy intent of encouraging prompt settlement of such matters with limited lawyer involvement. Limiting costs for such matters is not opposed. Rather, as has been repeatedly indicated to Government officials, the current cost provisions are too complex to properly moderate lawyers' behaviour and offer, for each side, one or two potential outcomes. This encourages lawyers to run such matters rather than to settle them quickly. For example, in working through the current costs provisions for matters in which the award is under $50,000, excluding general damages, there are at least 9 different possible outcomes and cost possibilities. Moreover, there is no simple monotonic relationship between the reasonableness of an offer made by one party and the costs they can claim from the opposing party.

- The Bill could have simplified the costs provisions by introducing an arrangement such as the following:

    a. If the court awards $30,000 or less in damages, the insurer cannot be required to pay more costs than those calculated as follows:

        i. if the amount awarded is more than the respondent's mandatory final offer, then the respondent must pay the claimant's costs and disbursements on a party/party basis (with professional costs calculated at 2/3rd of Schedule 4 of the *Court Procedures Rules 2006*) up to the time of the offer and on an indemnity basis thereafter up to a combined total of no more than $10,000, inclusive of GST;

        ii. if the amount awarded is equal to, or less than, the respondent's mandatory final offer, no costs are payable to the claimant and the claimant must pay the respondent's costs and disbursements incurred after the mandatory final offer on an indemnity basis up to $5,000, inclusive of GST.

    b. If the court awards more than $30,000 but not more than $50,000, the insurer cannot be required to pay more costs than those calculated as follows:

        i. if the amount awarded is more than the respondent's mandatory final offer, then the respondent must to pay the claimant's costs and disbursements on a party/party basis (with professional costs calculated at 85% of Schedule 4 of the *Court Procedures Rules 2006*) up to the time of the mandatory final offer and on an indemnity basis thereafter up to a combined total of no more than $15,000, inclusive of GST;

        ii. if the amount awarded is equal to, or less than, the respondent's mandatory final offer, no costs are payable to the claimant and the

claimant must pay the respondent's costs and disbursements incurred after the mandatory final offer on an indemnity basis up to $7,500, inclusive of GST.

Guidelines for non-economic loss damages

- The proposed section 155N, which provides for the making of non-economic loss guidelines, is potentially a positive step forward. It echoes the approach recommended by the Ipp Report, that Australian jurisdictions develop guidelines for non-economic loss damages based on precedent, as is done in the UK.[35] However, instead of being imposed by the CTP regulator, such guidelines should reflect a survey of awards of non-economic loss damages, as they do in the UK, where they are compiled by a committee for the Judicial Studies Board. The UK Guidelines, which are currently in their 10th edition, "with each edition ... becomes ever more authoritative. As the *Guidelines* become increasingly recognised, their guidance is adopted more frequently by practising lawyers and judges, and, as the guidance is more frequently adopted, the *Guidelines* become increasingly recognised. A well merited virtuous circle." [36] Such *Guidelines* work best by providing guidance to the Court, rather than offering prescription. Courts would follow the guidelines while considering the relevant facts of any given case, which would provide greater certainty without causing injustice that results from one-size-fits-all models (such as WPI thresholds).

- The ACT is in a good position to develop such guidelines, because of its policy of not allowing judgments to be confidential, even when such judgments arise out of a compromise between the parties, rather than a trial and resultant judgment. Despite the fact that judgments by agreement usually aggregate all forms of damages into a single sum, the information available to an expert panel to research and publish guidelines for general damages is much richer than in other jurisdictions. It is also relevant that ACT has a wealth of common law decisions over recent years because it has retained the common law system in its courts.

- These guidelines would need to be made in conjunction with the courts and the legal profession to ensure their credibility and compliance.

It is submitted that these suggestions will reduce legal costs and delays, and will reduce the amount of time-consuming legal work in CTP claims. If implemented, these proposals would greatly reduce costs and uncertainty around "small" claims, making the radical changes put forward in this Bill completely unnecessary.

Conclusion

The Bill in its current form should not be introduced. Its proponents should clearly state what they desire to achieve and enter into meaningful and constructive consultation with stakeholders to achieve those aims.

As outlined in this submission, the draft Bill, if implemented, will impact most severely on those with severe/major injuries. Ironically, it is those people whom the Government contends will benefit from this draft Bill.

[35] *Guidelines for the Assessment of General Damages in Personal Injury Cases*, Judicial Studies Board
[36] Ibid *Foreword for the tenth edition...* The Rt. Hon. Lord Neuberger of Abbotsbury p. vii

It is submitted that no evidence has been presented by the government that there is any problem that this draft Bill might address. There is no insurance crisis, there is no major concern in the community about the cost of CTP insurance, there is no evidence presented that Canberrans are becoming "more litigious" and no other justification has been presented by the government that would justify implementing such draconian restrictions on the rights of people injured through no fault of their own.

There is nothing in the draft Bill that will "improve health outcomes for injured people", such as funding for better health and rehabilitation services. To the contrary, reducing awards for future medical treatment and care expenses is likely to worsen health outcomes. The proponents of this draft Bill assert, without any basis in fact or reason, that restricting common law rights of injured people will assist their recovery. It is submitted that this is a claim without any foundation in logic or reason.

