Law Council
OF AUSTRALIA

From the Office of the President

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Ms Caroline Le Couteur MLA
Chair, Standing Committee on Public Accounts
ACT Legislative Assembly
GPO Box 1020
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Dear Ms Le Couteur,

ROAD TRANSPORT AMENDMENT (THIRD PART INSURANCE) BILL 2011

The Law Council of Australia has serious concerns about the proposal to introduce the *Road Transport Amendment (Third Party Insurance) Bill 2011* (**the Bill**) and the impact it will have on people negligently injured on ACT roads.

The Law Council is the peak body for the Australian legal profession, representing around 56,000 Australian lawyers through the Law Societies and Bar Associations of the States and Territories and the Large Law Firm Group Ltd (the ―constituent bodies” of the Law Council). The Law Council advocates on behalf of the profession nationally and internationally, to promote the rule of law, access to justice and the administration of justice.

The Law Council has read and strongly endorses the submissions of the ACT Law Society, ACT Bar Association and the Australian Lawyers Alliance (**the joint submission**). The Law Council does not intend to address the Public Accounts Committee‘s Terms of Reference in relation to the impact of the *Road Transport (Third Party Insurance) Act 2008* (**the 2008 Act**), as these are comprehensively covered by the joint submission of the aforementioned organisations. The Law Council‘s submissions, set out below, will measure the objective of the Bill against its likely impact, with reference to the experience of other jurisdictions.

Purpose

The following addresses the putative ‗objectives‘ of the Bill, as set out in section 5C. As a general comment, the Law Council is concerned that the provision of the Bill are largely inimical or unrelated to most of its stated objectives.

<u>Medical treatment and rehabilitation</u>

The Explanatory Statement for the Bill states that its primary objective is to ―to promote and encourage the rehabilitation of people injured in a motor crash”.[1]

[1] *Road Transport Amendment (Third Party Insurance) Bill 2011*, Explanatory Statement, p 2

The Law Council strongly rejects any suggestion that the Bill might affect recovery outcomes for road accident victims. There is nothing in the Bill directed at improving access to treatment and rehabilitation services and it is disingenuous to suggest otherwise. Nor is there any provision creating a stronger presumption that insurers will agree to meet the cost of medical or other treatment.

The basis for this claim is the spurious and unsupported notion that allowing injured people to pursue their common law rights impedes their recovery. Numerous scientific studies have been conducted into the effect of litigation on recovery following accident. The majority of these studies have been either discredited or inconclusive and the Law Council notes that a recent authoritative meta-study conducted in 2010, which included an examination of all previous studies into the link between litigation and poor health outcomes, concluded that:

> “Until consistent, high quality evidence is available, calls to change scheme design or to otherwise alter the balance between the cost and availability of injury compensation on the basis that compensation is ‘bad for health‘, should be viewed with caution.”[2]

Encourage speedy resolution of motor crash claims

There is nothing in the Bill which appears to be directed at speeding up the resolution of claims, either through improved interlocutory processes or otherwise. The Law Council notes that speedy resolution of claims was a central objective of the 2008 Act. As noted in paragraph 17 of the joint submission, the 2008 Act has gone some way to improving the claims resolution process.

It appears to be suggested in the Explanatory Statement to the Bill that “speedy resolution” will be achieved by restricting compensation to victims of road accidents. No other explanation is offered, however it is understood by this that injured claimants will not enter into disputes with the negligent party‘s CTP insurer because their prospects of recovering compensation will be substantially reduced by this Bill.

It is concerning that neither the Explanatory Statement nor the public comments by proponents of this Bill admit that the only way this Bill can possibly impact on claims resolution is by substantially weakening the rights of people who are negligently injured and, correspondingly, strengthen the position of the sole CTP insurer in the ACT.

Introduce competition

The Law Council accepts that the purpose of the Bill is to reduce compulsory third-party (CTP) insurance premiums paid by registered motorists in the ACT. The mechanism by which the Bill seeks to achieve this is by substantially restricting the rights of negligently injured road users to claim compensation from the ACT‘s monopoly CTP insurer, NRMA Ltd.

The Government has apparently formed the view that the only way to lower CTP insurance premiums is to introduce competition by encouraging interstate insurers to enter the ACT CTP insurance market. It is assumed that this can be achieved by reducing benefits to those insured under CTP insurance policies, thereby reducing risk and increasing the profitability of CTP insurance in the ACT.

