

# Statutory Review of the *Motor Accident Injuries Act 2017*

Submission to SIRA

2 August 2021



## Contents

Who we are.....	4
Introduction .....	5
Objective (a).....	6
Minor injury .....	9
At-fault injured persons .....	11
Objective (b).....	12
Weekly payments.....	13
Cessation of weekly payments.....	13
Gratuitous attendant care .....	14
Minor injury .....	14
Damages.....	15
Objective (c) .....	16
Objective (d).....	17
Objective (e).....	19
Competition on premium .....	20
Innovation in premium setting .....	20
Point to point industry .....	20
SIRA's role in relation to sustainability, affordability and fair market practices .....	21
Objective (f).....	21
Objective (g).....	23
Time limits.....	27
Internal review.....	27
Independent review.....	28
Medico-legal assessments and legal assistance .....	29
CTP Assist .....	30
Insurers as decision-makers.....	30
Objective (h).....	32
Implementation (KPI analysis) .....	33
Issues not raised .....	33
Conclusion.....	34

## 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.

---

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

## Introduction

1. This submission as to the operation of the *Motor Accident Injuries Act 2017* (“the MAI Act”) is provided in response to the discussion paper issued by Clayton Utz dated 5 July 2021.
2. The ALA has had less than one month to prepare this submission responding to the very specific formulation of various issues in the discussion paper. That is clearly not enough time for a considered response addressing the full gamut of operations of the motor accidents scheme under the MAI Act.
3. The ALA looks forward to the opportunity to further engage with those conducting the statutory review to address the issues under consideration.
4. The invitation for submissions in response to the discussion paper acknowledges that those conducting the statutory review have had access to previous submissions from the ALA. Most significantly, that incorporates the ALA submissions made to the Standing Committee on Law and Justice in the conduct of their 2020 review of the Compulsory Third Party Insurance Scheme. The ALA relies upon those submissions in addressing various issues raised by the statutory review, as well as submissions to the preceding SCLJ review, correspondence with SIRA and submissions to the Legal Assistance review.
5. The specific questions raised in the discussion paper are addressed below.
6. It is noted that the statutory review focuses on whether the Act is delivering on its current objectives. This exercise is done by reviewing the various statutory objects contained in Section 1.3(2) of the Act. Unfortunately, the stated statutory objects do not always reflect the practical realities of a statutory insurance scheme. The fundamental role of the statutory compensation scheme is to collectivise the risk of road-related accidents through compulsory insurance and to look after (as best as can be afforded) those who are injured.
7. The Motor Accidents Compensation Act 1999 had as one of its objects at Section 5(1)(e):

*To keep premiums affordable, in particular, by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities.*

8. The MAI Act has (for no clearly articulated reason) abandoned the principle of providing full compensation for those with severe injuries involving ongoing impairment and disabilities. The reality is that the imposition of a 5% discount rate on awards for future losses meant that the Motor Accidents Compensation Act 1999 never could and never did provide full or proper compensation for those with catastrophic injuries. However, at least it stated that it was trying to look after the most seriously injured. The ALA's first recommendation is to restore this objective to the Act.
9. One of the inherent limits in conducting a statutory review looking purely at the statutory objects clauses can be a failure to step back and at the broadest level determine whether a scheme is meeting its objectives in terms of compensating motor accident victims in a timely, fair and efficient manner. The complexity of the MAI Act with its sixty plus dispute categories and extensive Regulations and Guidelines ought to be a source of profound embarrassment to its designers. The manifest inadequacies and inequities of the Costs Regulations are an area of specific concern within the Act that the "objectives based" review risks failing to fully or properly consider.

## Objective (a)

### **Question 1: Does this objective remain valid?**

10. Yes encouraging early and appropriate treatment and care to maximise recovery and to enhance return to work is a perfectly valid object of the scheme.

### **Question 2: Are the terms of the Act, Regulations and Guidelines appropriate for securing this objective? If not, then in what respects and to what extent are those terms not appropriate for securing this objective?**

11. No. There are still extraordinarily prolonged disputes over treatment, especially in relation to areas such as spinal surgery. Insurers place next to no reliance upon the opinion of treating specialists and place far heavier reliance upon their own at times ill-qualified and so-called independent medico-legal experts. In some instances, insurers cut off treatment in a punitive fashion in relation to what they perceive to be non-compliant conduct by the claimant. The gross delays at the Personal Injury Commission (which delays existed at DRS before the PIC commenced operations and before the pandemic) actively deter claimants from pursuing treatment disputes, as does the need to first clear the hurdle of internal review before obtaining a PIC determination. The ALA has a widely separate tranche of

criticisms of the paltry return to work efforts of the CTP insurers. A substantial number of significantly injured claimants never see a rehabilitation plan.

**Question 3: What is the evidence that the Scheme is, or is not, achieving this objective?**

12. SIRA are relatively poor monitors of whether the scheme is achieving this objective or not. Timeliness in making payments is measured. Effectiveness in facilitating return to work at 12 and 18 months is extraordinarily poorly monitored. The efficacy of insurers' return to work programs is extremely poorly monitored. There seem to be no real efforts to enforce the statutory requirement for insurers to prepare rehabilitation plans.
13. The ALA's view is that the vast majority of decisions about vocational capacity utilised by insurers are being made by persons with little to no experience in actually assisting injured people in returning to work. Organisations such as the VCC and ECA have a disproportionate role in addressing loss of earning capacity utilising report writers whose expertise is, in some instances, highly questionable in relation to the actual labour market.

