

**Submission
No 28**

NON-REGISTERED MOTORISED VEHICLES

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The New South Wales Bar Association

NEW SOUTH WALES BAR ASSOCIATION

SUBMISSION TO JOINT STANDING COMMITTEE ON ROAD SAFETY

INQUIRY INTO NON-REGISTERED MOTOR VEHICLES

INTRODUCTION

1. The New South Wales Bar Association (the Association) is pleased to be able to provide a submission to this Inquiry. The issues raised are complex, covering vehicles standards, accident data collection, licensing and insurance. This submission is not intended to cover the field of those issues, but rather to offer specialist assistance with regards to the insurance issues with which members of the Association have extensive experience.
2. The Association understands that there has been extensive work within government on these issues over the past few years. It is also understood that there has been an internal government working party endeavouring to address the complexities of registration, insurance and licensing arrangements for vehicles such as motocross motorbikes.
3. This submission focuses on raising issues that have developed in relation to:
 - (a) A gap between public liability and motor vehicle insurance and;
 - (b) Potential gaps between Compulsory Third Party (CTP) insurance (with conditional registration) and public liability insurance.
4. It is respectfully submitted that closing these insurance gaps should be one focus of the Committee's deliberations.

CTP AND PUBLIC LIABILITY INSURANCE

5. Over the last fifteen years, an unfortunate gap has developed between what was previously relatively seamless insurance coverage.
6. Prior to 1995 the *Motor Accidents Act 1988* (now the *Motor Accidents Compensation Act 1999*) covered all accidents that arose from the "use and operation" of a motor vehicle. A registered motor vehicle had CTP cover. An unregistered motor vehicle was covered by the Nominal Defendant scheme provided the accident occurred on a public street.

7. Public liability policies were issued either as an extension to a home and contents policy or to organisations that dealt with the public and needed coverage as against the risk of negligently inflicted injury. These policies usually had an exclusion clause, excluding liability under the policy for any accident arising from the use and operation of a motor vehicle.
8. The form of the two policies thus meshed. If an accident arose from the use or operation of a motor vehicle, then the CTP cover applied. If the accident did not arise from the use or operation of a motor vehicle, then the public liability insurance applied.
9. This situation was fractured by amendments to the *Motor Accidents Compensation Act* in 1995. In an effort to narrow the scope of the CTP policy, a motor accident was restricted to being where injury occurred through:
 - (a) The driving of the motor vehicle;
 - (b) A collision with a motor vehicle;
 - (c) The vehicle running out of control; or
 - (d) A defect in the vehicle (the defect clause has subsequently been removed by amendment).
10. These changes meant that an accident could arise from the use or operation of a motor vehicle that fell outside the statutory definition in motor accident legislation, but was still excluded from the public liability policy.
11. To give an example from an actual case, a local club has a trailer used to transport a barbeque. The trailer does not have a dolly wheel (when it should have). This requires a volunteer to try and lift the front of a trailer to put it over the ball joint on the towing vehicle. The volunteer suffers a significant low back injury.
12. The trailer is defined by statute as being a motor vehicle. However, the trailer has no CTP policy. The CTP policy on the towing vehicle did not apply because the trailer had not yet been attached to the towing vehicle.
13. The club had a public liability policy, but it may not operate because there is an exclusion for all accidents arising out of the use and operation of a motor vehicle. The public liability insurer denies indemnity to the club.
14. The outcome is entirely unsatisfactory. The injured volunteer is unable to access either CTP or public liability insurance. If the volunteer sues, then it is the club assets that will be used to meet the claim.

15. The outcome is equally unsatisfactory from the club's perspective. Despite having both a CTP policy for its motor vehicle and public liability insurance, the club is not actually fully covered.
16. The Association has been raising the issue of the "insurance gap" with the Motor Accidents Authority for over a decade. There is a fairly straightforward solution. The exclusion clause under the public liability policy should only exclude "*statutory liability*" under a relevant compulsory third party scheme. If such phrasing were adopted by public liability insurers then we could return to a seamless join between public liability and CTP policies.
17. Some public liability insurers have adopted such an exclusion definition. Unfortunately, others have not.
18. As the committee's terms of reference note, there is an increasingly wide array of motorised vehicles being used by the public in public areas. These include:
 - (a) Motocross motorbikes;
 - (b) two wheel scooters;
 - (c) three and four wheel scooters, (particularly for the disabled and elderly);
and
 - (d) other vehicles for recreational activity.

All too often, the use of these vehicles is not covered by public liability insurance. That creates a double risk. There is the risk for the injured party who is reliant upon the liquidity of the wrongdoer and there is the risk for the wrongdoer as to their assets.

19. It is strongly suspected that very few elderly citizens on motorised scooters realise that their public liability insurance (if they have it) may not cover them if they accidentally run into a pedestrian. Very few will likely have contemplated the fact that they could lose their home if uninsured and if accidentally causing serious injury.
20. The Association makes the following recommendations for the committee's consideration.

