Submission No 9

INQUIRY INTO 2018 REVIEW OF THE COMPULSORY THIRD PARTY INSURANCE SCHEME

Organisation: Australian Lawyers Alliance

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2018 review of the Compulsory Third Party insurance scheme

Submission to the Standing Committee on Law and Justice

18 June 2018

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA appreciates the opportunity to make submissions to the Standing Committee on Law and Justice (Standing Committee) as it conducts its 2018 review of NSW statutory compensation schemes. This submission focuses on the operation of the Motor Accidents Scheme.

2. The *Motor Accident Injuries Act* 2017 (MAI Act) is just over seven months old. However, there has already been sufficient experience of the operation of the new scheme for the ALA to raise some immediate issues of concern with the Standing Committee, with recommendations for urgent legislative action. There are other areas of scheme concern that the ALA wishes to draw to the attention of the Standing Committee as requiring ongoing monitoring and review.

3. It is noted that the Standing Committee Terms of Reference state that the Committee does not have the authority to investigate a particular compensation claim. These submissions contain a number of case studies. They are partially de-identified in this submission (for the sake of the privacy of the individuals concerned) although annexures to the submissions will provide full details to the Standing Committee. Where information from individual cases is provided to the Standing Committee it is with the consent of the individuals concerned. These cases are not put before the Standing Committee on the basis that there should be any investigation of the particular compensation claims. Rather, the case studies are put before the Standing Committee as illustrations of particular aspects of scheme operation. The request is made that the annexures to the submission not be published.

4. Topics canvassed in this submission are:

    a. The MAI Act and s.151Z of the *Workers' Compensation Act* (WC Act);

b. The MAI Act and its treatment of foreigners;

c. The MAI Act — Minor injury;

d. The MAI Act — Insurer conduct;

e. The MAI Act — Internal review;

f. The MAI Act and the need for a MIRO (or MAIRO);

g. The MAC Act and the MAI Act — Police reporting;

h. The MAI Act — Liability at six months;

i. The MAI Act — Public reporting;

j. The MAI Act — Restoring hardship payments; and

k. The discount rate.

The Terms of Reference

5. The ALA will not be commenting on each and every one of the Terms of Reference. In some instances (such as the impact of the new profit normalisation and risk equalisation mechanisms) it is far too early to make any meaningful comment.

6. The ALA does raise one issue of concern with regards the scope of the Committee's Terms of Reference. What is absent from the Terms is any direct consideration of the adequacy of compensation arrangements under the scheme.

7. The ALA takes the opportunity to remind the Standing Committee that the *raison d'etre* of a compensation scheme is to provide payments to the injured to assist with recovery and by way of restitution for the infliction of those injuries.

    a. Premium collection is not an end in itself, but merely a means to an end (to provide the funds to allow for compensation).

    b. An efficient claims handling and claims resolution system is not an end in itself, but merely a means to an end (being timely delivery of compensation whilst avoiding unnecessary frictional cost).

8. It is acknowledged that the first subclause of the first Term of Reference does address increasing the proportion of benefits provided to the most seriously injured road users. However, there is no consideration as to whether the level of benefits being provided to the most seriously injured road users (or any road users for that matter) is actually fair or adequate.

9. So too, one of the Terms of Reference considers the impact of the changes regarding minor physical and psychological injuries. The ALA would prefer to see greater specificity of the Terms of Reference in considering whether these definitions are working to exclude those whom the Parliament intended to exclude, whilst ensuring compensation for those who are more seriously injured.

Recommendation

10. **The ALA respectfully suggests that one of the Terms of Reference for the Committee should be:**

    a. **Whether the scheme is achieving its broad objective of ensuring timely and appropriate compensation for those injured in motor vehicle**

accidents, with a particular emphasis on fully protecting innocent motor vehicle accident victims in relation to their past and future wage loss.

11. A topic on which the ALA has periodically addressed both the NSW government and the Standing Committee is the mandatory 5% discount rate. That mandatory prescription continues to be a source of significant injustice to accident victims and further submissions in relation to that topic are set out below.

The ALA's relationship with SIRA

12. The ALA continues to enjoy an excellent working relationship with the State Insurance Regulatory Authority (SIRA) within the motor accident sphere. Both the previous Executive Director, Mr. Andrew Nicholls, and the current Executive Director, Ms. Mary Maini, have ensured that there are frequent opportunities for scheme stakeholders such as the ALA, to have input into aspects of scheme operation.

13. There is a fixed quarterly consultation with the legal profession and extensive additional formal and informal consultation over guidelines, practice notes and the like. Those responsible for addressing concerns raised by the legal profession are approachable and available.

14. The ALA also acknowledges the open and collaborative approach of the Minister responsible for the scheme, the Honourable Victor Dominello MP.

15. Whilst there have been and will continue to be points of significant disagreement with both SIRA and the government, both have shown a commendable and continuing willingness to consult and listen. The ALA looks forward to that strong working relationship continuing.

The MAI Act and s.151Z of the WC Act — Legislative reform needed

16. Even before the MAI Act commenced on 1 December 2017 the ALA had written to SIRA (copying in the Minister) alerting the government to a serious drafting problem with the new legislation. The failure when drafting the legislation to consider the effects of s.151Z of the *Workers Compensation Act* 1987 and the new requirement that workers must pursue statutory workers compensation rights rather than compulsory third party (CTP) statutory benefits had an extremely unfortunate consequence.