**Question 4: What changes (if any) should be made for the Act, Regulations and Guidelines to secure, or better secure, this objective?**

14. This is a broad question that requires more detailed consideration than the ALA can provide in the course of 3 weeks. The issues that need to be canvassed include:
  - i. How to compel insurers to place greater reliance on treating medical opinion given their well-entrenched and ongoing reluctance to do so.
  - ii. The loss of most practitioners with any ongoing active clinical experience from the field of medico-legal opinion providers.
  - iii. Streamlining timelines for treatment disputes so that there is prompt provision of treatment.
  - iv. Streamlining dispute processes so that the PIC can produce a decision on a treatment dispute or a minor injury dispute in under 6 months.
  - v. Ensuring that insurers meet their obligations to advise claimants with regards their entitlement to paid care services.

- vi. Ensuring that insurers meet their obligations with regards developing rehabilitation plans.
15. These are only a few of the issues for consideration on a question that invites an entire discussion paper of its own.

**Question 5: Is the treatment and care being received by claimants appropriate for the nature and level of their injuries, and directed towards a return to work and other activities?**

16. The ALA has considerable doubts about the efficacy of the return to work support provided by CTP insurers to claimants.

**Question 6: Does determination of the relevant insurer under sections 3.2 and 3.3 of the Act:**

- (a) **affect policyholders by delaying the receipt of the statutory benefits; or**
- (b) **work efficiently in all cases from the perspective of the injured person?**

17. These provisions have worked tolerably well with an occasional exception. In individual cases, insurers have struggled with understanding that it is the insurer's responsibility to sort out between themselves as to who is the relevant insurer whilst providing the claimant with a seamless claims experience.
18. There remains considerable confusion with regards interstate vehicles and the workers compensation/CTP provisions of Section 3.35.

**Question 7: Section 3.25 of the Act provides that no statutory benefits are available for gratuitous attendant care services. Is paid care readily available to all who need attendant care?**

19. The ALA accepts the commercial reality that payment for gratuitous attendant care services has costs consequences for the scheme.
20. On the other hand, the scheme is meant to be fully funded in relation to the provision of necessary paid care services. The ALA is absolutely certain that CTP insurers are not fully and comprehensibly advising claimants with regards their entitlement to claim paid care where they need it. Vastly better oversight is required to ensure that CTP insurers offer paid

attendant care services, not just where the insurer thinks it might be unarguably essential, but in every case where there is any chance that it may be required.

**Question 8: Does section 3.25 of the Act:**

(a) **advance any of the objects of the Act; or**

(b) **limit achievement of any of the objects of the Act?**

21. The ALA has had the advantage of reviewing the Law Society submission in relation to this issue and adopts and supports that submission. In a perfect world, the family and friends of the injured would not cross-subsidise the CTP scheme. In the real world of restricted premium dollars, this is not the ALA's first priority for additional expenditure.

**Minor injury**

**Question 9: Should the defined term 'minor injury':**

(a) **be changed; and**

(b) **if so, be 'short-term benefits injury', or another term?**

22. This is a genuinely vexing issue. The term is clearly insulting to some claimants. A mother who has lost a child and is determined not to clear the "*minor injury*" threshold for psychiatric impairment is nonetheless egregiously insulted to have her understandable loss termed a "*minor injury*".

23. On the other hand, having been through three and a half years of stakeholders becoming used to the term, a change of terminology has its own adverse consequences. The ALA is open to ongoing discussion around the utility of a change in nomenclature.

**Question 10: Is the definition of 'minor injury' aligned with injuries (both physical and psychiatric or psychological) that are expected to resolve (or to stop improving with treatment and care) within the period that statutory benefits for treatment and care are available?**

24. The ALA is firmly of the view that the definition of minor injury does not align with scheme values.

25. The statutory reviewers are referred to the ALA submission with regards adjustment disorders to the SCLJ [Paragraphs 154-166]. The ALA would be happy to provide further and more detailed submissions as required.
26. It is worth bearing in mind that a finding that a claimant has more than a minor injury is not the automatic unlocking of a treasure chest of compensation. The finding that there is more than a minor injury does no more in relation to statutory benefits than:
- i. Entitle a claimant to ongoing treatment if they can establish that they have reasonable and necessary treatment needs causally related to the subject accident.
  - ii. Entitle the claimant to ongoing weekly wage support, to the extent that the claimant is restricted in their work capacity as a consequence of the subject accident.
27. When it comes to damages, a finding that there is more than minor injury is of little avail to the claimant unless:
- i. They can establish fault; and
  - ii. They are over 10% WPI (and thus eligible for compensation for pain and suffering);  
or
  - iii. Have a shortfall in past wage loss or an ongoing wage loss or a likely future wage loss as a consequence of injuries sustained in the accident.
28. In short, a finding that there is more than minor injury does no more than provide to a motor accident victim the opportunity to prove that they have a need for ongoing treatment or that their injury has an impact on their employment to permit them to receive compensation commensurate with their loss. There is no pot of gold automatically awarded for a declaration that the claimant has more than a minor injury.
29. The ALA has a series of specific recommendations around the minor injury definition including the following:
- i. The need to moderate the definition of minor injury as it applies to adjustment disorders to exclude adjustment disorder that persist more than six months and to exclude chronic adjustment disorders.

- ii. Deeming anybody with more than 10% WPI to have more than a minor injury. If a collection of soft tissue injuries is over the 10% WPI threshold, then why are those injuries not worth of continuing support for treatment needs, ongoing wage loss and compensation for the pain and suffering involved?
- iii. In relation to death claims, families should not be put through the wringer of the minor injury test for psychiatric impairment. Deem that for any parent who loses a child, a child who loses a parent or person who loses a spouse or sibling, there will be more than a minor injury without putting them to proof. This will not open any flood gates as it will still be necessary to establish loss in order to recover both statutory benefits and damages. If a person within this category loses a close relative and makes an adequate recovery with no ongoing psychiatric impairment, then there will be no need for treatment expenses, there will be no wage loss, and they will not have injuries over 10% WPI. The concession as to minor injury costs the insurer little, but extends some degree of dignity to the person concerned in not attaching a “*minor injury*” label to their situation.
- iv. The ALA has previously raised concerns with SIRA around minor injury in relation to scarring and traumatic brain injury. Those concerns have not been satisfactorily addressed.
- v. Treating DRE II spinal injuries as objectively verifiable and constituting more than a minor injury.