The government has also failed to inform the community about the likely impact of the changes proposed in the Bill. It is submitted that, before embarking on these changes, the Government should inform the ACT community that, based on the experience of similar, but less draconian, laws in NSW:

- 90% of people injured by negligent drivers would be ineligible to claim compensation for pain and suffering and loss of enjoyment of life;

- the majority of these proposed changes, including the cap on general damages, increase in discount rate from 3% to 5% and limitation of interest payments, will impact most harshly on the youngest and most catastrophically injured people;

- there will be many people with very serious, life-changing injuries, caused by the negligence of another driver, who will not be able to claim fair compensation as a result of these changes; and

- insurance companies are likely to be the sole beneficiaries of the changes, which will result in increased insurer profits at the expense of the rights of the injured – a fact which has been clearly borne out in NSW where similar changes were implemented in 1999.

We strongly urge the Government not to introduce this Bill, but to engage in real consultation with the community around what the community expects from CTP insurance and to explore other means of introducing greater efficiencies in the scheme.

The ACT Law Society, Bar Association of the ACT and Australian Lawyers Alliance would be very pleased to meet with the Government or its relevant agencies to discuss ways of addressing concerns around the CTP claims processes.

Attachment A – Who Are We?

ACT Law Society

The ACT Law Society was established in 1933 and today represents the interests of its 1500 solicitor and associate members. The Law Society exists to represent, advance and defend the interests of an independent legal profession in the ACT. The ACT Law Society also strives to protect the ACT system of justice through the efficient regulation of the profession and promoting access to justice and the equality before the law.

The Society endeavours to achieve these objectives by lobbying for "good law" and taking an active role in policy development by producing authoritative and influential submissions on proposed legislation and its impact.

Australian Lawyers Alliance Ltd

The Australian Lawyers Alliance is a national association of lawyers and other professionals, dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia.

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. We promote the development of expertise in areas such as workers' compensation, public liability, motor vehicle accidents and professional negligence.

Australian Capital Territory Bar Association

Since its establishment in 1962, the ACT Bar Association has promoted and fostered the growth of a strong and independent Bar in the Territory. The ACT Bar Association's aim is to promote the administration of justice by ensuring that the benefits of the administration of justice are reasonably and equally available to all members of the community.

The ACT Bar Association also endeavours to represent the views of its members by making recommendations with respect to legislation, rules of the court and the business and procedure of the courts.

These submissions reflect the united voice of the ACT Law Society, the Australian Lawyers Alliance and the ACT Bar Association.

Attachment B - Comparing CTP Premiums in ACT & NSW

1. Comparing CTP premiums across NSW and ACT is very difficult and complex because ACT premiums are fixed by type and use of vehicle (eg, a car for private use) while NSW premiums are fixed by reference to a multitude of variables.

2. In NSW, the Motor Accidents Authority annually produces pricing guidelines which allow insurers to set premiums based on any objective risk-rating factors, except race, whether the policyholder is entitled to an input tax credit. Some of the parameters and their effects on CTP premiums are outlined below:

   (a) CTP premiums for metropolitan Sydney are about 31% higher than for country NSW, with Wollongong and Newcastle being intermediate in premium levels.

   (b) Some insurers, including NRMA, charge up to 52% extra for drivers who have had an “at fault” accident in the last 2 years.

   (c) Drivers 24 years or younger pay about 45% to 50% more than those aged 60 or more.

   (d) Several insurers charge an additional 10% to 46% if the person registering the vehicle has 1 or more demerit points on their licence.

   (e) A car over 10 years old can attract a CTP premium which is 21% to 39% higher than the premium for a car up to 5 years old.

   (f) Whether a vehicle is to be used for private or commercial purposes has less effect on NSW CTP premiums than in the ACT.

3. AAMI is the only NSW insurer which varies premiums only by region. Except that it makes no distinction between private use and commercial vehicles, it is the most similar to the risk rating required for ACT CTP premiums. All AAMI premiums for NSW cars are higher than equivalent ACT premiums.

NSW CTP Premiums for Commercially Registered Cars by Region – comparison by DRIVER AGE

ACT Premium for Commercial Use Cars = $526.90

NSW premiums higher than the equivalent ACT premium are highlighted in yellow.

Premiums in this table based on a 2005 model car, the driver having had no at fault accident in the past two years

	COUNTRY			WOLLONGONG			NEWCASTLE			METRO		
AGE*	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**
24yrs	$527.17	$523.17	$517.69	$548.00	$543.86	$538.08	$530.93	$526.91	$521.37	$690.56	$685.22	$690.56
40yrs	$527.17	$427.03	$345.00	$547.94	$425.87	$359.00	$530.93	$412.48	$348.00	$690.56	$536.55	$452.00
60yrs	$527.17	$394.80	$311.00	$547.94	$410.33	$323.00	$530.93	$397.52	$313.00	$690.56	$517.10	$407.00

ACT CTP premiums are always less than the highest NSW premiums in any category.

ACT CTP premiums almost always less than Lo figure for drivers up to 24 years old.

NSW CTP Premiums for Commercially Registered Cars by Region - comparison by VEHICLE AGE

ACT Premium for Commercial Use Cars = $526.90

NSW premiums higher than the equivalent ACT premium are highlighted in yellow.

