

The Pot Luck for Injured Persons in Australia

1. Introduction

Last year there was a somewhat heated battle over the allocation of the GST receipts between States. At one point the South Australian Premier Jay Weatherill said "every Australian should be able to expect a similar level of services wherever they live." This struck a chord and has prompted me to use the quote in a context of services provided to injured persons.

This group is disadvantaged relative to the most part of the population. As a society Australia has accepted that we have a responsibility to provide some level of care and support for them. At the risk of alienating readers right at the outset I note another phrase that emerged in the 19th century, by the French politician and historian Louis Blanc "from each according to ability, to each according to need". You don't have to be a rabid socialist to agree with the sentiment, rather just wanting to belong to a caring society.

The Federal and State/Territory Governments have legislated for various forms of support for injured persons. However:

- i. Those provided by the States and Territories differ from those provided by the Federal Government
- ii. Those provided by the various States and Territories differ from each other

Various aspects of this situation are discussed below.

2. The current situation

Injuries arise from a number of different sources, namely:

- Workplace accidents
- Motor vehicle accidents
- Medical incidents
- Other-sport, assault, recreation, household accidents

Support provided to injured persons comes from:

- *Compulsory insurance schemes* established by State Government legislation. These schemes provide for injuries from workplace and motor vehicle accidents and are underwritten and managed through both State Government and private insurers
- *Voluntary insurance* provided by private insurers for injuries from other types of accidents
- *Social Security* as provided by the Federal Government, for injuries not covered by formal insurance

Some elaboration:

- In all jurisdictions insurance for workplace injuries is provided on a no-fault basis i.e. irrespective of whether or not the injured person was at-fault.
- In several jurisdictions no-fault insurance is also provided for motor vehicle accidents, but in others most injuries are subject to a fault-based common law environment. In these jurisdictions some 30% of injuries will not be fully covered.
- State Governments cover doctors who operate in public hospitals and most other members of the medical profession would certainly insure against medical misadventure for which they are deemed to be at-fault.
- Injuries from other sources are generally not subject to compulsory insurance and hence rely on the public to effect their own private insurance.
- Most companies dealing with the public are likely to insure against personal injuries for which they are at-fault.
- For half of the population private health insurance would cover a proportion of the cost for treatment in hospital. For income support the proportion covered is likely to be lower.

Suffice it to say that for all sources of injuries there are gaps in the support provided by compulsory State-based insurance and voluntary private insurance. Such gaps will, to an unknown extent, be filled by the Federal Government. A proportion of injured persons will bear the cost directly.

Numbers and payments

The most readily available source of the numbers of injuries occurring in Australia each year is that provided by Safe Work Australia and the Australian Institute of Health and Welfare (AIHW). They record what are defined as **serious** injuries, given in the following table.

Table 2.1 Numbers of serious injuries

Cause of injury	Numbers of serious injuries
Workplace	145,000
Motor vehicle	50,000
All other	250,000
Total	445,000

Note:

Workplace	1 or more week off work
Motor vehicles	Hospitalisation from a road traffic accident
All other	Hospitalisation from other causes

It can be seen that serious injuries not related to the workplace or motor vehicles make up 56% of the total. It is this group where insurance is largely voluntary.

The **amounts paid** to and on behalf of injured persons covered by the compulsory State-based insurance schemes comprise:

- Medical and hospital expenses and the like.
- Income benefits, generally related to the injured person's earnings prior to injury.
- Lump sum amounts related to neither outgo from medical expenses or loss of earnings. These are called amounts for *non-economic loss*, or *general damages*.

The eligibility conditions for benefits from the Federal Government are likely to be quite different from benefits under the insurance schemes. I would expect that access to some types of medical services under Medicare would be more restricted than those available under the insurance schemes.

In the case of income benefits, in most circumstances the amounts available under the Disability Support Pension will be less than under the insurance schemes.

No lump sum payments are available from the Federal Government for non-economic loss.

In summary, for injured persons it is likely to be far more beneficial to receive benefits under the insurance schemes than under the Federal Government disability arrangements.

The following table summarises amounts currently made by the insurance schemes to or on behalf of injured persons, together with estimates of corresponding amounts paid by the Federal Government. Deriving the latter

amounts has been difficult because published figures are in respect of **disabled** persons, of which injured persons are but a small subset.