## **At-fault injured persons**

### **Question 11: Should statutory benefits for treatment and care for at-fault injured persons be limited compared to injured persons who are not at fault?**

30. Yes.

### **Question 12: Having regard to the Objectives of the Act, why should they be limited, or why not?**

31. Fault is ultimately a rationing mechanism. The parliament have determined that the New South Wales driving public are only prepared to pay so much for a CTP premium. That identified premium tolerance excludes the prospect of fully compensating all those injured in motor vehicle accidents irrespective of fault.

32. If only certain groups are going to be partly compensated (a 5% discount rate ensures no one with future losses is fully compensated), then fault is an appropriate rationing mechanism. Those who are innocent victims of the actions of others are (at least on some philosophical levels) arguably a higher priority for compensation than those who have caused their own misfortune or even inflicted injury upon others.
33. There are broader social welfare nets including the Commonwealth medical and social security systems to act as safety nets for those who are at fault.
34. The ALA has no issue in principle with extending statutory benefits for treatment, care and lost wages out to 12 months subject to how it is paid for. If it is to be paid for by increasing premiums and making drivers more responsible for the damage they cause, then the ALA supports the premium increase. If it is to be paid for by further reducing insurer profits, then the ALA has no objection to that course either.
35. However, if the extra six months of statutory benefits is to be paid for by (yet again) slashing away at the rights of those innocent motor accident victims entitled to fair compensation, then the ALA stands firmly against any such course.

**Question 13: If they should be limited, what should be the nature and extent of the limits?**

36. See answer to 12. above.

**Question 14: If at-fault injured persons had the same entitlements to statutory benefits as persons not at fault (including weekly benefits), what would be the effect on the operation of the Scheme from the perspective of injured persons or other stakeholders?**

37. See answer to 12. above. Good for those who cause accidents and are currently cut off at 6 months, likely further restrictions on the rights of innocent accident victims whose benefits may be further cut to pay to increased benefits elsewhere.

## **Objective (b)**

**Question 15: Does this objective remain valid?**

38. Yes.

**Question 16: Are the terms of the Act, Regulations and Guidelines appropriate for securing this objective? If not, then in what respects and to what extent are those terms not appropriate for securing this objective?**

39. No. The inflexible 28 day timeframe is unduly harsh and should be revisited. If a claimant has legitimate grounds for not having given notice of the claim, they should be entitled to reimbursement of treatment expenses incurred and back-pay.

**Question 17: What is the evidence that the Scheme is, or is not, achieving this objective.**

40. See answer to 16. above.

**Question 18: What changes (if any) should be made for the Act, Regulations and Guidelines to secure, or better secure, this objective?**

41. See answer to 16. above.

## **Weekly payments**

**Question 19: Are the provisions governing the calculation of weekly payments working?**

42. The ALA notes and supports the detailed Law Society submissions in response to this question.

43. The ALA notes that there is regular receipt by claimants of correspondence advising that a CTP insurer has miscalculated weekly benefits and owes top-up pay. SIRA reporting around this issue is non-existent.

**Question 20: Are there amendments consistent with the objects of the Act that would result in fewer disputes or earlier determination of the correct weekly payments?**

44. The ALA notes and supports the detailed Law Society submissions in response to this question.

## **Cessation of weekly payments**

**Question 21: Should weekly payments only continue beyond 2 years if the person's injury is the subject of a pending claim for damages?**

45. Yes. Weekly payments should continue if there are ongoing medical disputes before the PIC with regards minor injury especially where the insurer puts minor injury in dispute after

having previously conceded the point. ALA members have had examples where insurers have withdrawn the previous concession as to minor injury over two years post-accident. If that occurs, the insurer should continue paying statutory wage benefits whilst there is a dispute in relation to that belated minor injury reversal.

46. Delays with the PIC determining 10% WPI threshold issues are causing real financial hardship to those whose benefits are being cut off at 2 years whilst the 10% WPI issue is still being determined.

**Question 22: Should the position be different if there is no one at fault (i.e. a claim by an injured driver in single-vehicle no-fault accident)?**

47. In situations where there is no-one at fault (and thus no entitlement to a CTP claim for damages), it is appropriate to cut off wages at two years, absent the financial means within the scheme to continue paying those benefits for 3 years, 5 years or indefinitely.

## **Gratuitous attendant care**

**Question 23: Should a person who provides gratuitous attendant care services be reimbursed for losses incurred as a result of providing that care?**

48. In principle, of course they should be. As a matter of practicality and scheme cost, the ALA believes that there are higher priority areas for reform and the allocation of scarce premium dollars.

## **Minor injury**

**Question 24: Should the period for which weekly benefits are available for persons with only 'minor injuries' be longer than 26 weeks?**

49. This raises complex issues around rationing of available premium dollars. The difficulty is in answering the question in the abstract without addressing what has to be cut to pay for any enhancement or increase in scheme benefits for at fault or minor injury statutory benefits recipients.

**Question 25: If so, for what period should weekly benefits be available for persons with only 'minor injuries'?**

50. See the answer to 24. above.

## **Damages**

### **Question 26: Should an injured person with permanent impairment <10% be required to wait 20 months (or some other period) before making a damages claim?**

51. No. See the ALA submission to the SCLJ at paragraphs 211-230.

### **Question 27: Does the 20 month period align with any of the objects of the Act?**

52. No. Indeed, the provision is at odds with various other objects of the Act in relation to encouraging the expeditious resolution of claims.

