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Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill 2007

About this Item

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Business - Bill, Division, Second Reading, Third Reading, Motion, Report Adopted

MOTOR ACCIDENTS COMPENSATION AMENDMENT (CLAIMS AND DISPUTE RESOLUTION) BILL 2007

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Second Reading

The Hon. JOHN DELLA BOSCA (Minister for Education and Training, Minister for Industrial Relations, Minister for the Central Coast, and Minister Assisting the Minister for Finance) [1.57 p.m.]: I move:

That this bill be now read a second time.

As the remarks are lengthy and they have been presented in the other place, I seek leave to incorporate the second reading speech in *Hansard*.

Leave granted.

The Government is pleased to introduce the Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill 2007. The purpose of this bill is to make further efficiency improvements in the motor accidents claims and dispute resolution processes and procedures currently operating under the Motor Accidents Compensation Act 1999.

These reforms build on the Government's 1999 overhaul of the motor accidents compensation scheme and continue the Government's commitment to providing people injured in motor vehicle accidents with faster and less formal methods for resolving motor accident compensation claims and disputes outside of the court system. The Government recognises the importance of providing injured people with access to compensation as soon as possible.

A key reform to the claims process introduced in 1999 was the introduction of an early accident notification process designed to encourage injured people to access early treatment with the goal of maximising recovery from their accident injuries. An accident notification lodged within 28 days of the accident provides early injury notification to the insurer and enables the injured person to access up to \$500 in medical treatment, pharmaceutical and rehabilitation expenses.

The bill expands the early notification and payment process to provide claimants with more minor injuries the option of a simplified process for the recovery of up to \$5000 in treatment expenses and lost earnings. This initiative will provide a fast-track process for more efficiently resolving small claims.

The bill also introduces processes to promote the earlier resolution of motor accident injury claims in disputed cases by requiring claimants and Green Slip insurers to co-operate with each other in exchanging information about claims and to participate in settlement conferences before claims can be referred for dispute resolution.

In cases where settlement is unable to be achieved through these new processes, these negotiations will assist the parties to narrow the issues in dispute prior to referring the matter for dispute resolution.

The bill also streamlines processes relating to the operation of the Motor Accidents Authority's Motor Accidents Assessment Service, which comprises the Medical Assessment Service and the Claims Assessment and Resolution Service.

The Medical Assessment Service and the Claims Assessment and Resolution Service were established as part of the Government's 1999 reforms to the motor accidents scheme to facilitate the resolution of motor accident claims without the need to resort to litigation.

The Medical Assessment Service provides an independent forum for assessing disputes between insurers and injured people concerning an injured person's medical treatment and impairment. Assessment is by way

of referral to expert medical specialists and other health care professionals.

The Claims Assessment and Resolution Service resolve claims outside of the court system and deal with all disputed motor accident claims as a precondition to commencing court proceedings.

These changes flow from close examination and review of the motor accidents claims process and the dispute resolution services against a background of more than seven years experience now with the operation of the reformed scheme.

The Motor Accidents Authority has also engaged in extensive consultation with representatives from the insurance industry, legal profession, medical assessors and claims assessors in order to identify strategies to improve the operation of the Motor Accidents Assessment Service.

This consultation has identified a number of procedural and process changes to promote greater scheme efficiency as well as facilitate earlier resolution of motor accident claims.

I now turn to the main provisions of the bill.

The bill makes amendments to the Motor Accidents Compensation Act 1999 to promote the earlier resolution of motor accident injury claims. The bill also makes several miscellaneous amendments to the Act to improve the operation of the motor accidents scheme.

Clauses [6]-[17] of the bill amend Part 3.2 of the Act dealing with early accident notification and payments.

The amendments will simplify the claim process for motor accident victims with more minor injuries. The bill extends the early payment provisions to include payment for lost earnings in addition to treatment expenses. The maximum limit on early payments is increased from \$500 to \$5000.

To support this expansion the bill also repeals section 124 of the Act, which excludes recovery of the first five days economic loss. Economic loss will now be recoverable from the first day of lost earnings.