17. In short (attempting to make a complex situation simple), a worker who received statutory workers compensation benefits who then elected to pursue their CTP damages entitlements for pain and suffering and lost wages would:

    a. Have to repay statutory treatment expenses paid by the workers compensation insurer out of monies received for pain and suffering or loss of earnings in the CTP claim. (This constitutes a particularly unfair and unjust outcome); and

    b. Upon settlement of the damages claim and recovery of damages for non-economic loss and economic loss, would be cut off from receiving any further treatment expenses through either the Workers' Compensation (WC) or CTP schemes.

18. Annexed to this submission are the following correspondence:

    a. Letter to SIRA dated 9 November 2017 raising the s.151Z issue [Annexure A].

    b. Response from SIRA dated 22 March 2018 advising that a response was proceeding through *'government process'* [Annexure B].

19. Subsequently, the Minister has announced there will be a retrospective legislative fix. ALA representatives have provided legislative drafting proposals to SIRA to address the s.151Z issue. Given the magnitude of the issue, the ALA looks forward to the opportunity to review amending legislation prior to its passage to ensure the amendments fix the problem and truly protect injured motorists who are also workers from unforeseen consequences of the interplay of statutory compensation schemes.

Recommendation

20. **That the NSW Parliament legislate (with retrospective effect) to fix the s.151Z issue as identified.**

The MAI Act and its treatment of foreigners — Legislative reform called for

21. For reasons the ALA never understood, the MAI Act contains two provisions grossly discriminatory against foreign tourists who are injured on NSW roads.

    a. Section 3.33 provides that a foreign tourist is unable to recover any medical or treatment expenses once they leave Australia, either as statutory benefits or as damages.

    b. Section 3.21 provides that a foreign tourist is unable to recover fortnightly payments of statutory benefits until their final return to work prospects are clear. The section is seemingly drafted in a fashion that the more seriously injured may wait longer to recover any statutory benefits for wage loss at all.

22. Already there are examples of these provisions creating very significant injustice. Set out below is a case study: Mr. and Mrs. FT.

23. In December 2017, Mr. and Mrs. FT were visiting Australia with their teenage son. They were involved in a motor vehicle accident when a vehicle came across the road and ran head on into their car at speed. Mr. and Mrs. FT sustained significant injuries including intestinal and rectal injuries.

24. After an emergency airlift to hospital, both Mr. and Mrs. FT underwent surgery. They each had a significant portion of intestine removed. Each had a stoma bag surgically put in place.

25. The squeamish may wish to skip to the end of this paragraph. With severe intestinal or rectal injuries, it may no longer be possible to pass faeces through the rectum. The intestine is re-directed through a tube in the abdomen and faeces are excreted into a plastic bag through that tube. For the most unfortunate, this arrangement is permanent. For the more fortunate, a reversal of the surgical procedure can be undertaken after six months or so when maximum intestinal and rectal healing has occurred. Mr. and Mrs. FT are, thankfully, in the latter category.

26. After several weeks in hospital, Mr. and Mrs. FT were medically repatriated to their country of origin. They each have additional injuries. Neither has been able to return to work. Since returning home they have been meeting their own treatment expenses, including having to pay for their own stoma bags. This is despite them being innocent victims of an accident on the road in NSW.

27. Mr. and Mrs. FT had high level travel insurance coverage with a major international travel insurer. However, even that policy only provided for one month of treatment up to a maximum of $10,000 (in their local currency) from the time of their return home.

28. Mr. and Mrs. FT are being treated very differently and very poorly compared to any NSW or Australian resident. If in Australia, Mr. and Mrs. FT would be having treatment expenses met for life.

29. Allianz are the insurers of the vehicle at fault. Allianz have sent a variety of letters observing that they are unable to pay treatment expenses because the Act mandates that they cannot do so. It is worth noting that Allianz have refused to provide any hardship payments or any advance on damages to Mr. and Mrs. FT. This is despite it being pointed out to Allianz that Mr. and Mrs. FT will ultimately be entitled to recover damages for lost wages (they have more than a minor injury and are not at fault). Those damages will include damages for past loss of earnings. Mr. and Mrs. FT will ultimately be recovering their lost wages for the last six months from Allianz. There is no harm to Allianz or the scheme in Allianz making a hardship payment. Yet still no payments have been made.

30. Allianz maintain that there is no specific provision within the Act for them to make a hardship payment (which is true). Allianz maintain that SIRA will not let Allianz make any hardship payment that is not within the scope of the Act or allow Allianz to make any advance on damages (despite this having been common practice previously). The ALA has raised this issue and this case with SIRA. SIRA has effectively advised that the government is content with the current policy settings under the new Act in relation to foreign tourists.

31. The ALA is of the view that the two identified provisions of the Act are disgraceful. NSW has sent two foreign tourists home medically crippled and, to put it less crudely than might be put, only able to excrete faeces through a tube in the abdomen running into a plastic bag. All this in circumstances where the CTP insurer of the vehicle at fault does not even have to pay for the numerous stoma bags required.

32. There will ultimately be a dispute about whether it is 'reasonable and necessary' for Mr. and Mrs. FT to return to Australia to have the stoma reversal surgery and whether Allianz will have to pay for the surgery in Australia and pay for the travel costs to bring Mr. and Mrs. FT to Australia for that surgery. If that dispute is not resolved in favour of Mr. and Mrs. FT, then they are looking at personal financial ruin when they have to pay upwards of $100,000 to have the stoma reversal operations carried out in their home country.