Premiums in this table are for a car driven by a 40 year old driver who has not had an at fault accident in the past two years

	COUNTRY			WOLLONGONG			NEWCASTLE			METRO		
CAR AGE	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**
<5 yrs	$527.17	$427.03	$345.00	$547.94	$425.87	$323.00	$530.93	$412.48	$348.00	$690.56	$536.55	$452.00
>10 yrs	$527.17	$498.03	$345.00	$547.94	$506.57	$359.00	$530.93	$490.77	$348.00	$690.56	$638.22	$543.00

Premiums in this table are for a car driven by a 24 year old driver who has not had an at fault accident in the past two years

	COUNTRY			WOLLONGONG			NEWCASTLE			METRO		
CAR AGE	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**
<5 yrs	$527.17	$523.17	$517.69	$548.00	$543.86	$538.08	$530.93	$526.91	$521.37	$690.56	$685.22	$678.13

>10 yrs	$527.17	$523.17	$517.69	$548.00	$543.86	$538.08	$530.93	$526.91	$521.37	$690.56	$685.22	$678.13

ACT CTP premiums are always less than the highest NSW premiums in any category.

ACT CTP premiums are mostly less than even the average or lowest NSW premiums for drivers up to 24 years old.

NSW CTP Premiums for Commercially Registered Cars by Region - comparison by AT FAULT ACCIDENT

ACT Premium for Commercial Use Cars = $526.90

NSW premiums higher than the equivalent ACT premium are highlighted in yellow.

Premiums in this table based on a 2005 model car, the driver having had at least one "at fault accident" in the past two years

	COUNTRY			WOLLONGONG			NEWCASTLE			METRO		
AGE*	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**
24yrs	$527.17	$523.17	$517.69	$548.00	$543.86	$538.08	$530.93	$526.91	$521.37	$690.56	$685.22	$678.13
40yrs	$527.17	$487.17	$345.00	$547.94	$443.86	$359.00	$530.93	$429.91	$348.00	$690.56	$542.65	$452.00
60yrs	$527.17	$417.30	$345.00	$547.94	$433.43	$323.00	$530.93	$419.91	$313.00	$690.56	$546.22	$407.00

ACT CTP premiums are always less than the highest NSW premiums in any category.

ACT CTP premiums are mostly less than even the average or lowest NSW premiums for drivers up to 24 years old.

NSW CTP Premiums for Privately Registered Cars by Region – comparison by DRIVER AGE

ACT Premium for Private Use Cars = $487.50

NSW premiums higher than the equivalent ACT premium are highlighted in yellow.

Premiums in this table are based on a 2005 model car, the driver having had no at fault accident in the past two years

	COUNTRY			WOLLONGONG			NEWCASTLE			METRO		
AGE*	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**
24yrs	$527.17	$523.17	$517.69	$548.00	$543.86	$538.08	$530.93	$526.91	$523.00	$690.56	$685.22	$685.22
40yrs	$527.17	$426.74	$352.00	$547.94	$426.61	$359.00	$530.93	$413.38	$348.00	$690.56	$537.53	$537.53
60yrs	$527.17	$390.61	$310.00	$547.94	$406.27	$323.00	$530.93	$393.65	$313.00	$690.56	$512.02	$512.02

ACT CTP premiums are always less than the highest NSW premiums in any category.

ACT CTP premiums almost always less than the lowest NSW premiums for drivers up to 24 years old.

ACT CTP premiums are less than all NSW metropolitan premiums

NSW CTP Premiums for Privately Registered Cars by Region - comparison by VEHICLE AGE

ACT Premium for Private Use Cars = $487.50

NSW premiums higher than the equivalent ACT premium are highlighted in yellow.

Premiums in this table are for a car driven by a 40 year old driver who has not had an at fault accident in the past two years

	COUNTRY			WOLLONGONG			NEWCASTLE			METRO		
CAR AGE	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**
<5 yrs	$527.17	$426.74	$352.00	$547.94	$420.61	$359.00	$530.93	$413.38	$348.00	$690.56	$537.53	$452.00
>10 yrs	$527.17	$497.03	$450.00	$547.94	$516.86	$431.00	$530.93	$500.62	$417.00	$690.56	$651.22	$543.00

Premiums in this table are for a car driven by a 24 year old driver who has not had an at fault accident in the past two years

	COUNTRY			WOLLONGONG			NEWCASTLE			METRO		
CAR AGE	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**
<5 yrs	$527.17	$523.17	$517.69	$548.00	$543.86	$538.08	$530.93	$526.91	$523.00	$690.56	$685.22	$678.13

>10 yrs	$527.17	$523.17	$517.69	$548.00	$543.86	$538.08	$531.00	$526.91	$523.17	$690.56	$685.22	$678.13

ACT CTP premiums are always less than the highest NSW premiums in any category.

ACT CTP premiums are always less than the lowest NSW premiums for drivers up to 24 years old.

ACT CTP premiums are almost always less than even the lowest NSW Metropolitan premiums.

NSW CTP Premiums for Privately Registered Cars by Region - comparison by AT FAULT ACCIDENT

ACT Premium for Private Use Cars = $487.50

NSW premiums higher than the equivalent ACT premium are highlighted in yellow.