This expansion will operate within the framework currently applying for the early accident notification process. If within the early accident notification period the injured person lodges a full claim, then the claim will take precedence.

Clauses [18]-[36] of the bill amend Part 3.4 of the Act dealing with medical assessments.

The bill clarifies a number of procedural issues relating to medical assessments including the processes for referral of disputes for medical assessment and further assessment, the correction of obvious errors in assessment certificates, the conduct of review assessments and makes provision for issuing combination certificates in cases of multiple injuries which require assessment by more than one medical assessor to determine the extent of a person's permanent impairment.

The bill also refines the dispute jurisdiction of the Medical Assessment Service to focus on its core functions of dealing with disputes about treatment for motor accident injuries and assessment 7 of permanent impairment. The Medical Assessment Service will discontinue dealing with matters about impairment of earning capacity and injury stabilisation—other than consideration of whether an injury has stabilised to enable an assessment of the extent of permanent impairment to be determined.

The bill also provides statutory recognition of the Medical Assessment Service and makes it absolutely clear that medical assessors are not subject to the control or direction of the Motor Accidents Authority in the exercise of their assessment functions.

The bill also enables the Medical Assessment Service to recoup the administrative costs associated with medical assessments. This may include, for example, costs associated with the processing of applications involving non-New South Wales insurers.

To overcome unnecessary disputation, the bill provides for the regulation of reimbursement rates for claimants' travel expenses.

Clauses [37]-[77] of the bill amend Chapter 4 of the Act relating to motor accident claims. Clauses [37]-[42] are largely clarifying amendments of existing provisions dealing with disputes about preliminary claims matters such as reporting the accident to police, late claims and the notice of claim.

Amendments proposed by clauses [43]-[55] clarify the duties of the parties in relation to the claim. Clause [47] provides for the Authority's medical guidelines to approve what constitutes reasonable treatment, rehabilitation and attendant care for the purposes of an insurer's obligation to pay for an injured person's reasonable and necessary treatment, rehabilitation and care expenses.

Clause [50] imposes a new obligation on insurers, in matters where liability has been admitted, to make advance payments of economic loss entitlements in cases of economic hardship.

Clause [51] clarifies a claimant's duty to provide all relevant particulars about the claim as expeditiously as possible and introduces a procedure to deal with inactive claims. This new procedure enables an insurer to issue an approved notice requiring the claimant to provide relevant particulars about the claim after two years and six months from the date of the accident.

If the claimant does not comply with the notice, the claimant is taken to have withdrawn the claim. A claimant will, however, have a right to apply for reinstatement of the claim, subject to a satisfactory explanation for their delay.

Clause [57] places new obligations on the parties to a claim to exchange documentation about the claim, participate in a settlement conference and exchange offers of settlement before the claim can be referred to the Claims Assessment and Resolution Service for assessment of the claim.

The bill also provides that only those documents that have been exchanged by the parties may be included in a claims assessment. If one party refuses to co-operate and fails to exchange documents or participate in the settlement conference, a claims assessor may, in assessing costs, impose a costs penalty of up to 25 per cent on that party.

The bill also provides for the regulations to prescribe time frames in which an insurer is to pay compensation entitlements assessed by a claims assessor once the assessment has been accepted by the claimant.

The bill expands the interim or special dispute jurisdiction of the Claims Assessment and Resolution Service to assist the continued progress of claims.

Claims assessors may now also consider procedural disputes about:

- interim payments of economic loss in cases of financial hardship;
- whether due inquiry and search about the identity of a vehicle has been made where a claim is made against the Nominal Defendant arising from an accident involving an unidentified vehicle;
- whether an insurer is entitled to require the claimant to provide relevant particulars about a claim; and
- reinstatement of a claim taken to have been withdrawn.

The bill extends the powers of claims assessors to require information about a claim. Currently a claims assessor can direct a claimant or insurer to provide information and documents that the assessor considers relevant to the claim.

The bill enables a claims assessor to direct a third party to produce specified information or documents that are considered relevant to a claim.