33. In the meantime, Mr. and Mrs. FT are facing financial ruin anyway because neither can work, they do not come from a country with a particularly strong social welfare safety net and the NSW government has stripped the hardship provisions out of the MAI Act, whilst making it incredibly difficult for Mr. and Mrs. FT to recover statutory benefits for lost wages.

34. The ALA wrote to SIRA addressing this issue. Annexed to this submission are the following:

    a. Email to Ms. Mary Maini at SIRA dated 28 February 2018 [Annexure C].

    b. Email response from Ms. Maini dated 16 March 2018 [Annexure D].

    c. Further email to Ms. Maini in reply [Annexure E].

35. In March 2018, the Premier met with ASEAN leaders in NSW. The ALA prepared the attached press release [Annexure F]. A copy was provided to SIRA and to the Minister's Office. Ultimately, the ALA made the decision not to distribute the press release.

36. The ALA is concerned that in pursuing a campaign to rectify the obvious injustices that the MAI Act contains in terms of its discriminatory treatment of foreign tourists, that the ALA may damage the NSW tourism industry. That is not what the ALA wants.

37. However, the blunt reality is that Queensland provide full reimbursement of treatment expenses of foreign tourists who are innocent accident victims on Queensland roads. Victoria provides full reimbursement of medical expenses for those injured on Victorian roads who are ultimately entitled to pursue a damages claim. The ACT provides full compensation for the medical expenses of tourists injured on ACT roads. If Mr. and Mrs. FT had been rendered paraplegic, the NSW LTCS scheme would meet their treatment expenses in their home country. It can be done.

38. The ALA believes that the NSW government has erred in making no provision for substantially injured foreign tourists to recover any medical expenses once they are repatriated to their home country. The ALA is prepared to publicly campaign on this issue. This submission to the Standing Committee is a last attempt to get the government to take this issue seriously.

39. It is understood that at some level of either the bureaucracy or the government there was some belief when the MAI Act was being designed that foreign tourists should be able to look after themselves because they would or should have travel insurance. The members of the Committee who hold International travel insurance are invited to review their own policies, whereupon they will discover that such policies do not provide for unlimited benefits for unlimited periods for being the innocent victim of a motor accident abroad. Most policies contain a time cap (between one month and twelve months) and most policies contain a financial cap.

40. Any Australian innocently injured in a motor accident abroad is going to want to be able to sue and recover for their medical expenses. Any foreign tourist innocently injured in a motor vehicle accident in NSW should be treated the same as any local resident.

41. It is anticipated that the cost of covering medical expenses for foreign tourists injured on NSW roads is only a few cents in the total premium. All it takes is one adverse public example reducing enthusiasm for tourists to travel to NSW for a driving holiday and any savings to motorists will pale compared to the cost to the NSW tourism and education sectors.

42. The Committee is invited to consider the damage that a story in the Indian press about an Indian student in the position of Mr. and Mrs. FT would do to the NSW education sector. Or the damage that a story about a Mr. and Mrs. FT would do to NSW tourism if their story ran in the Chinese, Japanese or US media.

43. The Committee is urged to recommend that the government revisit these provisions and extend the same fairness to foreign tourists as is provided to NSW and Australian residents.

Recommendation

44. That section 3.33 be revised to provide foreign tourists to the same medical treatment rights as Australian residents.

Recommendation

45. That section 3.21 be revised to allow foreign tourists to collect statutory benefits for lost wages (or hardship payments) without waiting for their medical condition to stabilise (as is the case for Australian residents).

The MAI Act — Minor injury

46. It is too early to yet tell how the '*minor injury*' thresholds are operating. Scheme numbers are small. Disputes around '*minor injury*' have yet to develop.

47. The Minister did commit during the drafting of the Bill to a two year review of the operation of the minor injury definition. What the ALA is concerned about is ensuring that adequate data is being collected to determine whether the minor injury definition is working effectively or too effectively or not effectively enough.

48. In particular, the ALA is concerned about those with persistent physical symptoms causing a restriction in work capacity who will nonetheless be held to have a '*minor injury*'.

49. The Standing Committee members would appreciate that there is a 10% whole person impairment (WPI) threshold to obtain damages for pain and suffering under the *Motor Accidents Compensation Act* 1999 and the new MAI Act. Only 10% of motor accident victims exceed the 10% WPI threshold.

50. However, it is technically possible for someone to have a 'minor injury' under the MAI Act and at the same time, have 15% WPI.

51. Assessment of the spine for WPI purposes is done using bands labelled as DRE (Diagnosis Related Estimates). Those with DRE 1 have no identifiable or measurable physical symptoms. These are assessed at 0% WPI.

52. Those with DRE II have objectively measurable signs and symptoms, but these signs and symptoms have not reached the severity of *'radiculopathy'*. These are assessed at 5% WPI.

53. To have radiculopathy usually requires an extruding disc from the spine to be impinging upon a nerve root and causing radicular symptoms (tingling and shooting pain) in the limbs. With radiculopathy, an injury is assessed at DRE III and either 15% WPI for the cervical spine or 10% WPI for the lumbar spine.

54. To have more than a *'minor injury'* (as defined by the MAI Act) at any of the three levels of the spine the claimant has to have more than DRE II. They effectively have to have DRE III (i.e. radiculopathy).

