

INQUIRY INTO 2022 REVIEW OF THE COMPULSORY THIRD PARTY INSURANCE SCHEME

Organisation: Australian Lawyers Alliance (ALA) NSW

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2022 Review of the Compulsory Third Party Insurance Scheme

Submission to the Standing Committee on Law &
Justice

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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

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the 2022 Review of the Compulsory Third Party Insurance scheme.
2. The ALA provided extremely comprehensive submissions for the 2020 SCLJ review of the Compulsory Third Party Insurance Scheme. It is noted that in the 2020 report, the SCLJ made very few recommendations, pending completion of the 3-year review as to the operation of that scheme. The review was conducted by Clayton Utz and Deloitte.
3. Clayton Utz provided an impressively thorough report dated 5 July 2021. The Clayton Utz report made some 49 recommendations for modification and improvement in the operation of the Motor Accidents Scheme.
4. Subsequently, the ALA wrote to the Minister on 21 March 2022 providing wholehearted support for 46 of the 49 recommendations and conditional support for the remaining three. Many of the recommendations made by Clayton Utz adopted recommendations made by the ALA to the 2020 SCLJ enquiry in submissions dated 23 December 2020.
5. The ALA respectfully submits that one of two primary focuses of the 2022 review of the CTP scheme should involve;
 - a. ensuring the implementation of the carefully considered and widely supported Clayton Utz recommendations. This is further addressed below.
 - b. The second recommendation is for the SCLJ to carefully review the operation of the Personal Injury Commission.
6. Fundamental to the motor accidents scheme is the efficient operation of the PIC. If the PIC is not producing timely medical and other assessments, then the motor accidents scheme grinds to an entirely unsatisfactory halt. The PIC is beset with delays. The PIC largely attributes those delays to the pandemic. The ALA is concerned that there are more widespread reasons for delay at the PIC and that the PIC is not fully addressing all of the causes of delay.
7. SIRA is currently conducting a review of whether the PIC is delivering on the object's clauses contained in the PIC legislation. The ALA encourages that review to frankly address the performance issues that the PIC is experiencing. Additionally, the ALA urges, in the strongest possible terms, the retention of external management consultants to review the operation of

the PIC, including its computer service procurement issues, staff turnover, the drop-out rate of medical experts willing to participate in the scheme and a number of other issues that potentially affect PIC efficiency and performance.

ENACTING THE CLAYTON UTZ RECOMMENDATIONS

8. It is understood that the government is still considering the Clayton Utz recommendations. As at the date of drafting of this submission, there has not been a formal government commitment to enact any or all of the recommendations.
9. The ALA is in the difficult position of being aware that SIRA and the government are working on adopting various of the recommendations without being able to publicly address that program of works. This in turn makes it difficult for the ALA to address any potential concerns about Clayton Utz recommendations that are not being pursued or acted upon.
10. The following statements reference the ALA submissions to the 2020 SCLJ of the operation of the motor accidents scheme:
11. The ALA remains concerned that insurers are making ill-informed decisions to cut off statutory benefits at six months. The SCLJ is invited to have SIRA address insurer effectiveness in making accurate decisions about entitlements towards the conclusion of the six months no fault statutory benefits period as claimants' transition to the fault-based statutory benefits component of the scheme.
12. Recommendation 2 from Clayton Utz involved better SIRA reporting on insurer compliance with the insurers over-arching obligations under the Act. Recommendation 3 was SIRA reporting on and publishing insurer business plans.
13. There were further specific recommendations by Clayton Utz to try and provide for a better statutory benefits experience, such as Recommendation 13 for prompted decisions by insurers on treatment needs and Recommendation 14 to simplify calculations as to weekly payments. Recommendation 16 also addressed prompter weekly payments.
14. These are all important objectives for the scheme and the ALA continues to endorse them.

FINANCIAL PERFORMANCE OF THE MAI ACT

15. Since the last review by the SCLJ, SIRA has engaged in one round of clawback of super profits and is currently in the process of a second clawback. The first round saw over \$70 million in super profits clawed back.
16. The SCLJ is invited to ask SIRA to explain why the clawbacks have been able to occur. In short, there can only be clawbacks of super profits if super profits are being made. Super profits only occur if some aspect of the scheme does not performance in accordance with premium filings.
17. If super profits are solely the result of reduced accidents because people did not drive to work during COVID, then that is an unforeseen externality. On the other hand, it should be of enormous concern to both SIRA and the Parliament if super profits are being made because benefits are not being paid as intended to motor accident victims.
18. The first super profit clawback by SIRA came without any simple public explanation as to what was generating the super profits. It is respectfully suggested that the SCLJ should be demanding a detailed explanation for the source of the super profits from SIRA and why these super profits are being generated. Further, the SCLJ is encouraged to recommend that each and every clawback of super profits come with a public explanation from SIRA as to why the super profits have occurred.