The bill also provides for the position of Principal Claims Assessor as a statutory office, with remuneration determined by the Statutory and Offices Remuneration Tribunal.

Finally, the bill makes several miscellaneous reforms to the motor accidents scheme.

The bill makes clear that 'as incurred' payments made by insurers are subject to apportionment when there is a finding of contributory negligence which requires a proportionate reduction in the damages awarded.

The bill clarifies that the Act's provisions for damages for personal injury arising from motor vehicle accidents in New South Wales is part of the substantive law of the State. This amendment is necessary to protect the motor accidents scheme from the impacts of overseas awards of damages in excess of the compensation entitlements provided in the New South Wales scheme.

The bill also provides that an insurer is not required to pay damages to the extent those damages exceed entitlements provided by the Act and has a right to recover any excess if an award exceeds entitlements provided by the Motor Accidents Compensation Act.

The New South Wales scheme is fully-funded from Green Slip premiums. If insurers are exposed to liability for awards in other jurisdictions which exceed entitlements provided by the New South Wales scheme, this will impact on Green Slip premiums for the motorists of this State.

The bill also provides that for the purposes of the motor accidents scheme the standard of care required of the driver of a motor vehicle is not affected by the driver's skill or experience.

This amendment responds to the decision of the High Court in the case of *Cook v Cook* where the Court determined that the standard of care expected of an inexperienced driver, such as a learner driver, is different to the standard of care ordinarily expected of a driver in relation to their passengers. The High Court reasoned that a supervising passenger, for example, is aware that a learner driver is less skilled and inexperienced.

It is not desirable that the costs of injury to an instructor or supervisor from an accident caused by the actions of a learner driver could be borne primarily by the injured person, a parent for example, depending on the view of a court as to the standard of care required of the particular learner driver.

This amendment will ensure that such injuries are covered by the Green Slip scheme.

In conclusion, I reiterate that the reforms proposed by the bill make further improvements to the claims and dispute resolution processes operating under the Motor Accidents Compensation Act.

The changes will promote speedier resolution of motor accident matters which will result in injured people finalising their claims and receiving compensation payments earlier. The changes will also create greater certainty in the underwriting of claims by insurers and therefore promote stability in Green Slip premiums for motorists.

I commend the bill to the House.

The Hon. MATTHEW MASON-COX [1.57 a.m.]: I lead for the Opposition on the Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill 2007, which amends the Motor Accidents (Compensation) Act 1999 to improve efficiency in claims and dispute resolution. By way of background, the Motor Accidents Compensation Act 1999 was introduced to overhaul the New South Wales Motor Accidents Scheme, which is regulated by the Motor Accidents Authority. The 1999 reforms included the establishment of the Medical Assessment Service and the Claims Assessment and Resolution Service to resolve disputes without the need for litigation. Those services operate under the auspices of the Motor Accidents Authority.

The New South Wales Parliament's Standing Committee on Law and Justice recently reviewed the Motor Accidents Authority and found that medical dispute assessments can remain within the authority system for years rather than months. As has been noted in the other place, the Government believes the amendments will enable people involved in motor vehicle accidents to resolve their claims and disputes more quickly, thereby reducing their cause for litigation. By and large, the Opposition agrees with that assessment.

I now turn to the major amendments in the bill. These include expanding the early notification and payment process so that claimants with minor injuries can receive up to \$5,000, which is an increase from \$500; removing the provisions in the 1999 Act which state that the insurer does not have to pay for the first five days of lost earnings; requiring insurers to provide advance payments when liability is admitted to claimants experiencing financial hardship; obliging claimants and insurers to participate in settlement conferences prior to claims being referred for dispute resolution; extending the power of claims assessors to obtain information about a claim; and abolishing the rule in the case of *Cook v Cook* so that an inexperienced driver has the same standard of care as an ordinary driver.

The Opposition understands there are some concerns about aspects of the bill, although most of the amendments are of a procedural nature. The New South Wales Bar Association has raised concerns about the powers of the Claims Assessment and Resolution Service to obtain information. Although they are legitimate concerns, the Opposition believes that given the tenor of the bill it will not oppose it in its current form.

