



New South Wales

# Motor Accident Injuries Amendment Bill 2013

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Motor Accidents Compensation Act 1999* as follows:

- (a) The Bill establishes a new scheme for the payment by insurers of no-fault statutory benefits for motor accidents. Statutory benefits will include weekly payments during incapacity for work, payment of treatment and care expenses and payment of lump sum benefits for persons suffering permanent impairment of greater than 10%.
- (b) Common law damages will be recoverable only for past and future loss of earnings and non-economic loss. No damages will be recoverable unless permanent impairment is greater than 10% (which is the threshold currently applicable to non-economic loss damages).
- (c) Maximum net weekly earnings for the purposes of an award of damages will be reduced to the level of the maximum weekly statutory benefit amount (which in turn is limited to the maximum weekly workers compensation amount).

- (d) The Motor Accidents Claims Assessment and Resolution Service (CARS) will have exclusive jurisdiction in respect of claims for statutory benefits, subject to a right of appeal to the Supreme Court on a question of law.
- (e) Claims for statutory benefits that are unresolved after 2 years (or 1 year after a late claim is made) will be subject to review and direction by CARS to facilitate their finalisation.
- (f) The insurer who is liable for a claim for statutory benefits will be appointed as the agent of the insurer of an at-fault vehicle to handle any related damages claim (so that a claimant claiming both statutory benefits and damages will deal with the one insurer).
- (g) Transitional provisions will facilitate the adjustment of third-party premiums for up to 3 years after the commencement of the new no-fault statutory benefits scheme to avoid excess profits and losses arising from the effect on cost of claims of the new scheme and to apply any unearned premium surplus in reduction of premiums.
- (h) The office of CTP Independent Review Officer will be established with functions including dealing with complaints about insurers and reviewing earnings decisions of insurers in relation to statutory benefits claims.
- (i) A claim for damages will not be able to be settled unless the claimant is legally represented or the settlement is approved by a claims assessor.
- (j) The regulations will be able to prescribe standard rates of deduction from damages for contributory negligence.
- (k) Generally, legal costs will not be recoverable for statutory benefits claims. Regulations fixing maximum costs for legal services will be permitted to fix maximum costs by reference to the amount recovered by the claimant.
- (l) CARS claims assessors will be given power to summon and compel witnesses.
- (m) The time within which a claim for damages must be made will be extended from 6 months to 12 months after the motor accident. A claim for statutory benefits will also be required to be made within 12 months.
- (n) Existing provisions that require the parties to a claim for damages to participate in a settlement conference and exchange the documents on which they propose to rely for the purposes of the CARS assessment of the claim will be repealed. The parties to the claim will be required to use their best endeavours to settle the claim before referring it for CARS assessment. A party will be required to give at least 42 days' notice of intention to refer a claim for assessment and a claim will not be able to be referred for assessment more than 3 years after the motor accident unless there is a full and satisfactory explanation for the delay.
- (o) Provisions for insurers to file their third-party premiums for consideration by the MAA will be amended to provide greater flexibility in the arrangements for the filing and commencement of premiums.

- (p) The factors to be used in the calculation of a fully funded premium for a third-party policy will be modified to ensure that insurer costs and expenses and estimates of claims costs and expenses are reasonable. The relevant MAA guidelines will have an enhanced role in the determination of whether a premium will fully fund liabilities.
- (q) The matters for which the various MAA guidelines can make provision under the Act will be expanded and existing provisions for mandatory consultation will be made optional.
- (r) A new duty to act in the utmost good faith will be imposed on claimants and insurers and a new duty to minimise loss will be imposed on a claimant.
- (s) Funding arrangements for the Motor Accidents Authority Fund and the Lifetime Care and Support Authority Fund will be revised to provide for the MAA to determine and collect the levy required to fund both Funds. The payment of grants to the Lifetime Care and Support Authority Fund from the Motor Accidents Authority Fund will be authorised if that Fund is in surplus.
- (t) Other minor and consequential amendments will be made and the name of the Act will be changed.

The Bill also makes consequential amendments to the *Motor Accidents (Lifetime Care and Support) Act 2006*, the *Civil Liability Act 2002* and the *Motor Accidents Compensation Regulation 2005*.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation, except for savings and transitional provisions (which will commence on the date of assent).