DISPUTE LEVELS

19. The ALA submission to the 2020 SCLJ review identified that SIRA data as to dispute levels under the scheme did not match initial scheme estimates and was likely to generate windfall gains to insurers. SIRA has subsequently conducted work that has resulted in a radical revision of actuarial assumptions as to likely dispute numbers.
20. The source of part of the super profits that has in fact materialised was predicted by the ALA nearly two years ago. There was a massive over-estimate of dispute levels.
21. When the MAI Act was introduced, SIRA set the regulated professional fees for legal assistance on the basis of gross over-estimates as to the likely number of disputes. There have in fact been less than one quarter of the number of disputes that SIRA anticipated would occur. No doubt the lack of legal resources to assist claimants with disputes is part of the reason the

scheme is generating the current super profits that it does. It should not be the goal of the scheme to generate super profits through claimants not recovering the benefits to which they are entitled under the Act.

22. SIRA is currently conducting a review of legal costs under the scheme. Unfortunately, the review has dragged on for the better part of a year. Urgent action is required. SIRA should be asked for timelines on the concluding of its work in relation to legal fees and its review of legal support mechanisms. SIRA should be asked when action can be expected rather than yet another interminable review process.

INSURER REGULATION

23. In its submission to the 2020 SCLJ review, the ALA identified shortcomings in SIRA's regulation of insurer conduct. Specific case studies were provided. The Clayton Utz recommendations from the 3-year review included (adopting the Clayton Utz numbering):

2. Better SIRA reporting on insurer compliance with over-arching obligations.

3. SIRA ensuring reporting on and publication of insurer business plans.

32. SIRA to have a better policy on disclosing regulatory action.

24. The SCLJ is invited to ask SIRA whether it has become a better and bolder regulator in the last two years and what evidence there is of any such changes. The SCLJ is encouraged to ask SIRA what it has done to implement recommendations 2, 3 and 32 from the Clayton Utz report.

JOINT MEDICO-LEGAL EXAMINATIONS

25. The ALA has long supported reducing the stress on claimants by reducing the number of medical examinations they need to attend for the claims process. SIRA has publicly espoused the same goal.
26. Clayton Utz specifically recommended that SIRA consult over scheme changes to facilitate joint medico-legal reports and to collect data on the frequency with which joint medico-legal examinations are occurring.

27. The ALA is not yet aware of SIRA having taken any steps to try and collect the data on the frequency of joint medico-legal examinations and which insurers have a better rate of procuring agreement in relation to joint examinations.
28. Although this topic has been the subject of ongoing discussion between SIRA and the ALA for the better part of the last 5 years, there is still considerable timidity on SIRA's part in taking aggressive steps to ensure that insurers maximise the number of joint medico-legal examinations occurring and minimise the number of unilateral examinations.

THE DEFINITION OF MINOR-INJURY – ADJUSTMENT DISORDERS

29. The ALA addressed this subject in detail in its 2020 submission to the SCLJ. The Clayton Utz report recommended that the diagnosis of adjustment disorder be removed from the definition of minor injury [Recommendation 34]. Over fourteen months after Clayton Utz provided this recommendation to the government there has been no action. The SCLJ is invited to ask SIRA why this recommendation has not been actioned.

THE EFFICACY OF INTERNAL REVIEW

30. The ALA submission to the 2020 SCLJ enquiry addressed why internal review for some disputes is more effective than in relation to others.
31. Clayton Utz recommended that internal review no longer applied to WPI decisions [Recommendation 23]. For the reasons set out in the ALA submissions in 2020, it continues to be the ALA's position that internal review should also be removed as a mandatory step in disputes over minor injury and liability for statutory benefits after 6 months.
32. The ALA has no objection to internal review in relation to treatment and care disputes and disputes over weekly payments of statutory benefits. These are areas where internal review contributes rather than detracts from scheme efficiency.

Conclusion

33. The Australian Lawyers Alliance (ALA) has welcomed the opportunity to have input into the 2022 Review of the Compulsory Third Party Insurance scheme.
34. The ALA has additional issues arising out of the 49 Clayton Utz recommendations for discussion. However, until SIRA and the government have clearly identified which aspects of the recommendations are being adopted, which are still being worked on and which (if any) the government intends to ignore, the ALA is hamstrung in providing the degree of assistance it wishes to provide to the SCLJ with regards the efficient operation of the Motor Accidents Scheme.
35. The ALA is available to provide further assistance to the Committee on the issues raised in this submission. For enquiries in relation to any matters mentioned above, please contact Andrew Stone SC, spokesperson on personal injury and compensation at .

Joshua Dale

NSW President

Australian Lawyers Alliance