Dr JOHN KAYE [2.00 a.m.]: I find it highly alarming that we are dealing with this complex legislation at almost 2.00 a.m.

The Hon. Michael Costa: Can't you cut it?

Dr JOHN KAYE: Perhaps I can, but that is not the point. The point is that we owe it to the people of New South Wales not only to do a good job but also to appear to be doing so. I fail to see how any reasonable person would imagine that any member—regardless of his or her robustness—could give reasonable consideration to a complex piece of legislation at this hour. This legislation follows the 1999 overhaul of the Motor Accidents Compensation Scheme. The objective of those reforms was largely positive. They involved the early treatment and rehabilitation of people injured in motor vehicle accidents, the fast-tracking of accident notification within 28 days and access to early treatment costs. The overall objective of the reforms was to reduce litigation by using a medical and claims dispute resolution technique. This bill expands on the earlier provisions with regard to early notification and payment. A positive feature of this bill is that it increases the preliminary payment from \$500 to \$5,000. That is important because it will ease the financial stress that victims of motor vehicle accidents experience by providing easy access to a reasonable amount of money.

The bill will allow coverage for the first five days of economic loss, which is important. It introduces penalties for late payments on claims assessment resolution scheme [CARS] payments. It abolishes the *Cook v Cook* ruling,

which effectively excludes learner drivers, and it contains a number of other provisions which are largely positive. These are all advances on the rights of injured people. Hopefully, they will produce better outcomes for those people. However, a number of provisions in the bill will add complexity to the process. They will increase barriers for those who are least capable of dealing with complexity, and increase the need for legal advice and representation. Indeed, to that extent the amendments will work against the intent of the legislation. In making my remarks I am relying heavily on the joint submission from the legal profession—the New South Wales Bar Association, the Law Society of New South Wales and the Australian Lawyers Alliance.

The Hon. Amanda Fazio: Plaintiff lawyers by another name.

Dr JOHN KAYE: There is nothing wrong with that.

The Hon. John Della Bosca: With a second Jaguar.

Dr JOHN KAYE: How many Jaguars does the Minister have? The legal profession has analysed the bill in detail and raised a number of specific concerns. I should point out to those who are interjecting that this was self-pleading on behalf of the lawyers that their analysis is that these amendments will not decrease but increase the amount of legal time involved in the claims assessment resolution scheme process. Indeed, they are blowing the whistle on increased funds for themselves. The claims assessment resolution scheme is evolving, and as it has evolved the delays have decreased, largely as a result of higher settlement rates. The problems with long delays early in the scheme have largely been fixed, and it must be said that delays are no longer highly significant.

The problem is that some provisions in the bill have been identified in the joint submission from the legal profession as showing that they will increase delays. In particular, they identified new section 70, which contains tougher provisions in relation to notifications; new section 91 (1) (a), which gives the claims assessment resolution scheme assessor the power to determine whether there has been a new search and inquiry on claims brought against the nominal defendant—these matters should be dealt with at trial, where such matters are more appropriately analysed—and new section 89A, which mandates a compulsory settlement conference before a claims assessment resolution scheme application is lodged.

The bill provides penalties for failure to disclose all documents and if a written offer of settlement is not provided within 14 days. This will create more legal work, not less, and it will create a level of complexity for injured people that will act as a barrier for those who are not capable of dealing with such complexity. New section 85B provides that insurers can demand all relevant particulars once 2½ years have elapsed since the accident. The bill does not specify what information is required, yet non-compliance with the provisions will lead to presumed withdrawal and significant penalties, with a possible prohibition on reinstatement of the claim. We understand that, effectively, an error made under new section 85B will lead to injured people being shut out from the motor accident compensation area.

