CTP reform consultation observations

September 2016

CTP Reference Panel

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1 Draft is subject to feedback from stakeholders that views attributed to them are properly represented.
Introduction
The CTP Reform Reference Panel was tasked by the NSW Government to lead consultation with service providers and stakeholders to the CTP Scheme to gain their views on details and processes required to implement the Government’s preferred reform model for CTP.

It should be noted that two streams of consultation were being undertaken concurrently to inform the proposed scheme design:

1. Benefits and dispute resolution
2. Premium setting and competition

The intent of the consultation was to gain a balanced perspective on the views of all parties and consider these against best interests of injured people and premium payers and the reform objectives, which are:

- Increase the proportion of benefits provided to the most seriously injured road users;
- Reduce the time it takes to resolve a claim;
- Reduce the opportunities for claims fraud and exaggeration; and
- Reduce the cost of Green Slip premiums.

The CTP Reference Panel was specifically asked to consider:

1. Required benefit thresholds, caps, time limits and processes, while ensuring fairness to injured people.
2. Establishment of a fairness test to protect people with lower severity injuries who may require additional assistance.
3. An appropriate regime for disputes and legal costs.
4. Measures to ensure CTP insurers deliver the expected savings and ensure that insurer profits are effectively regulated during transition to the new scheme and beyond.
5. An appropriate system for risk pooling to ensure a fair distribution of the costs of the new scheme and to avoid price impacts for higher risk vehicles.
6. Suggestions to encourage competition and consumer choice in the scheme from potential new insurer entrants.
7. Options around reducing the cost impact on consumers from insurer acquisition costs and marketing expenses.

In considering the matters under consultation, the Reference Panel needed to weigh up its advice to Government around several important themes:

- Fairness, which has been defined as variations to benefit structures or benefit delivery systems to meet the reasonable needs of injured people for support, when they need it;
- Affordability, which has been taken to mean the cost of any measures when compared to the Government’s initial proposal, noting that NCOSS has set as a reasonable target an average premium of $500 across all vehicle types; and
- Certainty, which is the extent to which there is clearly defined entitlements to benefits, thereby reducing the likelihood of insurers building in buffers in prices (and embedding future super-profits).

In undertaking this process the Reference Panel considered many similar schemes but the most relevant and realistic schemes to look at for ideas and issues were those within Australia. The interconnecting cultural, environmental and economic factors such as the availability and cost of
health and medical services in international schemes did not provide a sound basis for direct comparison. Some stakeholders stated that no-fault and defined benefit schemes were not sustainable, but again the Australian experience would indicate that several scheme designs if managed properly are sustainable.

The Panel acknowledges the impact that the cultural shift to a less adversarial scheme model will have on insurer and legal firm businesses, but has kept the interests of the injured person and premium paying motorist at the forefront of thinking. This was extended to ensuring any considerations around fairness included the needs of both injured people and motorists. As the submission from the NSW Council of Social Service highlights, a motor vehicle is essential to many people’s lives and the impact of rising costs on low income earners can have a significant impact on them and their family. Additionally, if Green Slips become unaffordable for many people the incidence of unregistered and uninsured vehicles may increase which adds costs to other motorists and the broader community.

There were many areas of broad consensus among service providers and stakeholders with the Government’s proposed CTP scheme model, as well as areas of contention. The legal professional groups emphasised that their participation in the process should not be interpreted as support for an alternative to the existing common law system.

During the consultation process additional submissions were received from the insurance industry and legal professions for consideration. These are attached to this summary of the consultation process. The Reference Panel also put some additional questions to the insurance industry and legal professions and their responses have been incorporated in this document and are also attached.

This paper provides the Government with a succinct outline of the broad issues, and where opinions diverge from the Government’s proposal, or vary among parties to the scheme, options for Government consideration.

Parties in the CTP scheme
The Reference Panel has consulted with a wide range of service providers and stakeholders in the CTP scheme including the current CTP insurers, Insurance Council of Australia (ICA), the three peak legal professional bodies in NSW (NSW Law Society, Bar Association and Australian Lawyers Alliance), transport peak bodies, health and medical associations, individuals and community advocates.

While there was general agreement on many issues, views vary significantly on some issues based on the interests and perspectives of the individuals and groups presenting them. This paper captures these issues at a high level and provides options for consideration by Government.

The legal profession and insurance industry support Codes of Conduct for service providers to the scheme. The legal profession suggests that any disciplinary action over legal or health professionals should be dealt with by the professional bodies rather than the State Insurance Regulatory Authority (SIRA).
Benefits and disputes
The focus of discussions in the benefits and disputes stream primarily centred around:

- the benefits or otherwise in retaining lump sum payments in defined benefits;
- whether or not the 10% Whole Person Impairment (WPI) threshold is the appropriate gateway to common law;
- an appropriate mechanism to assist people below the threshold for common law but who have ongoing needs; and
- the appropriate extent of involvement of legal representatives in resolving disputes.

Retention of some form of lump sum in defined benefits
Retaining some form of lump sum in defined benefits as a way of commuting (finalising by one-off payment) a claim was supported by both the legal professions and insurers.

The legal profession claims that lump sums give a person self-control, self-determination and the capacity to move on with their lives and prefer this over lifetime benefits. The profession notes that this is consistent with the general principles of the International Convention on the Rights of Persons with Disabilities (Article 3), which promotes respect for individual autonomy and inherent dignity of individuals.

Insurers prefer the finality of a claim which extinguishes their liability and reduces uncertainty when setting prices. Insurers were wary of long term payments which they maintain have the potential to give rise to superimposed inflation as well as increased administrative costs.