## **Schedule 1      Amendment of Motor Accidents                                  Compensation Act 1999 No 41**

### **Amendments to Chapter 1 (Preliminary)**

**Schedule 1 [1]–[16]** make the following amendments to Chapter 1:

- (a) The name of the Act is changed.
- (b) Changes that are consequential on the new no-fault statutory benefits scheme are made to various provisions and new definitions are inserted.
- (c) Existing provisions for no-fault recovery by children are repealed because they are superseded by the new no-fault statutory benefits scheme.
- (d) The provisions for blameless motor accidents are amended to make it clear that an injured person is not entitled to recover damages for a blameless motor accident where the person caused the motor accident (even though not “at

fault”). The amendment addresses an issue raised by the Court of Appeal in *Axiak v Ingram* [2012] NSWCA 311.

### **Amendments to Chapter 2 (Third-party insurance)**

**Schedule 1 [17]–[34]** make the following amendments to Chapter 2:

- (a) Information sharing requirements are expanded to authorise RMS to provide vehicle and driver information that is requested by insurers for use in connection with issuing and quoting for third-party policies and to require provision of that information to the MAA on request.
- (b) The power to issue MAA Premiums Determination Guidelines is changed to make it clear that the power can be used to respond to any provision in the Act that authorises or requires matters to be the subject of those Guidelines.
- (c) The requirement for the approval of the Safety, Return to Work and Support Board for changes to the MAA Premiums Determination Guidelines is removed.
- (d) The premium filing arrangements for insurers are amended for the following purposes:
  - (i) to make it clear that 2 or more insurers can jointly file premiums,
  - (ii) to provide flexibility in the period within which the MAA must decide whether to reject a proposed premium and to provide flexibility for insurers by allowing insurers to nominate a proposed commencement date for the commencement of a new premium,
  - (iii) to allow the relevant MAA guidelines to provide for when premiums must be filed and how often they can be filed, and for the payment of fees in connection with premium filing.
- (e) All acquisition and policy administration expenses of insurers, cost of claims and settlement expenses used in the calculation of a fully funded premium will be required to be reasonable.
- (f) The relevant MAA guidelines are to have an expanded role in the determination of whether a premium will fully fund liabilities and whether it is excessive.
- (g) It is made clear that the regulations for giving effect to premium risk adjustment arrangements can impose obligations and liabilities on insurers in connection with those arrangements.
- (h) The requirement for the approval of the Minister before the MAA can make premium risk adjustment arrangements a condition of an insurer licence is removed.
- (i) Specific limits on the amount of agents’ commission that can be taken into account in the determination of third-party premiums are removed (as a consequence of the enhanced role of the relevant MAA guidelines to provide for this matter).

---

**Amendments to Chapter 3 (Motor accident injuries)**

**Schedule 1 [35]–[67]** make the following amendments to Chapter 3:

- (a) The MAA Medical Guidelines are to be authorised to provide for the matters to be taken into account in determining whether treatment and care to be provided to an injured person is reasonable and necessary.
- (b) Consultation on proposed changes to the MAA Medical Guidelines will no longer be mandatory.
- (c) Existing provisions for the early payment of treatment expenses and lost earnings (in the context of a claim for common law damages) are repealed because the new scheme for no-fault statutory benefits makes them redundant.
- (d) The Act will state the objects of the Motor Accidents Medical Assessment Service.
- (e) The power of a medical assessor to determine a dispute about whether treatment and care is reasonable and necessary is clarified so that it includes power to specify the particular treatment and care that is reasonable and necessary.
- (f) The dispute resolution jurisdiction of medical assessors is expanded to include disputes about whether an injury was caused by a motor accident.
- (g) Persons appointed as medical assessors will be required to be registered health practitioners under the *Health Practitioner Regulation National Law (NSW)*.
- (h) Medical disputes in claims for no-fault statutory benefits will only be able to be referred to a medical assessor by a claims assessor (unless the dispute is about the degree of permanent impairment).
- (i) A medical dispute about permanent impairment will be able to be refused access to medical assessment if the party referring the dispute for assessment has not provided sufficient evidence in support of the degree of permanent impairment asserted by the party.
- (j) Provisions for the assessment of the degree of permanent impairment that results from an injury are relocated and provision is made for the interim assessment of permanent impairment for the purposes of a claim for no-fault statutory benefits when a medical assessor is unable to assess permanent impairment because impairment has not yet become permanent.
- (k) Provision that allows a court hearing a claim for damages to substitute the court's own determination of the degree of permanent impairment is repealed (requiring the matter to be referred for further assessment by a medical assessor).
- (l) A medical dispute will not be able to be referred for further medical assessment except on the grounds of additional relevant information that is capable of having a material effect on the outcome of the previous assessment.
- (m) The parties to a medical dispute that is referred for further assessment or review will be able to agree on the degree of permanent impairment resulting

from a particular injury and whether a particular injury was caused by a motor accident.