Recommendation 1

That all available efforts are made to encourage public liability insurers to limit the exclusion clause within their policies in relation to motorised vehicles and their usage to circumstances where the liability is otherwise covered by compulsory third party insurance.

Recommendation 2

That the government undertake public education in relation to the risks of injury associated with the use of motorised vehicles in public and the necessity of having appropriate insurance to cover potential liability.

CONDITIONAL REGISTRATION AND ITS LIMITATIONS

21. Many of the motorised vehicles being considered by the scope of this inquiry are capable of obtaining conditional registration. For example, motocross motorbikes can be conditionally registered, albeit only for use on Stockton Beach and for agricultural purposes. Forklifts can be conditionally registered.
22. However, there is significant restriction upon the scope of the coverage provided by conditional registration. The relatively cheap policy (issued with the registration) only applies where the vehicle is being used on a road or road-related area. The statutory definition of a road or road-related area is one that is *“open to and used by the public for driving”*.
23. The Association is concerned that those who take out conditional registration do not appreciate this restriction on the scope of the policy.
24. Conversely, other members of the public who own such equipment may believe that they are adequately covered by their public liability insurance without appreciating the scope of what constitutes a road and road-related area.
25. Two examples are illustrative:

Example 1:

26. Flemington Market buzzes with forklifts. The forklifts regularly traverse roadways within the market area (that are open to and used by the public for driving), but also access areas where ordinary members of the public cannot drive.
27. If an accident occurs on one of the public roadways, then the vehicle is covered by its conditional registration. The authorities at Flemington Market sensibly require that all forklifts used in the market have conditional registration.
28. However, if a forklift driver runs down a pedestrian near one of the stall areas inside one of the sheds (where the public cannot drive) then the conditional registration will not apply. The Association is aware of an example where the CTP insurer issuing the conditional registration (QBE) has denied indemnity in such circumstances.
29. At that point, both the injured party and the forklift owner are reliant upon there being appropriate public liability insurance for the forklift. However, it does not seem that the Flemington Market authorities require that there be public liability

insurance for the forklift when it is being used “*off road*”. Further, it does not seem there is any requirement that the public liability policy not have an exclusion clause that eliminates all liability arising out of the use and operation of a motor vehicle.

30. The clear message from this example is that anyone operating a forklift requires both conditional registration (for road and road-related use) and public liability insurance (that does not have a motor vehicle accident exclusion clause) for when the forklift is being used in an area not open to and used by the public for driving.

Example 2:

31. A forklift was being used to unload a truck in the driveway of a factory premises. The forklift’s owner had public liability insurance, but the forklift was not conditionally registered (because it was used within the factory premises). However, the driveway was a road or road-related area – it was open to and used by members of the public who drove in and out of the factory.
32. An accident occurred when the forklift driver ran down the driver of a truck that was being unloaded in the driveway. The truck driver sued the Nominal Defendant on the basis the forklift was being used on a road or road-related area. The Nominal Defendant paid the damages but then successfully sought to recover those damages (pursuant to a statutory clause) from the forklift owner. This was because the forklift had been taken onto a road or road-related area (the driveway) without conditional registration.
33. The forklift owner’s public liability insurer refused to meet the claim because the exclusion clause in the public liability policy excluded liability where CTP insurance could and should have been held.
34. The company ended up paying hundreds and thousands of dollars to the Nominal Defendant.
35. The Association anticipates that very few small businesses with a forklift would appreciate that they need conditional registration for the forklift if it ventures even a few metres onto the factory driveway, even if only occasionally.
36. The Association supports the existence of conditional registration and the provision of CTP insurance with conditional registration. However, clearly conditional registration is not a universal panacea due to its limited scope. If conditional registration is to continue to exclude all liability for accidents not occurring on a road or road-related area, then it needs to be made very clear to policy holders that they do not have full coverage.
37. Equally, there needs to be education of those who conduct such operations on private property that any public liability insurance they have may not operate if

the vehicle at any stage moves onto a road or road-related area (an area open to and used by the public for driving).

Recommendation 3

That those taking out conditional registration be clearly advised as to the limitation of the scope of conditional registration.

Recommendation 4

That there be education for those using industrial equipment concerning the need for conditional registration if there is even the smallest possibility that at any stage the equipment will be used outside factory doors.

CONCLUSIONS

38. The issues raised above deal with only some of the complexities of insurance arrangements surrounding the use of unregistered vehicles. Regularising insurance arrangements and strengthening the scope of public liability insurance is in the interests of both the public and the equipment owners. The public want to have access to insurance in the event of injury. Equipment owners do not want to lose their company assets or their homes if a moment's carelessness in the use of motorised equipment causes injury.
39. The interplay between CTP insurance, conditional registration and public liability insurance is complex. Nonetheless, it is clear that there are unsatisfactory gaps in current insurance arrangements.
40. The Association would be delighted to provide all available assistance to the Committee in the course of its deliberations as it addresses these complex issues.

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