

# **Proposed amendments to the Motor Accident Guidelines — Version 5**

State Insurance Regulation Authority (SIRA)

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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.<sup>1</sup>

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

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Part 3

### 3.26 Insurer self-assessment

1. The ALA notes the introduction of a self-assessment regime for insurers in relation to their performance. The ALA is not enthused about self-assessment as a regulatory tool. The ALA would much prefer that SIRA relieve the insurers of this administrative burden, increase the levies on CTP insurers and engage in a firm and vigorous program of external audit.
2. It is fully anticipated that the insurer response to self-assessment will in no way involve frank disclosure of any weaknesses in systems. The primary focus will be on minimising, explaining away and justifying.
3. If the Financial Services Royal Commission and the disaster of apartment constructions in NSW ought to have taught the NSW Government anything, it is that self-assessment is no substitute for rigorous external assessment.

## Part 4

### 4.8 Different insurers for statutory benefits and damages

4. The ALA strongly endorses putting the obligation on insurers to work collaboratively to ensure a consistent and seamless claim experience for the claimant when there are multiple insurers responsible for managing the statutory benefits claim and/or damages claim.
5. Consistent with previous communications with SIRA, the ALA again identifies the complex issues that arise when claimants have competing statutory rights to statutory benefits, such as non-NSW workers' compensation rights or extraterritorial Transport Accident Commission (TAC) rights for injuries arising in a Victorian vehicle in an NSW motor vehicle accident.
6. As the ALA has previously emphasised, in those circumstances, the claimant is almost invariably better off relying upon NSW compulsory third party (CTP) rights on the basis that medical expenses paid will not be refundable out of the damages recovered in any NSW CTP claim.

7. The ALA would very much like to see incorporated in the principles an obligation for the CTP insurer to advise as to the availability of CTP statutory benefits even where alternate statutory benefits are being accessed and advising the claimant as to the necessity to obtain legal advice and consider the consequences of remaining on non-NSW CTP statutory benefits.

#### **4.9 Communication with the claimant**

8. The ALA maintains its ongoing protest that CTP insurers are being encouraged to treat legal representatives as second-class citizens and to communicate directly with the claimant, even where they are legally represented. A claimant is entitled to have a legal representative represent them and it should not be the role of SIRA to direct insurers to communicate directly with the claimant when the claimant wishes otherwise.

#### **4.16 Verifying the motor accident**

9. This clause should be redrafted so that in the event the claimant cannot provide the accident event number, the insurer 'may' request from the claimant other information. It should not be mandatory that the insurer 'must' request information. The insurer may be well satisfied as to the circumstances of accident, in which event, mandatory enquiries would be time wasting and pointless.

#### **4.37 Liability decisions and supplying the liability information**

10. The ALA strongly supports the redrafting of 4.37 to ensure that the insurer must provide copies of all listed information to the claimant along with a list of that information.
11. For abundant caution, it might be just as well if the provision read: 'A list of all information in the insurer's possession relevant to the decision....'.
12. The ALA has already experienced insurers playing silly buggers with the current provision and claiming that in ignorance they did not know that they were required to hand over items such as file notes of conversations with the insured driver.
13. There would be no harm in expanding upon this provision by specifying that information relevant to the decision includes, but is not limited to:
  - (a) Any property damage information.

- (b) Any claim forms or Notices of Claim lodged by the insured driver.
- (c) Any investigative reports.
- (d) Any internal file notes or documents referencing the circumstances of accident.
- (e) Any statements or records containing references to accounts of the circumstances of accident.

14. Again, the ALA emphasises that absent clarity, insurer misconduct is anticipated.

#### **4.39 Advising the legal representatives of the liability notice**

15. The ALA supports this provision, but says that it must be made clear that not only should the notice be given to the claimant's legal representatives, but also a copy of all of the liability materials relied upon by the insurer that should be annexed to the notice. All the liability information should be supplied to the legal representative. Again, unless the provision is specific insurer misconduct should be anticipated.

#### **4.45 New liability information**

16. The ALA strongly supports this provision and the ongoing disclosure requirement.

#### **4.115 Insurer decision making**

17. The ALA is disappointed that SIRA has seen fit to remove the practical example contained within the previous regulation. If insurers had a problem with conceding an entitlement to non-economic loss when in possession of opinions that the claimant's WPI was greater than 10%, then the example could have been amended by adding: 'Unless there was compelling not to make such concession.'

18. The removal of the specific example is regrettable.

## Part 7

### 7.33/7.34 DRS without internal review

19. The ALA supports the proposed amendment on the basis that the previous guideline was *ultra vires* the Act. The same comment applies in relation to the revised 7.47.

### 7.69 Additional DRS disputes

20. The ALA supports the improvement in processes which had previously proved cumbersome for Dispute Resolution Service (DRS) dispute matters that were not a merit review matter, medical assessment matter or a claims assessment matter.

### 7.174 Conflicts of interest

21. The ALA does not support handing over the power to determine whether a DRS Assessor should be re-allocated to the DRS decision maker. It is far more sensible and convenient to have the Dispute Resolution Officer (DRO) make that decision. The DRS process should be as non-confrontation as possible and having such decisions made by the DRO is the best way to ensure that outcome.

### 7.317.2 Correcting DRS errors

22. Much as the ALA supports having DRS Medical Assessors fully refer to the submitted documentation, the concern is that CTP insurers will be far better resourced to utilise this provision than claimants. It is not hard to imagine that upon each and every DRS Medical Certificate being issued, someone at the insurer will sit down with the list of the insurer's documents submitted (including submissions) and tick off where the assessor has made reference to them. If one document is missed, the insurer will be asking for reconsideration.
23. The ALA repeats it would like DRS Assessors to refer to all of the documents supplied to them, to analyse them and to respond. This is what a comprehensive certificate does. However, if only one party has the resources to go line item by line item through the certificates and protest about incompleteness, then the system (yet again) becomes fundamentally unfair and unbalanced.

24. The ALA is concerned that it will only be insurers who will be reviewing each and every certificate and insisting upon reconsideration and re-issuing of the certificate every time one of their reports or submissions are not acknowledged and addressed.



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