55. That in turn means that a claimant with injuries to the cervical, thoracic and lumbar spine may have measurable impairment at all three levels of the spine (i.e. DRE II/5% WPI) with a combined total of 15% WPI. However, they would still have a *'minor injury'* under the MAI Act. This situation seems anomalous and absurd.

56. Further, there is concern that there will be a significant number of claimants who have DRE II in the cervical and lumbar spines (persisting and permanent soft tissue injury is unfortunately not uncommon following motor vehicle accidents). This group will have 10% WPI. They will have a significant permanent impairment and potentially permanent restrictions in work capacity. Nonetheless, this group all get bundled out of the MAI scheme at 26 weeks, unless they happen to have some other injury that keeps them in the scheme.

57. The ALA is very keen for SIRA to comprehensively assess those being excluded from the scheme with minor injury who would be assessed with DRE II in the cervical and lumbar spines, who would have 10% WPI and who are still experiencing significant loss of income at twelve and eighteen months post-accident.

58. Consideration of the long-term consequences of scheme design upon this group is going to require follow-up of those who have been excluded from the scheme and are still not back at work after twenty-six weeks.

Recommendation

59. **That the Committee ask SIRA what specific studies and follow-ups will occur in order to measure the fairness of the minor injury definition and in order to properly assess the financial consequences of exclusion from the scheme for those with significant and lasting soft tissue injury. What data is being collected for the 2 year review? Will this include reviewing the real rate of full return to work?**

60. Amongst the sensible middle ground of medical opinion, the evidence appears to be that only 50% or so of accident victims will have recovered from soft tissue injuries within six months of the accident. Some will have permanent impairment and permanent work restrictions.

61. It is noted that the Act provides for medical treatment to continue beyond six months with a minor injury where the treatment is proving of assistance. Just one measure of the willingness of insurers to look after the interests of claimants, rather than their own financial interests, is how often insurers offer and encourage claimants to continue treatment beyond six months. It is suspected there will be very few such cases, with CTP insurers taking every opportunity to cut off the claimant well before the six month deadline, on the basis that they have a minor injury.

Recommendation

62. **That the Committee request SIRA to record and report upon the frequency with which CTP insurers fund treatment for minor injury post-six months and report on whether this statutory provision is working well or poorly.**

The MAI Act — Insurer conduct

63. Critical to the success of the MAI Act is a significant change in insurer conduct. Part of the government's commitment upon introduction of the MAI Act was that there would be a major change in the way that insurers approached claims. There would be a lessening of the insurer's adversarial focus and an increase in customer service.

64. During development of the MAI scheme, the ALA understood and acknowledged the government's desire to reduce legal representation rates from upwards of 80% of claims back down towards 50%. However, the ALA cautioned that if legal representation was to be stripped back, then SIRA would have to step up and become a much more vigorous and pro-active regulator in ensuring that CTP insurers treated claimants properly and fairly.

65. Unfortunately, the first six months of operation of the MAI Act have, at least in this regard, been a complete disaster. The ALA has seen no evidence whatsoever of any change in insurer conduct towards claimants. To the contrary, insurers appear to have become more aggressive and adversarial and even keener to take advantage of unrepresented claimants.

66. Some CTP insurers appear to have little recognition that they now bear any obligation to treat claimants in a fair, frank and honest fashion. The ALA has not seen any evidence of CTP insurers volunteering information to claimants beyond statutory obligations that is contrary to interest.

67. CTP insurers appear to have little interest in advising claimants of the full array of their rights. CTP insurers appear to have little interest in providing information to claimants that would be adverse to the insurer's interests, even where it is important that an insurer do so.

68. The ALA has provided multiple examples to SIRA over the past several months of inappropriate insurer conduct. SIRA has listened carefully and made all the right comments as to being concerned about such conduct. However, the ALA does not yet observe any evidence of any new culture amongst insurers. If there has been any measurable improvement in any aspect of insurer conduct, then the ALA would be delighted to see any evidence of it.

Recommendation

69. That SIRA measure and report upon insurer conduct towards legally unrepresented claimants under the MAI Act.

70. Substantiating the ALA's concerns, we provide the following examples:

Example 1: Communicating with claimants and refusing to talk to their lawyers

71. The Guidelines to the MAI Act provide that a CTP insurer is to deal with the claimant in addressing statutory benefits issues. There is no bar on dealing with lawyers as well. There is no bar on copying in lawyers in communications with the claimant.

72. Nonetheless, multiple CTP insurers have taken the opportunity of the new Act to point blank refuse to engage in any communications with lawyers and insist that all communications will be conducted only through the claimant and to the exclusion of lawyers. A number of CTP insurers clearly see the new Act as their opportunity to pit their skilled, experienced and legally qualified claims team as against uninformed and unrepresented claimants (presumably to maximise insurer profits and minimise claims).

73. It costs a CTP insurer nothing to include a claimant's solicitor as a cc into an email to the claimant. Nonetheless, some insurers seem determined (to the maximum extent possible) to exclude lawyers at every opportunity.

74. Such is the determination with which insurers have sought to exclude the legal fraternity that SIRA has had to pursue urgent amendments to the Guidelines simply to make CTP insurers copy in a claimant's lawyer on communications with the claimant. Such a step should never have been necessary and speaks volumes about the approach some CTP insurers are taking. SIRA's pro-active response is noted and applauded. The insurer conduct that necessitated this response is not.