It should be noted though, that numerous studies, including those prior to the establishment of the Lifetime Care and Support scheme, highlight significant problems with lump sum payments in personal injury schemes. These include ongoing health issues as people are often discouraged from returning to their normal life until the claim is settled and the failure of claimants to properly invest lump sum payments so the money is available when it is needed, often many years after they receive the payment. When this occurs, the person may become reliant on government safety nets such as Medicare and Centrelink. Another issue with negotiated lump sums is the time and costs of the negotiation or dispute.

The CTP Reform Reference Panel comment
- Overall, the Reference Panel is persuaded that lump sums create perverse incentives for behaviour by all parties and create uncertainty. Lump sums are preferably to be avoided in a defined benefits model which is aimed at getting benefits quickly and easily to claimants. It is recognised that a lump sum remains a key part of common law claims for the more seriously injured.

Common law threshold
The Government’s Position Paper proposes using the 10% WPI measure as the threshold for access to common law. The benefits under common law would be similar to the common law benefits under the current scheme, but restricted to those with permanent impairment greater than 10% WPI with payments for non-economic loss (pain and suffering) limited to set amounts tied to WPI ranges or bands.

The insurance industry considers the WPI threshold to be essential to the success of reforms and preventing cost blowouts. Insurers recommended maintaining price stability through regular review.
by SIRA of the WPI percentage as a threshold and allowing flexibility in regulations to respond to unintended scheme trends and changes.

Some stakeholders raised concerns about psychological impairment and suggested a revision of the Permanent Impairment Guidelines to ensure that the accident circumstances are taken into account in determining such impairment, and/or raising the threshold for access to common law for psychological injury to 15%.

The legal profession advocates that a functional assessment model or ‘serious injury test’ would better identify people who have ongoing needs, with access to a lump sum or common law remedy. It opposes non-economic loss WPI percentage bands and proposes that the amount of damages awarded for non-economic loss (NEL) should be negotiated based on the individual’s circumstances, as is currently the case. They say that tying these payments to the actual WPI will result in unfair disadvantage for those whose injury has had a particularly significant impact on their lives.

Comment and data from other jurisdictions would indicate that functional assessment models or ‘serious injury’ tests are generally eroded over time, drive disputation and lead to uncertainty and inflated costs over time when used as a gateway to common law.

As identified by some stakeholders, use of WPI bands for the calculation of non-economic loss would reduce the entitlement of some claimants and increase disputation as eligible claimants seek to get into the next band and receive greater compensation. This would in turn add additional costs to the new scheme.

Including accident circumstances as a component of the psychological impairment test could assist in identifying exaggerated claims, particularly as psychological impairment can be difficult to quantify accurately. However this might involve a medical assessor reviewing accident details on the claim and may be considered subjective. Having SIRA required to regularly review the WPI threshold would ensure that the intention of the scheme that more payments are directed to the seriously injured is maintained.

Access for specific injury types
A further point was raised during consultation regarding some specific injuries that are known to have “ongoing needs” or impact on earning capacity yet may not meet the greater than 10% threshold. This includes some lower limb injuries, some specific spinal injuries and less severe traumatic brain injuries, in particular those who are interim participants in the Lifetime Care and Support scheme but do not meet the requirements for lifetime participation at two years post-injury due to good recovery.

Medical service providers recommended reviewing the Permanent Impairment Guidelines to expand coverage for specific injury types, such as significant lower limb injuries and minor brain injuries. The impact of this is unknown and should be reviewed thoroughly once the new scheme is established.

Medical examinations
One stakeholder stated that the number of medical examinations that a claimant can be referred to should be capped (ideally at just one around impairment) as they are stressful for the claimants. The legal profession and insurance industry agree that medical assessments should be limited, especially through SIRA’s Medical Assessment Service, however there were differing views among stakeholders on introducing joint medical examinations.
The CTP Reform Reference Panel comment

- The 10% WPI measure is an existing effective threshold in the Scheme and provides for the most seriously injured, which is an objective of scheme reform.

- The focus of any additional support to the less seriously injured (10% or less WPI) with ongoing needs should be a return to maximum health. The emphasis of scheme reform is on the most seriously injured road users.

- It is understood that it is planned to review the *Permanent Impairment Guidelines* to ensure coverage is appropriate as part of routine, ongoing scheme review and update.

- A psychological impairment threshold of 15%, rather than 10%, provides for the most seriously injured and will reduce exaggerated claims. Keeping the psychological injury threshold separate from the physical injury threshold also provides for the most seriously injured.

- Ensure, when reviewing the scheme as a whole in 3 years, as the NSW Government has proposed, that a review of the use of WPI as the threshold for common law is included.

- Consider retaining negotiation of the non-economic loss lump sum once the greater than 10% WPI threshold has been reached, as currently exists. When considered against the objective for reform, it is estimated this will add about $35 per CTP policy based on the Government’s proposed scheme, including an expected increase in legal fees compared to the original bands proposal. However, it does ensure a greater proportion of funds are directed to the more seriously injured.

- The promotion and use of independent, binding medical assessments will reduce the reliance on multiple medical assessments and be appreciated by claimants.

- To be fair and perceived as fair Medical Assessments must be conducted by medical specialists expert in the relevant diagnostic field. SIRA should contract them but as far as practicable, their predominant income should not come from SIRA.

**Defined benefits**
The central focus of the NSW Government’s proposed scheme is supporting recovery and return to work and life for injured people, while ensuring that benefits provide the most support to those with the more serious injuries and needs.

