

Australia's Accident Compensation Framework: quality reforms and introduction of an NDIS (National Disability Insurance Scheme)?

Australia's Accident Compensation Framework: Quality Reform,
Claimant Gaps Or A National Scheme

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Descriptive abstract: In this paper I discuss continued quality reform of various structures within Australia's accident compensation framework. I also discuss the limited opportunity for some individuals to claim for accident compensation and recent suggestions on implementation of a nationalised accident compensation scheme.

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The opportunity to claim for compensation in Australia following the acquirement of a serious and permanent impairment remains broad and diverse. A complex variety of structures operate at individual state levels, and to lesser extent at a national level, to make up the Australian accident compensation framework. In this paper I examine firstly, reform of various structures within the accident compensation framework that are working towards improvement of provisions associated with accident compensation. Secondly, I identify existing gaps still remaining within Australia's accident compensation framework, and lastly, discuss suggestions being put forward for major structural reform of Australia's accident compensation framework that include the introduction of a national and comprehensive no-fault disability insurance scheme.

1 Quality reform

In examining quality reform of various structures within Australia's accident compensation framework, I examine reform within a number of state-based statutory authorities that administer accident compensation in Australia – in Victoria, the Victorian Transport Accident Commission (TAC) and Victorian WorkCover authority (VWA), in New South Wales (NSW), the recently established Lifetime Care and Support Scheme (LTCS) related to motor-vehicle accidents.

The TAC, VWA and LTCS are schemes characterized as being well resourced and managed, and progressive in providing reasonable and necessary lifetime post-accident support. The schemes provide excellent support platforms in providing comprehensive medical and income cover, and promote a strong return-to-work ethos. Both the TAC and VWA in Victoria have retained the opportunity to claim through Common Law on a fault basis where permanent and serious impairment has been acquired.

With a philosophy of 'taking what works within the schemes and making them better', recent reviews of these schemes have seen the introduction of a number of quality reforms. The reforms have included:

- the establishment of a buy-in options to the NSW LTCS for people that acquired a permanent injury before establishment of the LTCS
- the linking of superannuation components to ongoing accident compensation arrangements under VWA scheme
- increased emphasis on responsibility associated with return-to-work - VWA

1.1 buy-in options LTCS

The LTCS scheme began for children under the age of 16 injured in motor accidents in New South Wales (NSW) from 1 October 2006, and for adults from 1 October 2007. The scheme, which is funded by Green Slip premiums, was established by the Motor Accidents (Lifetime Care and Support) Act 2006 on 1 July. The LTCS provides lifelong treatment, rehabilitation and attendant care for people severely injured in a motor vehicle accident in NSW, regardless of who was at fault. Revenue for the scheme is collected through levies

attached to the motor vehicle registration of each vehicle registered within the state, however the scheme remains separate from the state's Compulsory Third Party (CTP) Insurance. The establishment of the LTCS was viewed as necessary in seeking to improve overall post-accident equity in relation to support, and cover gaps viewed as unacceptable by the NSW society.

The main source of funding was a levy on Compulsory Third Party insurance premiums collected by licensed insurers, thus controlled levy costings, however the scheme is structured as a consolidated not for profit part of the NSW Total State Sector Accounts (New South Wales Government 2010).

Unique to the LTCS is the opportunity for individuals that acquired a serious and permanent impairment before the commencement of the scheme to buy into the new LTCS. The 'buy-in' provision was established through an amendment to the LTCS legislation in 2009. The passing of this amendment allowed an individual that had acquired a serious and permanent injury before the commencement of the Scheme to buy-into the scheme if they meet the eligibility criteria. Eligibility criteria included an individual agreeing to pay an amount, determined by the LTCS Authority, that would fund their future treatment and care needs. Schedule 1 Amendment of Motor Accidents (Lifetime Care and Support) Act 2006 No16 Section 7A notes that:

- (1) A person who has suffered a motor accident injury as a result of a motor accident occurring before the relevant Scheme commencement date (a pre-commencement injury) may be accepted as a lifetime participant in the Scheme if the person pays to the Authority, for payment into the Fund, a contribution determined by the Authority.
- (2) The contribution is to be the amount that the Authority determines as the amount required to fund the treatment and care needs of the person as a lifetime participant in the Scheme in respect of the injury.
- (3) A person is eligible to participate in the Scheme in respect of a pre-commencement injury only if the person would have been eligible to participate in the Scheme:
 - (a) had the motor accident occurred immediately after the relevant Scheme commencement date, and
 - (b) if the person has been awarded damages in respect of the injury—had those damages not been awarded.
- (4) An application for a person to become a participant in the Scheme in respect of a pre-commencement injury cannot be made by an insurer
- (5) The LTCS Guidelines may make provision for or with respect to how a person's contribution for participation in the Scheme in respect of a pre-commencement injury is to be determined (New South Wales Government 2009).

