



Précis Paper

ACT CTP Reforms

A discussion of the recent process to pursue changes to the Compulsory Third Party insurance scheme in the Australian Capital Territory, including the Jury's preferred model and the Government's commitment to legislate the reforms in the near future.

Discussion Includes

- The reform process
- 'Model D' and its criticisms
- Differences between the current system and the reforms
- Defined Benefits
- Whole Body Impairment
- Citizen's Jury
- Takeaways for Practitioners

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ACT CTP Reforms

1. In this edition of BenchTV, Arthur Marusevich (Lawyer, Canberra) and Geoff Atkins (Principal – Finity, Sydney) discuss the recent process to pursue changes to the Compulsory Third Party insurance scheme in the Australian Capital Territory, including the jury's preferred model and the Government's commitment to legislate the reforms in the near future.

The reform process

2. The Government has committed to introducing legislation to Parliament to be effective early 2019. Prior to the reform process starting and prior to the details of the reforms being known, the Government committed to implementing CTP reforms based on the decision of a Citizen's Jury.
3. The process was carried out by around 50 volunteer Canberrans who were chosen for the Citizen's Jury. The Jury was briefed by various experts over the course of 4 days and subsequently chose their preferred option from four alternative models of reform which had been presented to them.
4. There were various concerns in relation to the Jury. In a deliberative democratic system, it is necessary that the Jury is afforded time and the requisite information to deliberate on an issue and provide its recommendation.
5. Critics say that in relation to the CTP reform process, the Jury did not receive enough time and resources to come to an adequate conclusion given the complexity of the CTP system.
6. Advocates for the process contend that the process was well structured, well organised and well executed.
7. It is also contended that it is clear that the Jury competently understood the issue they were deliberating on and this can be evidenced in their articulation of what they felt the objectives for the reformed scheme were, in a report issued at the end of October 2017.

'Model D' and its criticisms

8. The Jury ultimately selected 'Model D' which includes some complex and minute details which a minority report, expressing the dissenting views of Jury members, has criticised.
9. Whilst the minority report expresses reasonable opinions, they were not accepted by the substantial majority of the Jury
10. Much of the criticism and debate was around how to assess the severity of an injury.
11. The fundamental belief in the minority report was that the system did not need to be changed in any radical way.
12. This is because, whilst the changes to CTP legislation in NSW stemmed from the fact that there were many claims, exaggerations and fraud, when the CTP regulator in the ACT

explored whether there were any similar claims or exaggerations in the ACT, ultimately concluded there were not.

13. Nevertheless, the premiums in the ACT are significantly higher than in NSW and in fact are highest in the country.
14. However, the road accident rate in the ACT is only a half of the rest of the country.
15. One proposition for why the premiums are highest is because the average income in the ACT is higher than anywhere else in Australia.
16. In the ACT the average wage is higher by at least \$2,000.00 than in other Australian jurisdictions.
17. However, since only 1/4 of CTP payouts are due to loss of earnings and less than a half of the CTP claimants are wage earners in the first place, it would be difficult to contend that the high premiums in the ACT are actually due to high average wage.

Differences between the current system and the reforms

18. The major difference between the current common law system and the proposed new system is that where there was no cap on damages, Model D will cap general damages at \$500,000 and injured persons will only receive damages above the defined benefit if the injured person can show a 10% or more whole body impairment.
19. The Jury came to this conclusion after reflecting on the current system in which about one third of people who are injured in a motor vehicle accident are deemed to be legally at fault and as such, are not entitled to anything.
20. The Jury considered it unfair that under the current common law system, one third of injured people received nothing.
21. The other concern of the Jury was the fact that there were far from optimal delays in establishing and settling a common law claim which is on average around 3-4 years after the date of the accident.
22. The Jury wanted people to have access to loss of earnings promptly as well as access to the best healthcare and treatment without having to fund it themselves or go through Medicare.
23. Therefore, the issue of whether to cap general damages arose as a secondary issue as to how the system could be reformed to be best affordable to be better for the one third of people.
24. Even though the cost of premiums was never an issue considered by the jury, the Government had set the requirement prior to the process commencing, that the premiums were not to go up.
25. The Jury looked at where expenditure from the premiums was going and found that a significant amount of money from the premiums was going to people with minor injuries with general damages awards in the range of \$20,000- \$50,000 and legal costs of around \$20,000 per claim.

26. Therefore, the Jury decided that since general damage awards is where the greatest spend is, this is the area that needed the greatest reform.
27. The Jury chose the Model that was the most radical change from the current CTP system.
28. It is significant to note that there are two components to Model D- general damages and defined benefits.