Premiums in this table based on a 2005 model car, the driver having had at least one fault accident in the past two years

	COUNTRY			WOLLONGONG			NEWCASTLE			METRO		
AGE	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**	**Hi**	**Mean**	**Lo**
24yrs	$527.17	$523.17	$517.69	$548.00	$543.86	$538.08	$530.93	$526.91	$521.37	$690.56	$685.22	$678.13
40yrs	$527.17	$432.60	$345.00	$547.94	$426.61	$359.00	$530.93	$413.38	$348.00	$690.56	$537.53	$452.00
60yrs	$527.17	$414.03	$345.00	$547.94	$406.27	$323.00	$530.93	$393.65	$313.00	$690.56	$512.02	$407.00

ACT CTP premiums are always less than the highest NSW premiums in any category.

ACT CTP premiums are mostly less than the lowest NSW premiums for drivers up to 24 years old.

ACT CTP premiums are mostly less than the NSW metropolitan premiums for drivers up to 24 years old.

NSW NRMA CTP Premiums for Motor Cars by Region and Type

All premiums higher than the ACT premium for the same policy are highlighted in yellow

ACT Premiums for Commercial Use Cars $526.90 **ACT Premium for Private Use Cars = $487.50**

	Commercially Registered Vehicles				Privately Registered Vehicles			
DRIVER AGE*	**Country**	**Wollongong**	**Newcastle**	**Metro**	**Country**	**Wollongong**	**Newcastle**	**Metro**
Driver Age 25	$524.34	$545.00	$528.07	$686.84	$524.34	$545.00	$528.07	$686.84
Driver Age 40	$403.21	$419.07	$406.06	$528.16	$368.76	$383.28	$371.37	$483.04
Driver Age 60	$368.76	$383.28	$371.37	$483.04	$360.65	$374.86	$363.22	$472.42
VEHICLE AGE**								
< 5years	$403.21	$419.07	$406.06	$483.04	$368.76	$383.28	$371.37	$483.04
>10 years	$524.34	$545.00	$528.07	$686.84	$524.34	$545.00	$528.07	$686.84
ATFAULT***								

Driver Age 25	$524.34	$545.00	$528.07	$686.84	$547.94	$545.00	$528.07	$686.84
Driver Age 40	$524.34	$545.00	$528.07	$686.84	$547.94	$545.00	$528.07	$686.84
Driver Age 60	$524.34	$545.00	$528.07	$686.84	$547.94	$545.00	$528.07	$686.84

*Vehicle 2005 model, no at fault accident in the past two years

** Vehicle driven by a 40 year old that has not had an at fault accident in the past two years

***Vehicle 2005 model driven by a driver that has had an at fault accident in the past two years

[i] Letter from Taylor Fry Consulting (11 April 2006), n. **Error! Bookmark not defined.**. Table 3 (p. 9).

Annexure B – Comparative Table of Third Party Insurance Schemes Across Australia

State	**ACT**	**NSW**	**NT**	**Qld**	**SA**	**Tas**	**Vic**	**WA**
Governing Legislation	*Road Transport (Third-Party Insurance) Act 2008*	*Motor Accidents Compensation Act 1999*	*Motor Accidents (Compensation) Act*	*Motor Accident Insurance Act 1995/Civil Liability Act 2003*	*Motor Vehicles Act 1959/Civil Liability Act 1936*	*Motor Accidents (Liabilities & Compensation) Act 1973/ Civil Liability Act 2002*	*Transport Accident Act 1986*	*Motor Vehicle (Third Party Insurance) Act 1943*
General Nature of system e.g. unrestricted common law, no fault, common law with restrictions	Unrestricted common law	Common law with restrictions	No fault only, statutory benefits only.	Common law with restrictions	Common law with restrictions and no fault	Unrestricted Common Law and no fault	Common Law with restrictions and no fault	Common Law with restrictions
Jurisdiction e.g. name of court or tribunal	Magistrates Court/Supreme Court	Claims Assessment and Resolution Service/Local or District Court	Motor Accidents (Compensation) Appeal Tribunal	Supreme Court / District Court /Magistrates Court	Magistrates Court/District Court/Supreme Court	Supreme Court/Motor Accidents Compensation Tribunal	Magistrates Court/County Court/Supreme Court	Magistrates Court/District Court/Supreme Court
If general damages are limited – what is the mechanism e.g. 4th edition AMA guides to permanent impairment; table of maims	Unrestricted	General damages are capped under the Act at $432,000. No damages awarded when impairment caused by injury less than 10%.	General damages are based on the AMA impairment guidelines. Damages are calculated by multiplying impairment percentage by the prescribed amount, currently $259,022.40. No damages are awarded if less than 5%. Impairment percentage is reduced if under 15%. Impairments above 85% attract the whole prescribed amount.	Caps on general damages based on a scale value of injury. Under the current scale, an injury value of 1 would receive $1,180 and an injury value of 100 would receive $294,500 in general damages.	Caps on general damages based on a scale value of injury. The scale ranges from 0 – 60. Under the current scale, an injury value of 1 would approximately receive $1,440 and an injury value of 60 would receive $302,180 in general damages.	There is not cap on general damages, however smaller claims are excluded or limited by thresholds.	General damages are capped under the Act at $305,250 and no damages are awarded if the amount is less than $30,530. Further, serious injury or 30% whole person impairment required.	General damages are currently capped at $350,000 and no damages are awarded if less than $17,500 (the deductible). If the amount is greater than the deductible and less than $70,500, the amount is reduced by the full or percentage of the deductible.
Is past or future economic loss capped or restricted	No	Economic loss can not be assessed on the basis that the plaintiff earns more than $3,966 per week. No cap.	Economic loss when calculated is limited to 85% of the average weekly earnings at time of payment, currently $773.91 per week. No cap.	Economic loss can not be assessed on the basis that the plaintiff earns more than the 3 times average weekly wage. No cap.	Economic loss damages are currently capped at approximately $2,841,000.	Economic loss can not be assessed on the basis that the plaintiff earns more than the 3 times average weekly wage. No cap.	Pecuniary loss damages are capped at $686,840 and no damages are awarded if amount is less than $30,520. No claim for pecuniary loss 18 months after accident.	Economic loss can not be assessed on the basis that the plaintiff earns more than the 3 times average weekly wage. No cap.
Is domestic assistance capped or restricted	No	Gratuitous care is only recoverable in limited circumstances.	Gratuitous care is only recoverable in limited circumstances.	Gratuitous care is only recoverable in limited circumstances.	Gratuitous care is only recoverable in limited circumstances.	Gratuitous care is only recoverable in limited circumstances.	Gratuitous care is not recoverable.	Gratuitous care is only recoverable in limited circumstance.