Buy-in to the LTCS is thus voluntary and funded from the individual's insurer payment. Support is only provided through the LTCS once an individual has been accepted as a participant of the Scheme through an application process. The application process includes an interim application stage where an individual has the costs of their support paid for up to two years, when after this time, the individual is assessed for lifetime participation. If an individual then meets the application criteria, they are then eligible for lifetime inclusion within the LTCS. A governing LTCS board determine eligibility and individuals must meet eligibility criteria to be accepted into scheme. Buying into the Scheme is voluntary and subject to an agreement between the Authority and the injured person (or their guardian), and includes costs associated administrative and management.

Of substantial note, the LTCS operates independently of state's Compulsory Third Party (CTP) insurance, which operates substantially as a fault based insurance scheme such that an individual may be eligible for compensation to fund support if their injury was caused as a result of a motor accident vehicle where fault was assigned to another driver (i.e. a claim is made against the insurer of the driver at fault).

Estimated costs associated with the LTCS are calculated by obtaining information about the injured person's previous and current treatment, rehabilitation and care needs. Estimated

costs are determined by assessing attributes such as an individual's age, nature, frequency and duration of support required. An individual may be required to undertake a LTCS based assessments to determine if they meet eligibility.

Once an individual has completed the application process, the LTCS notify individuals in writing as to their success or non-success with the application. The LTCS may deny an application to buy into the scheme if an individual does not meet the eligibility criteria (as noted in Part 1 of the LTCS Guidelines). If an application is denied, the individual may appeal the LTCS decision in accordance with the LTCS Guidelines.

For successful applicants, information on calculation of estimated costs is given, and individuals are notified of the amount that will be required for buy-in to the scheme. An individual must then provide full payment of the amount requested by the LTCS upfront to enter the scheme. No additional payments can be requested from the LTCS once payment and an agreement have been made.

Expenses not included within the LTCS include unreasonable support costs, loss of income during rehabilitation, property damage, rent payments or capital costs e.g. funds to buy a house.

1.2 linking of superannuation components VWA

On 10 December 2007, the Victorian Government commissioned Peter Hanks QC to undertake a review of the WorkCover scheme administered by the Victorian WorkCover Authority (VWA). The aim of the review was 'to reduce the administrative burden on employers, improve the support and services provided to injured workers and improve overall efficiency of the accident compensation scheme'. The Australian Industry Group (AI Group) was appointed to a stakeholder reference group to ensure that employer views were heard during the review process.

The review was based on the fact that there have been wide-ranging amendments to the WorkCover legislation over many years since its establishment in 1985, and that because of these changes, many of the schemes components, including the legislation, were now viewed as clunky, complex and piecemeal, with elements of the scheme difficult to administer and deliver. The review was thus the first extensive review of the scheme on a large scale in 23 years and sought to provide recommendations for reform that would refine support processes, improve utilisation of available resources and deliver real benefits to injured workers, their families and other stakeholders.

In March 2008 a discussion paper was released and public comment was sought. Extensive public and stakeholder consultation occurred throughout the Review. In August 2008, Mr Hanks QC provided a report to the government outlining 151 recommendations (http://pdf.aigroup.asn.au/ohs/170609_Government_Response_Table.pdf) for change to the legislation and WorkCover scheme. In December 2009, the Victorian Government introduced into parliament the 350 page Accident Compensation Amendment Act 2009 (The Act). The Act was passed on 11 March 2010 with the amendments effective from 5 April 2010.

One significant reform to the WorkCover scheme that was passed was the creation of superannuation entitlements for long term (over 52 weeks) injured workers. Section 37 of the Act created an entitlement for the payment of superannuation contributions for injured workers who had received loss-of-income compensation for an aggregate period of 52 weeks (and had not attained the age of 65 years). The amendment to the Act stipulated that superannuation contributions would be calculated as a percentage of the worker's previous weekly income, and that this contribution would then be added to the payments of 80% of lost income already entitled. These superannuation contributions would thus effectively increase the level of weekly benefit entitlements for injured workers to approximately 87% of previous earned weekly income.

The VWA was the first jurisdiction in Australia to introduce a form of superannuation contributions for long term injured workers into the compensation benefit regime. It is estimated that approximately \$20 million per year of superannuation contributions will be forwarded on to eligible injured workers following this new amendment. In addition, as superannuation is viewed as a deferred benefit, the introduction of superannuation contributions into the VWA benefits scheme is not viewed as acting as a disincentive to return to work.

