Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

2 October 2018

The Hon. Natalie Ward MLC
Chair
Standing Committee on Law & Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms. Ward

**ALA QUESTION ON NOTICE: PUBLISHING COMPARATIVE DATA**

The substantive ALA submission to the Standing Committee on Law and Justice (SCLJ) identified the capacity under the Motor Accident Injuries Act (MAI Act) to publish comparative data about insurer performance. The ALA strongly endorsed the publication of such data, both as a mechanism for informing the public and stakeholders about relative performance of insurers under the scheme and as an incentive for insurers to engage in positive conduct.

The ALA has made repeated periodic requests of SIRA over the last twelve months to engage in discussions about the type of comparative data to be collected and published. There has been no engagement from SIRA on this topic.

The ALA was disappointed to learn during the course of the SCLJ hearings that SIRA only plan to collect and publish comparative data as to complaints. The ALA urges the SCLJ to recommend that SIRA collate and publish a much more wide-spread set of comparative data that will allow both regulatory review of insurer performance and inform decision making by the public when it comes to purchase of CTP policies on any basis other than price.

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**AN UNHEALTHY RELIANCE UPON COMPLAINTS**

For near two decades SIRA has seemingly enjoyed publishing the relatively small number of complaints compared to the very large number of claims brought under the CTP system.

This is seemingly done with little appreciation that measuring the number of complaints is not a particularly effective method of measuring scheme health.

There are a significant number of variables that go into the number of complaints lodged:

(a) The dissemination of information about how to make a complaint.

(b) The ease of making a complaint.

(c) What the regulator chooses to categorise as a complaint and what they don't.

(d) The experience of complainants that can discourage further complaints (members of the legal profession who complain and receive an unsatisfactory response from SIRA are unlikely to complain again).

Measuring the health of the CTP system by only measuring the level of complaints is a poor choice of measures for systems analysis. It is far more a measure of complainant enthusiasm and persistence and knowledge than it is a measure of scheme performance.

It is noted that SIRA recently issued an information sheet regarding complaints in which scheme participants (claimants) were directed to first take their complaint to the CTP insurer to see if the CTP insurer could resolve the issue. No doubt, this will result in some small number of complaints being resolved by the insurer. More likely, it will serve as a deterrent to complaints to SIRA – being directed to take the complaint to the very party you have an issue with as a mandatory step in the complaints process may signal to the public that the regulator is not all that interested in hearing about complaints. Only the most persistent are going to make it through to complain to the regulator.

To give just one example, as identified in evidence to the SCLJ, there has been a significant problem in the early months of the operation of the new scheme with one particular CTP insurer (Allianz) experiencing systemic failure in correctly deducting the tax from weekly payments. This has apparently led to Allianz demanding that claimants refund statutory payments made.

Presumably, each and every person so affected (SIRA has to date refused to identify the number) would have excellent cause for complaint. It would be instructive for the SCLJ to ask about how many people have been affected and how many have lodged formal complaints with SIRA. If there are a significant number affected and no formal complaints, then that speaks volumes about the ineffectiveness of measuring complaints as a measure of scheme performance.

It is assumed SIRA is not logging a complaint onto its system on behalf of each victim of Allianz's miscalculations.

Publication of comparative data to allow the public to measure the respective performance of insurers should not rely upon the motivation or enthusiasm of the public or the legal profession to lodge complaints.

**WHAT DO CLAIMANTS CARE ABOUT?**

The primary concern of claimants is the timely and fair processing of claims. Measures as to timeliness, efficiency and avoidance of disputes are useful measures about which to publish comparative data.

**AVOIDING INSURER GAMING**

One of the side effects of setting a test with consequences is that those being tested start to study/perform to produce the best test results.

This can have negative consequences in terms of insurers manipulating reporting solely for the purposes of obtaining better outcomes.

One of the insurer KPIs under the 1999 Act was (at least at one stage) measured as being compliance with a statutory provision to make an early offer of settlement. One insurer performed exceptionally well on that KPI, not because they were making meaningful early offers of settlement, but because they were making early offers of settlement of negligible amounts in order to *"tick the box"* and score well on the KPI. The insurer was gaming the system.

One of the reasons the ALA has been keen to engage with SIRA over measures for comparative data publication is to ensure that meaningful measures are adopted that are not easily gamed.

There is also a tremendous opportunity for the setting of comparative measures for publication to have a positive influence upon insurer behaviour. That is what the ALA seeks - to stop gaming behaviour within the scheme and to measure insurers on real and positive outcomes.