Annexure B – Comparative Table of Third Party Insurance Schemes Across Australia

Are treatment expenses capped or restricted	No	No	No benefits payable if services provided outside Australia. Otherwise, no	No	No	No	No	No
Insurers e.g. free market or licensed only, government etc	Licensed insurers, currently 1.	Free market.	Territory Insurance Office (NT Government)	Licensed insurers, currently 6.	Motor Accident Commission (State government)	Motor Accidents Insurance board (State Government)	Transport Accident Commission (State Government)	The Insurance Commission of Western Australia (State Government)
Costs – regulated or not e.g. lump sums	Yes, regulated by the Act and Civil Law (Wrongs) Act 2003.	Yes, regulated by the Act.	Court Scale	Yes, regulated by Motor Accident Insurance Act 1994.	Court Scale	Court Scale	Court Scale	Court Scale

State and Territory Motor Accident Compensation Scheme Summaries
Note: All values as at 1 August 2011.

State and Territory Motor Accident Compensation Scheme Summaries - *Note: All values as at 1 August 2011.*

New South Wales (*Motor Accidents Compensation Act 1999*)

1. In New South Wales the nature of the scheme is restricted common law. Under section 131 of the *Motor Accidents (Compensation) Act 1999, general* damages are not recoverable if the injured person is not impaired by more than 10%. General damages are currently capped at $432,000.

2. Under section 125 of the *Motor Accidents (Compensation) Act 1999* economic loss when calculated is currently limited to $3,966 per week. No cap applies. A discount rate of 5% applies.

CTP Premium

3. CTP insurance is provided by a number of licensed insurance companies who set premium prices in a competitive market. They may take into account factors such as[1]:

- your accident record
- the age of all regular drivers that drive your vehicle
- the age of your vehicle
- the type of vehicle
- comprehensive or third party property insurance
- the purpose for which your vehicle is used (private or business)
- renewal or new Green Slip

4. Insurer CTP premium determinations are subject to *MAA Premiums Determination Guidelines.*

Northern Territory (*Motor Accidents (Compensation) Act*)

[1] http://www.maa.nsw.gov.au/default.aspx?MenuID=139

Annexure B – Comparative Table of Third Party Insurance Schemes Across Australia

5. Northern Territory is a no fault statutory scheme. General damages are based on the AMA impairment guidelines. Under section 17 of the *Motor Accidents (Compensation) Act*, general damages are calculated by multiplying impairment percentage by the prescribed amount, currently $259,022.40. The prescribed amount is worked out as 208 time the average weekly earnings at time of payment. No damages are awarded if less than 5%. Impairment percentage is reduced if less than 15%. Impairments above 85% attract the whole prescribed amount.

6. Under section 13 of the *Motor Accidents (Compensation) Act* economic loss when calculated is limited to 85% of the average weekly earnings at time of payment, currently $773.91 per week. No cap applies. A discount rate of 6% applies.

7. Under section 18A and 18B of the *Motor Accidents (Compensation) Act*, gratuitous care is recoverable in limited circumstances.

CTP Premium

8. CTP Insurance is provided by Territory Insurance Office. CTP varies for vehicle type. The current premium for a standard personal passenger car is $487.70. Provides no fault cover. For a full schedule of premiums, see below link:

   http://www.nt.gov.au/transport/mvr/registration/index.shtml

Queensland (*Motor Accident Insurance Act 1995/Civil Liability Act 2003*)

9. In Queensland the nature of the scheme is restricted common law. Schedule 6A of the *Civil Liability Act 2003* provides caps on general damages based on a scale value of injury. The scale values are regulated under the *Civil Liability Regulations 2003.* The scale ranges from 0 – 100. For example a quadriplegia injury upon assessment would result in a scale value of 75 – 100. At the lower end of the scale, a minor lower limb injury, such as an uncomplicated fracture would result in a scale value 0 – 10. Under the current scale, an injury value of 1 would receive $1,180 and an injury value of 100 would receive $294,500 in general damages.

10. Economic loss can not be assessed on the basis that the plaintiff earns more the 3 times average weekly wage, no cap is applicable, a 5% discount rate applies.

11. Under section 59 of the *Civil Liability Act 2003*, gratuitous care is recoverable in limited circumstance. Damages for loss of consortium or servitium is available in limited circumstances.

