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Wrongs Amendment Bill Exposure Draft
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WRONGS AMENDMENT BILL 2014 – EXPOSURE DRAFT

Thank you for the opportunity to provide feedback on the Exposure Draft of the *Wrongs Amendment Bill 2014*. This submission builds on the information provided by the Insurance Council of Australia (ICA) to the Victorian Competition and Efficiency Commission (VCEC) in the course of its review of the *Wrongs Act 1958*.

Considered cumulatively, the changes contemplated by the draft Bill will likely have the effect of increasing the number of insurance claims lodged, and increasing the average claim size. These factors could very likely have a marked impact on the affordability of insurance premiums.

We have provided some further detail about particular clauses below.

1. Clause 4 – Cap on damages for past or future economic loss

- 1.1. The draft Bill adopts the VCEC recommendations to (a) apply the cap on damages for economic loss to the gap between pre- and post-injury earnings, and (b) in claims for loss of expectation of financial support, to deduct a deceased person's personal expenses before applying the cap on economic loss.
- 1.2. According to actuarial consultants Finity Consulting, in a report commissioned by the ICA in January 2014 and provided to VCEC,¹ the expected cost of these changes is very minor.

2. Clause 5 – Cap on damages for non-economic loss

- 2.1. The VCEC report proposed an increase in the cap on non-economic loss to \$539,000. The draft Bill increases the maximum amount payable further to \$571,080, which is a significant increase on the existing cap.
- 2.2. The report prepared by Finity assumed that damages for non-economic loss make up around 12.5% of premiums.² A significant increase in the cap for non-economic loss would likely impact the affordability of premiums.

¹ Finity Consulting *Victorian Wrongs Act Inquiry – Modelling Assumptions* (15 January 2014) at page 4.

3. Clause 7 – Loss of capacity to care for others

- 3.1. Clause 7 of the draft Bill provides clarity on the availability of damages in limited circumstances for loss of capacity to provide gratuitous care for others. According to Finity,³ it is not possible to establish a reasonable estimate of the costs of re-introducing damages for loss of capacity to care for others, due to a lack of available data.
- 3.2. However, it is worth noting that any expansion into new heads of damages will almost certainly increase the average claim size, which could have an impact on the affordability of insurance premiums.

4. Clause 10 – Impairment threshold for psychiatric injuries

- 4.1. Clause 10 lowers the impairment threshold for eligibility to access damages for non-economic loss for psychological injuries from “more than 10 per cent” to “10 per cent or more”, so that a person with a psychiatric injury assessed at 10 per cent can recover damages where they previously could not.
- 4.2. There is a lack of available data for claims for primary psychiatric injuries in the civil liability space.⁴ However, any lowering of a threshold will likely result in a greater number of claims lodged, which could have an impact on total claims costs.

If you have any questions about the detail described above, please contact Vicki Mullen, General Manager, Consumer Directorate on (02) 9253 5120 or vmullen@insurancecouncil.com.au.

Yours faithfully



Robert Whelan
Executive Director and CEO

² Ibid.

³ Above n 1 at page 5.

⁴ Above n 1 at page 3.

15 January 2014

Ms Justine Hall
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Dear Justine

Victorian Wrongs Act Inquiry – Modelling Assumptions

The Insurance Council, on behalf of its members, has requested Finity Consulting Pty Ltd (Finity) to review and provide expert commentary on the Modelling Assumptions used by VCEC in preparing its draft report.

Background and Scope

This review responds to the draft report on the Inquiry into Aspects of the Wrongs Act published in November 2013 by VCEC. We were also provided with the confidential VCEC background paper – Modelling assumptions and calculations - and the earlier Insurance Council submission to the inquiry dated 13 September 2013.

Summary of Findings

The assumptions and calculations used by VCEC produce reasonable overall conclusions, despite the fact that the sources of assumptions are limited and some of the interpretations are, in our view, not appropriate. Given that technical criticisms of the work are not relevant to the outcomes, the particular relevant findings from our review are:

- In respect of the non economic loss threshold:
 - The cost of changing the non economic loss threshold for spinal injuries is probably towards the top of the range estimated by VCEC, but is more uncertain than most estimates in the VCEC paper
 - We concur with VCEC that the cost of changing the non economic loss threshold for psychiatric injuries can be given little or no weight
 - We concur with VCEC that the introduction of a narrative test would increase costs by a significant and unpredictable amount

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- While this option was not preferred by VCEC, we concur that the cost of changing the non economic threshold for all physical injuries would be significantly greater, of the order of double, the cost of the preferred change for spinal injuries only
- In respect of caps on non economic loss and economic loss:
 - Raising the cap on non economic loss would cost a little more than 1% of premiums, within the range of VCEC estimates
 - Changes to the order of calculations for the cap on economic loss would not have a material impact
- We concur with VCEC that changing the discount rate from 5% to 4% would increase the cost of premiums by a significant amount, as well as the change being inconsistent with other schemes.
- The impact of the other changes in Chapter 6 is not material.