Example 2: Misrepresenting the Costs Regulations

75. A number of CTP insurers have sent pro-forma letters to claimants bluntly mis-stating the nature of the Costs Regulations. Whilst it is true that a lawyer cannot charge fees for assisting a claimant through some aspects of the statutory benefits regime, it is **untrue** to say that there are no costs recoverable in the statutory benefits regime. There are costs available to assist with some types of disputes. Annexed to this submission [Annexure G] is a letter from GIO dated 5 June 2018 referencing s.8.3(4) of the Act and then stating:

> 'The above means that even if you incur any legal costs in relation to your claim for Statutory Benefits you and/or your solicitor are unable to recover those costs from GIO.'

76. This statement is just false. It would breach consumer protection legislation as being false and misleading. Some legal costs are recoverable in some circumstances.

77. It concerns the ALA that, six months after the new scheme commenced, GIO send out an untrue and misleading letter and feel so emboldened within the new CTP scheme that they are seemingly indifferent to any consequences of any complaints regarding the inaccuracy of the letter.

78. The ALA has made a formal complaint and addressed the following questions to SIRA regarding this correspondence:

    a. Does SIRA agree the letter is misleading?

b. If so, what is SIRA doing about it?

c. Why are GIO making misleading statements to claimants? Why are GIO not telling the whole truth? When is it going to stop?

d. Is there going to be corrective publishing to all those who have received a misleading letter from GIO? If so, when?

79. The ALA has not yet received any formal response from SIRA, although there have been informal reassurances that the issue is being vigorously pursued by SIRA. If the SCLJ shares the ALA's concerns about misleading communication with claimants, then the SCLJ is urged to ask SIRA the same questions. The answers should be on the public record.

Example 3: Joint WC and CTP Rights

80. Under the MAI Act, CTP insurers are entitled to refer a motor accident victim injured in the course of their employment to workers compensation to recover statutory benefits (rather than recover statutory benefits within the CTP scheme). The ALA has written to SIRA about the pro-forma letters used in such circumstances by both QBE and NRMA (example letters attached [Annexures H and I]).

These letters:

a. Denied liability in circumstances where the insurer is not entitled to decline liability. The insurer is only entitled to decline statutory benefits if the workers compensation insurer agrees to pay statutory benefits. In neither case had there yet been such agreement.

b. Failed to advise the claimant about the capacity to return to the CTP scheme to recover statutory benefits if for any reason workers compensation benefits were declined (s.3.35(2)).

c. Failed to advise the claimant about the entitlement to return to the CTP scheme to recover damages if there was more than a minor injury and if liability could be established.

81. Again, it appears that insurers within the CTP scheme feel little obligation to *'play fair'* by properly advising the claimant about their rights and properly advising the claimant about all of their rights. The CTP insurers just do not seem to have the sense that they have any positive obligation to fully inform the claimant.

82. There have been frequent communications between the ALA and SIRA in recent months regarding insurer communications with claimants. The SCLJ is encouraged to seek from SIRA comprehensive information about the nature and extent of the problems being experienced, what SIRA is doing to address those problems and what, action has been taken against CTP insurers who are failing to comply with their obligations under the new Act.

83. The new Act was premised on a change of insurer culture. SIRA could be asked as to whether that change has yet occurred. SIRA should be asked to identify the measures being taken to bring about that cultural change and exactly when SIRA anticipates that claimants can start to expect receiving full and frank letters from CTP insurers properly explaining their rights and without the CTP insurer omitting important and relevant information.

84. Following the various complaints made to SIRA, the ALA has not yet received reassurance that each and every claimant who has received a letter containing false or misleading or inaccurate or incomplete information from a CTP insurer is going to receive further correspondence setting the record straight. The ALA submits that this should be a fundamental requirement imposed by a regulator upon any insurer found to have sent inaccurate correspondence. SIRA has been very good at listening

to the ALA complaints about unsatisfactory correspondence from insurers. Yet the correspondence is still occurring.

85. The ALA appreciates the time and effort SIRA staff have applied to listening to complaints. The ALA would also appreciate greater transparency as to exactly what is being done by SIRA in response and when improvements are to be expected. The Parliament is entitled to a full and frank report.

The MAI Act — Internal review

86. Unfortunately, a feature of the new MAI Act is that many statutory benefits disputes can only be progressed beyond an insurer rejection after the claimant pursues (within a short timeframe) an internal review.

87. The ALA strongly opposed introducing internal insurer review into the MAI Act. The experience of ALA members within the workers compensation scheme has been that internal review can be successful in addressing minor mathematical issues (miscalculation of wage rates), but is usually a waste of time when it comes to more substantive issues.

88. That experience is already starting to repeat itself in the CTP scheme. It is anticipated that internal review will be a pointless waste of time, with little role other than to deter many claimants from pursuing any review at all.

Case study: Mr DC

89. Attached to this submission is an internal review conducted by an Internal Review Officer at GIO dated 10 May 2018 in a claim brought by Mr. DC [Annexure J]. Also attached is the letter of complaint from the ALA of 6 June 2018 regarding systemic issues raised by the internal review decision [Annexure K].