Table 2.2 Amounts paid 2013/14

Type of benefit, cost	Amounts paid by		
	Insurance(a)	Federal Govt (b)	Total
	\$bn	\$bn	\$bn
Medical & the like	4.8	1.8	6.2
Income support	6.9	1.3	7.6
Lump sums (NEL)	2.7	0.0	2.5
Total	14.4	3.1	17.5

Notes

- (a) Compulsory State-based schemes plus voluntary insurance
- (b) Total expenditure on disabled persons adjusted for proportion of injuries

Of the \$14.4bn paid by insurers almost 90% derives from workplace and motor vehicle accidents, notwithstanding that they represent only 44% of serious injuries.

3. Differences within States and Territories.

In this section I note some of the differences in the support provided in the various States.

For workplace accidents and no-fault motor vehicle accidents we have differences in:

- The **level** of income support.

While generally expressed as a percentage of pre-injury earnings, the percentages vary, as indeed do the definitions of earnings.

- The **duration** of income support.

This is a key determinant of the cost of a scheme and can be used as a lever to control costs. The approaches taken vary according to circumstances in each jurisdiction.

- Access to, and quantum of, lump sum benefits whether defined by legislation or through access to common law.

Access is generally determined by the degree of Whole Person Impairment (WPI), assessed according to the American Medical Association Guidelines. However there are a number of editions of the Guidelines and different

jurisdictions use different versions. In some cases the guidelines themselves are extended or varied.

The minimum WPI for access varies, as do the maximum amounts and the scales to reach the maximum.

- In the case of medical services and the like the differences are not as marked.

In some of the fault-based jurisdictions for motor vehicle accidents, but not all, amounts for care and support are provided to very severe/catastrophic injuries from motor vehicle accidents, irrespective of fault.

In addition to the differences in benefits described above each scheme will be **managed** according to its own legislation. The discretions permitted and how they are exercised by management will vary accordingly.

A large proportion of benefits paid in respect of other injuries (i.e. not workplace or motor vehicle related) are determined at common law. Each jurisdiction has its own *Civil Liability Act* that is modified from pure common law, and these modifications vary between jurisdictions. For example:

- Access to lump sums for general damages is, in most jurisdictions, restricted by an injury threshold that varies.
- There are differences in how to measure severity and restrictions in the costs of attendant care.
- The compensation is a lump sum estimated by converting a stream of future medical and income to a present value. The discount rate to be used in this conversion varies by jurisdiction.

For severe injuries in particular, where the income streams can extend to the remaining lifetime of the injured person, this leads to significant differences in lump sum compensation for identical injuries and circumstances.

It is clear to that for persons injured in Australia there is high degree of potential as to the level of support to which they will be entitled from formal insurance arrangements. Contrary to Jay Weatherill's wish, it **does** depend upon where you live.

4. Does it really matter?

One of the consequences of the differences in the level of support between States is that the need to access Federal Government Social Security benefits will vary according to the jurisdiction in which the injured person lives i.e. each jurisdiction is relieving the Federal Government of expenditure to an extent that is **not** commensurate to their proportion of injured persons.

This raises the question of whether allowance should be made for this disparity in the allocation of GST proceeds between jurisdictions. Should those jurisdictions that provide lesser support (i.e. those where greater costs are shifted to the Federal Government) receive a smaller share of the GST proceeds?

While logic would suggest the answer should be in the affirmative, politics is likely to determine otherwise. Indeed, the method of allocation of GST proceeds would appear to have more significant difficulties than variations in the support for injured persons.

The more important issue is: why we should tolerate the differences, or should we try to do something about it.

In this context I note that the recently introduced National Disability Insurance Scheme (NDIS) will, when fully implemented, provide care and support services for seriously **disabled** persons on a consistent basis throughout Australia.

Furthermore, some progress in providing similarly consistent services for severely **injured** persons has been made in recent years. As part of its consideration of the NDIS the Productivity Commission also proposed the introduction of National Injury Insurance Schemes (NIIS) in each jurisdiction.

Such schemes would provide consistent care and support for severely injured persons on a no-fault basis. These NIISs would be extended to different sources of injury over time. Workplace accidents are already covered, as are some motor vehicle accidents. The extension to motor vehicle accidents in all jurisdictions has progressed in recent years, but are still yet to be introduced in a couple of States.

The next stage will be to extend the NIISs to medical incidents and all other sources of injury, at which stage we will have achieved uniformity in care and support services (but **not** income support) for those most severely injured.

However, the severely injured group comprises only 0.5% of all injuries. What about the other 99.5%?

In the following section I consider the possibility of removing all the differences in benefits between jurisdictions and extending the insurance coverage to **all** sources of injuries.

5. Is uniformity possible?

Fundamental principles

If we are to address the question of uniformity we must consider two fundamental principles, namely;

- i. Do we accept that **all** types of injuries should be eligible for support?