Overall the package of changes proposed by VCEC would probably result in an increase in required premiums for public liability and medical malpractice of about 2% to 3%. More importantly, they would not materially change the risk profile of the scheme established by the Wrongs Act.

Impairment thresholds

VCEC models two changes to impairment thresholds:

- (a) Reduction in the thresholds:
 - (i) For physical injuries from 'more than 5%' to 'at least 5%'
 - (ii) For psychiatric injuries from 'more than 10%' to 'at least 10%'
- (b) For spinal injuries only, reducing the threshold from 'more than 5%' to 'at least 5%'.

The preferred option of VCEC is to use (a) (ii) and (b) but not (a) (i)¹. We note that there is a principled logic in making the proposed change for spinal injuries, because a corresponding change was made in the Worksafe legislation for giving access to a permanent impairment lump sum for spinal injuries.

The impact of the change would be to move 'over the threshold' (to grant access to non-economic loss damages) those claimants with the 'exact number' impairment assessment – exactly 5% for spinal injuries or exactly 10% for psychiatric injuries as the case may be.

Source of the assumptions

It is of concern that the two sources quoted (VWA and TAC) show such different numbers. No explanation is proposed for this anomaly, and it is likely that for some reason the figures are not comparable.

The headings in the table refer to 'impairment assessments under common law'. If this description is accurate then it is not the relevant measure because in both the schemes common law is already

¹ VCEC also examined a narrative test but does not propose it.

restricted to those meeting the narrative test. What would be relevant is the proportion of all non-trivial claims that have 5% impairment.

Further, the proportion is then applied to a Wrongs Act claim number of 1000 per annum, based on LIV supplied information. We believe that the LIV data applies only to actions **commenced in the courts**². The number of public liability claims made against insurers is much higher, because only some public liability claimants commence litigation. Based on the NCPD³ we estimate that the number of personal injury claims in Victoria (excluding medical malpractice) is between about 1,700 and 2,000.⁴

General observations

The nature of injuries arising in motor accidents, workers compensation and public liability vary a lot. In workers compensation back and neck injuries are very prominent. In motor accidents orthopaedic injuries and head injuries are common, as is 'whiplash' (although in the TAC whiplash rarely gets over the common law threshold). In public liability there is a wide variety of injuries, with 'slip and fall' being the most common. In the 'slip and fall' category, the result is most often damage to upper and lower limbs, with back and neck injuries also common.

The public liability experience will be more like workers compensation than traffic accidents. Therefore an assumption closer to the VWA experience will be appropriate. A cost estimate at the higher end of the quoted range would follow.

In public liability, psychological injuries are far less common than in workers compensation and probably less common than in motor accidents (where 'nervous shock' claims by relatives are not unusual). In this respect we agree with the VCEC approach of giving little or no weight to the psychiatric component⁵.

Findings regarding the threshold

The lack of relevant data makes it particularly difficult to make a good estimate of the impact of moving to an 'at least 5%' WPI threshold for spinal injuries. On balance we think that the cost would be toward the top end of the range given by VCEC, but with the uncertainty it could be outside the range.

Regarding the change for psychiatric injuries to 'at least 10%' we agree with VCEC that the cost can be given little or no weight. This is because of the relative scarcity of claims for primary psychiatric injuries in the civil liability arena.

Finally, regarding the option not preferred by VCEC – changing to 'at least 5%' for all physical injuries – we agree with VCEC that the cost would be significantly more than that for spinal injuries only.

² It is similar to figures available from the County Court

³ National Claims and Policy Database, run by APRA

⁴ The total claim number for public liability is about 6,800 and about 20% to 25% are for personal injury

⁵ Note (a) on page 3

A narrative test

We agree with VCEC that a narrative test would have a larger impact on claim costs than either of options 1 or 2. The uncertainty and unpredictability created by a narrative test cuts directly across the design principles of the tort reforms. With a WPI threshold there can still be argument, but it is resolved on medical grounds via (if necessary) the medical panels. Decision making in respect of a narrative test is much more complex and frequently leads to long and expensive court cases just to resolve that point.

In drawing comparisons with TAC and VWA we also note that their common law thresholds are much higher. There is 'deeming' above 30% WPI, and most cases resolved by the narrative test are between 10% and 20% WPI. In civil liability the WPI threshold is already much lower and addition of a narrative test would mean a return to the pre-reform situation where most claimants were seeking and receiving non-economic loss damages, including those with less serious injuries.