**CONSTRUCTIVE SUGGESTIONS FROM THE ALA**

What follows is by no means an exhaustive list of measures where comparative data could be published. It is only a few suggestions. No doubt, SIRA can and should be capable of producing additional meaningful measures.

It is noted that by and large the insurers have a relatively similar claims portfolio and with various risk equalisation measures under the new scheme, the portfolios should have an even greater degree of overlap. The ALA accepts that any publication of comparative data

should be relative to insurer portfolio size – measures should look at percentages rather than absolute dollar figures.

**1. Statutory Benefits – Liability Denied**

The percentage of each insurer's portfolio of statutory benefits claims in which at six months the insurer wholly denies liability (either on the basis that the claimant is at fault, or that there has been a serious criminal offence, or that injuries stem from the accident).

**2. Damages Claims – Liability Denied**

Although this data will not be meaningfully available for a couple of years, in due course, it would be useful to have comparative data so as to identify any insurer which makes excessive denials of liability in damages claims – all insurers should have fairly similar numbers.

**3. Statutory Benefits Claims – Contributory Negligence >61%**

The MAI Act builds in a statutory incentive for insurers to make grossly excessive allegations of contributory negligence. Any allegation of contributory negligence over 61% allows the insurer to cut off statutory benefits.

In discussions with scheme actuaries during the drafting of the MAI Act, it was identified that under the MAC Act 1999, there are currently less than 30 to 40 claims per year where liability is established and contributory negligence is assessed at 60% or higher. There is no reason for that number to change under the MAI Act. However, there is now incentive for a change of insurer behaviour.

All insurers should be alleging contributory negligence to a similar degree (given a common portfolio of claims). If any insurer is going overboard in making excessive allegations, then that behaviour is useful to identify.

**4. Average dollar amount of payments of statutory benefits in the first six months**

Each insurer should be paying roughly the same amount (on average across the portfolio) for statutory benefits inside the first six months. If one insurer is identified as being more generous with payments, then that is an insurer that should attract market share (it should be who you want to insure with).

If one insurer is particularly parsimonious or lies outside common boundaries for payments in the first six months, then that could lead to further investigation. Is that insurer delaying in making payments? Is that insurer unduly denying liability? Is that insurer more quarrelsome and difficult with its *"customers"* than everybody else? Comparative data would be extremely useful.

**5. Timeliness in Paying Treatment Expenses**

This data may be a little harder to collect, but if insurers were required to log in the date of receipt of requests for treatment and then the date on which treatment was approved or treatment was paid, then this would be important information for consumers and an important incentive for insurers to make timely payments. SIRA is invited to consider the most appropriate mechanisms for collating and publishing this data.

**6. Minor Injury Denials**

Measure the rate at which each insurer denies statutory benefit claims on the basis of minor injury. Self-evidently, this is significant information for consumers, the legal profession and the regulator, as well as the SCLJ in its supervisory capacity over the scheme. If there are outliers in denying claims on the basis of alleged minor injury, they should be identified.

**7. Statutory Benefits – Determinations reversed by DRS**

If insurers are denying statutory benefits claims following internal review, it is useful to measure and compare the insurer with the 50% reversal rate at DRS as against the insurer with the 100% reversal rate.

**8. Minor Injury Payments Post-Six Months**

The MAI Act provides for insurers to continue paying statutory benefits past six months where there is benefit to the claimant's recovery in doing so. The ALA suspects very few such payments have been made to date. There should be comparative measurement of each insurer's performance.

This would be measured by identifying the dollar amount of payments (divided back to a per claim figure to account for insurer portfolio size).

**9. Claim Resolution Time**

Again, it will be a number of years before damages claims start being resolved. However, the average time to resolution for each insurer for a damages claim is well worth measuring and publishing on a comparative basis.

**CONCLUSIONS**

The foregoing are only a few suggestions as to some useful measures of comparative data that might be collated and published. The ALA has been prepared for the last twelve months to sit down with SIRA and discuss these and additional measures.

The Standing Committee on Law and Justice is urged to recommend that SIRA do far more on a comparative publishing front than just publish the number of complaints per insurer.

Given the new legislative capacity to hold insurers publicly accountable on an individual basis and to publish comparable information on insurer performance, it would be a tragedy if that publication were limited to no more than a flawed complaints mechanism.

Yours faithfully

**ANDREW STONE SC**
**ALA State President**

cc Ms. Mary Maini, SIRA
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