New section 94A provides that a claims assessment resolution scheme assessor may assess costs, and it creates a right of appeal against an assessor's determination of costs. In practice only insurers will have the resources and the ability to avail themselves of the appeals process provided in new section 94A. The issues I have raised will increase the complexity of the scheme. One issue that the Greens think is highly significant—I will pick up this issue in Committee—are the amendments relating to the proposed subpoena powers provided in section 100. The amendments effectively enable the claims assessment resolution scheme assessor to subpoena documents, first, by requiring claimants to furnish authorities to the assessor and, second, by directing any non-party to furnish documents or information relevant to a claim.

That creates three key problems with the legislation. The first is that the powers granted to a claims assessment resolution scheme assessor are wide ranging, and nowhere in the bill is the idea of relevance to the claims assessment resolution scheme defined. Almost anything can be relevant to a claim under the scheme. Health issues, criminal convictions, alleged domestic violence, the need to care for an ailing spouse, domestic violence orders—all those matters could be deemed to be relevant issues, yet they could violate the privacy of the complainant. There is also potential conflict with privacy provisions in other legislation. For example, an assessor could issue an order for the complainant to fill in and submit a freedom of information request to, say, the Health Insurance Commission, Centrelink or the Australian Taxation Office.

Compelling a complainant to submit a freedom of information authority does not break the law in terms of the privacy provisions for the Health Insurance Commission, Centrelink and the Taxation Office, but the privacy provisions within those bodies will effectively be undermined. The same applies to the police, the Department of Community Services and doctors. It is possible for an assessor to compel a complainant to submit a freedom of information authority to the police or the Department of Community Services, or to provide information from his or her doctor. The amendments to section 100 undermine privilege. There is no provision to protect client privilege with respect to counselling, legal client privilege or confessional privilege. We are concerned that these provisions will effectively undermine a right to privacy.

These coercive powers should not be vested in the claims assessment resolution process where, for example, the

compulsory third party insurer is not bound to respect the confidentiality and privacy of the documents being produced. An insurer is not bound by the same ethical obligations that apply to legal practitioners who obtain documents under subpoena. We are concerned that the amendments to section 100 will, either advertently or inadvertently, undermine a number of important principles of privilege and privacy. Apart from those issues, the Greens are of the view that the bill is an advance over the current situation, and we will not oppose it. However, we will seek to delete the amendments to section 100, which would create the subpoena power of claims assessment resolution scheme assessors.

The Hon. JOHN DELLA BOSCA (Minister for Education and Training, Minister for Industrial Relations, Minister for the Central Coast, and Minister Assisting the Minister for Finance) [2.08 a.m.], in reply: I thank members for their contributions, and I commend the bill to the House.

Question—That this bill be now read a second time—put and resolved in the affirmative.

Motion agreed to.

Bill read a second time.

In Committee

Clauses 1 to 5 agreed to.

Dr JOHN KAYE [2.10 a.m.], by leave: I move Greens amendments Nos 1 to 6 in globo:

No. 1 Page 24, schedule 1 [69], lines 28-34 and page 25, lines 1 and 2. Omit all words on those lines.

No. 2 Page 25, schedule 1 [70], lines 3-17. Omit all words on those lines.

No. 3 Page 25, schedule 1 [71], lines 18 and 19. Omit all words on those lines.

No. 4 Page 25, schedule 1 [72], lines 20 and 21. Omit all words on those lines.

No. 5 Page 25, schedule 1 [73], lines 22-29. Omit all words on those lines.

No. 6 Page 25, schedule 1 [74], lines 30 and 31. Omit all words on those lines.

I spoke to these amendments during the second reading stage. They remove the changes to section 100 of the Act that would create an effective subpoena power for the Claims Assessment Resolution Scheme assessors. I outlined the reasons for the amendments during the second reading stage, which were basically that the proposed subpoena powers will undermine the privacy rights with respect to federal bodies such as the Health Insurance Commission, Centrelink or the Australian Taxation Office, they will undermine privacy with respect to police, the Department of Community Services and medical service providers, they will undermine privilege with respect to counselling, legal client privilege and confessional privilege, and they will create a wide range of powers for assessors which are more appropriately dealt with when the matter gets to court.