[2] Spearing, N. and Connelly, L., 2009, ‘Is compensation “bad for health”? a systematic meta-review‘, *International Journal of the Care for the Injured,* vol. 41, no. 7, pp 683-92.

The Government's case is based on an assumption that, all other things being equal, interstate insurers will be motivated by potential profit to attempt to break the NRMA's long held monopoly on CTP insurance in the ACT (which was, until introduction of the 2008 Act, supported by statute). The Law Council considers this to be a dangerous assumption, the cost of which will be borne by those injured on ACT roads without any corresponding certainty as to the degree of reduction in premium that may result.

If this Bill is enacted and premiums fall as a result (which is a highly contestable assumption given there is a monopoly insurer), it will be because CTP insurance policies in the ACT are worth substantially less.

<u>Promote measures directed at eliminating or reducing causes of motor crashes and mitigating their results</u>

While this is enumerated in the Explanatory Statement as one of the objectives of the Bill, there does not appear to be anything in the Bill which will encourage safer driving or eliminate/reduce causes of motor accidents, much less mitigating their results. In fact, the primary outcome of this Bill will be to worsen outcomes for those injured in motor vehicle accidents.

The people worst affected by this Bill will be retirees, stay at home parents, children, disabled or incapacitated people and the unemployed. This is because people who cannot earn income through employment and receive injuries assessed below the 15% WPI threshold will receive no compensation for their loss of enjoyment of life or pain and suffering, and will therefore be unlikely to receive any compensation at all.

Experience in NSW

The Law Council and its members have observed the deleterious effect of laws introduced in NSW to restrict rights of road users in that jurisdiction. When the *Motor Accidents Compensation Act 1999* (NSW) (**the MACA**) was enacted, a 10% whole person impairment threshold was applied to restrict access to damages for pain and suffering. The result was an 81 per cent reduction in the number of negligently injured road users who could claim compensation for pain and suffering, many of whom have been left with long-term or life-long injuries and impairment.[3]

In 2006, the Law Council obtained documents from the NSW Motor Accidents Authority under the *Freedom of Information Act* (NSW), which revealed the following:

- The projected proportion of claims which resulted in a payment for non-economic loss (pain and suffering) dropped from 58% in 1996-1999 to 11% for 2000-2005.[4] This represents an 81% decrease in the number of people who receive payment for non-economic loss in NSW following a road accident.

- Between 1999 and 2005, average CTP premiums in NSW fell by around $100, from $433 to $332.[5] However, the average CTP premium across NSW is now

[3] Letter from Taylor Fry Consulting Actuaries to the Deputy General Manager of the Motor Accidents Authority of New South Wales of New South Wales (11 April 2006). Table 3 (p 9).
[4] Ibid.
[5] MAA Annual Report 2005-2006 (p 83).

$453.97, despite the unfair restrictions on common law rights applied in that jurisdiction.[6]

- Insurer profitability in NSW for compulsory third party (**CTP**) insurance has been outstanding and, arguably, unjustifiably high in light of the cost to NSW road users. Over 8 years, between 1 July 1991 and 30 June 1999, NSW CTP insurers made an estimated profit of **$1034m** (discounted value) which is equivalent to **12%** of CTP insurance premiums collected.[7] However, in just 6 years, between 1999 and 2005, NSW CTP insurers made profits of **$2.239m**, which is equivalent to **27%** of CTP insurance premiums collected over that period.[8] According to NSW Government commissioned actuarial advice, profit margins in the range of **4½ - 6%** of gross premium for a CTP insurer are considered reasonable.[9]

When considering these data, it is worth bearing the following in mind:

1. In NSW, a 10% whole person impairment threshold applies, whereas the Bill under consideration will introduce a 15% whole person impairment threshold. Under the Government's own estimates, the number of those eligible for compensation for non-economic loss arising from injury on ACT roads following the introduction of this Bill will fall by 85%. While this should be a cause for major concern among ACT residents, the Law Council considers the Government's estimate to be highly conservative and, in fact, the true reduction in eligibility is likely to be higher.

2. 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."[10]

   That is, the imposition of a 10% WPI threshold in NSW resulted in enormous insurance industry profits because insurers had not anticipated the extent to which personal injury insurance claims would reduce in determining risk-rated premiums.