Both the insurance industry and the legal profession recommend keeping defined benefits as simple as possible and settling any ongoing needs through a lump sum payment, rather than potentially keeping claims open for a lifetime. It is argued that creating long tail claims through lifetime benefits creates uncertainty from an underwriting perspective and will lead to conservative pricing, resulting in price increases and likely super profits for insurers. This creates a significant and controversial scheme design challenge when considered against the previously mentioned issues with lump sums.

The legal profession and insurance industry suggest that there should be greater step-downs for weekly benefits than proposed by the Government. Insurers recommend 90% pre-accident income for the first 12 weeks (and lawyers 100%) with 70-80% thereafter (lawyers 70%) as an encouragement to return to work. The proposal by the Government on the other hand would have
aligned the CTP scheme more closely with the existing caps and step-downs in the NSW worker’s compensation scheme.

The Government proposed that defined benefits would run for five years, though both the legal profession and insurance industry suggest this should be reduced. Both groups have suggested the defined benefits be paid for one to two years for most claimants which is shorter than comparable schemes. If claimants received no further defined benefits after 18 months, the impact on the scheme is expected to be a $90-$100 saving compared to the proposed scheme cost\(^2\).

If those claimants eligible to access common law after 18 months do so, the impact on the scheme is expected to be an additional $120-$200 on top of the proposed scheme cost. This would result in little or no reduction in price compared to the existing scheme.

The insurance industry supports the use of a test of capacity for any work, rather than work that is reasonably available to the claimant, for payment of any ongoing weekly benefits as labour market factors are beyond the control of the scheme. The legal profession argues that capacity assessments must take account of work availability, and further, that a lump sum will best cover future needs.

All parties agreed with the Government’s position to abolish gratuitous care payments (aka Griffiths v Kerckmyer). The Attendant Care Industry Association advised that commercial care can be arranged at short notice and modified as required to meet the changing needs of a client.

The legal profession is concerned about the proposed monetary cap on funeral expenses and states the reform should allow for ‘reasonable’ funeral expenses as currently exists. This suggested amendment to the proposed position would not have a material cost impact on the scheme.

The CTP Reform Reference Panel comment

- As previously mentioned, numerous studies highlight significant health outcome problems with lump sum payments in personal injury schemes, in addition to inflated scheme costs. The Reference Panel considers that the central focus of the defined benefits regime is proactive management by insurers to promptly identify those with ongoing needs and develop more of a supportive relationship with them, to ensure they have access to qualified and accredited rehabilitation professionals to restore optimal function and maximise return to work.

- The Victorian Transport Accident Commission (TAC) experience indicates that the vast majority of those employed at the date of accident will have returned to their previous employer within 12 weeks. Those that have not, receive intensive support to return to their pre-injury or alternative work. This is achieved for most under the TAC scheme within three years of the accident.

- There are valid arguments for various approaches to weekly benefit step down rates, however there is no compelling evidence for any variation to the Government’s proposal, which aims to have some consistency with the NSW worker’s compensation system. Step downs of weekly benefits should be monitored as part of the intended review of the new scheme after three years of operation.

- Reasonable funeral expenses, rather than capping expenses at $15,000, are considered appropriate. As mentioned, this would not have a material cost impact on the scheme.

\(^2\) Assumes all claimants’ defined benefits cease after 18 months and they have no access to further benefits
People with ongoing needs not eligible for common law

Assuming that the 10% WPI threshold is retained, the Government proposes to establish a ‘fairness test’ to protect people with low severity injuries (i.e. those <10% WPI and therefore not eligible for common law) who have ongoing losses and needs beyond the 5 year defined benefits cut off.

Fairness was a large focus of discussions, however opinions on how to proceed were many and varied as fairness is defined differently by various stakeholders.

Fairness for the legal profession was conveyed as the ability to provide adequate legal representation and giving a claimant choice through the provision of a lump sum payment, and by being able to tailor benefits quite specifically to the circumstances in each and every case. A counter view is that fairness is people getting what they need, when they need it, rather than having to argue their case and wait, sometimes years, for their benefits.

Some parties questioned the fairness of an at-fault driver gaining benefits, while others questioned whether it was fair for at-fault people to be excluded because of a genuine mistake or because they could not find another driver to sue (as in the case of a single vehicle accident). Fairness was also raised in the context of price and whether it was fair, or not, to cross subsidise some higher risk road users.

Estimates from the scheme actuary suggest that the number of claimants with less than 10% WPI and ongoing needs beyond the 5 year cut off for defined benefits as proposed by the Government is around 100 people per year (not at fault claimants only), which is consistent with the experience in Victoria. The cost of providing ongoing medical needs to this group is estimated to be around a $4 per policy increase on the average insurer premium in the proposed scheme. The cost of providing for future economic loss is less certain but is estimated to be about a $2 increase in average insurer premium if benefits were extended for a further two years and about a $5 increase on average insurer premium if extended for a further five years.

The scheme actuary estimates that the cost to commute these claims after the five year defined benefit period could be in the range of a $120-$200 increase in average insurer premium since there may be strong incentives for a larger number of claimants to hold out for the lump sum.

The insurance industry has provided two options (and costs) to address the fairness issue based on claimants having a WPI of 6%-10%:

- A defined benefit model that addresses both earning capacity and future medical needs and is estimated to cost $10 per policy.
  - Earning capacity – a vocational assessment, re-training and job search assistance.
  - Future medical – payment of any necessary surgery and related costs for a set time after the defined benefits period ends, or the option to commute the assessed value of these costs.
- A common law option that is estimated to add $74 per policy.
  - Claimants with WPI of 6%-10% would be eligible for common law, though with no ‘contracting out’ of legal fees on the value of a claim below $100,000.

The idea of a ‘narrative test’ being applied to claimants with WPI of 10% or less has been suggested by some stakeholders.