It is hard to see why the cause of injury is relevant as to whether the cost of treatment and income replacement is provided.

The inclusion of other causes of injury does raise the question of how their costs should be funded. While this is certainly a relevant issue it hardly represents a compelling reason that such injuries should not be covered.

- ii. Do we accept that injuries should be covered on a no-fault basis?

This is already accepted for workplace injuries and for injuries from motor vehicle accidents in some jurisdictions.

The issue of ~~%a~~+~~fault~~+derives from the idea that if the actions of someone else caused the injury then they should financially compensate the injured person. This compensation, determined under common law, will include amounts for general damages (non-economic loss). Effectively the person causing the injury should be ~~%punished~~+for doing so.

For an injured person their needs are not determined by the question of who caused the injury, but on the severity of the injury itself. In my view the idea of fault with respect to injured persons is medieval in nature and is out of place in a caring society.

Extend the Social Security System?

Here I now note that the Social Security system accepts the fundamental principles discussed above.

This raises the question as to why an alternative scheme is needed? Just terminate existing State-based schemes and include all injured persons in the Social Security system?

In my view this would be a retrograde step. The main reason for this view is the importance I place on *insurance principles*, which acknowledges the following equation:

$$\text{Premiums+investment return=Cost of claims+expenses+cost of capital}$$

Managing an insurance operation is about controlling all of the components of this equation. At present I do not believe that the existing Social Security system fully operates on insurance principles, although there are some signs of movement towards their acceptance.

The discipline imposed by the adoption of insurance principles cannot be overstated. They are critical to the sustainability of any scheme.

Benefit design

I would propose that benefits to be provided in our scheme injured persons be those for income support and for medical and the like benefits only.

Specifically, the lump sum benefits currently provided in existing schemes for general damages or non-economic loss would no longer be available.

The detail of benefit design will be problematical because of the existing differences between Social Security benefits and those currently provided in State-based insurance schemes.

If these benefit differences are maintained (i.e. with lower benefits in the Social Security system) then this will bring into sharper focus a question that currently exists: - why should disabled persons be treated differently to injured persons?

I have no answer to this question. Others may have.

The NZ ACC Scheme

Readers familiar with accident compensation will by now have recognised that we are heading towards the scheme that has been operating successfully in New Zealand since 1974, managed by the Accident Compensation Corporation (ACC).

The ACC Scheme provides benefits on a no-fault basis for all injuries occurring in New Zealand. Coincident with the introduction of the scheme injured persons gave up their rights to sue for damages at common law.

The benefit design is the same irrespective of the cause of injury. However injuries from different causes are allocated to different accounts, largely for the purposes of funding.

Modest lump sum amounts were introduced in 2006, but represent less than 2% of Scheme costs.

The existence of the NZ ACC Scheme answers, in the affirmative, that uniform treatment of injured persons is possible. The next section considers whether such a scheme is **plausible** for Australia.

7. Is uniformity plausible?

The question of plausibility is discussed under two headings:

- Cost
- Practicality

Cost

The costs given below should be considered as ~~ballpark~~ estimates, given as an aid to further discussion and a precursor to formal costings.

I first consider workplace and motor vehicle accidents.

The weighted average premium rate for Workers Compensation schemes in Australia is currently around 1.35% of wages, or 1.1% of wages excluding management expenses.

This claims cost includes lump sums and common law legal expenses, which are to be excluded from the scheme. This reduces the claims cost to around **0.8%** of wages i.e. 25% less than at present.

There is no extension of persons covered.

For motor vehicle accidents the conversion to a completely no-fault environment will, in the current common law jurisdictions, extend the number of persons covered.

However, the replacement of common law with statutory defined benefits will reduce the claims cost. This is not only due to the removal of lump sums and legal expenses but also because experience suggests that a no-fault environment with an absence of lump sum benefits can result in material reductions in the cost of claims.

In my view it is reasonable to expect an overall reduction in total claims costs in respect of motor vehicle accidents of at least 15%.

The cost of extending the scheme to other sources of injury is more difficult. There is no direct Australian experience from which to derive an estimate.

However I note the following:

- i. Table 2.1 indicates that the number serious injuries from workplace and motor vehicle accidents is 44% of the total of serious injuries from all sources
- ii. In the New Zealand ACC Scheme the combined cost of workplace and motor vehicle injuries is 45% of the total cost of all injuries

This is very fortuitous. While there is of course a level of uncertainty, it seems reasonable to use this information to provide a broad estimate of the total cost of our proposed scheme.