### **Question 28: Does the 20 month period:**

(a) **encourage early resolution of claims?**

(b) **deter injured persons from making damages claims?**

(c) **effectively deter fraud?**

53. No, no and no. In relation to (c) there may be some deterrent effect in relation to claims harvesting. However, claims harvesting is not technically fraud.

### **Question 29: Does the 20 month period benefit:**

(a) **injured persons;**

(b) **insurers; or**

(c) **policyholders by having a material effect on premiums?**

54. No, yes and yes. Injured persons are badly disadvantaged by the provision. Some of them walk away from the scheme without returning to collect their proper entitlements. Some of them have much more traumatic claims experiences as consequence of the delays. There is no doubt that insurers benefit. They profit when claimants abandon their entitlements because they are forced to wait to collect them. Unconscionably depressing the recovery of scheme benefits might advantage policy holders if insurers were not able to conceal their super profits and actually had the super profits clawed back with medium-term reduction in green slip costs.

**Question 30: To the extent that the rationale for the 20 month waiting period is to allow maximum recovery from injury before damages are claimed, how does that rationale only apply to persons with permanent impairment <10%?**

55. The rationale is entirely illogical. The assertion that somehow waiting 20 months allows maximum medical recovery from injury is entirely unsupported by reference to any medical research or literature. The wait extends claim resolution time which is acknowledged to have adverse health consequences.

**Question 31: If the 20 month period were removed or replaced with a shorter period, would any other changes to the Scheme be needed?**

56. Not necessarily. The ALA would suggest bringing forward the period for notifying damages claims to a window of 6 to 12 months post-accident with a mandatory obligation for insurers to send claimants a damages claim form at 6 months and again at 9 months with information as to how damages entitlements are to be pursued.

## **Objective (c)**

**Question 32: Does this objective remain valid?**

57. Yes.

**Question 33: Are the terms of the Act, Regulations and Guidelines appropriate for securing this objective? If not, then in what respects and to what extent are those terms not appropriate for securing this objective?**

58. No submission.

**Question 34: What is the evidence that the Scheme is, or is not, achieving this objective?**

59. No submission.

**Question 35: What changes (if any) should be made for the Act, Regulations and Guidelines to secure, or better secure, this objective?**

60. No submission.

## Objective (d)

### **Question 36: Does this objective remain valid?**

61. Yes. Although in a relative rather than an absolute sense. There is a very clear relationship between premium and benefits. The point of collecting the premium is to be able to pay the benefits.

### **Question 37: Are the terms of the Act, Regulations and Guidelines appropriate for securing this objective? If not, then in what respects and to what extent are those terms not appropriate for securing this objective?**

62. The ALA representative at the SCLJ hearing has already boldly predicted that there will be super profits from the opening years of operation of the scheme. That prediction was based on:

- i. Considerably lower than projected claim numbers on the part of at-fault drivers.
- ii. A gross over-estimation as to dispute numbers by EY.
- iii. Lack of legal representation resulting in a substantial number of claimants under-utilising their legal rights.

63. There are no identified areas of cost blowout in the scheme and a number of clearly identifiable areas of under-utilisation of the scheme that will result in insurer super profits. The extent to which SIRA can or is willing to try and claw back those super profits remains to be seen. To date, SIRA have been remarkably but not unsurprisingly secretive with regards any plans to seek to claw back super profits.

### **Question 38: What is the evidence that the Scheme is, or is not, achieving this objective?**

64. See answers above.

### **Question 39: What changes (if any) should be made for the Act, Regulations and Guidelines to secure, or better secure, this objective?**

65. Ultimately, SIRA as regulator is responsible for delivering profits outcomes that get somewhere close to profit projections in premium filings. For twenty years under the *Motor Accidents Compensation Act 1999*, SIRA failed miserably in doing so. The insurers would

consistently file on the basis of profit of 8 to 10% and yet made profits in excess of 20%. This occurred for almost the entire duration of the operation of the MAC Act.

66. It is acknowledged that profit claw back provisions now give SIRA better tools to try and restrain insurer's profits. However, the efficacy of those tools is entirely untested.

67. Of particular concern to the ALA is SIRA's intention to give insurers credit and to allow them to partially retain super profits where that outcome is a consequence of identified innovation. The process of insurers retaining super profits on the basis of innovation appears as if it will be conducted entirely in secret and with no external or stakeholder scrutiny.

**Question 40: Objective (d) identifies two means of keeping premiums affordable – regulating insurer profits and limiting benefits for minor injuries.**

**(a) Should this objective be expanded to include other means of keeping premiums affordable?**

**(b) If so, what other means should be considered and why?**

68. The drafting of this objects clause is entirely irrelevant to actual scheme operations. The 10% WPI threshold for recovery of compensation for pain and suffering and the restrictions on legal costs are two longstanding mechanisms to keep premiums affordable.

**Question 41: Does 8% exceed, or not exceed, the amount of profit that is sufficient to underwrite the relevant risk?**

69. The ALA does not profess to be expert in insurer underwriting practices or what profit margin keeps sufficient insurers in the scheme. The ALA largely regards this as an entirely academic number given that SIRA has not succeeded in over twenty years in actually holding insurers to an 8% return. There are broader questions as to whether given the stability and consistency of the actual return near 20%, private underwriting is actually justified within the scheme, but that is a broader subject potentially beyond the scope of this review.

**Question 42: Are any aspects of the TEPL mechanism not expected (when activated) to secure the objective of keeping premiums affordable by regulating insurer profits?**

70. ALA members are not experts in TEPL. What can be objectively measured is that for 20 years, all efforts to hold insurers to the projected 8% profit have failed. The TEPL mechanism contains an “*innovation*” escape hatch that will operate in secrecy.