- (n) The number of medical assessors required to constitute a review panel is reduced from 3 to 2.
- (o) A claims assessor will be authorised to refer a medical issue to a medical assessor for a non-binding opinion for the assistance of the claims assessor.
- (p) The reasonable and necessary costs and expenses incurred by a claimant in obtaining medical reports in connection with a medical assessment will be payable by the insurer.
- (q) The MAA will be authorised to publish details of the decisions of medical assessors.

### **New Chapter 3A (No-fault statutory benefits)**

**Schedule 1 [68]** inserts new Chapter 3A which establishes a scheme for the payment by motor accident insurers of no-fault statutory benefits for motor accidents, with the following features:

- (a) Statutory benefits will be payable in respect of the death of or injury to a person resulting from a motor accident. Statutory benefits will be payable whether or not the motor accident was the fault of any person. Statutory benefits will be payable by the *relevant insurer*, which is the third-party insurer of the vehicle in which the person killed or injured was travelling as either driver or passenger or a third-party insurer nominated by the MAA in any other case. Statutory benefits are only payable if the motor accident occurs in New South Wales and after the commencement of the new scheme.
- (b) Statutory benefits for death are limited to payment of funeral expenses.
- (c) Weekly payments of statutory benefits will be payable to an injured person during any period of incapacity for work. Weekly payments will cease 5 years after the motor accident unless the injured person has a degree of permanent impairment of greater than 20%.
- (d) Statutory benefits will be payable for the reasonable cost of treatment and care that is provided to an injured person if it is reasonable and necessary that the treatment and care be provided. No statutory benefits are payable for gratuitous attendant care services. Statutory benefits for treatment and care will cease 5 years after the motor accident unless the injured person has a degree of permanent impairment of greater than 10%.
- (e) Lump sum statutory benefits will be payable to an injured person with a degree of permanent impairment of greater than 10%.
- (f) The scheme provides for the redemption of a claim for statutory benefits by payment of a lump sum that will extinguish all statutory benefits liabilities. Redemption of a claim requires the agreement of the parties or the approval of a claims assessor.

- (g) The process for the resolution of disputes about statutory benefits requires internal review by an insurer before a dispute can be referred to a claims assessor for binding determination.
- (h) The CTP Independent Review Officer will also be able to review decisions by insurers about an injured person's earning capacity and make recommendations for the improvement of insurer procedures.
- (i) Claimants will be able to recover their reasonable and necessary costs and expenses incurred in connection with a claim, except for legal costs. Legal costs will usually not be payable or recoverable by a party.
- (j) Statutory benefits will not be payable to an injured person who is entitled to claim workers compensation for the injury. An at-fault driver will not be entitled to statutory benefits if his or her vehicle is uninsured. No statutory benefits will be payable to a person who is charged with or convicted of a serious driving offence.
- (k) Claims assessors will have exclusive jurisdiction to examine, hear and determine all matters arising in connection with a claim for statutory benefits, subject to a right of appeal to the Supreme Court on a question of law.

#### **Amendments to Chapter 4 (Motor accident claims)**

**Schedule 1 [69]–[137]** make the following amendments to Chapter 4:

- (a) Consultation on proposed changes to the MAA Claims Handling Guidelines and Claims Assessment Guidelines will no longer be mandatory.
- (b) New general duties to act in the utmost good faith will be imposed on both claimants and insurers and a new duty to minimise loss will be imposed on claimants.
- (c) The process for making a claim for damages is adapted for the making of a claim for statutory benefits. Both kinds of claim will require the police accident report that is currently required for a claim for damages. A claim for statutory benefits will also require provisional notice of the claim to be given to the insurer. Shorter time-frames are provided for the handling of claims for statutory benefits by insurers, to expedite payment of statutory benefits.
- (d) A claim for statutory benefits or damages will be required to be made within 12 months after the motor accident. Currently a claim for damages must be made within 6 months after the accident. Provision for the making of a late claim for statutory benefits will require there to be a reasonable cause for the delay, with a maximum claim period of 3 years after the accident (or longer in the case of death or greater than 10% permanent impairment).
- (e) Provision is made for extending a claim for statutory benefits to a claim for damages.
- (f) The insurer against whom a claim for statutory benefits is made is appointed to act as the agent of the insurer of an at-fault vehicle for the purposes of

handling and satisfying a claim for damages made against the insurer of the at-fault vehicle.