Where material produced by those assessors is going to end up with compulsory third party insurers, giving effective subpoena powers is taking documents out of the legal domain and putting them into the hands of organisations and individuals that are in no way bound to respect the privacy or confidentiality of the documents. To that extent it is inappropriate to have subpoena powers at the assessor stage. If those documents are required, it is more appropriate to have those matters dealt with by a court where those sorts of ethical responsibilities would obtain to the people who were given access to the documents. I commend the Greens amendments to the Committee.

The Hon. JOHN DELLA BOSCA (Minister for Education and Training, Minister for Industrial Relations, Minister for the Central Coast, and Minister Assisting the Minister for Finance) [2.13 a.m.]: The Act currently makes provision for claims assessors to direct the parties to a claim to provide documents relevant to the claim. Unfortunately, often parties experience difficulties or delays in obtaining those documents or they are unsuccessful in obtaining them. On occasions that might be thought of as legal strategy—for example, when a treating medical practitioner will not prepare a report or an employer is not forthcoming with payroll or other employment records. Obviously, this delays progress of the claim and prevents resolution, and requires the injured person or the insurer to make repeated requests to third parties in an effort to obtain the information.

The new provisions provide the assessor with additional power to require a third party, such as the injured person's doctor or employer, to provide documents that are relevant to the claim. I stress that the proposed amendment fits into the existing section 100 framework. Currently, the Act provides for a reasonable excuse for the failure to produce information or a document in compliance with an assessor's direction. In addition, section 100 (4) enables the making of regulations exempting specific types of documents or information in specified cases

or circumstances in which a claims assessor is required to exercise powers under this section.

The amendments proposed to section 100 will assist both parties in obtaining relevant claims information in circumstances where a third party does not cooperate with the direct request for information from the claimant or the insurer. The provisions will also enable more matters to remain within the less formal claims assessment and resolution service framework rather than parties seeking exemption and commencing court proceedings in order to have subpoena powers to obtain their information. For that reason the Government opposes the Greens' amendments.

The Hon. MATTHEW MASON-COX [2.15 a.m.]: The Opposition also opposes these amendments for reasons so well and extensively put by the Minister.

Dr JOHN KAYE [2.15 a.m.]: In response to the Minister and the echo that came from the Opposition, in the first instance if the problems outlined by the Minister exist, the Government is beholden to come up with solutions to those problems which do not do such violence to issues such as privilege, confidentiality and privacy. The problem with the issue of reasonable excuse, on which a lot of this turns, and the provisions within existing section 100, which allow claimants to use reasonable excuse as a way of avoiding these orders, is that where an assessor orders a claimant to submit a freedom of information request to, for example, the Health Insurance Commission, our understanding is that it is not a reasonable excuse because no law is being broken. It is not as if a claimant submitting a freedom of information requirement in any way violates a law. Therefore, we are unconvinced by the reasonable excuse clause and we commend the amendments to the Committee.

Question—That Greens amendments Nos 1 to 6 be agreed to—put.

The Committee divided.

Ayes, 4

Mr Cohen Ms Hale	
<i>Tellers,</i> Dr Kaye Ms Rhiannon	

Noes, 25

Mr Ajaka Mr Brown Mr Clarke Mr Colless Mr Costa Mr Della Bosca Ms Ficarra Mr Gay Ms Griffin	Mr Hatzistergos Mr Kelly Mr Khan Mr Lynn Mr Mason-Cox Reverend Nile Ms Parker Mr Pearce Mr Primrose	Ms Robertson Ms Sharpe Mr Veitch Ms Voltz Ms Westwood <i>Tellers,</i> Mr Donnelly Mr Harwin
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Question resolved in the negative.

Amendments negated.

Schedule 1 agreed to.

Schedule 2 agreed to.

Title agreed to.

Bill reported from Committee without amendment.

Adoption of Report

Motion by the Hon. John Della Bosca agreed to: Motion by the Hon. John Della Bosca agreed to:

That the report be adopted.

Report adopted.

Third Reading

Motion by the Hon. John Della Bosca agreed to:

That this bill be now read a third time.

Bill read a third time and returned to the Legislative Assembly without amendment.

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