90. The issues raised by the ALA included:

    a. The internal review decision contained a clear legal error, fundamentally misinterpreting the Act. The internal review officer decided that a claimant with a non-minor physical injury and minor psychiatric injury could only claim damages for the physical injury. This is not what the Act provides.

    b. The internal review raised procedural concerns with regards the internal review officer telephoning the claimant and questioning the claimant to adduce evidence. It is unclear whether this is to be a feature of the internal review system – the insurer questioning the claimant to adduce evidence to support a denial of benefits.

    c. The internal review officer conducting his own analysis of psychiatric diagnostic criteria (DSM 5), reaching interpretations of those medical diagnostic criteria contrary to that of the treating psychologist.

    d. The internal review officer not seeking yet further information from the treating specialist, but taking the opportunity to impose his own psychiatric diagnosis in preference to obtaining more information from the treating specialist.

    e. The internal review officer preferring his own medical diagnosis to that of the treating specialist.

91. Within three days of the ALA complaint, GIO acknowledged that the internal review decision was legally incorrect, reversed it and apologised [Annexure L].

92. However, but for the willingness of members of the legal profession to advocate for Mr. DC (without charge) a patently incorrect decision may have gone unchallenged and uncorrected.

93. This case study clearly illustrates just some of the problems that can attend on an internal review where there are no rules as to how the insurer concerned is to conduct a fair and reasonable review of the initial denial of benefits (and in circumstances where the internal review was entirely unnecessary to begin with and where a significant legal error was made in trying to divide up physical and psychiatric injury for the purposes of an ongoing entitlement to benefits).

94. The ALA has asked SIRA for reassurance that GIO has not communicated or imposed this incorrect legal analysis on any other claimants.

Case study: Mr NY

95. Mr. NY was injured on 4 February 2018 (a Sunday). His claim form was submitted on Monday 5 March, 29 days later.

96. NRMA (for the Nominal Defendant) denied the first 28 days of benefits on the basis the claim was submitted 29 days post-accident. An internal review confirmed this decision.

97. Apparently, neither the original decision maker nor the review officer was familiar with s.36 of the Interpretation Act that provides that when a time limit expires on a weekend, time is extended to the next weekday. It took the involvement of a lawyer to assist the claimant and get the law right. Internal review was a waste of time.

98. On a separate note, SIRA has been notified and asked how many other claimants NRMA has underpaid as a consequence of legal ignorance.

99. SIRA has also been asked as to whether Claims Assist staff had been trained as to how the law measures time.

100. The government has made the very sensible decision to cut out or cut back on internal reviews and merit reviews in work capacity decisions within the workers

compensation scheme. The same dose of common sense should now be applied to the MAI Act, by removing internal review and merit review from that Act.

Recommendation

101. That internal reviews be removed from the MAI Act. If there must be internal reviews by CTP insurers then SIRA must impose far clearer rules to control the process of internal reviews to ensure they are fair.

The MAI Act and the need for a MIRO (or MAIRO)

102. The ALA have been strong supporters of the role of the Workers' compensation Independent Review Office (WIRO) within the workers compensation scheme. WIRO has been invaluable in providing an independent assessment of bureaucratic and insurer processes and in assessing the fairness of scheme operations and their effects upon injured workers.

103. There is no equivalent within SIRA. The Minister, the Committee and motor accident victims are, for now, going to have to depend upon SIRA to evaluate the operation of the Claims Assist service and depend upon SIRA to evaluate the effectiveness of the DRS.

104. The ALA submits that historically it has not been a bureaucratic strength of SIRA to acknowledge and address weaknesses within SIRA systems. To be blunt, SIRA should not be expected to be fearless and frank in publicly acknowledging any deficiencies in systems which SIRA operates. At the end of the day, SIRA will report so as to avoid criticism of SIRA and avoid criticism of the Minister.

105. The s.151Z issue is a case in point. The ALA is willing to admit that it missed the issue when commenting to government on the draft Bill. Can SIRA bring itself to say 'We

made a mistake!'? None of the SIRA communication so far actually acknowledges an error – they refer to an 'anomaly'. The spin is frustrating.

106. The ALA does its best, with incredibly limited resources, to speak up for the rights of the injured. However, a stronger and more permanent voice is needed, especially as lawyers are cut out of much of the CTP system. Just as there is WIRO within the workers compensation scheme, so too there should be an equivalent within the CTP scheme to speak up for injured road users.

107. There will never be any enthusiasm on the part of SIRA to support the existence of any agency committed to reviewing and critiquing SIRA operations. The ALA observes that there is seemingly little enthusiasm within the current SIRA bureaucracy for the existence of WIRO in relation to the workers compensation scheme. It is no real surprise that the SIRA preferred option for tribunal reform involved expanding the SIRA controlled DRS, abolishing the Workers Compensation Commission and abolishing WIRO. Contrary to such ambitions from SIRA, the ALA supports the retention of WIRO within the workers compensation scheme and its expansion to provide periodic independent review of the operation of the CTP scheme.

Recommendation

108. That the role of WIRO be expanded to independent reporting on the operation of the CTP scheme.

The MAC Act and the MAI Act — Police reporting

109. There has been a persisting problem under the MAC Act that will only get worse under the MAI Act in relation to police reporting. In order to bring a claim under the

MAI Act it is necessary to make a report to police. Insurers insist upon receiving a Police Incident number.

