



Australian Lawyers Alliance

Response to Motor Accident Insurance Commission Survey

August 2019



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WHO WE ARE

The 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 started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

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

OUR STANDING TO COMMENT

The ALA is well placed to provide commentary to the Motor Accident Insurance Commission (MAIC). Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another.

Our members advise clients of their rights under current state based and federal schemes, including motor accident legislation, workers compensation schemes and Comcare. Our members also advise in cases of medical negligence, product liability and other areas of tort.

We therefore have expert knowledge of compensation schemes across the country, and of the specific ways in which individuals' rights are violated or supported by different Scheme models.

We are well aware of existing methods of compensation reimbursement across the country, in order for individuals to gain access to care, as they deal with intersecting Schemes.

Our members also often contribute to law reform in a range of host jurisdictions in relation to compensation, existing schemes and their practical impact on our clients. Many of our members are also legal specialists in their field. We are happy to provide further comment on a range of topics.

¹ Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>

SCOPE OF DOCUMENTS

The ALA thanks the Queensland MAIC for the opportunity to comment upon a report of survey results dated 17 June 2019. (“The report”).

It is noted that the ALA was provided only with a document with a pictorial coversheet and an eight-page document headed “Summary”. We surmise that MAIC have the report in its entirety, of which the summary and recommendations are only part.

We note that MAIC commissioned an external provider MCR, to undertake the survey of CTP claimants and that MCR authored the report. The report not only contains statistical data, but qualitative conclusions and opinions.

It is not clear whether MAIC endorses the survey methodology, the questions asked of claimants, the survey results or the recommendations contained within the report. Those are all matters the ALA would seek clarity on from MAIC.

The report is in our view, an extraordinary and unfortunate document.

ALA COMMENTS

1. Sample Size

The covering communication from MAIC informs ALA that the intention was to have 300 respondents and the survey actually covered only 200. The statistical validity of this sample size is open to question. Moreover, the report does not make clear:

- i. How and by whom the respondents were identified to be participants in the survey.
- ii. The geographic distribution of participants.
- iii. The scope of the brief provided to MCR. In particular, we do not know which entity was responsible for the formulation of the questions to be asked nor the information (if any) given to participants to frame each question. The significance of this issue will become apparent below.

2. The Summary

Following the same order of the summary we have the following observations and suggestions:

Starting the Claims Process

The ALA only has one observation with respect to this component of the report. Direct claimants (27%) were more likely than legally represented claimants (3%) to say a CTP insurer alerted them to the possibility of claiming. As will become clearer later, the methodology by which a CTP insurer alerts a claimant about the possibility of financial recompense for injuries sustained in a compensable motor vehicle incident is unlikely to involve a CTP insurer advising claimants about the right to legal representation and in particular, about the financial consequences of *not* retaining lawyers in their claim. If we are incorrect in that assertion, please explain why.

The ALA wishes to expressly avoid any commentary on the survey results with respect to what are described to as “scammers”, this being a reference to claims farming activities. The ALA has engaged extensively with respect to this issue, in other contexts, and will continue to do so.

Lawyers

The survey notes that 1 in 2 legally represented claimants engaged a lawyer because they considered them to be experts in the area. We would be interested to learn what other alternatives were provided as the “trigger to engaging legal representation”. In particular, whether the participants were asked whether independence from the insurance company, ethical duties to the clients, and/or avoidance of conflicts of financial interests (when compared to dealing directly with an insurer) were alternative triggers.

It is noted that claimants overall satisfaction with their lawyers was rated positively at 3.66 and it was further noted that between 2017 - 2019 there was an increase in the proportion rating their overall satisfaction with their lawyer at the lowest level. That figure changed from 1 in 20 to approximately 1 in 10 over that two year period.

The summary states that “satisfaction regarding the amount of compensation received in the hand was lower by comparison (3.01)”; but it is not clear what the 3.01 is being compared to.

Insurers

It is noted that claimants dealing directly with insurance companies rated their overall satisfaction with their CTP insurer at 3.83 out of 5. Moreover, 85% of claimants in the 2019 survey felt that their CTP insurer had “acted fairly and professionally throughout the entire claims process”. 15% believe their insurer did not act fairly and professionally. Was there any commentary as to why they held this belief? It seems to us that those conclusions are at odds with the full factual matrix available to the community.

Is ALA correct to assume from the 3.83 and 85% ratings respectively that claimants were unlikely to be aware of the data available upon the amount of compensation paid to legally represented claimants? An informed answer could have been derived by asking the following question:

“If you were legally represented you could have reasonably expected to receive, on average, at least 5 times the amount of compensation you have actually received from the CTP insurer directly. Do you believe that the CTP insurer has acted fairly and professionally in that knowledge?”

Claimant Benefits

The report is exceptionally brief in its exposition of the survey results with respect to claimant benefits. Moreover, it is not clear what precise questions were asked of surveyed participants in deriving the results. However, from the two short paragraphs we can conclude:

- (a) Those legally represented reported settlement amounts averaging \$78,000 and estimated their lawyer’s costs (which would include outlays) at just under \$30,000.
- (b) Presumably the balance of approximately \$6,000 would be the estimated statutory refunds for each claimant (averaged).
- (c) A person legally represented would receive approximately \$42,000 clear in their hand after payment of all statutory refunds, legal costs and disbursements.



(d) Claimants without a lawyer – those who chose to rely on the insurance company - received less than \$8,000 (\$7,839.05) clear, in damages/compensation for their injury. This figure is down on the 2017 average by over \$5,000 from \$13,481.