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3 This estimate is based on the proposals set out in the Law Society letter to the CTP Reform Reference Panel which defined the concept of a “medium severity injury” group. The scheme actuary has assumed this group is broadly those claimants with less than 10% WPI but with ongoing needs, hence the concept of fairness applies
As noted above, both the legal profession and insurance industry have suggested reducing the duration of defined benefits for the majority of claims, though don’t have a common view on what happens to people with less severe injuries but ongoing needs. The insurance industry, while recognising that there may be circumstances in which defined benefits do not adequately meet an individual’s needs, also highlighted the risk to scheme costs of applying a narrative test or second gateway, as a means to access common law. The insurance industry cites the Victorian experience which has seen claims and costs increasing significantly. It is argued this would increase uncertainty in the scheme and be reflected in risk pricing.

There is no universally accepted mechanism in hybrid schemes to manage the ongoing needs of people that don’t qualify for common law and in many schemes there is no allowance for people with exceptional needs. Independent research and analysis commissioned by SIRA and undertaken by the ADIIS Group, identifies three potential options to assess people with ongoing needs: monetary tests (claims above a certain value), narrative test or injury (capacity) test. It is considered that the best mechanisms to identify people with exceptional needs are work capacity or functional capacity tests as they are considered more objective and consistent than monetary or narrative tests.

Researchers, the ADIIS Group, suggest the following two options could be considered for additional income benefits:

- capacity testing without a WPI threshold that provides access to an additional period of time (with regular testing) for defined income benefits with step downs
- capacity testing as above, however, with a WPI threshold, though it is recognised that this model does not allow for exceptional circumstances with low WPI.

The following five options for additional treatment benefits were put forward:

- fixed period of extension
- fixed period of extension based on income entitlements – similar to the workers compensation scheme
- capped dollar limit on additional benefits
- deemed injury model with benefits for prescribed injuries
- use of a narrative test

The scheme actuary estimates that allowing for lifetime treatment costs for these claimants after 5 years would increase the average insurer premium by less than $4. Implementing any combination of the above options could reduce that cost accordingly.

In meeting the ongoing needs of children with less than 10% WPI, concern was raised about the practicalities of leaving their claim open until they reach 18 years of age. The insurance industry has suggested an option that incorporates a fairness test approach at the end of the defined benefit period where children identified with ongoing needs could be eligible for a defined funding package.

The CTP Reform Reference Panel comment

- Evidence from Victoria and the NSW scheme actuary suggests the cohort of people below 10% WPI with exceptional needs requiring additional benefits is small and a special package and approach might be developed to assist them. However, any mechanism to provide benefits for people with less severe injuries and ongoing needs should promote return to maximum health and as normal a life as possible as the primary objective.
There appears to be a case for introducing a mechanism, overseen by SIRA, to determine people with exceptional needs that are below 10% WPI (and not eligible for common law). As highlighted in the ADIIS report, there are a number of options in both these situations. As previously mentioned there is no one way to address the needs of this cohort so the options need to be considered against the objectives.

The most viable options for consideration in identifying exceptional needs appear to be:
- People still receiving benefits after a predetermined time and greater than 6% or 8% WPI, though people with ongoing needs below this will miss out
- Work or functional capacity assessment at a set time
- Narrative test
- A combination of an injury/capacity test combined with a narrative test to ascertain the specific impact of the ongoing impairment

If the Government wants greater certainty in risk assessment and pricing, a WPI based model will deliver this, though in the opinion of the Reference Panel it doesn’t provide universal fairness as injured people just below the cut-off point will not be eligible for additional benefits. A narrative test, as a means to further defined benefits provides more universal fairness, though it brings in a degree of uncertainty from a pricing perspective as they tend to be eroded over time. If the narrative test is used only as a gateway to further defined benefits, rather than common law, the uncertainty and potential pricing impact is not considered material. An injury or functional test, would provide an objective measure of capability, provide some certainty in pricing and reduce the opportunity for fraud or exaggeration, but used alone it does not allow for the individual circumstances that are not measured through a physical assessment.

There are also a number of options in relation to the operation and delivery of additional benefits:
- A shorter initial period of defined benefits such as two years as suggested by stakeholders, followed by an extra period of 2, 3 or 5 years for those who qualify.
- Maintain the 5 year defined benefits time limit as proposed by the Government with an additional 2 or 5 years for those who qualify.
- Intensive case management of people who qualify, possibly independent of the insurer and provision of the vocational services suggested by the insurance industry.
- Commutation of loss of earning capacity at the expiry of any additional defined benefit period, though the cost of this could be up to $100 per policy and introduces the issues with lump sums.

Reducing the period of defined benefits would achieve significant price reductions if most claimants were to have their benefits stop at that time. The Reference Panel believes this would result in significant cost savings but does not deliver fairness to injured people. Commuting, or paying out defined benefit claims at some point would meet some definitions of fairness, but not all, and would add significant costs to the scheme which would not deliver against an objective for reform. In the opinion of the Reference panel, maintaining the five year period for defined benefits with additional time for those who qualify appears fair, and with the appropriate test for exceptional cases, would meet the objectives for reform.

The Reference Panel believes that the proposal for special case management of people with ongoing needs, including children, should be considered as it provides a benefit to those who most need it and any additional cost is likely to be small. The best outcomes for claimants would probably occur if this function was delivered by a specialist provider appointed by SIRA that is separate from the CTP insurer.
• Evidence presented to the Reference Panel would suggest that the number of people below 10% WPI with ongoing needs after 5 years is small.