1.3 increased emphasis on responsibility

In addition, a further shift in the accident compensation landscape is the recent trend of an increased emphasis of responsibility by all stakeholders in the return-to-work process. Influenced by the introduction of performance based OH&S legislation, shifts to a model of performance-based return-to-work components (as defined within new amendments to the VWA legislation) have been introduced. Obligation to return to work is increasingly emphasised, and scope for very different movements, over and above the norm, may be considered if it assists with return-to-work.

The performance based approach to return-to-work legislation is an Australian first and seeks to respond to previous employers concerns that previously prescriptive legislation imposed high compliance costs and stifled innovation in the business sector. The new legislation aims to 'put co-operation between all stake-holders in the return-to-work process at the centre of return-to-work processes'.

Key indicators of success of the new performance based approach include:

- timely delivery of new and increased benefits to workers as defined under new legislation
- employers, workers and providers being given access to sufficient information and support while changes to the return-to-work processes are implemented
- implementation of adequate and efficient systems and processes to support delivery of services

2 gaps in the compensation framework at both state and national levels

A serious and permanent impairment is devastating to any individual and their family. In Australia, approximately 700-800 individuals are catastrophically injured each year, with only approximately 60% of these individuals having the opportunity to claim for accident compensation insurance. A gap in opportunity to claim for compensation within the Australian accident compensation framework thus exists for approximately one third of individuals in Australia that acquire a serious and permanent impairment. As a result of these reduced levels of resources, many individuals experience increased difficulty with post-injury life-style choices.

Where opportunity to claim for accident compensation does exist, a broad and diverse array of compensation pathways at both individual state levels, and to lesser extent at a national level, exist. An individual having acquired a serious and permanent impairment is then required to identify their particular compensation pathway, and then navigate their way through the parameters of that prescribed pathway in making a claim for compensation.

Compensation Case Study:

For people having acquired a spinal cord injury (SCI) in Victoria, a range of scenarios may occur. If the SCI is a result of a transport or workplace accident, a Common Law claim for compensation may be made to TAC or VWA respectively. If the injury is not the result of a transport or workplace accident, but a level of fault can be proven, a claimant may claim for compensation through a public liability claim. If the accident is not a result of a transport or work related accident, and no fault in association with obtaining the SCI can be proven, then the individual has no opportunity to claim for any form of compensation.

Thus, a claim for compensation following the acquirement of a SCI in Victoria can be sourced through a number of pathways in claiming compensation exist. These include:

- Transport Accident Commission (TAC)
- Victorian WorkCover Authority (VWA)
- Crimes Compensation-criminal injury
- Public liability claims
- Private insurance schemes e.g. volunteer bushfire fighters compensation scheme, specific sporting league insurance schemes, Bicycle Victoria

Further, a claim for compensation can also be made through a number of national schemes that are operationalised within Victoria including:

- Veterans Affairs
- Comcare
- Military compensation (2004)

Incidents of SCI in Victoria reflect national trends. 60% of SCI accidents are related to car accidents, 13% to WorkCover claims and the remaining 27% a mix of non-compensated, smaller or federal insurance schemes (Drabsh 2005). Approximately 60% of people acquiring a SCI through a motor accident are able to claim for compensation, 100% of people acquiring a SCI through a work related incident able to claim for compensation, 50% of people acquiring a SCI as a result of a medical incident are able to claim for compensation, and 20% of people acquiring a SCI through other incidents are able to obtain compensation through general insurance schemes (Walsh, Dayton et al. 2005). Thus only half of the individuals in Victoria that sustain a SCI are entitled to compensation (Luntz 1975; Rickett 2003; Luntz 2003a; Drabsh 2005; Walsh, Dayton et al. 2005).

3 Consideration of structural reform to Australia's compensation framework - the National Disability Insurance Scheme (NDIS).

Major reform of the Australia's accident compensation framework and support service structures are currently being raised in an inquiry being conducted by Australia's Productivity Commission on Long Term Disability Care and Support. The inquiry is investigating feasibility of introducing a comprehensive national No-fault Disability Insurance Scheme (NDIS), inclusive of Common Law compensation processes. The introduction of a scheme would radically overhaul the parameters of accident compensation provision in Australia, and fundamentally alter the way in which support services and accident compensation in Australia are provided.

The Productivity Commission inquiry will examine the feasibility, costs and benefits of replacing the current system of disability services and accident compensation structures with a new approach which provides long-term essential care and support for people with severe or profound disabilities however acquired. The inquiry will examine a range of options for long-term care and support, including consideration of whether a no-fault social insurance approach to disability is appropriate in Australia. It will also examine if a scheme would fit with Australia's health, aged care, income support and injury insurance systems. Public consultation was completed in August 2010, and the Productivity Commissions report on findings is scheduled for release in March 2011.