CTP Premium

12. CTP insurance is regulated by The Motor Accident Insurance Commission (MAIC) but is currently delivered by 6 licensed insurers. CTP premiums are based on type and use of the vehicle. The MAIC sets an upper and lower limit for premiums each quarter. Currently for a standard personal passenger car premiums are set between $307.00 and $313.00. For a full schedule of premiums, see below link:

    http://www.maic.qld.gov.au/ctp-premium/ctp-premium-tables-motor-dealers.shtml

South Australia (*Motor Vehicles Act 1959/Civil Liability Act 1936*)

13. In South Australia the nature of the scheme is restricted common law. Like Queensland, section 52 of the *Civil Liability Act 1936* provides caps on general damages based on a scale value of injury. The scale ranges from 0 – 60. Under the current scale, an injury value of 1 would approximately receive $1,440 and an injury value of 60 would receive $302,180 in general damages.

14. Under section 54 of the *Civil Liability Act 1936* economic loss damages are currently capped at approximately $2,841,000, a discount rate of 5% applies.

15. Under section 58 of the *Civil Liability Act 1936*, gratuitous care is recoverable in limited circumstance.

CTP Premium

Annexure B – Comparative Table of Third Party Insurance Schemes Across Australia

16. CTP insurance is provided by the Motor Accident Commission. CTP Premiums for a motor vehicle varies according to the type of the vehicle and the locality. The current premium for a standard personal passenger car is either $489.00 or $382.00, depending on locality. For a full schedule of premiums, see below link:

    http://www.sa.gov.au/upload/franchise/Transport,%20travel%20and%20motoring/Motoring/documents/CTP_Premium_%20mr85.PDF

Tasmania (*Motor Accidents (Liabilities & Compensation) Act 1973/ Civil Liability Act 2002*)

17. In Tasmania the nature of the scheme is unrestricted common law. There is not cap on general damages, however smaller claims are excluded or limited by thresholds under section 27 of the *Civil Liability Act 2002*. In the 2010/11 financial year if general damages awarded were less than $5,000 they were not recoverable. If they were more than $5000, but less than $25,000, they are reduced. Economic loss can not be assessed on the basis that the plaintiff earns more the 3 times average weekly wage, a 5% discount rate applies.

18. Under section 28B of the *Civil Liability Act 2002*, gratuitous care is recoverable in limited circumstance.

CTP Premium

19. CTP insurance is provided by the Motor Accidents Insurance Board, it provides no fault cover. CTP varies for vehicle type. The current premium for a standard personal passenger car is $350.00. For a full schedule of premiums, see below link:

    http://www.transport.tas.gov.au/fees/premiums__and__vehicle_classifications

Victoria (*Transport Accident Act 1986*)

20. In Victoria, if a person suffers a serious injury or 30 % whole person impairment as defined by s93(4) of the *Transport Accident Act 1986* and another person was at fault for the accident, they may lodge a common law claim. Transport Accident Commission (TAC), a statutory corporation requires all owners of registered vehicles to pay a transport accident charge. The TAC indemnifies owners or the drivers of a registered motor vehicle in respect of common law liability in relation to an injury or death of a person arising out of the use of the motor vehicle.

21. General damages are capped under the Act at $305,250 and no damages are awarded if the amount is less than $30,530. Pecuniary loss damages are capped at $686,840 and no damages are awarded if amount is less than $30,520, a discount rate is applied a 6%. No claim for pecuniary loss 18 months after accident. Gratuitous care is not recoverable.

CTP Premium

22. The TAC Charge for a motor vehicle varies according to the type of the vehicle and the locality. The TAC provides no fault cover. The charge for a standard personal passenger car is currently between $348.70 and $449.00. For a full schedule of charges, see below link:

    http://www.tac.vic.gov.au/upload/TAC_WebRates.pdf

Western Australia (*Motor Vehicle (Third Party Insurance) Act 1943*)

23. In Western Australia the nature of the scheme is restricted common law. General damages are currently under the Act capped at $350,000 and no damages are awarded if less than $17,500 (the deductible). If the amount is greater than the deductible and less than $70,500, the amount is reduced by the full or percentage of the deductible.

Annexure B – Comparative Table of Third Party Insurance Schemes Across Australia

24. Economic loss can not be assessed on the basis that the plaintiff earns more the 3 times average weekly wage, no cap is applicable, a 5% discount rate applies. Under section 3D of the *Motor Vehicle (Third Party Insurance) Act 1943*, gratuitous care is recoverable in limited circumstance. Currently if amount awarded is less than $6,000 it is not recoverable.

CTP Premium

25. CTP Insurance forms part of your 'Licensing' in WA and is administered by The Insurance Commission of Western Australia. CTP varies for vehicle type. The current premium for a standard personal passenger car is $245.01. For a full schedule of premiums, see below link:

    http://www.icwa.wa.gov.au/mvpi/ctp/mvpi_premiums.shtml

Annexure C – Alternative Drafting Instructions

AMENDMENT	RATIONALE
Section 27 heading *substitute* **27 CTP policy not affected by errors etc** **New section 27 (2) and (3)** *insert* (2) The validity of a CTP policy is not affected by payment of an incorrect CTP premium for the policy. (3) A licensed insurer who has been paid an incorrect CTP premium may recover any outstanding amount as a debt owing to the insurer. 23 *Note* An amount owing under a law to a person may be recovered as a debt owing to the person in a court of competent jurisdiction (see *Legislation Act*, s 177).	These amendments proposed by the current Bill offer useful clarifications.
Sections 37 and 38 *substitute* **37 What is a *CTP premium*?** In this Act: ***CTP premium***, for a CTP policy, means— (a) the insurance premium approved under this part for the CTP policy; or (b) another premium worked out by the insurer in accordance with the CTP premium guidelines. **38 What premium licensed insurer may charge** A licensed insurer may charge a premium for a CTP policy only if the premium is— (a) approved under this part; or (b) worked out in accordance with the CTP premium guidelines.	These amendments proposed by the current Bill offer useful promotion of the importance of the CTP premium guidelines.