• The Reference Panel recognises the challenge and complexity of identifying individuals with exceptional circumstances and providing tailored support to them in a defined benefits scheme. While a negotiated lump sum has been suggested as the answer, the Panel feels this challenges the central proposition of a defined benefits scheme, as well as delaying the delivery of benefits which negatively impact health outcomes and would add costs to the scheme which ultimately threatens the long term sustainability of the scheme.

Disputes and legal costs
The Government intends streamlining independent review and dispute resolution and introducing an ‘arm’s length’ internal review by insurers as a preliminary step. The Government also proposes the creation of a claimant support and advocacy service to provide a ‘one stop shop’ that would assist injured people in making a claim, lodging a complaint, seeking a review of a decision and managing the majority of defined benefit disputes.

The insurance industry supports the establishment of an internal insurer dispute resolution process, as already exists in the General Insurance sector, along with a faster and simpler independent government service, incorporating binding decisions made by claims experts on claims entitlements, with stringent guidelines on the assessment of capacity, reasonable treatment and treatment and rehabilitation fees. The Medical Assessment Service (MAS) Panel decision would be the final review point as is currently the case.

The legal profession seeks protection of claimants through privately contracted legal advice for the moderate to seriously injured claimants and are opposed to a claimant support and advocacy service. They also suggest, for the common law cohort, a pre-CARS, full disclosure negotiation of benefits, with set legal fees, and procedures and cost penalties if the duration of the negotiation is needlessly protracted. Introducing a Code of Conduct was also recommended as was an appeal mechanism at law. Insurers recommended an appeal to SIRA prior to the Court system.

The majority of stakeholders agree that legal involvement for minor injury defined benefit claims should be limited. The legal profession suggests that this is approximately 50% of all claimants. The legal profession believes it should be able to represent the moderately injured (they suggest this is 40% of claimants) to seriously injured claimants (10% of claimants who exceed the 10% WPI threshold) without limitation.

The CTP Reform Reference Panel comment
• It is vital that injured people have immediate and easy access to support services such as the support and advocacy service that was referenced in the Government’s Position Paper. The Reference Panel believes it is important that the motor accident support services are well branded and promoted, possibly leveraging on the awareness and reputation of the former Motor Accidents Authority.

• The unique nature of the claimant/insurer relationship in CTP has in part been the cause of an adverse culture developing in claims management on the part of some insurers. This culture has exaggerated a culture of grievance, which in turn creates friction points and disputes. SIRA must be given the power to intervene in claims, in individual instances and management practices if they are adverse to the interests of the scheme.
Introducing an initial internal robust insurer internal review of disputed claims seems judicious. The Panel notes that development of an appropriate supportive relationship between claimants and the insurer is central to effective management of the defined benefit regime, and will require a significant cultural shift from the current adversarial regime.

Parties to the CTP scheme appear generally satisfied with the current SIRA dispute resolution mechanisms but suggest some enhancements to process which can predominately be dealt with administratively.

There is a need for a strong regulatory framework to ensure the appropriate establishment and performance of any internal review mechanism. There will likely be the need for regulatory change to ensure this happens. The Reference Panel believes that Codes of Conduct should be developed for all service providers to the scheme and agreed in partnership with the relevant professional bodies. The Codes should also mandate a model litigant approach in the management of disputes.

These Codes should be mandatory and persistent breaches of codes should result in exclusion of offending parties from the scheme.

Consider establishing an event based legal costs regime where fixed fees are paid for provision of advice to claimants on identified issues with the defined benefits component of the scheme. Such issues might be limited to assistance in preparing for administrative reviews under the defined benefits scheme only where eligibility for or cessation of defined benefits is at issue, and eligibility for common law (including impairment assessment).

Further analysis should be undertaken on a threshold for contracting out of legal costs. A monetary threshold ($100,000 as suggested by both the insurance industry and legal profession, though later reduced to $50,000 by the legal profession in a subsequent submission) is likely to create an incentive for artificial inflation of common law settlements to meet this threshold. The Panel suggests if a limit is to be applied to contracting out that any review also consider a maximum percentage of the total settlement amount.
Market and premium setting

Market and premium setting consultation sought to understand stakeholder views related to the underwriting framework for the scheme, and the premium setting model for the scheme with a particular focus on reducing the premium burden on high-risk vehicle classes or drivers.

Other than the need to reduce the price of CTP policies, which was a significant issue for a number of stakeholders, the market and premium consultation did not attract significant attention from stakeholders other than the insurance industry. For the insurance industry, most interest was in relation to vehicle classes and premium setting, especially risk equalisation measures.

The submission from the NSW Council of Social Service correctly highlights that the scheme needs to achieve a “delicate balance” between benefits for injured people and affordability for all motorists. The view of the Council is that in recent years the scheme has become too unaffordable for low income people who are reliant on their vehicles to undertake employment and family responsibilities.

It was evident to the Reference Panel that greater powers were required by SIRA, especially in relation to premium setting and market practices, to ensure it maintained control and direction of the scheme. To support SIRA in effectively regulating the scheme and ensuring it is able to identify and meet emerging issues there needs to be a strong commitment to collecting, analysing and acting quickly upon relevant scheme data.

Underwriting model

The Government proposes maintaining a privately underwritten scheme with a statutory review of the new scheme three years after commencement including a focus on whether super profits have been eliminated. Measures would be put in place during the transition phase, with the ability to extend beyond this, to ensure profits are not excessive.

Some stakeholders indicated a preference for a Government underwritten scheme but there was no strong evidence to support any change to the Government’s proposed position.

Third party versus first party

The ICA provided a submission, representing current CTP insurers, which supports a third party scheme. This was based on their research which highlighted that a first party approach adds significant complexity to the premium setting process. However, the ICA acknowledges that its members are divided on this position.