Table 2.2 gave estimated total payments of \$17.5bn on all injuries in 2013/14. Adjusting this amount for changes arising from our proposed scheme gives the following:

Table 7.1

Source of injury	Claims cost in 2013/14		
	Current arrangements	Change to proposed scheme (b)	
	\$bn	%	\$bn
Workplace	8.5	-25	6.4
Motor vehicle	4.3	-15	3.7
All other (a)	4.7		12.3
Total	17.5		22.3

Notes

(a) Other insurance and Social Security

(b) From discussion above

For "All other" dollars from gross up 45% to 100%

Our proposed scheme might therefore increase the overall claims cost by some $22.3/17.5-1=27\%$.

We need to also consider the allowances for expenses and, at present, Government charges to be included in the overall premiums. Such allowances are a material component of premiums and vary according to responsibilities each scheme has in their jurisdiction.

Where schemes are underwritten in the private sector the premiums will also include allowances for the insurers profit.

Suffice it to say that expenses in the New Zealand ACC Scheme are, at around 13% of claims costs, very substantially less than currently in Australian schemes. Such a level is unlikely to be possible in an Australian environment.

Any reductions from current levels in Australia will depend upon the roles of the State Governments and private insurers in any Scheme.

I conclude this section on cost with a brief discussion on the sources of *funding* the scheme.

Clearly, workplace and motor vehicle injuries will be funded by employers and motorists respectively. That is 45% of the scheme cost.

In the NZ ACC Scheme other injuries are separated, for funding purposes, into:

- *Treatment Injury*-which corresponds to medical indemnity insurance in Australia. This represents less than 10% of total cost and could reasonably be funded by medical practitioners.

In Australia the cost to medical practitioners is unlikely to be greater than currently paid for their medical indemnity insurance.

- *Earners*- for non-work or motor vehicle-related injuries. The costs represent 40% of total scheme costs and are funded by earners. The current premium/levy is 1.3% of earnings.
- *Non-earners*- for injuries to those not in the paid workforce. The costs are 7% of total costs and are funded by general taxation. This is less than the current outlay by the Federal Government.

It is the additional cost for earners that stands out as the most problematical from the point of view of funding. For other groups the required outlay is likely to be less than their current outlay.

Claims cost for the NZ ACC Scheme represents 1.6% of Gross Domestic Product. By comparison claims cost for the proposed scheme in Australia is 1.4% of GDP. Australia has a considerably higher GDP per capita than New Zealand.

New Zealand has taken the view that their scheme is worth the cost-why can't Australia?

Practicality

Even were the financial considerations pertaining to an all injuries support scheme in Australia considered to be manageable, there would be many practical/political obstacles to be overcome.

A few of these are listed below:

- i. Removal of lump sums: For workplace and motor vehicle injuries the existing benefits will be less than at present, due to the exclusion of lump sums. While this would affect **future** injuries only, it is still likely to create dissent.
- ii. Removal of common law: injured persons would forgo their right to sue for benefits at common law.

While the role of the legal profession has certainly been eroded in the past couple of decades, its complete abolition will be vigorously resisted.

- iii. The amount and duration of income benefits: For future workplace and motor vehicle accidents the value of these benefits will be increased or reduced relative to the past, depending on jurisdiction.

- iv. Roles of Federal and State Governments: We are proposing a national injury insurance scheme, with consistent benefits throughout Australia. In this sense the situation is the same as that of the National Disability Insurance Scheme. Similar to the NDIS there will be a mixture of Federal and State involvement. There may be lessons to be learnt from the establishment of the NDIS.

There would be a rationalisation of amounts received by States in levies and duties included in current premiums paid to workplace and motor vehicle accident schemes.

- v. Role of private insurers: Private insurers currently underwrite and manage the compulsory workplace and motor vehicle accident insurance schemes in a number of different jurisdictions. They also offer insurance covering other injury sources.

The type and extent of their involvement in a future national injury insurance scheme will be a major issue.

As discussed above the transition to a national injury insurance scheme can be said to have already started, albeit in a slow and punctuated manner. All we need to do is:

- Establish a NIIS for catastrophic motor vehicle accidents in those jurisdictions which have yet to do so
- Extend the NIIS in each jurisdiction to cover catastrophic medical incidents and other injuries
- Transfer all existing catastrophic workplace and motor vehicle injuries to the NISS in each jurisdiction
- In due course, extend each NISS to absorb all non-catastrophic injuries and to provide income support as well as care and support

Speed the day.

Chris Latham