Annexure C – Alternative Drafting Instructions

AMENDMENT	**RATIONALE**
Expressly allow approved insurers to set CTP premiums based on risk rating, using at least the factors used in NSW: age of insured, "at fault" accident history of insured; age of vehicle; whether insured has other insurance policies with the insurer This could be dealt with by *CTP Premium Guidelines* issued by the CTP Regulator under s39 of the Act or by amending Part 3 and Schedule 1 of the Regulation.	Removes the current cross-subsidy of at risk drivers by those less at risk and may facilitate the introduction of competition in the CTP market in the ACT. Other markets, such as NSW, do include risk rating.
Delete s139(3)(a)(ii) of the Act	Removes the requirement that prior to a compulsory conference (and thus before court proceedings are allowed to be commenced) a lawyer must certify that the matter is ready for trial. A solicitor who so certified could be guilty of negligence because the issues in dispute are not even certain at that stage. Removing this element of the certification avoids the additional wasted costs of having to apply to a court to dispense with the compulsory conference: see *Furler v Haureliuk* [2010] ACTSC 68.

Annexure C – Alternative Drafting Instructions

AMENDMENT	**RATIONALE**
Add after s141 requirements deeming settlement in the following circumstances: a. If the lowest mandatory final offer ("**MFO**") is greater than $0, the highest MFO is not more than $70,000.00, and the MFOs respectively put on behalf of the claimant and the respondent are not more than $20,000 apart, then the parties are deemed to have settled the matter for an amount mid-way between the two MFOs and that mid-point is taken to be the MFO which is accepted (for the purposes of costs provisions). b. If the lowest MFO is greater than $0, the highest MFO more than $70,000 but not more than $100,000, and the MFOs respectively put on behalf of the claimant and the respondent are not more than $30,000 apart, then the parties are deemed to have settled the matter for an amount mid-way between the two MFOs and that mid-point is taken to be the MFO which is accepted (for the purposes of costs provisions).	This precludes the running up of additional court expenses and legal costs for no significant gain on either side. The requirement that the lowest MFO is greater than $0 prevents the defendant insurer being deemed to have settled a matter for which they deny any liability. The relevant thresholds have been increased from $30,000 and $50,000 to $70,000 and $100,000 respectively because they will now include general damages (damages for pain & suffering)

Annexure C – Alternative Drafting Instructions

AMENDMENT	RATIONALE
Delete s141(5), s155(5) and s156(7) of the Act	These deletions remove the peculiar and uniquely ACT exclusion of general damages (damages for pain and suffering) from some thresholds used to define "small matters". These provisions in the current Act unfairly discriminate against children, mothers, the disabled, the elderly and others injured but who are not in the paid workforce. The ACT Human Rights Commissioner has drawn attention to these breaches of human rights. The discrimination is that such people are more likely to fall below the $30,000 and $50,000 thresholds (excluding general damages) and thus are more likely to be unable to recover costs from an at fault defendant. When general damages are included, such thresholds which determine costs limits should be increased from $30,000 and $50,000 to $70,000 and $100,000 respectively, with a proportionate increase in the costs limits.

Annexure C – Alternative Drafting Instructions

AMENDMENT	RATIONALE
Replace s144 with the following: **144 Working out costs for mandatory final offers** (1) A mandatory final offer for $100,000 or less must be exclusive of any amount for costs and disbursements. (2) If a mandatory final offer is for $100,000 or less but for more than $70 000, and is accepted, costs and disbursements must not exceed: (a) the amount of the mandatory final offer; and (b) $15,000. (3) If a mandatory final offer is for $70,000 or less, and is accepted, costs and disbursements must not exceed: (a) the amount of the mandatory final offer; and (b) $10,000.	These provisions reflect the increased thresholds concerning "smaller matters" when general damages are included (see below). These provisions also limit costs but remove the current provision of no costs being allowed for accepting a MFO below $30,000, a provision which only ensures that there will be few such MFOs accepted and which throws the burden of costs onto injured road users. The amendment also expressly includes disbursements in the costs limit.

Annexure C – Alternative Drafting Instructions

AMENDMENT	RATIONALE
Insert before s155 **154A Damages for future economic loss—claimant's prospects and adjustments** (1) In a court proceeding based on a motor accident claim, the court may award damages for future economic loss in relation to loss of earnings only if satisfied that the assumptions about future earning capacity or other events on which the damages are to be based reflect the claimant's most likely future circumstances were it not for the injury. (2) If the court decides the amount of an award of damages for future economic loss in relation to loss of earnings, the court must adjust the damages that would be payable if the assumptions were correct by the possibility, calculated as a percentage, of the events occurring were it not for the injury. (3) If the court awards damages for future economic loss in relation to loss of earnings, the court must state— (a) the assumptions and evidence on which the damages are based; and (b) the percentage by which the court has adjusted the damages. (4) In this section: ***loss of earnings*** means loss of prospective earnings or the deprivation or impairment of prospective earning capacity.	This amendment from the current Bill reflects the common law focuses the courts' attention on providing appropriate reasons for decisions. They are unproblematic clarifications.