The driver of differing views on third party/first party is that there are advantages for the different business and distribution models in use by CTP insurers. Any market advantage does not necessarily translate to an improved customer outcome, though some insurers have indicated a view to the contrary. It is argued by some that insurers would have a stronger customer relationship in a first party scheme and opportunities for earlier intervention in claims, as it will be easier to identify the insurer at the outset.

On the other hand, other insurers have suggested there are efficiencies arising from a single point of claims management, including particularly for any transition to common law claims, and a third party scheme that enables costs to be more easily attributed to the vehicle at fault, which helps with pricing. However, a challenge of a third party system is that a process is still required to identify the insurer at the outset and ensuring this happens in a timely manner so injured people are not delayed in making their claim and receiving benefits.
It is suggested that the third party approach be maintained but supported by clear guidelines to ensure that no injured person is disadvantaged while the managing insurer of a claim is determined, and that claims can be made quickly under the proposed approach. An enabling power could be included in legislation to permit SIRA to review, at any time, the effects of the reformed third party scheme and convert to a first party scheme if necessary. Principles supporting the cultural change could be mandated in a Code of Conduct for insurers. The success of the third party approach could be reviewed initially as part of the formal review at three years which the Government has proposed.

**Premium Setting and Vehicle classes**

The Government proposes to support more flexible premium setting across all vehicle classes as well as the development of a risk equalisation mechanism to ensure a balance between affordability and risk based pricing that will increase competition among insurers and provide a fair price for all road users.

The insurance industry asserts that there is consistently strong competition in the scheme through ongoing changes to price segmentation, distribution arrangements, and actions to reduce operating costs and avoidance of claims inefficiencies. This is contrary to the findings of the Independent Review of Insurer Profit (“Profit Review”), which found that the current premium system contributes to insurer super profits because of an inefficient system of cross-subsidisation.

**A mechanism to address excessive profit taking, spread risk and increase competition**

Following detailed consultation between SIRA and the insurance industry, the majority of insurers agree that a permanent risk equalisation or risk pooling mechanism is required. The ICA acknowledged that transitional arrangements may be required to address potential ‘super’ profits resulting from the introduction of the new scheme. However some individual insurers indicated their support for a risk equalisation mechanism and supported profit normalisation only in the shorter term while there is pricing uncertainty.

The legal profession supports the cross-subsidy of younger drivers as well as within the Sydney metropolitan area as it redistributes costs between higher and lower income earners. The profession also supports a profit normalisation mechanism, but recognises that profit targets must be practical and realistic.

The ICA also considered that if further cross-subsidisation is seen as detrimental, expanding the elastic gap in pricing using the existing mechanisms in the scheme is a solution to maintaining premium affordability. To overcome complexity the ICA recommended setting a benchmark where no vehicle class will pay more than 10% of what they would have paid prior to the reforms during the transition timeframe. However, these measures run the risk of further entrenching the inefficiencies identified in the Profit Review, and could reduce competition for those higher risks that have their prices capped under such an arrangement.

One insurance company recognised that the premium system directly affects the efficiency and affordability of the scheme. It recommended a phased approach whereby risk pooling of segments of the market could be introduced initially e.g. motorcycles. The introduction of free rating for commercial vehicles would be next and finally the introduction of some form of risk pooling to protect the high-risk motorists. This, it is claimed, will increase competition in the market, drive innovation among insurers, encourage safer driving from motorists, and support any future technological advancement in the motor vehicle market.
A number of options were considered to amend the premium system, though only the following two were considered to be realistic when assessed against the objectives for reform:

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<th>Introduce a risk equalisation mechanism</th>
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<tr>
<td><strong>Pros:</strong></td>
<td><strong>Pros:</strong></td>
</tr>
<tr>
<td>• This is easy to implement as it will have little impact on current premiums and minimal costs for insurers.</td>
<td>• No negative impact on higher risk road users as a result of reform.</td>
</tr>
<tr>
<td>• Insurers avoiding high risks will be rewarded with super-profits, entrenching anti-competitive behaviour.</td>
<td>• Insurers will be receiving the correct premium for risk but have less opportunity to make super-profits.</td>
</tr>
<tr>
<td>• It ignores the recommendations of the Report of the Independent Review of Insurer Profit within the NSW Compulsory Third Party Scheme by Trevor Matthews.</td>
<td>• Ensure certainty for motorists and insurers with clearer cross subsidies.</td>
</tr>
<tr>
<td>• Will not encourage new scheme entrants.</td>
<td>• Encourage new entrants and more competition for all risk levels.</td>
</tr>
<tr>
<td><strong>Cons:</strong></td>
<td><strong>Cons:</strong></td>
</tr>
<tr>
<td>• Setting up a REM, which will be mandatory for all players, may initially be complex.</td>
<td>• Insurers may be concerned that their underwriting strategies are undermined.</td>
</tr>
<tr>
<td>• System changes will be significant for insurers and SIRA.</td>
<td></td>
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</tbody>
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**Acquisition expenses including commissions**
The Government proposed removing the cap on commissions insurers pay to their intermediaries and allowing for an overall cap on acquisition expenses. Insurers did not support the proposal to remove the cap on commissions as it was felt this would lead to an upward spiral of commissions and distribution costs. There were differing views among insurers on applying an overall cap on acquisition expenses. The legal profession recommended the elimination of non-direct CTP marketing costs such as general branding and sponsorship.

