

**INQUIRY INTO 2020 REVIEW OF THE COMPULSORY
THIRD PARTY INSURANCE SCHEME**

Organisation: Insurance Council of Australia

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17 December 2020

The Hon Wes Fang MLC
Chair, Legislative Council Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Email: law@parliament.nsw.gov.au

Dear Mr Fang

2020 Review of the Compulsory Third Party insurance scheme – Insurance Council of Australia (ICA) supplementary submission.

I refer to your email of 17 November 2020 and the Law and Justice Committee's invitation for the ICA to provide a supplementary submission on the operation of the 6-month liability period under the NSW CTP scheme (the Scheme) and the period claimants are entitled to claim benefits irrespective of fault.

The ICA has consulted with the five licensed NSW CTP insurers and provides the following information and feedback on the operation of the 6-month statutory benefit period.

As outlined in our initial submission of 6 November 2020, the Scheme has been operating under the *Motor Accident Injuries Act 2017* (the MAI Act) since 1 December 2017.

The MAI Act provides for two distinct types of CTP claims. Firstly, claims for statutory benefits (covering weekly payments and treatment & care) and secondly, claims for common law damages. Statutory benefits claims introduced under the MAI Act represents a fundamental departure from the common law only claim model under the old Motor Accident Compensation Act 1999 (MACA) under which the Scheme previously operated.

Since the commencement of MAI Act, more than 5000 injured people,¹ who would otherwise have missed out on benefits under the previous MACA scheme, have been able to make a claim for statutory benefits. However, despite these improvements to scheme design, many of these injured people have had their benefits cease at 26 weeks post-accident. This is because anyone who is at fault, or sustains a minor injury is not eligible for benefits beyond 26 weeks.

¹ SIRA, CTP Open Data (At Fault Claims by Fault) at <https://www.sira.nsw.gov.au/CTP-open-data>

The ICA and our NSW CTP members agree that the minor injury definition and process has to date generally been working well.² Those with minor injuries have been accessing early treatment and care, and a large proportion of these claimants have had their treatment completed prior to 26 weeks.³ Medical experts with knowledge of the NSW CTP scheme have previously commented that 26 weeks provides sufficient time to recover from a minor injury.⁴ As outlined in the ICA's 6 November submission, there have been some challenges in applying the minor injury test to claims involving psychological injury. Subject to any changes to improve the Scheme in this area, the ICA otherwise believes that the minor injury threshold should be retained in its current form.

As stated above, the introduction of benefits regardless of fault was a welcome change to the Scheme. This addition has meant that any person injured on NSW roads (excepting those who have committed a serious driving offence) can access support for their recovery. However, with the benefit of three years' experience in the scheme, the ICA and the NSW CTP insurers recognise that there is currently an equity issue for people who are at-fault but have sustained a non-minor injury. Often these people require more than 26 weeks of support to recover and return to their pre-accident activities. This is illustrated in the following claim example:

A claimant suffered significant facial injuries from the motor vehicle accident and was considered mostly at fault. The claimant required approximately \$100,000 worth of dental treatment that was only available across an extended 12-month period (due to the need for the jaw to heal sufficiently prior to the final surgery). The current scheme prevents the claimant from accessing treatment and care beyond 6 months which may have resulted in the claimant completing and funding the treatment outside of the claim.

The ICA believes extending the current 26 week statutory benefit period for at-fault road users who have sustained a non-minor injury should be considered, as this would provide for a fairer and more equitable outcome for all.

The extension of benefits regardless of fault will allow more seriously injured people to access benefits beyond 26 weeks and address some of the unfair outcomes that can arise

² This is also consistent with SIRA's observation in the review of minor injury definition

https://www.sira.nsw.gov.au/_data/assets/pdf_file/0005/600737/Review-of-Minor-Injury-Definition-in-the-NSW-CTP-Scheme-report.pdf
(p 3, para 3).

³ Ibid, p 2. SIRA found that the data indicates positive outcomes in these first two years of the scheme. 42% of the people with minor injuries finished their treatment and care within 13 weeks after a motor accident. That increased to 75% by 26 weeks and 98% by 52 weeks.

⁴ Extract from transcript of the Legislative Council Standing Committee on Law and Justice 2018 Review of the Compulsory Third Party Insurance Scheme on Thursday 23 August 2018 at p 23, evidence provided by Professors Harris and Cameron on whether 6 months is a reasonable time to expect recovery for minor injury.

under the current operation of MAI Act. The benefit period for claimants that meets the definition of minor injury will continue to cease at the end of 26 weeks.

The proposed extension of the statutory benefits period would allow non-minor injury at-fault claimants more time for full recovery and provides the best opportunity for an injured person to return to previous activities in a reasonable timeframe. This is also consistent with one of the scheme reform objectives to increase the proportion of benefits provided to the most seriously injured road users.

Furthermore, an extended benefit period will assist with minimising protracted legal argument about fault and liability. This allows the insurers to focus on supporting an individual's recovery to achieve a better overall outcome.

The ICA and insurers believe there are various options for extending the statutory benefit period. These options are briefly outlined below. It is acknowledged however, that any reforms to the benefit structure of the Scheme must be sustainable. Therefore, any potential changes in benefit periods would need to be subject to appropriate modelling and costing to ensure they do not impact the long-term sustainability of the Scheme or undermine the broader improvements to the Scheme following the 2017 reforms.

Options for extending statutory benefits for at fault claimants with non-minor injuries:

1. **Extension of all statutory benefits:** The simplest option would be to provide a new time period under the MAI Act that at-fault delivers with non-minor injuries would be entitled to receive the current statutory benefits. That is, instead of benefits ceasing at 26 weeks a new cessation date would be created (eg. 52 weeks or 78 weeks). One advantage of this type of reform/change is that it would be relatively easy to implement and would add little complexity to the Scheme.
2. **Extension of treatment and care benefits:** Extension of the statutory benefit period for treatment and medical care (but not income replacement) for at-fault claimants who have sustained non-minor injuries beyond 26 weeks, where further treatment and medical care is likely to produce a better long term medical outcome for the claimant.

The potential benefits of this option would be that at-fault claimants would continue to receive the treatment and medical care they need while maintaining incentives for claimants with capacity to return to work. Given the relative infancy of the Scheme under the MAI Act, this option of providing an extended no-fault benefit period only in relation to treatment and medical care may also be a more appropriate first step from a scheme sustainability perspective.

Extending statutory benefits beyond 26 weeks for at-fault, non-minor injury claimants may also help solve the challenges created by unusual circumstances such as those in the matter of *AAI v Singh* [2019] NSWSC 1300. A single vehicle accident such as occurred in the *Singh* case would ordinarily qualify for statutory benefits for up to 6 months. However, due to the findings in this

case, such claims are now eligible for benefits for up to two years. Extending coverage as the ICA has proposed may resolve these inconsistencies and provide the community with more certainty about their coverage under the Scheme.

In summary, the ICA and our NSW CTP members believe that an opportunity exists to enhance the Scheme design to better support the recovery of those who have been seriously injured in a motor vehicle accident. We believe that extending statutory benefits for at-fault, non-minor injury claimants would enable the Scheme to provide ongoing support to those who are likely to require treatment and care for more than 26 weeks. By providing this support these claimants will be provided with assistance to maximise their recovery and NSW motorists will be provided with a more equitable CTP scheme in NSW.

We trust this information and feedback is of assistance.

Yours sincerely

Andrew Hall
Executive Director & CEO