110. With the expansion of the motor accident scheme to provide benefits to at fault drivers, it is understandable that there should be some deterrent against fraud. The need for the at fault driver to report the accident to police is both a disincentive to claim in relation to modest injuries and a fraud deterrent.

111. The experience of many claimants under both the old and new CTP schemes is that NSW police are not interested in taking a report of many accidents. If there was only modest property damage, if no one sustained significant injuries and if there is no prospect of charges being laid, then police are not at all interested in generating the paperwork of creating a report.

112. Claimants attended police stations to report accidents only to have police refuse to accept a report and send them away.

113. The CTP system is asking/demanding that police record the details of all motor accidents where anyone might bring a claim. Police seemingly have no interest in doing so. This is a problem that requires addressing. Representatives of the ALA have been raising this issue with SIRA for some time, as well as raising delays in police providing police reports to claimants and insurers. SIRA advise they continue to work on the issue. Claimants do not report any difference of approach at police stations.

Recommendation

114. That the Committee recommend that the issue of police reporting of motor accidents be reviewed jointly by the Police Minister and Finance Minister and addressed and resolved.

115. Ideally, the Police Minister and the Commissioner of Police need to directly discuss with the Minister responsible for the CTP scheme and the head of SIRA these bureaucratic differences. Agreement needs to be reached, either to have police prepared to take an incident report wherever a member of the public wants to make one in relation to a motor accident, or to have the CTP scheme reduce its requirements in relation to police reporting.

The MAI Act — Liability at six months

116. Theoretically, a CTP claim under the MAI Act should be notified within 28 days of the accident – there is the incentive for the claimant to make the notification so as to receive statutory benefits.

117. Theoretically, the CTP insurer should be making a decision on liability within three months. That means a liability decision should be made inside of six months of the accident. This in turn means that those with more than a minor injury and where liability is not in issue can seemingly continue to receive statutory benefits from six months, whilst waiting to make a damages claim.

118. Difficulties arise where the CTP insurer is not able to make a decision on liability within three months. At times this is due to delays in obtaining reports from NSW Police. (There is an ongoing issue with regards such delays).

119. One of the tests of the new scheme is the approach adopted by CTP insurers when the claim reaches six months and a determination on liability has not been made.

120. Where there appears to be reasonable prospects that liability will be admitted, the decent and appropriate step by a CTP insurer would be to continue making payments after six months on a *'without prejudice*' basis pending a final liability

determination. This is what should occur when the insurer anticipates it likely that liability will ultimately be admitted once investigations are completed.

121. The aggressive, anti-claimant thing to do is to cut off benefits at six months whilst a liability decision is still pending and then leave it as long as possible to get around to making a final liability determination and reinstituting benefits, all in the hope that the frustrated claimant will go away.

122. The ALA has raised this issue with SIRA [letter of complaint and correspondence – Annexure M]. The ALA has asked SIRA to advise the institutional approach of each of the CTP insurers in such circumstances and to ensure consistency of approach. The ALA has asked SIRA to identify any insurer that has a presumption of cutting off benefits at six months where liability is still being investigated and no application of the *'without prejudice'* payments approach.

123. The scheme is just past its first six months of operation and is just starting to see relevant cases reach the six month mark. The SCLJ is invited to ask SIRA to provide information on what approach is being adopted by each of the five CTP insurers. SIRA is encouraged to name those who have adopted a corporate philosophy of extending benefits without prejudice whilst a liability determination is pending and name those that do not. Which insurers have made a presumption in favour of continuing benefits and which insurers have made a presumption against it? Who is doing the right thing and who is not?

124. Further, what is SIRA doing to ensure insurers expedite liability decisions in such cases? Which insurers are delaying on making a liability determination beyond six months and which are not? Public reporting would do wonders for insurer compliance.

The MAI Act and public reporting

125. Under the *Motor Accidents Act* 1988 and *Motor Accidents Compensation Act* 1999, the Motor Accidents Authority/SIRA was not able to make public reports with identified comparative insurer performance. The Authority only ever reported on aggregate industry data.

126. Under the MAI Act, the Authority can, for the first time, publish comparative data on insurer performance (Section 9.15). The ALA is extremely keen to see this occur.

127. The ALA believes that there is an excellent opportunity to modify insurer conduct through publishing reports about insurer performance. If a particular insurer is publicly identified as being slower to resolve claims or slower to determine liability or making more spurious allegations of contributory negligence or being the subject of far more dispute applications, then that has the capacity to influence thoughtful members of the public to choose somebody else to insure with.

128. It is noted in passing that any sensible member of the public would not choose their CTP insurance based purely on price. For anyone taking out CTP insurance, the person most likely to rely upon that insurance is the driver of the vehicle (if at fault and making a statutory benefits claim for six months) or, more importantly, a loved one of the driver – a spouse or child. Your partner is infinitely more likely to be injured as a consequence of your negligent driving than any other member of the public. Accordingly, the only question in choosing a CTP insurer should be which one of the five you would want to handle your partner's claim should you be unfortunate enough to cause an accident and injure them.

129. However, members of the public have no information on which to base such a decision because they have no comparative data comparing insurer performance. Comparative tables identifying the better and the worse performing insurers when it comes to claims handling practice would be invaluable information for the public.

130. The ALA has been asking SIRA over the past six months as to the comparative data SIRA intends to collect and publish. The ALA has invited SIRA to consult on this subject because the ALA is keen to see meaningful data being published and to avoid gaming behaviour by insurers (manipulating the data to obtain artificially inflated positive results).