3. In NSW, while CTP premiums reduced following the imposition of the thresholds and other restrictions on victims' rights, it is clear that a significant proportion of the reduced claims liability has been retained by insurers – as demonstrated by the average 27% profits claimed each year since 1999. This is despite the fact that there is a competitive market for CTP insurance policies in NSW, constituted by 7 major insurers, none of which has a market share above 36.7%.[11] Given there is a monopoly insurer in the ACT and no indication that interstate insurers are lining up

[6] Finity Consulting, *CTP News – Spring 2010*, October 2010.
[7] 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).
[8] MAA Annual Report 2009/10, page 59
[9] 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).
[10] 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.
[11] MAA Annual Report 2009/10, p.57.

to offer policies to ACT drivers, what incentive does NRMA Ltd have to pass on a majority – or even a fraction – of the windfall profits it will realise as a result of these proposed changes?

These comments are not intended to suggest that NRMA Ltd or other insurance companies have or would engage in anything other than appropriate market behaviour, based on the best interests of their shareholders. Insurers are entitled to make reasonable profits, which will be affected by the nature of the market. The Law Council notes that the experience in NSW is a reasonable indication of what can be expected if similar changes are introduced in the ACT.

Discount rates

Under the Bill, discount rates will be increased from 3% to 5%. Whilst this might seem like a modest change, in reality the impact on injured people will be severe.

It is important for Committee members to understand that discount rates exist to account for the assumed benefit that recipients of common law compensation obtain from early receipt of future benefits. It is intended to offset the ability of the plaintiff to invest lump sums in reasonably safe investments.

Discount rates apply only to lump sum compensation amounts for future care and treatment expenses and future loss of income. Accordingly, those with the largest compensation payment for future care and treatment and loss of income (i.e. the youngest and most severely injured) will be most harshly impacted.

The Law Council strongly recommends that the Committee closely consider the joint submissions of the ACT Law Society, ACT Bar Association and Australian Lawyers Alliance in response to the earlier exposure draft of this Bill (dated 30 November 2010), which is set out in the annexure to their joint submission to this inquiry. In particular, the Law Council refers to the table on page 22 of that submission, which illustrates the impact on lump sum compensation resulting from and increase in the discount rate from 3% to 5%.

The ACT should not simply adopt the approaches of other jurisdictions, which have adopted a 5% discount rate on an unprincipled basis. There is no reason for imposing a 5% discount rate, other than to arbitrarily lower awards of compensation. In 2002, the Negligence Review Panel convened by the Heads of Treasury to inquire into means of restricting common law compensation expressly rejected using discount rates for this purpose, noting that:

> "Assume that a 25 year old is totally and permanently incapacitated for work. This means that damages for future loss of earning capacity will be calculated to cover a 40-year period. The effect of increasing the discount rate from 3 per cent to 5 per cent would be to reduce the lump sum to 75 per cent of its 3 per cent level. Thus, an increase of 2 percentage points in the discount rate would lead to a reduction of 25 per cent in the award."[12]

[12] Justice D. Ipp, Prof. D. Sheldon, Prof. P. Cane, I. Macintosh, *Review of the Law of Negligence*, September 2002, Commonwealth of Australia, page 209.

The Panel recommended that the discount rate be set nationally at 3%, after concluding that:

> “…using a discount rate higher than can reasonably be justified by reference to the appropriate criteria would be an unfair and entirely arbitrary way of reducing the total damages bill. Furthermore, we have seen that the group that would be most disadvantaged by doing so would be those who are most in need — namely the most seriously injured.”[13]

The Law Council submits that the best guide to a fair and appropriate discount rate is in fact the 10-year Commonwealth Treasury indexed bond rate, which presently stands at 2.69%. In addition, the Committee should have regard to actuarial advice provided by Cumpston Sarjeant Pty Ltd, which concludes that the discount rate should reflect the net, after tax investment rate, which stands at 2.65% after adjusting for inflation.

A further matter the Committee and the ACT government should consider is that high discount rates will affect the capacity of people catastrophically injured on ACT roads from ‘buying in’ to interstate no-fault schemes, such as the NSW Lifetime Care and Support Scheme, if such an option were made available in the future. This is because the actual cost of future care and treatment will not be covered if the overall award is reduced by 25% or more.

Conclusion

The Law Council recommends that the Bill not proceed in its present form. If the Bill is implemented, the motor accidents scheme in the ACT will be among the most restrictive in the country. There will be no mitigating factors for ACT drivers, other than speculation that the CTP insurance premium might fall. If this were to occur, as noted above, it will be because CTP insurance is worth substantially less.

The Law Council would be very pleased to respond to any queries regarding these submissions.

Yours sincerely,

Alexander Ward

15 September 2011

[13] Ibid, page 210.