**Question 43: The profit regulation provisions in the Act require that excess profits returned by insurers be used to fund reductions in the cost of CTP insurance. An alternative that has been suggested is to use the excessive profits to fund road-related initiatives, thus effectively converting the excess profits into government revenue to be used for specific purposes. Should SIRA have the power to use excess profits returned by insurers in this way?**

71. The ALA urges that excess profits within the CTP scheme should be retained within the scheme and should be re-directed to providing proper compensation to the injured, which was, after all, the point in collecting the premium in the first place. The CTP scheme should not be hollow logged by government for other projects.

**Question 44: Should section 2.25 of the Act be amended to align more closely with the way that insurer profits are regulated under Part 2 of Schedule 4 to the Act?**

72. No submission.

## **Objective (e)**

**Question 45: Does this objective remain valid?**

73. Yes.

**Question 46: Are the terms of the Act, Regulations and Guidelines appropriate for securing this objective? If not, then in what respects and to what extent are those terms not appropriate for securing this objective?**

74. No submission.

**Question 47: What is the evidence that the Scheme is, or is not, achieving this objective?**

75. No submission.

**Question 48: What changes (if any) should be made for the Act, Regulations and Guidelines to secure, or better secure, this objective?**

76. No submission.

**Competition on premium**

**Question 49: To what extent do CTP insurers compete on premium in the NSW market?**

77. No submission.

**Question 50: How can the framework in the Act, Regulations and Guidelines better promote competition on premium in the NSW market?**

78. No submission.

**Innovation in premium setting**

**Question 51: What innovations in premium setting would benefit the Scheme?**

79. No submission.

**Question 52: Does the framework in the Act, Regulations or Guidelines need to change to allow or encourage those innovations?**

80. No submission.

**Point to point industry**

**Question 53: Are there commercial disparities (particularly for small business operators) in the point to point industry?**

81. No submission.

**Question 54: If so:**

**(a) to what extent will the current reforms to determination of CTP premiums for taxis and hire vehicles address them?**

**(b) are there innovations in premium setting that could further address them?**

82. No submission.

## **SIRA's role in relation to sustainability, affordability and fair market practices**

**Question 55: Is the framework which defines SIRA's role in relation to sustainability, affordability and fair market practices adequate and appropriate to enable SIRA to take steps to ensure that these aims are achieved?**

83. No submission.

## **Objective (f)**

**Question 56: Does this objective remain valid?**

84. Yes, although the ALA has concerns that fraud is a bogie man within the scheme and the actual effects of fraudulent conduct are grossly overstated by insurers with ulterior motives. Further, it is necessary to maintain a keen distinction between a fraudulent claim (manufactured accident, claimant not in vehicle) and a claim which has any singular aspect of (what an insurer perceives to be) exaggeration. Claim harvesters were not manufacturing fraudulent claims. They were encouraging those who would not have claimed to do so, but there was an actual accident claim being “harvested”. Fraud is a term used too broadly and too loosely.

**Question 57: Are the terms of the Act, Regulations and Guidelines appropriate for securing this objective? If not, then in what respects and to what extent are those terms not appropriate for securing this objective?**

85. Yes. There is no current evidence that claims harvesters continue to pester the citizens of New South Wales to pursue motor accident claims or profit from the CTP scheme. Indeed, the various measures introduced to address fraud and claim harshly under the 1999 Act proved effective. Further deterrents under the MAI Act 2017 have unduly eliminated appropriate compensable entitlements for those who have sustained genuine injuries in motor vehicle accidents.

**Question 58: What is the evidence that the Scheme is, or is not, achieving this objective?**

86. There needs to be much more transparent reporting on the extent (if any) of fraudulent claims under the MAI Act, how that fraud is occurring and its cost, before the ALA can make any reasonable submission in response.

**Question 59: What changes (if any) should be made for the Act, Regulations and Guidelines to secure, or better secure, this objective?**

87. See answer to 58. above.

**Question 60: To what extent have each of the following aspects of the legislative framework been effective in deterring fraud in connection with the CTP Scheme:**

- (d) **the 'minor injury' framework?**
- (e) **the penalties for fraud?**
- (f) **SIRA's power to investigate claims to detect and prosecute fraud?**
- (g) **the obligations on insurers to take steps to deter and prevent the making of fraudulent claims, and apply the principle of detecting and deterring fraud across all claims management aspects for the life of a claim under the Scheme?**

88. As to the relative weighting of these issues in deterring claims harvesting or fraud, the absence of data from SIRA makes it impossible to say. The ALA cannot vouch for the motives of and effective deterrents to fraudsters with claim harvesters. Removing unregulated costs and contracting out from smaller claims appears to have been very successful.

**Question 61: Are there additional elements that should be introduced into the framework for securing Objective (f)?**

89. No.

**Question 62: Should the obligations on insurers in relation to deterring fraud be more prescriptive?**

90. No.

**Question 63: Are changes to the Scheme needed with respect to:**

- (a) **misreporting of CTP claims?**
- (b) **the consequences for those who do not take out the correct policy?**
- (c) **the consequences for those who engage in any dishonest activity to obtain (or assist another person to obtain) a benefit under the Scheme?**

91. No.

## **Objective (g)**

**Question 64: Does this objective remain valid?**

92. Yes. The ALA is all in favour of the scheme encouraging the quick, cost-effective and just resolution of disputes.

**Question 64: Are the terms of the Act, Regulations and Guidelines appropriate for securing this objective? If not, then in what respects and to what extent are those terms not appropriate for securing this objective?**

93. It would be an understatement to describe the Act, Regulations and Guidelines as having byzantine complexity. The suggestion that an unrepresented claimant could navigate their way through the scheme and receive a just resolution of their disputes with a well-informed and powerful insurer acting against them is laughable.

**Question 66: What is the evidence that the Scheme is, or is not, achieving this objective?**

94. There is significant evidence that the scheme is not achieving its objectives, in terms of not operating in a manner that is quick, cost effective and just in the resolution of disputes:
- i. The complexity of the Act, Regulations and Guidelines.
  - ii. The combative approach still adopted by CTP insurers in relation to claim management.
  - iii. Extensive delays in insurers providing internal review.