Defined Benefits

29. The Jury was insistent that people were provided good information about the scheme as quickly as possible following their accident and for insurance companies to ensure that starting a claim is as straight-forward as possible.
30. The average time from a car accident to reporting the car damage to the insurer is about 5 days and the average time for the matter to be resolved is about 5-6 weeks.
31. So, they wondered why should bodily injury be any different?
32. Insurance companies have a lot of onus in the proposed reforms to make reporting systems easy and fast.
33. In order for people to have fast and prompt access to funds following a claim, the Jury decided on a defined benefit scheme which provides early access to treatment and economic support for up to 5 years without having to establish fault.
34. This differs from the current scheme in which people only have access of \$5,000 for medical treatment only until they are found to not be at fault.

Whole body impairment

35. Under the proposed reforms, people seeking payment once the 5 year defined benefit period has ended must prove that they have a 10% or greater whole body impairment.
36. Assessment of whole body impairment is very subjective as it depends on the views of individual doctors.
37. Under Model D, both sides will have the opportunity to present medical reports and other investigative data to a judge who will then decide whether or not a claimant satisfies the 10% whole body impairment and how much they should receive.
38. The current stance by the common law is that the amount a person should receive should reflect an attempt to put the injured person back into the position they were in before the injury.
39. However, it has been decades since the common law has actually tried to put someone back into the position which they were before the injury and this is because the common law is full of restrictions and limitations.
40. The trend has typically been to go to a medically based assessment of physical or psychological consequences of the injury itself rather than putting emphasis on other impacts on a person's life.

41. Under the proposed reforms a person will have to show a 10% or greater whole body impairment, putting the emphasis on the physical injury and can be very difficult to meet in some instances.
42. A 10% whole body impairment is not a low threshold and will mean that around 80% of people who currently make a CTP claim will not cross the threshold.
43. It is arguable that Model D does not take into account the additional impacts on a person's life other than the medical and therefore might not adequately reflect the consequence of the injury to the individual if general damages are capped at \$500,000 particularly if the injury has life-long consequences.
44. However, it is important to note that the common law pays for several different heads of damage, not just general damages.
45. The proposed cap of \$500,000.00 is for pain and suffering and there is a separate assessment for damages in regard to loss of earnings which will not be capped.
46. The Jury chose the Model that was the most radical change from the current CTP system.

The Citizen's Jury

47. Information was provided to the jury at each stage of the process, including examples of injuries and the way they would be assessed
48. On the last morning of Jury deliberation, the Jury was given the opportunity for a Q&A session about the model and in particular, the assessment of whole body impairment. This was not the introduction of the information, but the culmination of the information given prior.
49. Another criticism of the process was that the 50 Jury members were not representative of the ACT population. This is because it is contended that the company the Government hired to carry out the process, DemocracyCo had a target of 300 people for the Jury, not just 50.
50. Further, claimants, lawyers and stakeholders of the CTP industry were not permitted to participate in the Jury.
51. DemocracyCo posted 6000 invitations to random people in the ACT inviting them to participate in the process and received a very low response rate.
52. DemocracyCo had always intended to have a Jury of a minimum of 50 people although they hoped for closer to 300 volunteers.
53. Further, whilst excluding persons from jury selection may not be fair and representative, its purpose was to remove any vested interests. The question is really a matter of whether or not the various stakeholders had a fair opportunity to give information to the jury
54. One further criticism of the process is over the fact that the jury was not permitted to design the models.
55. The Jury did have the opportunity to support the current system however expressed their desire for reform particularly change for persons legally at fault.
56. However, the opportunity to 'mix and match' between the models was not given to the Jury.

Takeaways for practitioners

57. Under the proposed new system, people regardless of fault will have access to defined benefits for up to 5 years.
58. The platform for resolving disputes between insurance companies and injured persons at the Statutory level, is now the Magistrate's Court instead of the Supreme Court.
59. However, where claims in the common law are made, the Supreme Court will retain Jurisdiction.
60. The Magistrates Court will require new staff, new processes and more use of external experts in order to assist in improving the processing times as is hoped by Model D.
61. However, as the CTP system has money behind it, it will be able to fund sensible changes to make the system work.
62. It is the time frames which are important to achieving the objectives set by the jury.
63. There is some concern about the fees that lawyers charge in settling CTP claims and this is because about 30% of the premiums are spent on legal fees.
64. However, it is important to note that the Jury did not consider the premiums or the cost of legal fees to be the problem instead, the way that the system responds to injured motorists was considered to be the problem.

BIOGRAPHY

Arthur Marusevich

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Arthur is a lawyer based in Canberra with experience in administrative and commercial litigation. He graduated with a Juris Doctor from the Australian National University and also holds a Bachelor of Arts Degree from Edinburgh Napier University, UK> Having lived across three continents, Arthur speaks five languages. He is an advocate for social justice and uses his language skills to help people from disadvantaged backgrounds.

Geoff Atkins

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Geoff Atkins is a Principal of Finity and has been consulting in general insurance since 1984. Geoff's experience covers a wide range of insurance issues in both the public and private sectors.