**Competition at point of sale**
The idea of combining the Green Slip purchase together with registration renewal as one transaction, possibly through Service NSW was discussed. Insurers recommend maintaining the current distribution arrangement where they transact directly with customers for their Green Slip and Service NSW transacts with the customer on the vehicle registration. Maintaining direct contact with customers is an overwhelming preference of the insurance industry. Insurers providing registrations and insurance details to a government website was not supported and would not suit bundling or fleet discounts. Efficiency gains were questioned as many customers purchase their motor insurance at the same time as their CTP insurance and therefore would still be contacting their insurer.

**Motorcycles**
The two primary motorcycle associations disagree on whether motorcycles should be included in a no-fault scheme, primarily because of the risk of significant price increases for owners. The motorcycle group which supports the no-fault scheme suggested that an ongoing cross subsidy is required to ensure premiums remain affordable.
The ICA suggested a levy be placed on all motorists to cross subsidise motorcyclists. An alternative suggestion is the establishment of a ‘high risk’ pool which captures motorbikes and other high risk vehicles and individuals which would have capped prices and receive a subsidy from other vehicle owners. Some members of the legal profession expressed concerns about other vehicle owners cross-subsidising motorcyclists.

The other motorcycle group supported exclusion of at-fault motorcyclists, which would result in overall lower prices for all vehicle owners including motorcyclists, and remove the ongoing issue of an ongoing cross-subsidy. This is the approach in New York State where a no-fault scheme operates but excludes the at-fault rider and their passenger from benefits, but retains a right for them to sue when another motorist is at-fault in causing their injuries.

The CTP Reform Reference Panel comment

- Retaining the status quo in premium setting does not address structural issues regarding lack of competition, potential super profits and risk avoidance, as identified in the Profit Review.

- A Risk Equalisation Mechanism (REM) is supported by the majority of insurers and appears to offer the following benefits:
  - address the problem of high risk vehicles such as motorcycles;
  - reduce the potential for super-profits by some insurers by targeting or avoiding some risks;
  - create a more level playing field and encourage competition between existing insurers and may encourage new insurers to enter the market; and
  - encourage innovation by insurers to become more efficient with their internal processes.

- The operation of a REM would find a balance to promote competition but off-set the adverse impacts of price control. Price controls should be retained to ensure young drivers do not face excessive premiums, and there should be some transparent system of cross-subsidy embedded in the REM, in addition to the traditional approach of pricing vehicles within a range.

- Profit normalisation presents an effective transitional means of handing super-profits back to vehicle owners but should, to be fair, allow insurers to catch up losses. This would be supported by clear powers for SIRA to drive the new scheme price to the appropriate level.

- It is considered that an overall cap on acquisition costs, including commissions, should help contain premiums. This may have initial impacts on some insurers depending on their distribution model but this should not be an impediment and may drive some innovation in distribution. It is suggested that a flat dollar fee for commissions be considered, as opposed to the existing percentage, as the work required to procure a policy is the same or similar regardless of the cost of the policy.

- An enabling power included in legislation would permit SIRA to review, at any time, the effects of the reformed third party scheme and convert to a first party scheme if necessary. As previously mentioned, a Code of Conduct for insurers to support the principles underpinning cultural change is suggested. The third party approach could be reviewed initially as part of the formal review which the Government has suggested at the 3 year mark after the new scheme commences.
• Customers could benefit from a single transaction when purchasing their CTP insurance and motor vehicle registration. However, there are a range of views and other models that can be explored to deliver a simple process for customers. Any arrangement to establish a single transaction should retain existing and alternative purchase channels to promote competition. The impact on potential new entrants needs also to be considered. It is suggested that this initiative be deferred for consideration after implementation of reform, given the many system changes already required.

• Removing motorcycles from the scheme would erode the principle of a no-fault scheme and could encourage other high risk road user groups to seek exemption from the scheme. Other no-fault schemes around Australia include at-fault motorcyclists while successfully cross-subsidising them from the general pool. Some form of ongoing (legislated) cross subsidy should be considered to avoid prices becoming unaffordable and risk an increase in unregistered, uninsured bikes.

Other scheme design issues

Extending protection to at-fault road users
The Government’s position is for a hybrid no-fault scheme with retained access to common law for the most seriously injured who are not at fault.

The legal profession does not support a no-fault scheme and the insurance industry has advocated for reduced benefits for at-fault drivers. This was counteracted by the health professionals who support a full no-fault defined benefits scheme with the same benefits for all. Following discussion on the issue, the Government's argument for providing benefits quickly without the need to prove fault was appreciated, however views are divided on whether benefits for at-fault drivers should be reduced or be more limited than not-at-fault road users, and to what extent. Insurers noted that if compromises were to be obtained to maximise benefits to the most seriously injured, then having more limited benefits for at-fault drivers (who by comparison get very limited support now) was perceived as an option.

However there are recognised complexities in applying fault in a defined benefits model, particularly where fault is not certain or where contributory negligence is involved. Social service and medical advocates argue that the scheme should be about rehabilitation and recovery, not punishment, and that the law deals adequately with significant wrong doing on the roads, separate from the scheme which is focussed on helping those who have been injured to recover.

Ceasing all CTP benefits for at-fault drivers after five years would reduce the initial costing of the new scheme by approximately $30-$35.

Exclusions
The Government proposes limitations and exclusions where the injured road user has engaged in unlawful activity.

Drivers deemed at-fault in the current scheme include those who have had a momentary lapse in concentration or have been distracted. A distinction needs to be drawn between those types of at-fault drivers, and people committing and convicted of serious driving offences, or in the process of committing a criminal offence for which they are convicted. It is generally accepted by stakeholders that it is this latter group that should have limited or no access to the proposed scheme.
A specific area where different approaches are taken in similar schemes involves driving under the influence of alcohol or drugs and options can range from a zero tolerance to no impact on benefits. Excluding people from defined benefits if they are convicted of a serious driving offence, including driving under the influence of alcohol or drugs may reduce the cost of a Green Slip by around $5-$15.