- iv. The fact that legal representation leads to better results for claimants in terms of both success with disputes and the level of benefits/compensation recovered.
  - v. The chronic delays at DRS/the PIC. These delays extend far beyond those that have been caused by the pandemic.
95. During the development of the *Motor Accident Injuries Act 2017*, it was repeatedly stated by both the Minister and Andrew Nicholls (then head of SIRA's motor accident operations) that the new Act would have to see a change of approach by all of the stakeholder participants. This included:
- i. A change of approach by insurers where they would be less combative towards claimants and more customer focused.
  - ii. A more muscular regulatory approach by SIRA.
96. The ALA accepts and acknowledges that the quick, cost effective and just resolution of disputes, especially in relation to statutory benefit issues, works best when a claimant can directly sort out those issues with the insurer. However, there is no point in a claimant having a right to statutory benefits or a right to damages if the claimant is not well enough informed and resourced to assert those rights and, if necessary, fight for those rights again.
97. In negotiations over the structure of the new Act, the ALA accepted that the interests of affordability meant that a substantial number of statutory benefits disputes around lost wages and treatment would not warrant the claimant receiving legal assistance.
98. The decision was made by government that bringing an application for internal review did not warrant a claimant receiving legal assistance.
99. The response from the ALA to the structure of the new Act was to emphasise that if claimants were to be denied legal representation, then it was necessary for the insurers to change their attitude and actually provide all necessary information to a claimant to allow them to pursue the claim. It was necessary for insurers to treat claimants fairly and not use their influence and power advantage to their benefit. It was necessary for SIRA to change a pattern of twenty years and become a robust regulator, ensuring that insurers treated claimants fairly and ensuring that insurers did behave appropriately.

100. The experience of the ALA is that insurer conduct has not changed or softened or become any more customer focused. SIRA remains far more focused on providing the general reassurance that the scheme is working well than it does on holding insurers to account for misconduct. The fact that there was not a single dollar of punishment imposed on either NRMA or Suncorp in relation to twelve months of gross failure to conduct internal reviews in a timely fashion speaks both as to the insurer conduct involved and the lack of willingness on the part of SIRA to impose financial penalties for misconduct. At times, it is hard to avoid the impression that SIRA is running a protection racket for the insurers.
101. One of the very early disputes under the new Act was a case where NRMA rejected the claimant's application for statutory benefits for the first 28 days on the basis that the claim form had been received on the 29<sup>th</sup> day. The issue ultimately proceeded to a dispute in front of a DRS Assessor.
102. Unsurprisingly, the claimant was successful before the DRS Assessor. That is because the claimant's position was correct at law and NRMA's position was untenable.
103. The claimant's form had been lodged on the 29<sup>th</sup> day, but the 28<sup>th</sup> day had fallen on a weekend. Pursuant to provisions of the Interpretation Act, the claimant was entitled to lodge on the 29<sup>th</sup> day as if it were the 28<sup>th</sup> day.
104. The point that the statutory reviewers are encouraged to draw from this example is that nothing has really changed amongst the insurers. If there is any technical opportunity to say no, then an insurer will avail itself of that opportunity. The promised cultural change has not occurred. The insured denied benefits when the claimant was one day late and continued fighting thereafter.
105. The statutory reviewers are also encouraged to ask SIRA exactly what punishment was imposed on the insurer for taking such a ridiculous point. The answer will be no punishment whatsoever. It is the ALA's view that SIRA still remains a largely ineffective regulator of insurer misconduct in claims handling.
106. Whilst a wide variety of improvements can be made to the Act, Regulations and Guidelines to improve the efficacy of dispute resolution, the real changes have to be driven by SIRA in terms of the robustness of its own regulatory approach and in terms of ensuring that the CTP insurers have the same imperatives to resolve disputes in a quick, cost-effective and just fashion. A good starting point would be to give SIRA far greater powers to impose

financial penalties on insurers by way of fines for misconduct and to allow SIRA to make restitutionary payments to claimants from those fines revenues.

107. It is worth noting that in twenty years of operation of the MAC Act, SIRA has only ever twice fined a CTP insurer for misconduct in claims handling. In both instances, the fine only came after a complaint by an ALA member. In each of those two cases, it took the better part of three years for SIRA to impose a financial penalty and SIRA ultimately refused to disclose the nature of the financial penalty or to make any restitutionary payment to the two claimants who had suffered as a consequence of the insurer misconduct.

**Question 67: What changes (if any) should be made for the Act, Regulations and Guidelines to secure, or better secure, this objective?**

108. There are a vast array of changes that could be made to improve on the efficiency and justness of disputes under the Act. These have been covered in various ALA submissions to the SCLJ. To mention just a few:
- i. Reduce the number of internal review requirements to those areas where internal review actually has some efficacy (primarily treatment disputes and wage disputes). Let disputes over minor injury, liability to pay statutory benefits post six months and the 10% WPI threshold proceed straight to medical or legal determination by the PIC.
  - ii. If there is going to be internal review, then only require one internal review per dispute category per claim.
  - iii. Provide some limitation upon an insurer's capacity to reverse its position with regards minor injury and reverse its position on an admission of liability for statutory benefits years after the accident. At present, an insurer can put both the minor injury threshold and liability in dispute for a statutory claim at any point in the life of the claim, even if that is twelve months or twelve years after concessions are first made as to minor injury or liability for statutory benefits post six months.
  - iv. Where there is a NSW insurer handling a claim for the Nominal Defendant do not allow the interstate insurer to revisit minor injury in the damages claim.

## Time limits

**Question 68: Does the loss of statutory benefits in respect of the period before a claim submission, if the claim is submitted more than 28 days after the motor accident concerned, help to secure Objective (g)?**

109. No. This guillotine provision is not just.

**Question 69: If not, does it help to secure any other Objective of the Act?**

110. Yes. Any time a claimant is denied benefits, then premiums are reduced and insurers make higher profits. However, Objectives (a) and (b) are clearly not met.

