

Review of Legal Support for Injured People in the NSW CTP Scheme

Preliminary submission to the State Insurance Regulatory
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.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 provide this preliminary submission to the State Insurance Regulatory Authority (SIRA) review of legal support for injured people in the NSW CTP Scheme within the *Motor Accident Injuries Act 2017* (“the MAI Act”).

Problems with the costs regime

2. There are clear flaws within the costs arrangements under the MAI Act, including those listed below.
3. There are unduly cumbersome processes for the recovery of regulated fees. It is absurd that a claimant’s legal representatives have to lodge an entirely separate dispute for determination by a separate assessor (a merits reviewer) in order to recover the fixed and regulated legal costs of a medical dispute or a miscellaneous claims assessment dispute as to liability. The system for claimants recovering the regulated fee should be streamlined and improved.
4. In some dispute categories, the regulated fee is unclear and inadequate. One area of lack of clarity arises from whether a miscellaneous claims assessment of a liability dispute carries two regulated fees as it determines entitlements under sections 3.11 and 3.28 of the Act or whether there is only one regulated fee (DRS Assessors have been adopting varying positions).
5. Further, as to the regulated fee that is recoverable, while it might be adequate to cover an ‘on-the-papers’ dispute as to wages or a medical assessment it is grossly inadequate when it comes to more complex liability disputes. Unsurprisingly, DRS Assessors have been prepared to find that a number of the miscellaneous claims assessments involving liability engage the ‘extraordinary circumstances’ provisions of section 8.10 of the Act. However, even there confusion abounds in terms of differing approaches to allowing those exceptional costs, including different approaches as to what is being allowed as a reasonable hourly rate for legal practitioners acting for claimants within the scheme.
6. A further area of potential confusion arises from the operation of section 8.10 in relation to those under a legal incapacity. The ALA has written to SIRA with regard to the operation of this provision (letter dated 18 August 2020). To date, no response has been received from SIRA addressing the potential confusion in the application of this provision.
7. In short, the ALA encourages review and reform.

Concerns with the current review

8. However, the ALA is concerned with SIRA's approach to the current review. Stakeholders do not have access to comprehensive scheme data with regard to legal representatives and costs. This makes it extraordinarily difficult for stakeholders such as the ALA to make comprehensive submissions, as there is insufficient data to properly analyse the extent to which the scheme is operating smoothly or otherwise. SIRA has provided little information as to whether scheme expenditure on costs is running on, over or under budget.
9. The ALA respectfully submits that this review should commence with SIRA publishing comprehensive data in relation to the operation of costs under the scheme. Stakeholders should then be given the opportunity to comment when properly informed by that data. The preliminary analysis from SIRA should not only cover the operation of the costs regime in the scheme to date, but should also extend to at least some preliminary analysis as to possible reform options.
10. For example, if introducing an ILARS-style regime into the motor accidents scheme (as currently applies to statutory workers' compensation claims) is to be considered, then it would be useful to have some analysis and data on how this might look, what it would cost to administer and where there would be any potential savings.
11. The ALA suggests that the following data should be presented and analysed. The following list is nowhere near comprehensive but merely intends to provide some suggestions for starting points:
 - a. What is the total amount paid to date to claimants' legal representatives in relation to statutory benefits disputes and damages claims? This should be presented with a breakdown as across statutory benefit dispute types. The payments of regulated and unregulated costs in relation to damages claims should be cross-referenced as against costs disclosures made to SIRA, both to establish the solicitor/client costs gaps applicable to the regulated payments and the extent to which the injured are cross-subsidising the CTP scheme through inadequate recovery of legal costs and excessive solicitor/client gaps.
 - b. How many specific statutory benefits costs disputes have been determined by a merits review? Why are these disputes occurring? What can be done to avoid these disputes?
 - c. How much are insurers spending on costs in statutory benefits disputes and damages claims? How does this compare with claimant expenditure? Does any comparison make allowance for

the fact that insurers are able to utilise investigators as a separate category of disbursement where claimants are not able to claim costs paid to an investigator?

- d. What were the actuarial assumptions entering into the scheme as to the likely expenditure on legal disputation for claimants and insurers in relation to both statutory benefits and damages? Is expenditure running above or below actuarial predictions? Why?
- e. How many miscellaneous claims assessments have been lodged? How many have proceeded to determination? With both claims that have been resolved prior to assessment and claims that have proceeded to determination, what number and what percentage have involved exceptional costs orders being made? What is the number, range and total dollar value of exceptional costs orders being made in these disputes?
- f. To date, what percentage of damages claims have been exempted from DRS assessment? Is this in accordance with actuarial projections? Are costs in litigated matters falling within projections? Why or why not?
- g. How many insurers are running internal legal departments and what is their expenditure on these departments? How is insurer expenditure on internal legal services accounted for in SIRA data as to expenditure by the insurers on legal services? Does the use of internal legal departments give the insurer legal resources that appear as claims handling expenses, rather than as legal expenditure? Does this distort the analysis of the relative resourcing of each side in legal disputes?
- h. What is the most recent data as to the performance of SIRA's legal advisory service? Does this service continue to address only a miniscule number of claims that renders it largely irrelevant within the operation of the scheme?
- i. How many claimants have proceeded through DRS disputes unrepresented? How have they performed in such disputes when compared to those who are legally represented? Does legal representation make a difference as to outcome?
- j. How many legally unrepresented claimants have proceeded to resolve damages claims? It is noted that resolution of unrepresented damages claims requires approval by a DRS Assessor. How many cases have proceeded to such an assessment? What percentage of resolved claims have been approved at the first proposed figure? What percentage have seen the insurer increase their offer prior to the final approval? If such increases have been made, what is the

range and average increase occurring between the insurer's initial proposal and the ultimate outcome? (This information all goes as to the value of legal representation, the efficiency of the DRS safety net and whether insurers are treating claimants fairly, in terms of making reasonable offers that are readily approved.)

12. The ALA will make further and more substantive submissions in relation to legal representation and costs within the scheme. However, the ALA would much prefer to do so from a position of being fully informed as to whatever data and analysis is available as to the operation of costs under the *MAI Act* to date.
13. It would further assist in the analysis of scheme performance in relation to legal representation and costs if SIRA was to provide some reflections and thoughts at the commencement of this process as to areas of concern. SIRA should know the operation of the scheme better than a stakeholder.

Conclusion

14. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this preliminary submission to the SIRA review of legal support for injured people in the NSW CTP Scheme.
15. The ALA respectfully invites SIRA to rethink its approach to this review. The ALA encourages SIRA to first publish the data and analysis, and identify the areas of concern, then invite the comment, then address reform.
16. The ALA will continue to contribute to discussions on performance of the legal costs structures under the *MAI Act* however SIRA chooses to run the consultation.



Joshua Dale

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