The Productivity Commission discussion paper gives acknowledgement that the disability service system was 'not properly designed and structured, but has developed in an ad hoc and deeply inequitable way over several decades'. The Productivity Commission is thus seeking to explore mechanisms to enable the creation of quality service provision through increased industry-wide competition and implementation of a direct payments system at a wide-scale, and remove the current framework's structural problems which are currently viewed as 'deeply flawed... and increasingly unable to meet people's needs' (Productivity Commission 2010). A focus on early intervention, decision-making and opportunity for participation in education, training and employment are also paramount. The Productivity

Commission is notably seeking advice to consider how a national disability scheme could be designed, administered, financed and implemented through a model of no-fault insurance (Productivity Commission 2010).

The creation of a new long-term disability care and support scheme would reflect the desire by the Australian Government to achieve its overarching policy goal of enhancing the quality of life for people with impairments, improving social justice, increasing the economic and social participation of people with impairment and their families and improving protection of people with impairment through Human Rights instruments. Any new scheme would seek to formally meet the requirements of the recently implemented United Nations Convention of Rights of Persons with Disability (CRPD) to which Australia is a signatory, which are not fully recognised in current support arrangements (Productivity Commission 2010).

The case for a national no-fault disability insurance scheme inclusive of increased opportunity to claim for compensation is considerable. Eradicating the anomaly between those who might become seriously and permanently impaired in a car accident, and receive a substantial compensation pay-out, and those that have no opportunity to claim for compensation because they acquired their injury in a non-fault related manner (tripping on a curb, a fall or being dumped on your head by an ocean wave), is compelling.

Implementation of a nationalised support services framework would be strengthened were opportunity to claim for compensation through a Common Law claim was maintained. Compensation plays an integral role in providing redress and rebalance, on both an individual and social level, where the acquirement of impairment was a result of significant fault or negligence (Luntz 2002; Luntz 2003a; Luntz 2003b; Luntz 2005a; Luntz 2005b; Luntz 2005c; Hanks 2008; New Zealand Government 2009). Inclusion of the right to claim for compensation through Common Law could be achieved if a system similar to that of the Victorian TAC system was expanded at a national level. The hybrid TAC system retains a Common Law claim component for serious injury where fault can be proven, and where loss-of-earnings and pain-and-suffering can be claimed through the courts (Transport Accident Commission 2010a). Under the TAC system, any claim for compensation and income related payments remain separate from funding for general support services, accommodation, medical and general entitlements, which remain within the standard TAC service support division (Transport Accident Commission 2010a; Transport Accident Commission 2010b). Any reduction or abandonment of the opportunity to claim for compensation through a Common Law claim would, in many respects, be introducing a differing form of injustice into the arena. Compensation or redress for a wrong would be difficult to address under a support services platform alone, particularly where income and/or livelihood was lost as a result of the acquirement of a serious impairment where there was fault. Compensation not only works to provide redress and correct the wrong, it provides resources for an individual to make significant life changes required, such as income needed to repurchase a more accessible home or vehicle, meet established financial commitments from previous work-roles or provide income for existing dependents.

At present, there is significant complexity in the sheer number of support service and compensatory funding bodies that exist across Australia, and with the substantial disparities in both state and federal compensation schemes currently in operation (Cass, Gibson et al. 1988a; Tito 1996). The introduction of such a national scheme would not only bring Australia into line with most OECD countries in providing accident compensation at a nationalised level, but establishment of a hybrid scheme that supported provision of support services and opportunity to claim for compensation would radically improve equity in terms of access to compensation for all. All Australians acquiring an impairment, inclusive of transport accident, workplace accident, criminal acts, through military action or through more general incidents (diving, sporting injury and falls etc) would at least be eligible for an assessment of a claim for compensation. Further, under such a scheme, any individual acquiring a serious, permanent and catastrophic impairment at birth would be supported under the scheme.

A nationalised support services framework could thus provide the means to consolidate all services and compensation related to impairment into a single scheme. A nationalised framework would also provide a more standardised means of monitoring and allocating funding for support services required, and provide increased efficiencies in administration and assessment. The extent to which an NDIS could cover all catastrophic injuries, and absorb all of the current, specific state-based schemes, such as transport accident and WorkCover schemes, will thus be inclusive of the Productivity Commission's findings.

The Productivity Commission view the key test of any new scheme as the extent to which it can address existing deficiencies in an equitable, efficient, cost-effective and accountable way (Productivity Commission 2010)

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