**Question 70: How do insurers apply the objective test required for a 'satisfactory' explanation for a failure to comply with a duty?**

111. The ALA's starting position is that insurers will take almost any opportunity to apply technical provisions to deny pursuit of a claim. Frustratingly, they appear to have been joined by certain bureaucrats at the PIC in that approach.

**Question 71: Should the test be aligned with the test required for a 'satisfactory' explanation for delay?**

112. Yes.

**Question 72: Are there changes to the provisions in the Act governing the timing of steps in the making and resolution of claims that could better secure Objective (g)?**

113. Yes. There are a variety of improvements. First and foremost amongst them is to remove the 20 month barrier to the pursuit of damages claims.

## Internal review

**Question 73: In what ways does the internal review framework help or hinder Objective (g)?**

114. Please see the ALA submission to and evidence before the SCLJ. If there must be internal review in the Act, then it should be limited to statutory benefits disputes over wages and treatment. This narrowing can be achieved through regulation without any need to amend the Act.

**Question 74: Are changes needed to the internal review framework to better secure Objective (g)?**

115. Yes. Please see above.

**Question 75: How often and for what reasons do insurers consult their in-house lawyers in connection with applications for internal review?**

116. There is no transparency around the use of in-house legal departments by the CTP insurers. The ALA is thus in no position to comment.

**Independent review**

**Question 76: Should the Act provide in any circumstances for a stay of an insurer's decision to stop or reduce an injured person's statutory benefits, if the claimant applies for a review of the decision?**

117. Yes. However, it is acknowledged that there is a difficulty in striking the right balance between incentivising claimants to maintain disputes (so as to continue receiving payments) and in penalising insurers for poor initial and internal review decision making.

118. It would certainly incentivise insurers to bring disputes on promptly if the insurer was required to continue making payments while the dispute was afoot.

119. The ALA strongly recommends that where insurers make belated reversals of decisions such as invoking the minor injury threshold or challenging a liability to pay statutory benefits years after an initial favourable decision to the claimant, then the claimant should continue to receive benefits until the dispute is resolved.

120. There may also be some creative solutions to be considered to improve the quality of insurer decision making and to incentivise insurers away from their current standard position that at times appears to unduly focus on “*deny, deny, deny*”.

121. For example, if an insurer’s decision in relation to minor injury or WPI was reversed by a medical assessor, where there was no new evidence put before the medical assessor, then there could be a financial penalty to the insurer or the capacity for the claimant to recover legal costs above the currently regulated fee. If an insurer’s decision was reversed in a Miscellaneous Claims Assessment as to liability for statutory benefits, then the insurer could be ordered not only to pay outstanding treatment expenses and wages for the period

of the denial, but could be ordered to do so without the benefit of the reductions under the Act (i.e. pay the full measure of the wage loss) or even be ordered to pay some higher percentage (such as 120% of the past wage loss).

122. The restriction on legal costs under the Act and the absence of any penalties for insurers for denying entitlements to benefits means that there are no incentives for insurers to substantially reduce disputes or to try and reach the just resolution of claims.

**Question 77: To what extent do insurers rely on their in-house lawyers in matters before the PIC, a merit reviewer or medical assessor?**

123. This is a question best answered by the insurers.

**Question 78: Subdivision 3 of Division 7.6 of the Act, which governs miscellaneous claims assessments, is complex as a result of incorporating the terms of Subdivision 2 subject to a range of amendments set out in the Regulations. Bearing in mind the restrictions on legal advice, would claimants be assisted if the relevant terms were simply set out in Subdivision 3 and, if so, should that be done?**

124. The ALA is all in favour of greater clarity. However, the suggestion that any claimant would get as far as reading the Act, let alone the Regulations and Guidelines in having to pursue their own claim is naive. Qualified legal practitioners struggle with reading and interpreting the Act, Regulations and Guidelines applicable to the motor accidents scheme. SIRA consistently refuses to answer direct questions on the proper construction of various provisions of the Act.

## **Medico-legal assessments and legal assistance**

**Question 79: Are there improvements to the system of 'Authorised Health Practitioners' that would help to secure Objective (g)? If so, what improvements?**

125. Yes, scrap it. The AHP regime has not seen any demonstrable improvement in the quality of medico-legal report writing within the scheme.

**Question 80: If the system of 'Authorised Health Practitioners' were abolished, what should replace it?**

126. A robust system encouraging joint medico-legal assessments. See paragraphs 123-137 of the ALA submission to the SCLJ.

**Question 81: Do the provisions restricting access to paid legal advice in connection with claim disputes help to secure Objective (g)?**

127. No. There is not a level playing field in the CTP scheme. Insurers are so resourced that they are prepared to use forensic accountants and accident reconstruction experts to address statutory benefits disputes. This occurs at disproportionate cost to the scheme. By way of contrast, claimants are heavily restricted in the legal advice they can purchase. The data clearly identifies that there are unjust outcomes that flow from lack of legal representation. The ALA relies upon submissions previously supplied to the legal costs review.

**CTP Assist**

**Question 82: How should CTP Assist recognise and support the role of carers who provide decision-making support to injured persons?**

128. The ALA respectfully suggests that there are far bigger and better questions to be asked about the role of CTP Assist and in particular, whether it provides legal advice and whether it provides accurate and comprehensive legal advice.

**Insurers as decision-makers**

**Question 83: Could the Scheme better secure Objective (g) if an independent person (as inquisitor) were appointed to decide the existence or otherwise of facts governing liability to pay statutory benefits?**

129. The ALA is open to discussion on this issue. This is particularly so in relation to medical disputes about treatment, minor injury and the 10% WPI threshold. However, the ALA starting point is that (as the Guidelines actually require), primary reliance should be placed upon the opinions of treating medical experts. SIRA has not yet engaged in any meaningful enforcement of this obligation.