Annexure C – Alternative Drafting Instructions

AMENDMENT	RATIONALE
Insert before s155 **154B Guidelines to assist determining non-economic loss** (1) The Minister may make guidelines (the ***non-economic loss guidelines***) setting out information to assist courts in deciding the appropriate level of damages for non-economic loss in motor accident claims. (2) A court may have regard to the non-economic loss guidelines when awarding damages, but is not bound by the guidelines. (3) A non-economic loss guideline is a notifiable instrument. *Note* A notifiable instrument must be notified under the Legislation Act.	Such guidelines could assist all parties reduce costs by providing increased consistency in damages awards across courts and jurisdictions. This amendment reflects a proposal of the current Bill, but proposes that the Minister issue the guidelines rather than the CTP Regulator. The CTP Regulator arguably would have a conflict of interest in issuing such guidelines because of the CTP Regulator's role in approving premiums and concerning the Nominal Defendant scheme.
Replace s155 of the Act with provisions enacting a regime to limit costs as follows: c. If the court awards $70,000 or less in damages, the insurer cannot be required to pay more costs than those calculated as follows: i. if the amount awarded is more than the respondent's MFO, then the respondent must pay the claimant's costs and disbursements on a party/party basis up to the time the MFO was refused or closed and on an indemnity basis thereafter up to a combined total of no more than $20,000, inclusive of GST; ii. if the amount awarded is equal to, or less than, the respondent's MFO, no costs are payable to the claimant and the claimant must pay the respondent's costs and disbursements incurred after the refusal or closure of the	The proposal is to simplify the current cost provisions and better control lawyers' behaviour to limit costs incurred in small matters. The current provisions are too complex to properly moderate lawyers' behaviour and offer, for each side, one or two possibilities of a significantly large costs bonanza. This encourages lawyers to run such matters rather than to settle them quickly. In working through the current costs provisions for matters in which the award is under $50,000, excluding general damages, there are at least 9 different possible outcomes and cost possibilities. Moreover, there is no simple monotonic relationship between the reasonableness of an offer made by one party and the costs they can claim from the opposing party This regime limiting costs in smaller matters should be enacted in the Regulation. The proposed regime assumes that the Magistrates Court jurisdiction will be at least $100,000 that there will be rules limiting costs for matters within that jurisdictional limit. Putting the costs regime largely in the

Annexure C – Alternative Drafting Instructions

AMENDMENT	RATIONALE
respondent's MFO, such costs and disbursements being paid on an indemnity basis up to $10,000, inclusive of GST. iii. Except that the insurer cannot be required to pay more in costs than the total of damages awarded. d. If the court awards more than $70,000 but not more than $100,000, the insurer cannot be required to pay more costs than those calculated as follows: i. if the amount awarded is more than the respondent's MFO, then the respondent must to pay the claimant's costs and disbursements on a party/party basis up to the time the MFO was refused or closed and on an indemnity basis thereafter up to a total of no more than $30,000, inclusive of GST; ii. if the amount awarded is equal to, or less than, the respondent's mandatory final offer, no costs are payable to the claimant and the claimant must pay the respondent's costs and disbursements incurred after refusal or closure of the respondent's MFO, such costs and disbursements being paid on an indemnity basis up to $15,000, inclusive of GST. iii. Except that the insurer cannot be required to pay more in costs than the total of damages awarded. a. The above costs do not include costs awarded for interlocutory matters, including applications in	Regulation will allow adjustments in line with any changes to rules concerning costs for matter below the Magistrates Court jurisdiction. In line with earlier comments, the relevant thresholds are increased from $30,000 and $50,000 to $70,000 and $100,000 respectively because of the inclusion of general damages. There are roughly proportionate increases in costs. The final provision applies to all CTP matters and deems MFOs to be *Calderbank* offers. This will ensure that there are usual costs implications for refusing an MFO even in relatively larger claims. In those relatively larger claims courts retain appropriate discretion concerning costs, thereby allowing a court to be responsive to the peculiar circumstances of each case.

Annexure C – Alternative Drafting Instructions

AMENDMENT	RATIONALE
proceedings. b. If the court awards more than $100,000, then the court must, in making any orders concerning costs, consider the parties' respective mandatory final offers as though they were *Calderbank* offers.	
In s156(1) substitute "$50,000" with "$100,000"	This amendment is a technical change reflecting the above changes in thresholds for costs limiting provisions for "small matters" once general damages are included in the thresholds.
Insert before s156(6): (5A) Section 156(5) does not apply to the costs of any supplementary expert report reasonably required for trial.	This amendment provides that costs can be recovered, at the discretion of the court, for a supplementary expert report so long as it was reasonably required for trial. Supplementary reports are often required, for example, to provide an update on a person's medical condition prior to trial, which may be many months after any exchange of MFOs.
Transitional provisions – much as for Current Bill	These provisions would mirror those in the current Bill and ensure that the new provisions applied only to matters concerning injuries arising from motor vehicle accidents which occurred after the commencement of the amendments.