- (g) Provision is made for a costs penalty of up to 25% to be imposed on insurers who fail to admit liability for a claim for statutory benefits or damages if there was no reasonable basis for the failure.
- (h) A claim for damages will not be able to be settled unless the claimant is legally represented or the settlement is approved by a claims assessor.
- (i) Claims for statutory benefits that are unresolved after 2 years will be subject to review and direction by CARS to facilitate their finalisation.
- (j) Existing provisions that establish CARS are transferred to Chapter 4 and modified to provide for the CARS jurisdiction in respect of claims for statutory benefits.
- (k) Claims assessors are given power to summon and compel witnesses.
- (l) Existing provisions that require the parties to a claim for damages to participate in a settlement conference and exchange the documents on which they propose to rely for the purposes of the CARS assessment of the claim are repealed. The parties to the claim will be required to use their best endeavours to settle the claim before referring it for CARS assessment. A party will be required to give at least 42 days' notice of intention to refer a claim for assessment and a claim will not be able to be referred for assessment more than 3 years after the motor accident unless there is a full and satisfactory explanation for the delay.
- (m) An unintended limitation on the extent to which CARS assessments of certain disputes are binding on the parties is removed to make it clear that dispute determinations are binding.
- (n) An assessor will be permitted to determine the amount of a hardship payment when determining a dispute about whether a hardship payment should be made.
- (o) The MAA will be authorised to publish details of claims assessor decisions.

#### **Amendments to Chapter 5 (Award of damages)**

**Schedule 1 [138]–[149]** make the following amendments to Chapter 5:

- (a) Damages will only be recoverable for past and future loss of earnings and for non-economic loss.
- (b) No damages will be recoverable unless permanent impairment is greater than 10% (which is the existing threshold requirement for an award of damages for non-economic loss).
- (c) Maximum net weekly earnings for the purposes of an award of damages will be reduced to the level of the maximum weekly statutory benefit amount (which in turn is limited to the maximum weekly workers compensation amount).



- (d) The regulations will be able to prescribe standard rates of deduction from damages for contributory negligence.

#### **Amendments to Chapter 6 (Costs)**

**Schedule 1 [150] and [151]** make the following amendments to Chapter 6:

- (a) Regulations fixing maximum costs for legal services will be permitted to fix maximum costs by reference to the amount recovered by the claimant.
- (b) The regulations will be able to require parties to a claim to share information about legal costs payable by the parties.

#### **Amendments to Chapter 7 (Insurers)**

**Schedule 1 [152]–[154]** make the following amendments to Chapter 7:

- (a) It will be made clear that a condition of an insurer licence can limit the kinds of third-party policies that a licensed insurer can issue.
- (b) The MAA will be authorised to publish information about licensed insurers relating to compliance, premium pricing, profitability, performance comparisons and other matters of public interest.
- (c) Government bodies will be able to be approved as self-insurers so they can issue third-party policies for their own vehicles and those of other government bodies.

#### **Amendments to Chapter 8 (Administration)**

**Schedule 1 [155]–[164]** make the following amendments to Chapter 8:

- (a) The office of CTP Independent Review Officer is established with functions including dealing with complaints about insurers and reviewing earnings decisions of insurers in relation to statutory benefits claims.
- (b) Funding arrangements for the Motor Accidents Authority Fund and the Lifetime Care and Support Authority Fund are revised to provide for the MAA to determine and collect the levy required to fund both Funds, and to authorise the payment of grants to the Lifetime Care and Support Authority Fund from the Motor Accidents Authority Fund if that Fund is in surplus.

#### **Other amendments**

**Schedule 1 [166]** provides for the making of savings and transitional regulations.

**Schedule 1 [167]** enacts savings and transitional provisions which provide that in general the amendments made by the Bill will not apply to a motor accident that occurs before commencement of the amendments. A transitional provision will facilitate the adjustment of third-party premiums for up to 3 years after the commencement of the new no-fault statutory benefits scheme, to avoid excess profits and losses arising from the effect on cost of claims of the new scheme and to apply any unearned premium surplus in reduction of premiums.

**Schedule 2      Amendment of Motor Accidents  
(Lifetime Care and Support) Act 2006  
No 16**

**Schedule 2** amends provisions of the *Motor Accidents (Lifetime Care and Support) Act 2006* relating to funding arrangements for the Lifetime Care and Support Authority Fund as a consequence of the fact that the MAA will determine and collect the levy required to fund the Fund.

**Schedule 3      Amendment of Civil Liability Act 2002  
No 22**

**Schedule 3** modifies the application of the *Civil Liability Act 2002* in relation to motor accidents (to disapply provisions about damages for loss of capacity to provide domestic services and about loss of superannuation entitlements).

**Schedule 4      Amendment of Motor Accidents  
Compensation Regulation 2005**

**Schedule 4** makes amendments to the *Motor Accidents Compensation Regulation 2005* that are consequential on the change of name of the Act and the fact that legal costs will usually not be payable or recoverable by a party.