130. When the 1999 Act was first introduced, the then Motor Accidents Authority (now SIRA) proclaimed that medico-legal appointments would become a thing of the past, as any medical dispute between the parties could be referred to MAS. That enthusiasm lasted less than twelve months when delays at MAS threatened to destroy the then new scheme.

131. The MAS delays were eventually overcome, but the enthusiasm for having independent government appointed doctors resolving medical disputes rather than the

parties engaging in medico-legal appointments evaporated. There was even discussion of financial penalties for “*inappropriate*” referrals to MAS.

132. The ALA is all in favour of getting actual disputes before real doctors for determination faster if there is a legitimate reason why the opinions of treating doctors cannot be relied upon. However, the PIC is swamped in trying to deal with its current dispute load. The PIC looks to be several years away from having any additional capacity.

**Question 84: If so:**

**(a) who would be the decision-maker?**

**(b) what role, if any, would insurers have in the inquisitorial process?**

**(c) what rights, if any, would insurers have to seek review of the decision-maker's decision?**

133. The ALA is interested in exploring this topic, but again harks back to history. When CARS assessors first commenced assessing damages upon the introduction of the 1999 Act, it was meant to be a quick and informal dispute resolution mechanism. Within a relatively short period of time, CARS was requiring schedules of damages, written submissions, chronologies, and the like. CARS Assessors were producing lengthy decisions, rather than short explanations of 1 or 2 pages. An entire industry has built up around CTP insurers bringing judicial review applications challenging the decisions of MAS and CARS Assessors.

134. Indeed, there is now the crazy situation that the party that has no right of re-hearing of a CARS Assessment (the insurer) is bringing more challenges to CARS decisions (through judicial review) than the party that notionally does have a right of rehearing (the claimant).

135. The ALA is all in favour of quick and cheap determination of statutory benefits disputes, but is concerned how this occurs when insurers have unlimited internal resources and claimants have no assistance in presenting their side of the argument. The moment decision makers have to provide written decisions, then the judicial review enthusiasm of insurers comes into play.

136. SIRA might theoretically have the power to require insurers to seek permission before bringing judicial review applications and might even have the power to put a financial threshold on those applications (such as the Court of Appeal does in requiring leave for

damages disputes of less than \$100,000). SIRA has shown little enthusiasm for exercising such regulatory muscle.

137. Again, the ALA is open to creative thinking, but part of that will have to involve SIRA becoming a more robust regulator of insurer conduct.

## Objective (h)

### **Question 85: Does this objective remain valid?**

138. Yes.

### **Question 86: Are the terms of the Act, Regulations and Guidelines appropriate for securing this objective? If not, then in what respects and to what extent are those terms not appropriate for securing this objective?**

139. No submission.

### **Question 87: What is the evidence that the Scheme is, or is not, achieving this objective?**

140. Published data by SIRA should be driving change in insurer conduct. However, SIRA's desire to hide (if not bury) weaknesses in scheme operation and misconduct by insurers means that there is little link between consumer decision making about which insurer they purchase with and insurer conduct within the scheme. The publication of data has not been aggressive enough or effective enough.

### **Question 88: What changes (if any) should be made for the Act, Regulations and Guidelines to secure, or better secure, this objective?**

141. No submission.

### **Question 89: Should the Act or Regulations prescribe particular data that must be collected or publicised by SIRA or insurers, or particular uses to which SIRA or insurers must put certain data, in addition to such obligations that already exist?**

142. There are at least two major gaps in SIRA's data publication:
- i. The return to work data is entirely meaningless as SIRA does no follow-up post 26 weeks with regards those who have not returned to work and who have been pushed out of the scheme with a minor injury.

- ii. There is no data collected with regards insurer success in procuring joint medico-legal examinations and the relative performance of insurers in that regard.

## Implementation (KPI analysis)

### In relation to each Objective:

- (a) Are the proposed KPIs adequate for assessing the implementation of the Scheme objectives? If not, what other measurable KPI(s) could be included for each Scheme objective, and why do you view these as important? Please include any supporting evidence.
- (b) Should any of the proposed KPIs be amended to improve the assessment of the implementation of the Scheme Objectives? If so, please propose amended wording for the relevant KPI.
- (c) Please select two (2) out of the proposed KPIs for each Scheme objective you view are most important in assessing the implementation of each Scheme objective and provide your reasoning for selecting the two (2) KPIs.

143. The limited time available for consultation does not permit the ALA to make detailed submissions with regards potential KPIs. The ALA acknowledges and adopts the Law Society submissions on these issues, but would be happy to discuss the subject further during the course of consultation.

## Issues not raised

144. There are a number of significant technical issues around the operation of the Act that are not being addressed by the discussion paper, despite previous indications from SIRA that these would be topics of discussion.

145. Some of the issues which the ALA would seek to additionally address (consistent with previous correspondence with SIRA) include:

- i. The shabby treatment of foreigners who sustain injury on NSW roads through the operation of Sections 3.21 and 3.33.
- ii. The poor drafting of Section 3.37 (as addressed in ALA submissions to the SCLJ).

- iii. Debates about what constitutes a legal disability for the purpose of construction of Section 8.10(4)(a). [See ALA submission to SCLJ at paragraphs 188-199].
- iv. The monitoring of damages settlements for unrepresented claimants by PIC Assessors. How many settlements are being rejected when first presented? Is the “*approval rate*” real or misleading?

## Conclusion

146. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the review of the operation of the *Motor Accident Injuries Act 2017*. The ALA looks forward to ongoing consultation in the course of this Review.

**ANDREW STONE SC**

**On behalf of the NSW branch of the Australian Lawyers Alliance**