Recommendation

131. That the Committee request SIRA to report on what insurer comparative data SIRA is currently collecting and when will it first be published? How frequently will it be published?

The MAI Act — Restoring hardship payments

132. With the introduction of a statutory benefits regime, the provision previously contained within the MAC Act permitting a claimant to ask an insurer for an advance on damages (a hardship payment) has been removed. This was a poor choice.

    a. There will be some persons ineligible for statutory payments of weekly benefits who will nonetheless suffer economic loss and financial hardship. There should be the capacity for this group to ask for a hardship payment.

    b. There will be some overseas residents, such as Mr. and Mrs. FT identified above who are not immediately eligible for quarterly payments, but who will suffer a financial hardship. They should be able to ask the insurer for an advance on damages and should be eligible to recover one.

    c. In Compensation to Relatives claims, the death of the primary income earner in a family will cause financial hardship. There should be the capacity

for the surviving dependent spouse or dependent children to apply for an advance on damages as a hardship payment.

133. If CTP insurers are going to adopt the approach that they can only make payments in accordance with the Act and will never make a payment that is not specified within the Act (see the Allianz approach to Mr. and Mrs. FT), then the parliament needs to reintroduce the hardship provisions into the Act to allow for the cases identified above to be addressed.

134. Unfortunately, some insurers cannot be trusted to act as good corporate citizens. The learned experience is that they have to be collectively treated as profit maximisers who will take any opportunity to deny any payment to any claimant unless forced to make it. This approach is unfair to the relatively better behaved insurers, but rules have to be designed to curb the badly behaved.

Recommendation

135. That the MAC Act hardship provisions (appropriately modified) be inserted in the MAI Act.

The discount rate

136. As promised, the ALA takes the opportunity to say a few more words to the SCLJ about the lack of justice involved in NSW having a 5% discount rate. Annexed to these submissions is a copy of a letter sent to the then NSW Attorney General, The Hon. Gabrielle Upton MP dated 8 April 2016 [Annexure N]. Unfortunately, nothing came of that letter/submission.

137. Under the MAI Act, future losses (economic loss/loss of wages) are subject to a 5% discount rate.

138. The discount rate is said to represent the advantage that a person obtains from having a lump sum from which to meet the future loss of wages. To counter the discounting brought about by the prescribed discount rate the damages must be invested so as to ensure an earning rate on average in every year of future loss in excess of 5% after tax.

139. Back in 1981, the High Court set a 3% discount rate for Australia. [*Todorovic v Waller* (1981) 150 CLR 402].

140. The 5% discount rate was introduced in NSW in 1984 at a time when interest rates were exceeding 17%. It was said in parliament at the time that the rate would be subject to a review. It has never been reviewed. At no stage since 1984 has any NSW Minister ever explained to the parliament why a 5% discount rate is appropriate or fair.

141. The Ipp review recommended a 3% discount rate. The Legislative Council General Purpose Standing Committee No 1 report of 28 December 2005 recommended, after receiving actuarial advice, restoring the 3% discount rate to avoid under-compensating the most seriously injured.

142. The Lifetime Care and Support (LTCS) scheme utilises a discount rate around 2% for its own internal purposes.

143. In Canada the discount rate varies between provinces and ranges between 0% and 3%. In the UK, the discount rate has been progressively reduced until now it is a positive rate (i.e. it is assumed that someone investing some will lose rather than gain over time as the net consequence of inflation and tax). The UK rate is presently 0.75%.

144. To somebody in their late teens who has experienced catastrophic injury, looking at the loss of a fifty year working life, the 5% discount rate reduces the lump sum recovered for future lost wages by over 25% compared to a 3% discount rate.

145. The blunt reality is that no one can conservatively invest so as to earn 5% clear of tax over a fifty year period. The 5% discount rate is an arbitrary punishment imposed upon the injured under both the *Civil Liability Act* 2002 and the motor vehicle legislation. The rate is unjust. The rate is incorrect. The rate is actuarially unjustifiable. The ALA continues to encourage the Committee and the NSW government to address and consider the injustice involved.

146. Self-evidently, it is the more catastrophically injured (and in particular, those who are young and catastrophically injured) who are punished the most. This is not something about which any parliamentarian can take any pride.

Recommendation

147. That the Committee obtain actuarial advice and recommend to government a 3% discount rate for NSW injury claims.

Conclusions

148. The ALA repeats its appreciation that the Committee conducts this important review of the operation of the motor accidents scheme. Notwithstanding that the ALA has raised numerous early issues in relation to the operation of the MAI Act, it is anticipated there will be much more significant issues arising in twelve to eighteen months' time that will require the Parliament's attention.

149. The ALA takes the opportunity to note that these submissions contain multiple examples of CTP insurers misinterpreting and misapplying the new Act. These

mistakes have not been picked up by Claims Assist. They have not been identified by SIRA. They have been found and fixed by claimants' lawyers, mostly acting without charge to assist the injured. Removing lawyers from parts of the statutory benefits regime has seen a deterioration in the quality of justice.

150. Given the evolution of a new scheme, the Committee is strongly urged to consider a further review in twelve months rather than in two years.

151. The ALA would be pleased to further address the matters raised above in evidence before the Committee should the opportunity be provided.

Yours Sincerely,

Andrew Stone SC

NSW President
Australian Lawyers Alliance