(e) Thus, those with independent lawyers representing their interests, receive clear in their hand after all legal costs, statutory refunds and outlays more than five times the amount of compensation of those who relied upon the purported “fairness and professionalism of insurers” [the phraseology used in the report] and were not legally represented.

We will return to this theme in the context of “overall satisfaction” below:

Treatment and Rehabilitation

In 2019, 70% of claimants reported receiving insurer funded treatment or rehabilitation in association to their claim. This is a disappointing reduction from 81% in 2017. This reflects what the members of our organisation observe commonly; insurers are generally slow to offer rehabilitation; and reactive and restrictive with respect to rehabilitation. This contrasts to the MAIC guidelines with respect to rehabilitation under s.51 of the Motor Accident Insurance Act, guidelines the ALA regard as articulating the right principles.

Importance of Factors in the Claims Process

The quality of treatment and rehabilitation was rated 4.79 out of 5, as the most important factor in the claims process. The nexus to the previous item is obvious: work needs to be done on insurer culture and behaviour with respect to treatment and rehabilitation; a diminution by 11% from 81% to 70% in claimants receiving insurer funded treatment and rehabilitation is unacceptable within the context of that factor.

Future Claims Pathway

The survey concludes that around 7 out of 10 claimants who dealt with a lawyer would likely engage a lawyer again if they ever needed to claim. Whilst a similar percentage (69%) would go through their insurer if they needed to claim in the future. We reiterate the importance of an appropriate knowledge base for the pursuit of answers to such a question. In any future survey, in our view, participants ought to be provided transparently with the facts. These are not mere assertions, but rather derived from the MAIC’s own figures.

Those who dealt with insurers on a previous occasion should be asked:

“If you knew that on average, clear of all legal costs, statutory refunds and outlays, you would receive at least 5 times that which you will receive if you negotiate directly with your insurer, how likely would you be to use a lawyer?”

The statistical outcome of such a question seems to us to be clear.

In terms of overall satisfaction with the CTP insurance claims process, and direct claimants being more likely than legally represented claimants to be satisfied with the Queensland CTP insurance claims process, we reiterate the same observation.

CONCLUSION AND RECOMMENDATIONS

The report contains some recommendations and conclusions. For the sake of completeness we extract the first paragraph in its entirety.

“Lawyers are positioning themselves as experts and claimants are increasingly drawn to engaging legal representation for this expertise. This finding, coupled with the fact that claimants arrive at the claims process with limited knowledge suggests a potential need for claimants to be provided with an understanding of what’s involved in making a claim and their option to make a claim directly.”

Several things can be observed with respect to the statements contained within the paragraph above, and more broadly:

1. Lawyers are experts. Our members typically have at least five years’ of university training, and many have additional specialist qualifications.
2. Lawyers have duties to the court and to their client, which are entrenched both in legislation and in the Common Law. Those longstanding duties, including the duties of independence, require them to use their best endeavours to get the best outcomes for their clients.
3. Lawyers are not conflicted.
4. Insurers are, indisputably, conflicted. They have a commercial interest in minimising the amount paid to claimants. The results of this survey bear that out. Thus, they have a direct financial interest in applying methodologies to dissuade injured scheme participants from seeing a lawyer. On a daily basis, people injured in incidents to which the CTP legislation applies, come to our

members with offers from insurers. Those offers, when compared to sums available to people who have lawyers; are almost invariably paltry and insulting; and an affront to access to justice and to the objects of the governing legislation.

5. Claimants do indeed arrive at the claims process with limited knowledge. Insurers do not provide that knowledge because they are profoundly conflicted by their commercial interests.
6. The suggestion that claimants (or more of them) need to be provided, by insurers, with an understanding of what is involved in making a claim directly; is meritless. This is because insurers are irrevocably conflicted and true access to justice involves the use of people (in this circumstance, lawyers) who have well understood and longstanding duties of independence and duties to the court.
7. For many years the MAIC has been obtaining data from insurers and reporting this data through to stakeholders. Over the last few years it has been consistently reported that those people who have the guidance, expertise and professionalism of an independent lawyer in pursuing their CTP claim will receive somewhere between 12-15 times as much compensation from a CTP insurer as a person who deals directly with an insurer. ALA is unclear as to whether the data elicited in this report is accurate. Assuming it to be accurate, a statistic that a represented claimant on average receives more than 500% more than an unrepresented claimant, is a damning indictment upon the behaviour of insurers. This data supports a conclusion that insurers are exploiting people with limited knowledge, and vulnerabilities inter alia, by reason of their compensable injuries. This type of misleading and deceptive conduct was called out in the banking context at a recent Royal Commission headed by former High Court Justice, Mr Kenneth Hayne.
8. In 2016, a MAIC review of the CTP Scheme concluded that insurers were making profits far in excess of those originally modelled. It is clear from the earlier actuarial presentations (referred to above), as well as the limited results in this current report, that insurer gouging ought to be the target of further policy measurers. Insurers have no mandated legal mechanisms by which they must advise of the likely differences between outcomes for those people with a lawyer, and those people who leave themselves to direct negotiations with an insurer. In ALA's views, such a mechanism should be legislated, and vulnerable people actively encouraged to seek independent legal advice.

9. We have provided observations with respect to rehabilitation above. We have some further observations to make with respect to the rehabilitation process at the coal face (as distinct from the commendable principles enunciated in the MAIC's rehabilitation guidelines) and would be happy to share those in further stakeholder engagement moving forward.

10. The recommendation that there be an expansion of the methods by which insurers could mislead by omission, and perpetuate their excessive profits, is categorically rejected for the reasons outlined herein.

Yours Sincerely,



Greg Spinda
Queensland President
Australian Lawyers Alliance