Cap on non-economic loss

VCEC proposes an increase of about 8.3% in the NEL cap (from \$497,000 to \$539,000).

At present the Wrongs Act cap is the same as the TAC, and less than Worksafe. There is merit in having a common basis for the three common law legislative systems, but increasing the Wrongs Act to go from TAC up to Worksafe does not deal with this problem.

While the assumptions used by VCEC have a wide range, they are plausible. Another way of looking at them would be to assume that NEL makes up about 12.5% of premiums (30% of bodily injury claims which in turn are 70% of a claims ratio of 60%). An 8.3% increase in NEL would mean slightly more than a 1% increase in premiums which is in the middle of VCEC's estimates.

Cap on economic loss

The only changes proposed by VCEC are to change the order of calculations so that the dollar cap on weekly earnings is applied after deduction of other amounts from the earning capacity.

The expected cost of this change is very minor, and VCEC's allowance of \$2m per annum is likely to be an overstatement.

Change in discount rate

We have not reviewed the cost estimate for the option to reduce the discount rate from 5% to 4% since it is not favoured by VCEC. This change would increase costs and make the Wrongs Act inconsistent with TAC, Worksafe and most other states.

Loss of capacity to care for others

Damages for loss of capacity to care for others⁶ (typically family members) has been controversial for many years. The case establishing the precedent was decided by the NSW Court of Appeal in 1999, after a number of earlier decisions in different courts that had varied outcomes.

⁶ Known as Sullivan v Gordon damages

This timing is important, because it coincides with the period of expansion of common law that led (along with other causes) to the liability crisis and the subsequent tort reforms of 2002 and 2003.

The Ipp committee final report in 2002 recommended four limitations on damages for loss of capacity to care for others.⁷ Provisions similar to the Ipp recommendations were included in the civil liability reforms in some states.

However, there was a very important development in 2005. The High Court⁸ ruled that damages for loss of capacity to care for others were **not part of the common law of Australia** and would be available only if specifically provided for in legislation.

We understand that Section 281D of the Wrongs Act, which describes a set of limitations not as restrictive as those in the NSW law, has been made irrelevant by the 2005 decision of the High Court.

The arguments quoted from LIV and ALA submissions assert that the Parliament intended to reinstate the head of damage. This seems unlikely when at the time of the legislation the head of damage already existed. The only reasonable interpretation can be that the Parliament intended to place limits on the availability and amount of this head of damage.

The issue for VCEC is whether it is satisfied that the High Court ruling should stand, or whether the Victorian Government should legislate to establish an entitlement that the High Court said is not part of the common law.

VCEC is correct in saying that 'there is uncertainty about the likely impact on insurance premiums'. It is worth noting that:

- The specific wording of the access legislation is very important (e.g. is it only for disabled family members?)
- The judicial interpretation of any such wording is equally important
- There is very little data available even on the pre-reform cost of this head of damage, because it was only established in 1999, then limited in 2002/03 and abolished by the High Court in 2005.

It is not possible to establish a reasonable cost estimate of the option in these circumstances. The High Court has pointed out that non-economic loss damages are available to meet the need identified in this issue, and there seems to be no good argument for the Victorian Government to take such a risk.

There is a considerable irony here. The limitations brought in during the tort reforms to limit the potential cost impact were taken to have legitimised this head of damage, whereas if the High Court decision had preceded the tort reforms the head of damage would not exist at all.

⁷ Recommendation 52, page 206

⁸ CSR Limited v Eddy HCA64

Change to gratuitous care threshold

In your request you also note the proposal by VCEC to make the 6 hour and 6 month thresholds for gratuitous care damages cumulative rather than alternative. It has been argued this is a cost saving measure and should be quantified. We note that the proposal would return this provision to its original intention and to that used in other states.

Gratuitous care damages make up less than 10% of bodily injury claim costs and the proposed change would reduce the amount of such damages by about 10%. The premium saving would therefore be no more than 0.4% of premiums.


Remedial surgery

It is anomalous that the beneficial impact of surgery (as with any other treatment) is ignored as per Mountain Pine. Corresponding changes should be made to the Wrongs Act, although the premium impact would be minimal.

Interaction with the Transport Accident Act

The anomaly between the Wrongs Act and the Transport Accident Act should be rectified as proposed by VCEC. There would be no impact on public liability premiums because any savings would accrue to the TAC.

Yours sincerely



Estelle Pearson



Geoff Atkins

Fellows of the Institute of Actuaries of Australia