**Bicycles**
The Government also proposes to provide coverage for pedestrians injured by bicycles.

This is not supported by the insurance industry, which recommends keeping insurance to registered vehicles only. They also stated that bicycles are just one group of unregistered road users and this creates an inequity with other ‘vehicles’ such as mobility devices, scooters and hover boards. It was mentioned that insurance coverage is already available through bicycle clubs or as an add-on to a cyclist’s home insurance.

The recent media coverage of the accident involving the partner of a Commonwealth Senator in which she was hit and seriously injured by a mobility scooter, has also brought into question the reach of the scheme and vehicles currently not in the registration and CTP systems. In addition, Transport for NSW has recently commenced consultation on expanding the conditional registration scheme to include off-road motorcycles. The potential impact on the scheme of this possible expansion is unknown and is currently being reviewed.

The legal profession does not support inclusion of pedestrians injured by bicycles in the CTP scheme. They stated that a bicycle owner could be sued directly by a pedestrian, however this rarely happens and they are concerned about the potential for aggressive litigating by insurance companies seeking recovery from bike riders. If any potential recovery was limited to a nominal cap, the recovery would not be worthwhile.

Some other stakeholders, such as the Pedestrian Council, were supportive of the inclusion of any expansion of benefits to protect pedestrians, on the basis that the proposal is beneficial in nature. That is, the community is better off with the inclusion of this measure than without it, and costs are also minimal.

**The CTP Reform Reference Panel comment**

- The Government’s argument for providing benefits quickly without the need to prove fault is recognised. However, if a compromise were to be obtained to maximise benefits to the most seriously injured, then having more limited benefits for at-fault drivers appears to be a reasonable option.

- Research into how other schemes articulate exclusions might be undertaken, particularly regarding blood alcohol concentrations, impairment by drugs or drugs and alcohol, and speeding offences. The Reference Panel recognises that determining what driving offences (e.g. how many kilometres over the speed limit) warrant the exclusion of the at-fault driver from CTP insurance coverage or certain defined benefits, are informed by the Government’s policy position on these matters.

- Two options present in relation to exclusions. One is the suspension of benefits upon laying of charges for a serious driving offence, with back payment of any losses if the case is dismissed or driver is found not guilty by a Court, the second option is to continue with statutory benefits
until a Court issues a conviction. In both cases the right to any benefits would cease immediately upon conviction.

- Further consultation and consideration on the inclusion of coverage for pedestrians injured by bicycles and other vehicles currently outside the scheme may be warranted, including the possibility of defining vehicles to be covered by the scheme (where they are not registered vehicles) in a Regulation. Bicycles are just one group of unregistered road users and detailed consideration should be given to implications of bicycles and other vehicles such as mobility scooters and off-road motorbikes being included in the scheme.

**The CTP Reform Reference Panel Conclusion**

Based on consultation and the evidence presented to the Reference Panel there appears to be a range of options which the Government can employ to ensure fairer outcomes for injured people within the new scheme. However it is recognised that there is, and always will be, complexity and options in the system which may create potential grey areas and anomalies over time.

It is the view of the Reference Panel that good scheme management is just as important as good scheme design in ensuring a scheme that is fair, affordable and sustainable. Finity Consulting, in their paper *A Best Practice Workers Compensation Scheme* (May 2015) identifies that effective scheme management along with scheme culture are equally as important as the design of the scheme – entitlements and dispute resolution systems – in achieving a sustainable scheme.

This is where the role and resourcing of SIRA as regulator is vital. For this reason, the legislative and regulatory frameworks and SIRA need to be adaptable to quickly deal with changing market and scheme factors.

A strong regulatory framework is critical to encouraging a significant cultural shift from the current adversarial regime. SIRA needs to play a proactive role in claims management oversight through strategies such as setting claims performance standards, insurer licensing conditional upon meeting a Code of Conduct and publication of claims performance metrics.

It is suggested that SIRA be required to proactively undertake ongoing reviews of the scheme and make reforms and improvements on a regular basis as required. To ensure this the legislative and regulatory framework needs the flexibility to allow amendments to be made quickly and easily to maintain pace with emerging case law, cultural and environmental factors.

This will critically require an augmentation of SIRA’s regulatory powers, capacity and capability, to enable it to be a direct manager of the scheme, not merely an oversight role. The Reference Panel is concerned that the intended benefits of the new scheme design will be muted without the concurrent commitment to resource and empower the regulator.

While not specifically a focus of consultation, the Reference Panel believes it is important that further consideration be given by the Government and SIRA regarding the relationship between road safety and the insurance system. The scheme only exists because of injuries arising in motor vehicle accidents and these are by far the greatest contributor towards the cost in the scheme. Specifically, it is observed that in Victoria, which has successfully operated a defined benefits scheme for many years, has established a single authority responsible for both road safety and the operation of insurance. This is seen as a major contributor to reducing the costs of injuries, whereas by contrast, the linkages in NSW are much more diffuse.
Without commitment at a Government level to direct road safety efforts towards the areas of greatest cost in the Green Slip scheme, it may be harder to achieve longer term savings to the same extent as Victoria which targets specific road safety campaigns and initiatives high risk groups and areas from an injury and insurance perspective.

The Reference Panel noted that a stated aim of the Government’s reforms is the improvement of data collection and use by SIRA, to enable proactive management of the scheme. This should be supported by greater data linkage between the agencies with responsibility for road safety in NSW and the regulation of the CTP scheme, supported by appropriate governance arrangements.